

MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
Fall 2026

Tuesdays and Thursdays, 3:30 pm – 5:30 pm
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CLASS 18 HOMEWORK ASSIGNMENT

Instructions

Submit by email by 3:30 pm on Tuesday, October 27

Send to wdc30@georgetown.edu

Subject line: Merger Antitrust Law: Assignment for Class 18

Assignment: Calls for a memorandum to a partner (which may be sent to a client)

Dianne Lockhart, a partner at Able & Baker LLP, is advising a client that is considering acquiring a competitor. The client believes that any attempt by the merged firm to raise prices would attract new competitors or induce existing rivals to expand. Lockhart has asked you to prepare a memorandum explaining the modern entry defense in merger antitrust law and what the client would need to establish to rely on it. The memorandum should examine the requirements of the 2010 and 2023 Merger Guidelines and explain how courts have analyzed the defense in recent judicial opinions. She may share your memorandum with the client.

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

ABLE & BAKER LLP

INSTRUCTOR'S ANSWER

To: Dianne Lockhart

From: Dale Collins

The Entry Defense

You have asked me to prepare a memorandum explaining the modern entry defense in merger antitrust law, the requirements of the 2010 and 2023 Merger Guidelines, and how courts have applied the defense. The client believes that a price increase following its proposed acquisition would attract new competitors or induce existing rivals to expand. That response can prevent a merger from substantially lessening competition, but the possibility of entry is not enough. We would need evidence that the competitive response would occur soon enough, and on a sufficient scale, to prevent the harm otherwise threatened by the merger.

The governing legal standard. Section 7 of the Clayton Act prohibits acquisitions whose effect may be substantially to lessen competition. The entry defense addresses that prediction. It does not excuse a merger that will substantially lessen competition on the ground that competition might eventually recover. Instead, it explains why the merger is unlikely to produce the competitive harm that the plaintiff predicts. The same reasoning applies to expansion by existing competitors and to repositioning, in which a firm changes its products or operations to compete more directly with the merging firms.¹

The distinction matters for the burden of proof. Under *Baker Hughes*, a plaintiff may establish a prima facie case through evidence of market concentration. The defendants then have a burden of producing evidence that the concentration figures do not accurately predict the merger's competitive effects. The stronger the prima facie case, the more persuasive the rebuttal must be. The ultimate burden of persuasion remains with the plaintiff. Entry is one way to rebut the case; it is not the only way, and defendants do not assume the ultimate burden of proving that their merger is lawful.²

Baker Hughes accordingly rejected a rule requiring defendants to clearly prove quick and effective entry as the exclusive means of rebuttal. Modern decisions nevertheless commonly ask whether the entry or expansion on which defendants rely will be timely, likely, and sufficient to prevent or counteract the threatened harm. These propositions are consistent: the first concerns the overall allocation of proof and the range of permissible rebuttal evidence; the second tests whether a particular claim about future entry provides a persuasive answer to the plaintiff's case. The court in *Henkel*, a 2026 decision discussed below, drew the same distinction: unlike the

¹ 15 U.S.C. § 18; *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982–83, 987–91 (D.C. Cir. 1990); *FTC v. Sanford Health*, 926 F.3d 959, 965 (8th Cir. 2019); see also U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 6.1 (2010) [hereinafter 2010 Guidelines] (repositioning “is evaluated much like entry”); U.S. Dep't of Justice & Fed. Trade Comm'n, *Merger Guidelines* § 3.2 n.65 (2023) [hereinafter 2023 Guidelines] (same).

² *Baker Hughes*, 908 F.2d at 982–84, 991; *Sanford Health*, 926 F.3d at 962–63.

rejected “quick and effective” test, the “timely, likely, and sufficient” standard “does not impose a specific timeline or require evidence of specific competitors and their plans.”³

The Merger Guidelines. Section 9 of the 2010 Horizontal Merger Guidelines organizes the analysis around the same three requirements. Entry must occur quickly enough to make harmful conduct unprofitable overall or to counteract it without significant customer harm. It must be profitable after allowing for the entrant’s costs, expected sales, and the prices that will prevail after entry. And it must be large enough and of the right character to address the competitive harm. Replicating the scale and strength of a merging firm is sufficient under this formulation, but smaller entrants may collectively suffice if they are not at a significant competitive disadvantage.⁴

Section 3.2 of the 2023 Merger Guidelines retains the three requirements but states them more strictly. Entry must replace lost competition before any effect from that loss occurs and must be durable. It must be sufficiently likely that no substantial lessening of competition is threatened. And it must at least replicate the scale, strength, and durability of one merging party. The agencies also ask why the merger would induce entry if successful entry would restore the competitive conditions under which entry had not previously been planned. They consider whether the merger itself would increase barriers to entry.⁵

The 2023 Guidelines superseded the 2010 Guidelines as agency policy. They do not bind courts. The difference between the two formulations therefore matters in advising a client about agency review, but a memorandum addressing litigation must also examine what the courts actually require. In particular, neither a rigid requirement that a single entrant duplicate an acquired firm nor a transfer of the ultimate burden of persuasion to the defendants should be assumed merely from the agencies’ formulation.⁶

The recent decisions discussed in this memorandum, without adopting the stricter particulars of § 3.2, continue to apply the established “timely, likely, and sufficient” framework drawn from the 2010 Guidelines and *Sanford Health*. In *JetBlue*, the government argued that entry into the affected airline routes had to be assessed over the shortest possible period, one that was “possibly immediate.” The court found that timeframe “unrealistic” and, relying on the government’s earlier concession and the record, assessed entry over two to three years. In *Tapestry*, the court accepted the parties’ shared view that the question was whether existing and potential competitors could collectively constrain the merged firm, not whether a single new brand would replicate the acquired one. *Henkel* and *Edwards Lifesciences*, both decided in 2026, applied the same standard. In litigation, the governing circuit’s precedent controls. The Second Circuit, for example, has not affirmatively adopted the three-part standard, although district courts in that

³ *Baker Hughes*, 908 F.2d at 983–84, 986–91; *Sanford Health*, 926 F.3d at 965; *FTC v. IQVIA Holdings Inc.*, 710 F. Supp. 3d 329, 393–95 (S.D.N.Y. 2024) (applying the standard over the defendants’ objection); *FTC v. Henkel AG & Co. KGaA*, No. 25 Civ. 10371 (KPF), 2026 WL 2676755, at *33 (S.D.N.Y. Aug. 14, 2026) (redacted version filed Sept. 11, 2026).

⁴ 2010 Guidelines §§ 9–9.3.

⁵ 2023 Guidelines § 3.2.

⁶ 2023 Guidelines § 1; *Baker Hughes*, 908 F.2d at 989–91; *FTC v. Tapestry, Inc.*, 755 F. Supp. 3d 386, 412 n.3, 465 (S.D.N.Y. 2024).

circuit apply it. In an agency investigation, by contrast, we should expect the staff to evaluate the client's evidence under the 2023 formulation.⁷

Timeliness. The relevant event is the arrival of effective competition, not the announcement of a business plan or the first sale. A firm may be able to launch a product promptly yet need years to qualify with customers, establish a reputation, develop distribution, or reach the scale necessary to compete for the business at risk. We therefore would need a timetable covering the entire process. The question is when customers would have a meaningful alternative to the merged firm, taking account of the time required for customers themselves to switch.

Sanford Health illustrates the distinction. A prospective entrant had plans to enter and had recruited a prominent physician. Those steps did not show that it would replace the lost competition promptly. The entrant still needed to recruit additional physicians and build its reputation. The district court credited the entrant's own testimony about those difficulties, and the Eighth Circuit upheld the preliminary injunction. The lesson is that a credible intention to enter can coexist with an inadequate competitive response.⁸

The same problem arose in *Staples*, where the defendants relied heavily on Amazon Business to replace competition lost through the acquisition of Office Depot. Amazon had resources, a well-known brand, and ambitious plans. But large business customers required services that Amazon had not demonstrated it could supply, including guaranteed and customer-specific pricing and the ability to serve as a primary vendor. The court found insufficient evidence that Amazon would restore the lost competition within three years. It also rejected reliance on local and regional suppliers. The relevant inquiry concerned competition for the large business customers in the market, rather than Amazon's prospects in commerce generally.⁹

Courts frequently treat two to three years as the relevant period. *Edwards Lifesciences* described it as the "relevant time frame" for timely entry, and *Bertelsmann* found it "a strain" to characterize Disney's "five-year aspirational plan" as evidence of timely entry. The benchmark has its roots in the 1992 Guidelines, which generally treated entry as timely only if it could be achieved "within two years from initial planning to significant market impact." Some later decisions have measured the period from the merger rather than from initial planning; *Edwards Lifesciences* measured it from the date the merged firm's expected monopoly would form. The 2010 Guidelines dropped any fixed period. Individual courts have also chosen the period on the record before them: *Staples* relied on the government economist's testimony, and *JetBlue* relied on the government's concession and the record. The period therefore should not be treated as a universal safe harbor. A forecast that an entrant will become effective within three years does not mean that customers will be protected in the meantime. Timing must be assessed against the competitive harm in the particular market. Conversely, the date on which a firm first entered tells us little unless we also know when it became capable of competing for the affected customers.

⁷ *United States v. JetBlue Airways Corp.*, 712 F. Supp. 3d 109, 155 (D. Mass. 2024), *appeal dismissed*, No. 24-1092, 2024 WL 3491184 (1st Cir. Mar. 5, 2024); *Tapestry*, 755 F. Supp. 3d at 465; *Henkel*, 2026 WL 2676755, at *32-33; *FTC v. Edwards Lifesciences Corp.*, No. 25-2569 (RC), 2026 WL 228723, at *33 (D.D.C. Jan. 28, 2026).

⁸ *Sanford Health*, 926 F.3d at 965.

⁹ *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 133-37 (D.D.C. 2016).

Amazon had been in the office supply business for fourteen years, yet large business customers still did not regard it as a viable alternative to Staples and Office Depot.¹⁰

Likelihood. A company's technical ability to enter does not mean that entry would make business sense. Entry may require expenditures that cannot be recovered if the venture fails. An entrant must expect enough sales, at the prices likely to prevail once it begins competing, to justify those expenditures and the risk. This is why a prediction based only on the higher prices the merged firm might initially charge can be misleading. Those prices may disappear when entry increases competition. A plausible account of entry must explain why the entrant would proceed under the resulting conditions.

The practical barriers may include permits, specialized personnel, intellectual property, access to inputs, distribution, customer acceptance, and the cost of acquiring a reputation. In *EnergySolutions*, for example, the only successful new entrant into licensed low-level radioactive waste disposal in thirty years had taken seventeen years and invested more than \$700 million. That entrant, WCS, was the company the defendant proposed to acquire. The record also showed substantial licensing and other obstacles, and the defendant had told its lenders that its principal disposal site "creates significant barriers to entry." The court rejected both new entry and the proposed expansion of other disposal facilities as adequate responses. This was evidence about the actual requirements of competing, not merely an assertion that entry was difficult.¹¹

Recent successful entry is relevant, but it must be examined rather than assumed to be repeatable. In *IQVIA*, the defendants pointed to the growth of Lasso, a firm founded in 2019 that IQVIA itself had acquired in 2022, and the possibility that large general advertising platforms could compete in healthcare programmatic advertising. The court examined the specialized technology, regulatory requirements, personnel, and customer relationships needed to do so. Lasso's success showed that entry was possible, but not that another firm would reproduce it, and the resources of large technology companies did not show that they would become effective competitors. The merging firms' own documents describing entry barriers were particularly damaging to their position. In both *IQVIA* and *EnergySolutions*, moreover, the recent successful entrant was one of the merging firms. In that situation, evidence that entry is possible also shows what the merger would eliminate.¹²

Sufficiency. Even prompt, profitable entry may be too limited to protect competition. It must also address the particular harm the merger threatens. If that harm includes reduced quality, service, variety, or innovation, entry that merely constrains prices may not be enough.¹³ A new firm might serve only a narrow product line, a small geographic area, or customers who would not otherwise buy from the merging firms. The same is true of expansion: spare capacity is useful only if a rival can and will use it to compete for the business threatened by the merger. The

¹⁰ *Id.* at 133–36; *Edwards Lifesciences*, 2026 WL 228723, at *33, *35; *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 53 (D.D.C. 2022); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 73 n.28 (D.D.C. 2011); *JetBlue*, 712 F. Supp. 3d at 155; U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 3.2 (1992, rev. 1997); 2010 Guidelines § 9.1.

¹¹ *United States v. EnergySolutions, Inc.*, 265 F. Supp. 3d 415, 443–44 (D. Del. 2017).

¹² *IQVIA*, 710 F. Supp. 3d at 345, 393–95.

¹³ 2010 Guidelines § 1 (adverse effects may include "reduced product quality, reduced product variety, reduced service, or diminished innovation"); 2023 Guidelines § 1 (competition "incentivizes businesses to offer lower prices, improve wages and working conditions, enhance quality and resiliency, innovate, and expand choice").

analysis must connect the expected response to the particular loss of competition. Adding another supplier to a list does not show that it will replace an important competitive constraint. In *JetBlue*, the court found that other low-cost airlines would likely enter routes Spirit abandoned, but doubted that they could do so on the necessary scale: to replace just half of Spirit's capacity on its Boston routes, Allegiant would have had to grow by 412 percent, compared with its historical average annual growth rate of 10 percent. Nor was capacity the only problem. Spirit was a disruptive competitor that had disciplined larger airlines, and the court reasoned that entrants unable to replicate the competitive intensity of the acquired firm would not fill the void it left, even if they backfilled its routes.¹⁴

Nor must the lost constraint invariably be replaced by a single firm. In *Tapestry*, the court agreed that the question was whether existing and potential handbag companies could collectively constrain the merged firm, rather than whether a new brand as large as Michael Kors would soon emerge. It nonetheless rejected the defense on the evidence. Supply-chain requirements and the expense and time needed to build brands and acquire customer information limited the competitive response. The court also relied on a merger simulation showing that even a new entrant the size of Tory Burch, or the equivalent in one hundred smaller entrants, would reduce the merged firm's predicted upward pricing pressure only from about 17 percent to 15 percent. The decision permits an aggregate-entry theory, but requires proof that the firms in the aggregate would actually constrain the merger's effects.¹⁵

The analysis also applies when the merging firms are buyers. In *Bertelsmann*, the threatened harm was lower advances paid to authors of anticipated top-selling books. The existence of many smaller publishers did not mean that they could compete adequately for those books. Established backlists, financial resources, reputation, and marketing and distribution capabilities mattered. The court also rejected the suggestion that larger publishers' ability to acquire more books established that they would expand enough. The distinction between capacity and likely competitive conduct is equally important when the threatened harm is higher selling prices.¹⁶

The threat of entry. In some markets, the prospect of entry can constrain prices without entry actually occurring. If an attempted price increase would rapidly attract effective rivals, the merged firm may have no incentive to attempt it. The D.C. Circuit endorsed this reasoning in *Baker Hughes*: "If barriers to entry are insignificant, the threat of entry can stimulate competition in a concentrated market, regardless of whether entry ever occurs." In *Waste Management*, the Second Circuit found easy entry into local waste hauling decisive in rejecting the government's case. A small operator could compete with a truck and containers, and firms in a neighboring city could expand into the market. The absence of actual entry is not necessarily inconsistent with deterrence: prices may remain competitive precisely because entry would follow a price increase. Courts do not always draw that inference. In *Bertelsmann*, the court treated stable market shares as "the best proof" that would-be competitors faced formidable barriers, and noted that firms able to maintain high margins and shares without notable entry are likely protected by significant barriers. Stable shares alone therefore prove little. Evidence of the incumbents' margins and of

¹⁴ *JetBlue*, 712 F. Supp. 3d at 155–59, 163.

¹⁵ *Tapestry*, 755 F. Supp. 3d at 464–74.

¹⁶ *Bertelsmann*, 646 F. Supp. 3d at 51–53.

how rivals responded to past price increases would be needed to distinguish the two explanations.¹⁷

Baker Hughes is also one of the few decisions in which evidence of entry helped defeat the government's case. Two firms had entered the U.S. market for hardrock hydraulic underground drilling rigs in 1989 and were poised to expand; firms selling in Canada and elsewhere could be expected to enter if prices rose; and Secoma, the acquired firm, had gone from no U.S. sales in 1983 and 1984 to market leader by 1989. Together with *Waste Management*, the decision shows the kind of record that can support the defense: concrete evidence of recent entry and expansion in the relevant market, not merely capable firms nearby. We should be candid with the client, however, that such records are uncommon in reported merger decisions. In every other decision discussed in this memorandum, the government ultimately prevailed despite the defendants' entry evidence. *JetBlue* illustrates the burden distinction explained above. The court held that likely, timely entry, together with the merger's potential procompetitive benefits, met the defendants' relatively low burden of rebutting the prima facie case. It nonetheless doubted that entry would be sufficient to replace Spirit and, weighing the full record, found for the government.¹⁸

But a theoretical threat is not enough. In *Henkel*, the court rejected the argument that other suppliers would replace Loctite or Liquid Nails on retailers' shelves if prices increased. Manufacturing capacity was not the decisive obstacle. The merging brands had customer recognition and loyalty that other suppliers could not promptly reproduce, and retailers were reluctant to remove them even in response to price increases. The court distinguished *Waste Management* on those commercial facts. The Second Circuit had stated broadly that goodwill earned through effective service is "the natural result of," rather than an impediment to, competition. The *Henkel* court read that statement as a judgment about waste hauling, noting that few customers choose their waste haulers by brand; in construction adhesives, it found, brand was "the key barrier to entry." Reputation remains a relevant consideration: the 2010 Guidelines recognize "reputational barriers to rapid expansion by new entrants," and *Sanford Health* turned in part on the time an entrant needed to establish a name and reputation. For our client, a threat-of-entry argument would therefore require evidence that customers and potential entrants could make the threatened competitive response effective, not simply that another firm could manufacture the product.¹⁹

Courts also disagree about how much weight a threat of entry can bear. The Fifth Circuit has declined to adopt what it described as *Baker Hughes*'s conclusion that a mere threat of entry suffices, although *Baker Hughes* itself tied the threat's disciplining effect to the absence of significant entry barriers. *JetBlue* stated that the "mere threat of entry" is insufficient. *IQVIA* rejected the argument that large technology companies posed a competitive threat merely because they were already involved in related advertising, and distinguished *Waste Management*, where individuals operating out of their homes could compete, from the specialized capabilities that healthcare advertising required. *Edwards Lifesciences*, applying *Baker Hughes*, rejected a

¹⁷ *Baker Hughes*, 908 F.2d at 988; *United States v. Waste Management, Inc.*, 743 F.2d 976, 982–84 (2d Cir. 1984); *Bertelsmann*, 646 F. Supp. 3d at 52.

¹⁸ *Baker Hughes*, 908 F.2d at 988–89; *JetBlue*, 712 F. Supp. 3d at 155–59, 162–63.

¹⁹ *Henkel*, 2026 WL 2676755, at *31–33; *Waste Management*, 743 F.2d at 984; 2010 Guidelines § 9.3; *Sanford Health*, 926 F.3d at 965.

threat-of-entry argument because the FDA approval process made entry barriers significant and there was little evidence of imminent entry. The forum in which a challenge would be litigated may therefore affect how receptive a court is to a threat-of-entry argument. In any forum, however, we would need the kind of evidence described above.²⁰

Entry already planned. Entry that would occur without the merger belongs in the forecast of competition absent the transaction. It should not be counted as a benefit caused by the merger. That does not make it irrelevant: a well-supported plan may show that current market shares overstate the firms' future position. The comparison must include the planned entry on both sides and then ask what competition the acquisition would eliminate. Any additional entry or expansion attributed to the merger requires a separate explanation. Otherwise, the same competitive development is effectively counted twice. *JetBlue* adopted this approach: potential entrants' "pre-existing growth or entry plans" are "already baked into the world without the merger" and do not count toward filling the gap the merger creates. In the airline setting, where carriers' capacity was constrained, the court added that entry requiring carriers to abandon routes they otherwise would have served could not offset the merger's effects, because it would create new harm to competition elsewhere. The 2023 Guidelines state the narrower general principle: the agencies "typically do not credit entry that depends on lessening competition in other markets." Redeploying idle capacity, or capacity that is readily replaced, would not raise that concern.²¹

Application to the client. We should begin by identifying the products, customers, and geographic areas in which the client and the acquisition target compete. For each plausible entrant or expanding rival, we should determine what steps remain before it can serve those customers, what those steps would cost, how long they would take, and why the firm would undertake them. Business plans, approved investments, customer qualifications, and the firm's own sales and profitability projections would provide a stronger basis for the analysis than our client's general expectations about what rivals might do. Some of this information may be public, in investor presentations, announcements, or the trade press, but much of it will be in third parties' nonpublic documents. Before litigation, the client can obtain those documents only with the firms' cooperation. The agencies, by contrast, can compel third parties to produce documents and testimony during their investigation, and the parties can subpoena them once litigation begins. Potential entrants may also have reasons to understate their plans; as *Baker Hughes* observed, they "have a strong interest in downplaying the likelihood that they will enter a given market."²²

We should then test the expected response against the competition that would be lost. Relevant evidence would include the sales the entrant could realistically win, the customers prepared to switch, the prices and services it could offer, and its ability to sustain that effort. Past entry attempts, unsuccessful as well as successful, would help test the forecast. We should also consider whose testimony a court would credit. In *Tapestry*, the court gave little weight to a

²⁰ *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 430 n.10 (5th Cir. 2008); *Baker Hughes*, 908 F.2d at 987–88; *JetBlue*, 712 F. Supp. 3d at 156; *IQVIA*, 710 F. Supp. 3d at 395; *Edwards Lifesciences*, 2026 WL 228723, at *33–34.

²¹ 2010 Guidelines § 9 (distinguishing precommitted entry from merger-induced entry); 2023 Guidelines § 4.4.A (including firms with committed entry plans among market participants); *id.* § 3.2 (generally declining to credit entry that depends on lessening competition in other markets); *JetBlue*, 712 F. Supp. 3d at 158.

²² 15 U.S.C. §§ 57b-1, 1312 (civil investigative demands); Fed. R. Civ. P. 45; *Baker Hughes*, 908 F.2d at 987.

defendant's supply-chain executive who testified that entry was easy but had no experience with new brands, and greater weight to recent entrants who described the difficulties they faced. The client's ordinary-course documents also need to be consistent with the argument. In *IQVIA*, *EnergySolutions*, and *Bertelsmann*, the defendants' own documents or executives acknowledged high entry barriers. Descriptions of durable barriers or an acquisition rationale based on reducing competitive pressure may undermine a later claim that rivals would readily defeat a price increase.²³

On the facts presently given, the client has identified a possible economic response, but has not established an entry defense. The next step is to develop evidence of the response in this particular market. If that evidence shows effective entry or expansion soon enough and on a sufficient scale, it may materially weaken the case against the acquisition. If it shows only that firms could eventually enter or grow, we should not advise the client to rely on entry to resolve the merger's competitive concerns.

Please let me know if you have any questions or would like to discuss this matter further.

²³ *Tapestry*, 755 F. Supp. 3d at 467–68; *IQVIA*, 710 F. Supp. 3d at 393–94; *EnergySolutions*, 265 F. Supp. 3d at 443; *Bertelsmann*, 646 F. Supp. 3d at 52.