

MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
Fall 2026

Tuesdays and Thursdays, 3:30 pm – 5:30 pm
Dale Collins

wdc30@georgetown.edu
www.appliedantitrust.com

Class 10 (September 24): H&R Block/TaxACT (Unit 5)¹

We now start a five-class unit on H&R Block/TaxACT. We will focus primarily on how Judge Beryl A. Howell of the District Court of the District of Columbia explained her decision that the transaction, if consummated, would violate Section 7 of the Clayton Act.

The case involves the proposed 2010 acquisition by H&R Block of TaxACT for \$287.5 million in cash. H&R Block was the largest firm in “assisted preparation” of income tax returns and the second largest firm in digital “do-it-yourself” (DDIY) tax software (15.6%). TaxACT was the third-largest firm in DDIY tax software (12.8%). Nonparty Intuit was the largest firm in the DDIY space (62.2%). The space was highly concentrated, with a three-firm concentration ratio (3-FCR) of 90.6%, so the transaction was a three-to-two merger with a fringe group of firms with a collective market share totaling slightly less than 10% *if* DDIY is the proper relevant product market. The DOJ challenged the deal and ultimately prevailed at trial, resulting in a permanent injunction blocking the transaction. The parties then voluntarily terminated their merger agreement without taking an appeal. Shortly thereafter, TaxACT was acquired by InfoSpace.²

The institutional context. DOJ challenged the transaction in district court by seeking a permanent injunction under Section 15 of the Clayton Act. That provision gives the Attorney General a right of action to prevent threatened or actual Section 7 violations; Rule 65 supplies the procedural framework for injunctions and restraining orders. This is the basic statutory and procedural setting for a DOJ merger challenge. Read Section 15 and Rule 65 before turning to the case study (pp. 6-8).

The H&R Block/TaxACT facts. The chronology leading to trial will help orient the case study. On October 13, 2010, the parties announced the deal (pp. 9-10). On May 23, 2011, following the completion of its HSR merger review seven months after the announcement, the DOJ issued a news release (pp. 11-13) and filed a complaint seeking a permanent injunction to block the transaction. The merging parties filed an answer denying any violation just over a month later. After the parties’ unsuccessful motion to transfer venue and the completion of discovery, the

¹ A reasonably complete set of the most important filings in the litigation (including the trial transcript) may be found [here](http://www.appliedantitrust.com) on AppliedAntitrust.com.

² Unlike the usual case when the first deal fails, InfoSpace paid \$287.5 million in cash to acquire TaxACT, the same amount H&R Block was to pay. *See* Press Release, TaxACT, [InfoSpace to Acquire TaxACT](#) (Jan. 9, 2012). After the acquisition, 2nd Story Software, the operating company for the TaxACT business, became a wholly-owned subsidiary of InfoSpace (later renamed Blucora, Inc.), and continued operations in Cedar Rapids, Iowa as a standalone business unit led by the TaxACT management team. In November 2022, private equity firm Cinven agreed to acquire TaxAct from Blucora for approximately \$720 million in cash and to combine it with Drake Software, a provider of comprehensive tax-preparation software for professional tax preparers, under a new holding company. *See* Press Release, Blucora, Inc., [Blucora to Become Avantax, a Pure-Play Leading U.S. Independent Tax-Focused Wealth Management Company](#) (Nov. 1, 2022); Press Release, Cinven, [Cinven to Acquire TaxAct](#) (Nov. 1, 2022). TaxAct, now organized under Cinven’s holding structure alongside Drake Software, remains headquartered in Cedar Rapids, Iowa, with Curtis Campbell continuing to lead the TaxAct business.

court's minute order of August 4, 2011, set a hearing date of September 6, 2011, and the parameters for trial. Eight days of trial began on September 6, 2011, and concluded on September 19, 2011 (trial days are often not continuous). The court heard closing arguments on October 3, 2011.

The district court issued an order entering a blocking permanent injunction on October 31, 2011 (pp. 14-15) and released a public version of the memorandum opinion in support of the order on November 10, 2011. We will work through the opinion in stages rather than reading it straight through. For this class, we will stop after the court's initial evaluation of the competing economic expert testimony on market definition; the DOJ's critical loss and merger simulation analysis is for the next class. Use the opinion's table of contents to keep the structure of the court's analysis in mind (p. 18).

The factual background. The early factual sections give you the information you would have had in counseling the parties before litigation: who the firms were, how their products were positioned, why H&R Block wanted TaxACT, and how free tax-preparation products fit into competition. As you read, think about the transaction's antitrust risk and what antitrust risk-shifting provisions the seller might want in the acquisition agreement. The opinion develops this background in its discussion of the parties, TaxACT, the transaction and deal rationale, and the tax-preparation products, including the role of free products (pp. 19-28).

Standard of review. Before the court can analyze the merits, it must state the legal framework governing a Section 7 challenge. The key points should be familiar from Sanford Health/MDC: Section 7 is forward-looking and incipency-based; DOJ bears the burden of proving a violation by a preponderance of the evidence; and the analysis proceeds through the Baker Hughes three-step burden-shifting framework. Read the court's concise statement of that framework (pp. 28-30). If you need a refresher, return to the Unit 3 materials.

Market definition: The judicial tests. Following the standard of review, the court turned to market definition (pp. 30-46). As you know, an essential element of every Section 7 violation is the finding of a *relevant product market*, which identifies the "line of commerce" (product market), and a *relevant geographic market*, which identifies the "area of the country" in which the threatened anticompetitive effect of the merger is to be located.³ The parties stipulated to a worldwide market, so the geographic market was not an issue.⁴ Product market definition, however, was the key to the case outcome.

Market definition class notes: general principles and Brown Shoe. The court's product-market analysis rests primarily on the two complementary approaches you have already seen: the Brown Shoe judicial factors and the hypothetical monopolist test. Start by refreshing the general role of market definition and the relationship between these approaches, including the additional methods identified in the 2023 Merger Guidelines (slides 3-15). The notes then review Brown Shoe's "outer boundaries" and "practical indicia" tests (slides 16-23). Pay particular attention to the Brown Shoe material because it provides the principal framework the court uses in H&R Block/TaxACT.⁵

³ The nomenclature is not precise since the relevant product market and the relevant geographic market are not separate markets but rather the product and geographic dimensions of the *relevant market*.

⁴ The parties agreed that the relevant product market involved only tax preparation products or services for filing U.S. tax returns and that they could be used by persons worldwide filing such returns.

⁵ All slide references in this reading guidance are to the Unit 5A market definition class notes.

Supply-side switching. Market definition ordinarily focuses on demand-side substitution—what customers would buy instead if prices rose—but firms sometimes can respond by rapidly switching production into the candidate market. The Merger Guidelines generally account for those supply-side responses in identifying market participants rather than in defining the market itself, while the case law is less uniform. This issue does not arise in H&R Block/TaxACT, so treat the material principally as reference. Focus on the basic Guidelines approach and its contrast with the judicial approach (slides 24-27 and 31-35). You may move quickly through the numerical pencil examples (slides 28-30 and 32); their purpose is to show why the treatment of supply-side switching can materially affect shares and concentration.

The hypothetical monopolist test. The HMT approaches market definition from a different direction: it asks whether a hypothetical monopolist controlling a candidate group of products could profitably impose a SSNIP without losing enough sales to products outside the group to make the price increase unprofitable. We introduced the basic idea in Sanford Health; here the notes develop it in considerably more detail. They begin with the original HMT and the 1992 Guidelines algorithm (slides 36-43), then distinguish the profitability/breakeven and profit-maximization versions of the test and explain the Cellophane problem (slides 44-52). The remaining slides address the smallest-market principle, selective SSNIPs, whether satisfying the HMT is necessary or sufficient to establish a relevant market, and the evidence used to apply the test under the 2010 and 2023 Guidelines (slides 53-63). Pay particular attention to the smallest-market principle and selective SSNIPs; both will matter when we evaluate the expert testimony in H&R Block.

Special cases and geographic markets. Some recurring settings create special market-definition problems—cluster markets, targeted-customer markets, bidding markets, R&D and pipeline products, and single-manufacturer products. None is central to H&R Block/TaxACT, so read this material for exposure and retain it as reference (slides 64-77). The notes also collect our more detailed treatment of geographic market definition (slides 78-99). Because we covered geographic markets in Unit 3 and the parties stipulated to a worldwide geographic market here, you need not reread that section closely for this class.

The court structured its product market analysis around the established judicial framework from *Brown Shoe*, which defines market boundaries through “reasonable interchangeability of use” and “cross-elasticity of demand,” supplemented by practical indicia such as industry recognition, unique product characteristics, distinct customer bases, differentiated prices, and specialized vendors. The court applied this framework using a three-pronged approach:

1. First, the court examined the defendants’ own business documents, which consistently showed that TaxACT and H&R Block viewed themselves as competing primarily against other DDIY providers rather than against assisted or manual tax preparation methods.
2. Second, the court analyzed the practical differences between DDIY products and other tax preparation methods in terms of technology, price, convenience, time investment, and user experience.
3. Third, the court employed the hypothetical monopolist test to determine whether a DDIY monopolist could profitably impose a small but significant nontransitory price increase without losing customers to assisted or manual preparation.

Notably, the court's application of the hypothetical monopolist test was predominantly qualitative rather than quantitative, relying on observational evidence and logical reasoning rather than formal econometric analysis. Instead of estimating cross-elasticity of demand or diversion ratios, the court emphasized the record showed persistent price disparities between DDIY products (averaging \$44) and assisted preparation (\$150-200), reasoning that even a 10-20% DDIY price increase would still leave prices substantially below those of assisted alternatives. The court also noted that DDIY providers do not set prices based on assisted preparation pricing, examined the functional differences between tax preparation methods, and used analogical reasoning (comparing the situation to airplane travel versus other transportation methods) to conclude that DDIY products were not reasonably interchangeable with other tax preparation methods. Through this primarily qualitative analysis, the court concluded that DDIY constituted a distinct relevant product market, rejecting the defendants' argument for a broader "all methods" market that would include assisted tax preparation and pen-and-paper filing. With this framework in mind, read the court's product-market analysis (pp. 30-46). As you read, identify which parts of the court's reasoning are Brown Shoe evidence, which parts resemble the HMT, and why the court was willing to reach its market-definition conclusion largely without formal econometric analysis.

Market definition: confirming economic expert testimony. After reaching a qualitative conclusion that DDIY was the relevant product market, the court turned to the parties' economic experts as a further check on that conclusion. This part of the case is useful not only for market definition but also for understanding how courts evaluate competing economic methodologies and the evidentiary foundations on which they rest.

Expert evidence can be admitted yet ultimately receive little or no weight. Federal Rules of Evidence 702 and 703 and Daubert require the court to examine whether an expert's methodology is sufficiently reliable, while the ultimate weight given the testimony remains a separate question. That distinction matters here because the court denied the government's motion in limine directed at Dr. Meyer's survey-based analysis, admitted the survey and related opinion, and later concluded that severe shortcomings in the survey prevented it from drawing conclusions from her analysis. With that framework in mind, read the note on expert evidence (pp. 108-17) and the court's ruling on the motion in limine (pp. 118-32).

The competing experts approached the market-definition evidence differently. Dr. Frederick Warren-Boulton, for DOJ, used IRS switching data covering more than 100 million taxpayers as a proxy for likely diversion patterns; Dr. Christine Meyer, for defendants, relied in important part on a consumer survey that the court later found methodologically deficient. The important questions are what each expert's data actually measured, how reliably those data supported inferences about diversion, and how the court distinguished admissibility from evidentiary weight.

Warren-Boulton also departed from the typical Merger Guidelines sequence in an important respect. Rather than beginning the HMT with a candidate market consisting only of an overlapping product of the merging firms, he used qualitative evidence of the type probative under Brown Shoe to identify all DDIY products as his initial candidate market, then applied economic tests to that group. The IRS data reliably measured switching but did not directly measure diversion caused by a price increase; the court nevertheless regarded the switching data as at least somewhat indicative of likely diversion because no direct, reliable diversion data were available. With this framework in mind, read the court's initial evaluation of the competing

expert testimony (pp. 46-51), paying particular attention to how the court evaluates the methods and data supporting each expert's conclusions.

The next section of the opinion examines Dr. Warren-Boulton's application of specific economic tests to validate DDIY as the relevant market, demonstrating how economists move from qualitative market definition to quantitative confirmation using the hypothetical monopolist test framework. Dr. Warren-Boulton employed two complementary approaches: a critical loss analysis and a merger simulation. We will examine Dr. Warren-Boulton's analysis in detail in the next class. But first, we need to understand the critical loss implementation of the hypothetical monopolist test in homogeneous markets, as this provides the foundation for more complex applications in differentiated product markets.

Critical loss in homogeneous product markets. Recall from Unit 3 that the "hypothetical monopolist test," originally introduced by the 1982 Merger Guidelines and now adopted in one form or another by the courts, was designed to introduce some economic sense and analytical rigor into market definition. A candidate market satisfies the HMT if a hypothetical monopolist of all products in the product group could profitably raise the prices in the product grouping over premerger levels by "a small but significant nontransitory increase in price" (SSNIP), often taken to be 5%.⁶ The idea is that if a hypothetical monopolist of a group of products could not profitably raise their prices, then a fortiori, the merged firm—either individually or tacitly with other firms in the market—could not raise prices as a result of the merger.⁷

In Unit 3, we applied the HMT by first specifying a candidate relevant market (with its product and geographic dimensions), then calculating the incremental profit gain for a hypothetical monopolist of that market if it uniformly increased prices for all products in the market by a SSNIP. The incremental profit gain from the SSNIP equals the gross incremental profit gain from the inframarginal sales that continued after the price increase, minus the gross incremental profit loss from the foregone marginal sales. If the incremental profit gain was positive, the SSNIP would be profitable and the candidate market would satisfy the HMT. If the incremental

⁶ Note that we are applying the profitability version of the HMT, not the profit-maximization version. As I mentioned in class, unless otherwise specified, we will consistently use this profitability version. Remember, when demand is linear and marginal cost is constant, a percentage SSNIP δ that satisfies the profitability HMT also satisfies the profit-maximization HMT at a percentage SSNIP of $\delta/2$.

⁷ While the various iterations of the hypothetical monopolist test in the 1982, 1992, and 2010 Merger Guidelines, as well as in the court precedents that followed them, focused exclusively on the ability of the hypothetical monopolist to profitably increase price by a SSNIP, the 2023 Merger Guidelines expanded the test. It now includes not just a price increase but also any significant change in the terms of trade that is adverse to customers (a "SSNIPT"). These nonprice changes may include, for example, changes in product or service quality or the rate or direction of technological innovation. See U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines § 4.3 (rev. Dec. 18, 2023).

Conceptually, an expanded HMT is consistent with the consumer welfare standard in antitrust law, which considers all dimensions of consumer harm, not just price. This change reflects the evolving nature of competition, particularly in some high-tech and other markets where nonprice factors play a critical role. However, two practical problems may limit the use of the expanded test. First, there are few, if any, generally accepted economic models for predicting how a monopolist's profit-maximizing behavior on dimensions other than price and output would differ from that of firms currently operating in the marketplace. Second, while the HMT has a quantitative metric for determining whether a price increase is "significant"—typically 5% over prevailing market prices—there is often no clear metric to measure how adverse a change is in competitive variables other than price and output, much less an accepted quantitative threshold for determining whether the change is "significant." It remains to be seen how useful courts will find this expanded hypothetical monopolist test in practice.

profit gain was negative, the SSNIP would not be profitable and the candidate market would fail the HMT. I call this method “brute force accounting.”

Critical loss offers a more straightforward way of applying the HMT with a uniform SSNIP in a homogeneous product market. For a specified SSNIP, the breakeven condition identifies the maximum quantity of sales the hypothetical monopolist could lose while still earning at least its pre-SSNIP profit. That maximum quantity is called the *critical loss*. If the actual loss from the SSNIP is less than the critical loss, the SSNIP is profitable; if the actual loss is greater than the critical loss, the SSNIP is unprofitable. At equality, the hypothetical monopolist breaks even.

Some simple manipulations of the breakeven condition enable us to create tests that are mathematically equivalent to brute force accounting. These tests compare the actual loss in sales from a specified uniform SSNIP to the critical loss for that SSNIP, given the gross margins of the products in the candidate market. If the actual loss in marginal sales from the SSNIP is less than the critical loss, then the candidate market satisfies the hypothetical monopolist test. Conversely, if the actual loss in marginal sales from the SSNIP exceeds the critical loss, then the candidate market fails the hypothetical monopolist test.

Critical loss class notes. With the basic economics in mind, turn to the class notes. They first develop the intuition behind critical loss graphically and explain why profitability turns on the comparison between actual loss and critical loss (slides 100-08). Make sure you can explain why a SSNIP is profitable when actual loss is below critical loss and unprofitable when actual loss is above it.

The notes then derive the unit and percentage critical loss formulas and express the same breakeven idea in terms of critical elasticity and critical revenue loss (slides 109-15). You should understand the unit and percentage critical loss derivations and be able to use the formulas. For the elasticity and revenue formulations, focus on what each test is measuring and how the actual value is compared with the critical value; we may not work through every algebraic step in class.

The section concludes by putting the pieces together as an algorithm for applying critical loss to market definition (slide 116). We will work through applications and examples in greater detail in the next class. For Thursday, the key is to understand the economics of the breakeven comparison and the basic formulas well enough to follow and replicate a critical loss analysis.

Once you understand the framework, read the short excerpt from *FTC v. Tronox* (pp. 134-35) for a clear judicial statement of the critical loss framework and a step-by-step comparison of predicted losses to the critical loss threshold.

If you have any questions, send me an email.