

MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
Fall 2024

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

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GRADED WRITTEN ASSIGNMENT

Instructions

Submit by email by 8:00 pm on Wednesday, November 20

Send to wdc30@georgetown.edu

Subject line: Merger Antitrust Law: Graded Homework Assignment

Assignment

Calls for a reasoned memorandum of law.

INSTRUCTIONS¹

1. This is a GRADED HOMEWORK ASSIGNMENT.
2. This untimed assignment will be available beginning at 8:30 pm ET on Friday, November 8, 2024, and must be submitted by email by 8:00 pm on Wednesday, November 20.
3. ~~This exam is final. No clarifications or corrections will be provided. If you are convinced that there is an error, inconsistency, or omission in the exam, please identify the problem, give your reasons why you believe there was a mistake, provide what you believe the correct information should be, and write your answer accordingly. If you have good reasons for believing there was a mistake in the problem (even if I disagree) and provide a sensible correction in the context of the hypothetical as a whole, I will accept the correction and grade your paper accordingly.~~

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

¹ These instructions are modeled on the instructions I intend to use (subject to the approval of the Registrar's Office) for the final exam. They have been modified to reflect that this is a graded homework assignment and not a final exam. Strikeouts indicate instructions that will apply to the final exam but not to the graded homework assignment.

4. ~~Exams at the Law Center are graded on an anonymous basis. The Student Disciplinary Code provides that the “unauthorized breach of anonymity in connection with a blind-graded examination” is a disciplinary violation. Therefore, be sure that you do not reveal your identity as the author of an examination in your answers themselves, in any communications with the professor, or otherwise discuss the substance of the exam with your professor(s) or with any other student from the time the exam is first administered until after grades are published.~~
5. You may consult any written source, including the reading materials, class notes, cases, outlines (commercial or otherwise), books, treatises, the Internet, Westlaw, and Lexis-Nexis. You may use Ctrl-F or search engines on your computer. Citations to cases or other primary sources are not required or particularly desired, although you may find reference to a case that we covered helpful at times to make your analysis more compelling or to shorten the exposition. Citations to secondary sources will *not* be helpful or appreciated. You may use calculators or spreadsheets as well as any spreadsheet templates you have prepared in advance.
6. ~~During the exam,~~ you may not use any artificial intelligence or large language model tools (including but not limited to ChatGPT, Claude, Microsoft Copilot, Google Gemini, and Perplexity.ai) to research, prepare, draft, or edit your answer. This prohibition includes AI features that may be built into word processors or other software you use ~~during the exam~~ in writing your answer.
7. As we discussed in class, you may cut and paste short passages *from materials you have collected in a single document* to introduce a concept, a rule of law, a legal principle, or an economic proposition or formula (“boilerplate”). You may include quotes from cases in the materials you create for this purpose, but if you do so, prepare the quote and cite the case (in proper Blue Book form) as you would in a brief. ~~Before starting the exam,~~ you may use artificial intelligence or large language model tools to research, prepare, draft, or edit your boilerplate, but be aware of the propensity of these tools to hallucinate and provide wrong responses especially in complex areas such as antitrust law. You are prohibited from copying/cutting and pasting any other prewritten text (~~written before starting your exam~~) into your ~~take-home exam~~ response, regardless of who authored the text.²
8. ~~Students who elect to print out take-home exam questions must destroy all exam documents after they have submitted their exam responses.~~
9. This homework assignment consists of one question. The question presents a hypothetical fact situation that you are asked to analyze from a particular perspective (e.g., a special assistant to the Assistant Attorney General making a recommendation on the disposition of an investigation, a private practitioner providing advice on the antitrust risks and likely

² To be clear, you may cut-and-paste passages into your boilerplate while you work on the assignment and then cut-and-paste those passages from the boilerplate into your answer, but you may not cut-and-paste passages not in the boilerplate into your response. If you cut-and-paste anything into your answer, it must come from your boilerplate.

outcome of a proposed transaction, a law clerk preparing an initial analysis of the application of the law to the evidence for a judge). Be sure that you write from the assigned perspective *and* answer the question(s) asked.

10. Grading will be on the completeness, coherency, and persuasiveness of your answers to the question presented and not on whether you reach the same conclusion as I did. Ideally, your answer to the question will persuade me that you have correctly identified the issues, properly analyzed them in the context of the prevailing legal standards and the facts presented, and advised a sensible course of action. I have no doubt that some of you will persuade me to go one way on a question, while others of you will equally persuade me to go a different direction on the same question.
11. Present your analysis in a well-organized, linear, and concise manner. Think about your answers before writing. *Remember Pascal's apology*: "I am sorry that this was such a long letter, but I did not have the time to write you a short one." Clarity of thinking and exposition are much more important than throwing in the kitchen sink. While there is no page limit for the graded homework answer, penalties will be levied for excessive length, verbosity, lack of organization, or the inclusion of irrelevant boilerplate.
12. If asked to write a memorandum in any capacity, you may start the answer with the first sentence of the memorandum. There is no need to include a privilege legend, "To" and "From" lines, or a subject line. Also, you may refer to a table in your answer by the table number in the question.
13. If you are asked to write a memorandum as an attorney in a law firm at a confidential phase of the transaction, it is *not* necessary or desirable to use code names for the transaction or the parties. This is an exception to the usual rules of practice.
14. You should assume that federal subject matter jurisdiction exists and that it is unnecessary to address any jurisdictional questions in your answers. Also, in the areas of interest all demand curves are linear and all marginal costs are constant.
15. If the hypothetical gives prices or costs for a group of products as an "average" or being "around" a given number, you should treat that number as the arithmetical average with only relatively small variations around the mean, and use that number in any formula. (This instruction is designed to simplify the math and substitutes for the less realistic assumption that all prices have coincidentally converged to the same number, notwithstanding their differentiation.)³
16. If there is an inconsistency between a number given in a table and a number given in the text, use the number in the table.
17. It should go without saying that, outside of this assignment, you should not believe everything (or anything) in the statement of any hypothetical fact situation. I have taken considerable liberties in fashioning the problems and have totally ignored reality whenever it

³ When the average has only small variations around the arithmetical mean, the formulas work reasonably well in practice using the average.

was convenient. It will be in your best interest to unlearn the “facts” in the question as soon as possible after you finish the ~~examination~~ assignment.

18. The hypothetical facts should be complete in the sense that they present what is known at the time the analysis is requested. As in life, some information you would like to have may simply not be available. Analyze the facts as they are presented in the question.
19. Since this is a graded homework assignment, I will not hold out hope that you find it enjoyable, but I do hope that you find it intellectually stimulating. I have sought to make the question challenging, but you should be well-prepared to tackle it.

This assignment consists of twelve (12) pages, including these four (4) cover pages. Please be sure your ~~exam~~ assignment is complete.

WILTON GROCERY STORE MERGER

You are an attorney in the Antitrust Section of the Connecticut Attorney General's Office. The Section has completed its review of HarvestMart's pending \$6 million acquisition of Sam's Market, two traditional supermarkets in Wilton, CT.

Joyce Davenport, the section chief, has asked you to draft a memorandum of law analyzing the likelihood of success if the Attorney General files a complaint in federal district court alleging that the acquisition, if consummated, would violate Section 7 of the Clayton Act.¹ In particular, Ms. Davenport wants your analysis to address how the state might present its case most persuasively, anticipate and respond to defenses the merging parties might raise, discuss the type of injunction the state should seek in its complaint, and give your conclusion of how the court would rule.

If you conclude that the Section 7 claim is likely to be upheld by the court, Ms. Davenport also would like you to address whether the Attorney General should exercise his prosecutorial discretion and not challenge the acquisition or settle the matter with a consent decree. If you recommend a consent decree, your memorandum should include a detailed proposal of the specific terms and conditions that the Attorney General should demand to address the competitive concerns raised by the acquisition.

Here are the facts found in the investigation:²

Wilton, CT. Wilton, Connecticut, is a town in Fairfield County with a population of approximately 35,000 and about 14,000 households. Originally a farming community, Wilton has evolved into an affluent suburb known for its colonial charm and meticulously maintained open spaces, including nearly 1,000 acres of protected recreational land. To preserve its quaint, residential atmosphere, Wilton's zoning regulations limit retail establishments to the town center, ensuring that most of the town retains a quiet, village-like character. Despite this, Wilton hosts several corporate headquarters in secluded, wooded areas, adding economic vitality to its predominantly family-oriented setting. The town's attractive qualities continue to draw new residents and businesses, and its population is projected to grow by 30% over the next decade, increasing demand for retail and residential development.

Wilton's grocery stores. Today, Wilton is served by four grocery stores. Three of these stores are traditional supermarkets—HarvestMart, Nature's Pantry, and Sam's Market—all located close to one another in the town center. The fourth store is MaxMart, a club membership store located on CT Route 33 between Wilton and Ridgefield.

Traditional supermarkets, including HarvestMart, Nature's Pantry, and Sam's Market, prioritize variety, depth of selection, and convenience and provide an extensive assortment of products and

¹ **Note to students:** While Connecticut has an antitrust law, it does not have a provision that is analogous to Section 7. Therefore, it is likely that the Connecticut Attorney General would challenge a merger in federal district court under Section 7 to take advantage of the wealth of precedent rather than to sue under a more general provision in the state statute.

² **Note to students:** For purposes of this problem, assume that online grocery shopping and delivery services have not yet become established in the Wilton-Ridgefield area. While such services are increasingly important in many markets, this simplifying assumption allows you to focus on competition between physical grocery stores.

services designed to meet diverse daily needs in a single visit. Traditional supermarkets are large retail stores, which average 38,000 square feet, designed to provide a convenient one-stop shopping experience. Supermarkets are typically designed to facilitate convenience and make shopping enjoyable. They offer a wide selection of food and household items, with 30,000 to 50,000 stock-keeping units (SKUs) across numerous product types, package sizes, and brands. Supermarkets typically include a range of food categories such as fresh produce, dairy, meats, seafood, frozen and refrigerated goods, and shelf-stable items like canned goods, dry groceries, and condiments. They are also known for their extensive non-food sections, which carry household supplies, health and beauty products, and, where permitted, alcoholic beverages. A distinguishing feature of supermarkets is their variety of specialized service departments, such as in-store bakeries, butcher counters, delis, prepared meal sections, and floral departments. Supermarkets also emphasize enhanced customer service, which may include personalized assistance, loyalty programs, or community-oriented initiatives. These additional services, along with the deep inventory and diverse product offerings, position supermarkets as comprehensive shopping destinations capable of fulfilling most or all of a shopper's food and household needs in a single trip. Like other supermarkets in the state, the Wilton supermarkets operate with a gross margin of around 32%, reflecting the balance between their extensive offerings and operational costs.

Both HarvestMart and Nature's Pantry are established regional supermarket chains operating throughout the Northeast. HarvestMart operates 85 stores across New England and New York, supported by two modern distribution centers—one in Hartford, Connecticut, and another near Albany, New York. Nature's Pantry, with 65 stores in Connecticut, Massachusetts, and Rhode Island, operates from a single large distribution center in central Connecticut. Both chains have invested heavily in efficient inventory management and distribution systems, allowing them to minimize costs and maintain consistent product availability. Their sophisticated logistics networks enable them to negotiate favorable terms with suppliers and quickly respond to changes in consumer demand. Sam's Market, in contrast, operates as a single independent store and must rely on wholesale suppliers, resulting in higher costs of goods sold and less efficient inventory management.

Club stores such as Costco, Sam's Club, BJ's Wholesale, and MaxMart emphasize cost efficiency and bulk sales, offering fewer items at lower prices per unit and catering to customers looking to stock up on essential goods. They operate on a membership-only model and require customers to pay annual fees for access. Club stores typically feature a limited assortment of products, with a stronger emphasis on selling items in larger quantities at lower per-unit prices. These stores operate in a no-frills, warehouse-style layout with wide aisles and high-stacking shelves, prioritizing efficient use of space over product variety. Club stores offer fewer SKUs overall, focusing on high-turnover items, and typically stock a narrower selection of brands and product variations. In addition to food and household goods, club stores also feature non-food items like electronics, furniture, and seasonal products, making them appealing to customers seeking value across multiple categories. The bulk format, combined with their large packaging sizes and focus on cost savings, makes club stores particularly popular with businesses and large families. Club stores like Costco, Sam's Club, and MaxMart operate with gross margins ranging around 15%, reflecting their focus on high-volume, low-margin sales strategies that prioritize cost efficiency and bulk purchasing. Customers who shop for groceries at a club store also shop at a traditional supermarket to buy items that the club store does not carry or are available only in quantities too large for the customer's needs.

Besides the three traditional supermarkets and the one club store, the Wilton area has no other grocery retailers, such as discount stores like Walmart, specialty food stores like Trader Joe's, convenience stores, or drugstores like CVS.

Ridgefield grocery stores. Ridgefield, CT, is the closest town to Wilton, located about 8 miles from Wilton's town center—a roughly 15-minute drive under normal traffic conditions. The two towns are connected by CT Route 33, making Ridgefield easily accessible for Wilton residents. Ridgefield, with a slightly larger population than Wilton, supports four traditional supermarkets: Select Grocer, Sunrise Market, Grand Market, and Town & Country Market. Although some Wilton residents choose to buy groceries in Ridgefield, less than 5% of all groceries purchased by Wilton residents are purchased in Ridgefield supermarkets. Many Ridgefield residents also shop at MaxMart, which serves both Wilton and Ridgefield.

Table 1 summarizes some key data for grocery stores in the Wilton-Ridgefield area.

Table 1
Grocery Stores in Wilton and Ridgefield

	Type of store	Sq. Footage	Annual Revenues	Annual Trips	Annual Spend/Trip	Percentage Margin
Wilton grocery stores						
HarvestMart	Traditional	40,000	\$40,000,000	280,702	\$142.50	35.00%
Nature's Pantry	Traditional	30,000	\$40,000,000	266,667	\$150.00	30.00%
Sam's Market	Traditional	50,000	\$20,000,000	140,351	\$157.50	25.00%
Between towns						
MaxMart	Club	45,000				
Wilton customers			\$20,000,000	250,000	\$80.00	15.00%
Ridgefield customers			\$30,000,000	375,000	\$80.00	15.00%
Ridgefield grocery stores						
Select Grocer	Traditional	50,000	\$60,000,000	413,793	\$145.00	37.00%
Sunrise Market	Traditional	35,000	\$30,000,000	222,222	\$135.00	30.00%
Grand Market	Traditional	40,000	\$30,000,000	200,000	\$150.00	30.00%
Town & Country Market	Traditional	35,000	\$30,000,000	187,500	\$160.00	35.00%

Consumer purchasing behavior. The investigating staff obtained point-of-sale scanner data from all eight grocery stores in the Wilton-Ridgefield area covering the past three years. This data provided detailed insights into shopping patterns, including the annual number of household trips to each store (measured by checkout transactions) and the average purchase amount per trip, as summarized in Table 1. Additionally, the staff obtained loyalty card data, which enabled tracking of individual customer shopping patterns over time.

Analysis of this data revealed that the seven traditional supermarkets sold similar product types in consistent proportions despite distinct branding, reflecting the demographic and shopping homogeneity in Wilton and Ridgefield. MaxMart, by contrast, offered a more limited range of items in larger quantities, consistent with its club store format. Interviews with grocery store experts and consumer surveys further highlighted strong store loyalty among consumers, with

most customers exclusively shopping at a single supermarket. When customers switched stores, they tended to do so completely, maintaining similar purchasing patterns but adjusting total spending according to each store's pricing. Transaction data from customer zip codes confirmed that less than 5% of Wilton residents' grocery spending occurs at Ridgefield supermarkets.

Competition. Competition in the Wilton-Ridgefield area shows distinct patterns in consumer spending, loyalty, and price sensitivity, as summarized in Table 1. Average spend per trip differs among grocery stores based on each store's unique differentiation and strategy. For example, HarvestMart's average spend per trip in Wilton is \$142.50, about 5% lower than Nature's Pantry's \$150, consistent with HarvestMart's value positioning. Meanwhile, Sam's Market's average spend is \$157.50—about 5% higher than Nature's Pantry and 10% higher than HarvestMart—reflecting its efforts to cover its higher operating costs. Likewise, the average spend per trip to supermarkets in Ridgefield varies from \$135 to \$160, again depending on each store's differentiation and business strategy.³

The investigation revealed that Nature's Pantry has attempted to exercise price leadership through several price increases over the past three years, typically raising prices 3-5% above the general cost-driven price increases that all stores implemented in response to inflation. However, HarvestMart maintained only its cost-based price increases without matching Nature Pantry's additional markup attempts, prompting Nature's Pantry to roll back its premium increases to avoid losing sales. Meanwhile, Sam's Market, hampered by higher operating costs and deteriorating conditions, has maintained prices 10% above HarvestMart's levels, contributing to its declining market share.

The investigation found distinct patterns in how customers respond to price changes. Overall, the aggregate demand for groceries nationwide is very inelastic with a demand elasticity of about -0.3 , so an increase of 5% in all prices would reduce grocery consumption by only 1.5%. However, the demand elasticity for a given geographic area depends on the realistic alternatives available outside the area. If all three Wilton supermarkets increased their prices by 5%, they collectively would lose 10% of their Wilton customers to Ridgefield supermarkets if the Ridgefield supermarkets maintained their original pricing.

However, even if all three Wilton supermarkets increased their prices by 5%, no customers would divert to MaxMart, as the investigation found that Wilton residents who find MaxMart an attractive shopping venue already shop there. The investigation found that MaxMart's inability to attract additional customers following price increases at traditional supermarkets reflects fundamental differences in shopping patterns. While MaxMart offers significantly lower prices per unit, shopping there requires paying an annual membership fee, buying in bulk quantities, and accepting a limited selection of brands and package sizes. The investigations consumer surveys revealed that Wilton residents generally fall into two distinct groups: those who find MaxMart's bulk-buying model attractive and already split their grocery shopping between MaxMart and traditional supermarkets for different needs, and those who strongly prefer the broader selection, smaller quantities, and more convenient shopping experience of traditional supermarkets regardless of price differences. Even when facing higher prices at traditional supermarkets, this second group of consumers indicated they would not switch to MaxMart's

³ **Note to students:** So that there will be no confusion you can use average spend per trip as the "price" and the annual number of trips to the store as the "quantity" in any formula.

bulk-buying model, preferring instead to switch to a different traditional supermarket if they found their regular store's prices too high.

For individual store price increases, diversion is significant but localized. As shown in Table 2, a unilateral 5% price increase results in notable customer shifts: HarvestMart loses 14.29% of customers, Nature's Pantry 16.67%, and Sam's Market 20%. All these diverted customers switch to other Wilton supermarkets rather than stores in Ridgefield or MaxMart. The specific pattern of customer switching varies significantly among stores, as shown in Table 2's diversion ratios. These differences reflect how stores are differentiated by their pricing, product selection, customer experience (including factors like inventory availability, store layout, and checkout efficiency), and customer service levels.

Table 2
One-Product 5% SSNIP Percentage Losses and Diversion Ratios

	%Loss (5% SSNIP)	Diversion Ratios				
		HM	NP	SM	MaxMart	Ridgefield
HarvestMart	14.29%	—	86.03%	13.97%	0.00%	0.00%
Nature's Pantry	16.67%	45.00%	—	55.00%	0.00%	0.00%
Sam's Market	20.00%	30.00%	70.00%	—	0.00%	0.00%

Sale of Sam's Market. While HarvestMart and Nature's Pantry are thriving, Sam's has been declining over the years. Owned by 80-year-old Sam Easten, Sam had hoped to have turned over the store to his children to operate years ago, but none of them had any interest. Over the last ten years, Sam himself has lost interest in running the supermarket and now devotes almost all his time and energy to his extensive—and costly—stamp collection. Rather than investing in maintaining and improving the store, Sam has used almost all of the store's net income (about \$500,000 per year) to support his lifestyle, allowing the store to deteriorate significantly over the last decade. The investigation showed that it would take about \$200,000 annually to maintain the store and a one-time investment of at least \$2 million to modernize it.

While Sam's Market currently shows a 25% gross margin, the investigation showed that this level is increasingly unsustainable. The store's steadily declining market share and lack of investment have created a downward spiral in its financial performance. Its deteriorating facilities have led to higher maintenance and energy costs, while its aging equipment frequently breaks down, causing inventory spoilage and lost sales. Customer service has suffered from high employee turnover and inadequate training. Moreover, its declining sales volume means fixed costs are spread across fewer transactions, while its smaller purchase volumes result in less favorable terms from suppliers. Industry analysts interviewed during the investigation predicted that without significant investment, Sam's Market's gross margin would likely fall to below 20% within two years, a level that would still allow the store to remain profitable and cover its expenses, but with steeply declining earnings. The store's current net income of about \$500,000 per year would likely fall to less than \$200,000 within two years, barely enough to fund essential operations.

Given his lack of interest in the store, its declining condition, and Sam's desire to invest more money in his stamp collection, Sam decided to sell Sam's Market. Although Sam aggressively sought buyers, only two companies bid on the store: Urban Furnishings, a chain of upscale furniture stores, and HarvestMart.

Urban Furnishings, which bid \$3 million, would demolish the supermarket and replace it with a large new furniture store to serve Wilton and the surrounding areas. Urban Furnishings valued only the real estate and placed no value on Sam's Market as an ongoing supermarket business. The company could close on the sale immediately, after which it would immediately shut down Sam's Market and begin construction. Urban Furnishings estimates that the new store would be operational 12-16 months after closing on the purchase.

HarvestMart bid \$5 million, which Sam accepted. HarvestMart plans to continue operating Sam's Market as a supermarket but rebrand it as a second HarvestMart location. The acquisition of Sam's Market would address HarvestMart's pressing capacity constraints at its existing Wilton store, which currently serves about 30% more customers per square foot than the average HarvestMart location. This overcrowding has created a significantly compromised shopping experience, with customers facing difficulty parking, congested aisles, long checkout lines, and frequent stock-outs as the store struggles to restock quickly enough to meet demand. HarvestMart's consumer surveys indicate that approximately 25% of Nature's Pantry's consumers would prefer to shop at HarvestMart given its lower prices but are deterred by these overcrowding issues, particularly during peak shopping hours.

HarvestMart says it will invest \$3 million to renovate Sam's Market into a modern HarvestMart store, with renovations to be completed within one year of closing. The renovated store could accommodate about \$40-45 million in annual sales, comparable to HarvestMart's existing location and Nature's Pantry. This expanded capacity would be sufficient to serve Sam's current customers (\$20 million in sales), accommodate customers who prefer HarvestMart but currently shop elsewhere due to overcrowding (approximately \$10 million in potential sales), and capture a significant share of the new demand from Wilton's growing population. Since HarvestMart cannot expand its existing store due to site constraints, HarvestMart views the acquisition as its only option for addressing current demand and future growth.

HarvestMart says it will maintain consistent pricing between both Wilton locations after the acquisition, with prices at the renovated Sam's Market location matching those at HarvestMart's existing Wilton store. Given that both stores would operate under the same HarvestMart banner and trade dress, the company could not practically charge different prices at stores less than a mile apart without damaging customer goodwill. This means customers at the former Sam's Market location would see prices decrease from current levels to match HarvestMart's lower price points, effectively passing through some of the operational cost savings to consumers.

HarvestMart is confident that the acquisition would generate significant operational efficiencies. Currently, Sam's Market must purchase through wholesalers who add their own markup to cover their costs and earn a profit. The investigation found that integrating Sam's Market into HarvestMart's network would reduce that store's costs of goods sold by approximately 22% compared to Sam's Market's current costs. This reduction would come from three sources: eliminating the wholesaler markup (accounting for roughly 10% of the reduction), obtaining lower prices from suppliers through HarvestMart's greater purchasing power (roughly 7%), and reducing distribution costs by integrating the store into HarvestMart's efficient Hartford warehouse and delivery system (roughly 5%). This cost reduction would allow HarvestMart to reduce prices at the acquired store by 10% while still achieving a 35% gross margin, matching the gross margin at its existing Wilton store. The investigation also found that operating the former Sam's Market location as a second HarvestMart store would generate additional savings of approximately 3% at that location through shared local management, combined advertising,

and the ability to optimize staff scheduling and inventory between the locations. The existing HarvestMart store's costs would remain unchanged. HarvestMart has achieved similar cost reductions when acquiring other independent supermarkets in the region.

HarvestMart also plans to increase staffing at the renovated store, projecting a need for 65 to 70 full-time employees compared to the current 45. This expansion represents a net increase in local employment, and HarvestMart has committed to offering positions to current Sam's employees, providing training on its modern systems and procedures. The acquisition, therefore, promises to benefit Wilton residents through competitive pricing, improved shopping experience, and increased local employment.

Old Mill Grocery. Old Mill Grocery, a regional supermarket chain operating 45 stores across the Northeast, has been drawn to Wilton by its demographics, Sam's Market's decline, and the town's projected population growth. Specializing in premium offerings, Old Mill stores are known for a carefully curated selection of organic, gourmet, and artisanal items, with prices typically 15-20% higher than conventional supermarkets.

Old Mill's extensive market research shows a strong demand for premium grocery options in Wilton. The company has secured an option on a 2.5-acre parcel—the last undeveloped land in Wilton's town center suitable and zoned for a large supermarket. Their business plan, which the investigation obtained, calls for constructing a new 35,000 square foot store. The company anticipates an average customer spend per trip of \$175, approximately 17% higher than Nature's Pantry and 23% higher than HarvestMart. Old Mill anticipates a 40% gross margin on revenues.

Based on its experience in similar markets, Old Mill projects that 30% of Wilton households currently shopping locally would become exclusive Old Mill customers within a year of opening. Old Mill also anticipates capturing 20% of Wilton residents who currently shop in Ridgefield. Table 3 below outlines Old Mill's projections for current and future trips and revenues for Wilton supermarkets, showing changes one year after Sam's Market closes and Old Mill opens.

Table 3
Old Mill's Business Plan Projections

Current		
	Trips	Revenues
HarvestMart	281,000	\$40,000,000
Nature's Pantry	265,000	\$40,000,000
Sam's Market	130,000	\$20,000,000
Old Mill		
TOTAL	676,000	\$100,000,000

One year after Sam's Closure and Old Mill's Entry		
	Trips	Revenues
HarvestMart	281,000	\$40,042,500
Nature's Pantry	195,000	\$29,250,000
Sam's Market		
Old Mill	207,000	\$36,225,000
TOTAL	683,000	\$105,517,500

The investigating staff notes that Old Mill's projections are based on market intelligence, which may not fully align with actual data gathered through subpoenas. As a result, minor discrepancies may exist between Tables 1 and 3.

Old Mill anticipates, and the investigation confirms, that Old Mill's entry into Wilton is unlikely to change the pricing of either HarvestMart or Nature's Pantry because of the considerable difference in Old Mill's offerings. Wilton customers who preferred premium products shopped at Wilton's traditional supermarkets because no premium supermarket was available. Once Old Mill opens, they will switch and not return to a traditional supermarket even if prices at the premium store increase by 5% or 10%.

Moreover, as Table 3 shows, Old Mill anticipates that even if some current HarvestMart customers switch to Old Mill, their spots will be filled by Nature's Pantry customers who have always preferred HarvestMart but avoided shopping there due to HarvestMart's overcrowded conditions. The upshot is that after Old Mill's entry, HarvestMart will continue to serve about the same number of customers, while Nature's Pantry will see its customer numbers materially decline.

Before Sam's Market was listed for sale, Old Mill announced plans to build a new 35,000 square foot store on the optioned Wilton property within three years. This announcement played a significant role in Sam's decision to sell Sam's Market and was a key reason other supermarket chains showed limited interest in acquiring it. After HarvestMart announced its pending purchase and renovation plans, Old Mill suspended plans to enter the Wilton market. However, if HarvestMart's acquisition is blocked and Urban Furnishings instead acquires Sam's Market, Old Mill plans to move forward with the development immediately. With land secured and site studies underway, Old Mill expects to complete permitting within 6-8 months and construction in an additional 12-14 months, allowing the store to open within approximately two years.

Current status. Sam Easten has signed a definitive agreement to sell Sam's Market to HarvestMart for \$5 million. The agreement obligates the parties to litigate if the deal is challenged on antitrust grounds and has a termination date seven months from now. HarvestMart has told the staff that it will litigate if the Attorney General seeks to block the deal.

Sam Easten told the investigating staff he was committed to selling Sam's Market. If he cannot sell to HarvestMart, he will seek to sell Sam's Market to Urban Furnishings. Urban Furnishings has told the staff that it remains interested in buying Sam's Market if the deal with HarvestMart falls through (although it is considering offering a significantly lower price than in its original bid).

Unit 16: Wilton Grocery Store Merger

Professor Dale Collins
Merger Antitrust Law
Georgetown University Law Center

Grading philosophy

■ My approach

1. I read all answers twice and blind grade them each time with a letter grade
2. If the grades for an answer differ significantly between the first and second reads, I read the answer for a third time and reconcile the differences
3. I rank order the exams by letter grade in descending order and apply the prescribed curve for the course
4. UNLESS the quality of the exams does not break significantly at a change in the grading curve, in which case I include the exam in question in the group to which it is most comparable (and fight with the Dean if required)

I grade an answer on the proper application of legal precedent and economic principles and its logic, completeness, and persuasiveness, not whether you approached the problem the same way I did or reached the same conclusion

I do not expect anyone to spot and properly analyze all issues in the hypothetical

Grading philosophy

■ My approach—A little more detail

I grade exams along three dimensions.

1. *Professional quality.* I evaluate each exam as if I were a law firm partner or mid-level agency official receiving the memorandum. A high raw grade goes to memoranda that are well organized, address all major issues and most minor ones, and provide tight analysis supporting their conclusions—essentially, work that would need minimal revision before sending to a client or senior official. Conversely, a low raw grade goes to memoranda that miss major issues, contain flawed analysis of identified issues, reach poorly supported conclusions, and would require major reworking before professional use.
2. *Horizontal equity.* I aim for horizontal equity across the class, so that memoranda of similar quality submitted by different students this year receive the same grade.
3. *Vertical equity.* I seek to preserve vertical equity across years, so that a grade (say, an A-) indicates the same quality of work as in previous years.

With these factors in mind, I apply the law school's curve to generate the exam letter grades that were posted.

Aside: Exam writing and reading

When I create exams, I start with a specific answer in mind. After drafting the hypothetical, I outline my response based on the facts provided in the scenario. During this process, I may add or modify details in the hypothetical to align with the answer I originally envisioned. Once I have fully synchronized the revised hypothetical and my outline with my intended answer, I finalize the exam question.

Over time, I have come to appreciate that my hypotheticals can sometimes allow for reasonable alternative interpretations that I did not foresee while writing. This oversight is likely influenced by confirmation bias—I naturally interpret the hypothetical in a way that supports my intended answer, which may cause me to overlook other plausible interpretations.

When evaluating a response that interprets the hypothetical differently than I intended, I consider whether the alternative interpretation is reasonable in the context of the entire hypothetical. If it is reasonable, I evaluate the response based on its completeness and persuasiveness under that interpretation and grade it accordingly.

Preparing to Write

Suggestion: How to approach the problem

1. Ask the setup questions
2. Read the hypothetical straight through quickly to spot the major issues
3. Read the hypothetical again more slowly
Annotate the hypothetical in the margin
4. Outline an answer—pay attention to your intuitions!
5. Start writing

Another suggestion:

***DISTINGUISH BETWEEN PRIMARY
AND SECONDARY ISSUES!!***

Be sure you address all the major issues. If you do not think you are going to have time to do everything, spot the secondary issues in your answer and leave the detailed analysis until later. Since you will be typing the exam in Word, it is easy to insert additional material if you have the time after you finish the important topics.

1. Ask the setup questions

1. Who are you/what role are you being asked to play?
2. What is the transaction?
3. What is the form of the work product?
4. What questions are you being asked to address?
5. What statutes(s) apply?
6. What are the worlds premerger, postmerger, and without the merger?

1. Ask the setup questions

1. Who are you/what role are you being asked to play?

- From the hypothetical:

You are an attorney in the Antitrust Section of the Connecticut Attorney General's Office. The Section has completed its review of HarvestMart's pending \$6 million acquisition of Sam's Market, two traditional supermarkets in Wilton, CT.

- Notes

- State AGs are more willing to accept behavioral relief than the DOJ or FTC (even when the DOJ and FTC were very open to consent settlements)

1. Ask the setup questions

2. What is the transaction?

- From the hypothetical:

You are an attorney in the Antitrust Section of the Connecticut Attorney General's Office. **The Section has completed its review of HarvestMart's pending \$6 million acquisition of Sam's Market, two traditional supermarkets in Wilton, CT.**

- Notes

- HarvestMart and Sam's Market are both currently operating supermarkets in Wilton, CT, so this is a horizontal transaction

1. Ask the setup questions

3. What is the form of the work product?

- From the hypothetical:

Joyce Davenport, the section chief, has asked you to draft a **memorandum of law** analyzing the likelihood of success if the Attorney General files a complaint in federal district court alleging that the acquisition, if consummated, would violate Section 7 of the Clayton Act.

You are being asked to write a **reasoned memorandum of law** with a recommendation

Every question I have asked on an exam to date calls for a reasoned memorandum of law

1. Ask the setup questions

4. What questions are you being asked to address?

- From the hypothetical:

Joyce Davenport, the section chief, has asked you to draft a memorandum of law analyzing the likelihood of success if the Attorney General files a complaint in federal district court alleging that the acquisition, if consummated, would violate Section 7 of the Clayton Act. In particular, Ms. Davenport wants your analysis to address how **[1] the state might present its case most persuasively, [2] anticipate and respond to defenses the merging parties might raise, [3] discuss the type of injunction the state should seek in its complaint, and [4] give your conclusion of how the court would rule.**

- Notes

- The memorandum must address all four questions regardless of your conclusion on the merits of the Section 7 claim

BE SURE THAT YOU ADDRESS EACH QUESTION!!

1. Ask the setup questions

4. What questions are you being asked to address?

- From the hypothetical:

If you conclude that the Section 7 claim is likely to be upheld by the court, Ms. Davenport also would like you to address **[5] whether the Attorney General should exercise his prosecutorial discretion and not challenge the acquisition or settle the matter with a consent decree. [6] If you recommend a consent decree, your memorandum should include a detailed proposal of the specific terms and conditions that the Attorney General should demand to address the competitive concerns raised by the acquisition.**

- Notes

- The memorandum must address the first contingent question if you conclude that a court will uphold the Section 7 claim
- The memorandum must address the second contingent question if you recommend that the Attorney General should settle the investigation with a consent decree

***BE SURE THAT YOU ADDRESS THE TWO CONTINGENT QUESTIONS
(IF NECESSARY)!!***

1. Ask the setup questions

5. What law(s) apply?

- From the hypothetical:
 - *Substantive violation*: Clayton Act § 7
 - *Cause of action*: Clayton Act § 16
 - States sue in federal district court under the private right of action section in the Clayton Act
 - *Allocation of the burden of proof*: *Baker Hughes*

1. Ask the setup questions

6. What are the worlds premerger, postmerger, and without the merger?
- *Remember:* Merger antitrust law compares the consumer welfare implications of the world with the merger to the world without the merger

Changes in Market Structure

Premember
1 HarvestMart 1 Nature's Pantry 1 Sam's Market
1 MaxMart
4 Ridgefield stores

1. Ask the setup questions

6. What are the worlds premerger, postmerger, and without the merger?
- ❑ *Remember:* Merger antitrust law compares the consumer welfare implications of the world with the merger to the world without the merger

Changes in Market Structure

	Premerger	One Year Later	
		With merger	
No change	1 HarvestMart 1 Nature's Pantry 1 Sam's Market	2 HarvestMarts 1 Nature's Pantry	
	1 MaxMart	1 MaxMart	
	4 Ridgefield stores	4 Ridgefield stores	

1. Ask the setup questions

6. What are the worlds premerger, postmerger, and without the merger?
- ❑ *Remember:* Merger antitrust law compares the consumer welfare implications of the world with the merger to the world without the merger

Changes in Market Structure

	Premerger	One Year Later	
		With merger	Without merger
No change	1 HarvestMart 1 Nature's Pantry 1 Sam's Market	2 HarvestMarts 1 Nature's Pantry	1 HarvestMart 1 Nature's Pantry 1 Old Mill* 1 Urban Furnishing
	1 MaxMart	1 MaxMart	1 MaxMart
	4 Ridgefield stores	4 Ridgefield stores	4 Ridgefield stores
			If Urban Furnishing follows through and purchases Sam's Market

* Actually, two year later

1. Ask the setup questions

6. What are the worlds premerger, postmerger, and without the merger?

- Remember: Merger antitrust law compares the consumer welfare implications of the world with the merger to the world without the merger

Changes in Market Structure

Premerger	One Year Later		
	With merger	Without merger	Without merger
1 HarvestMart 1 Nature's Pantry 1 Sam's Market	2 HarvestMarts 1 Nature's Pantry	1 HarvestMart 1 Nature's Pantry 1 Old Mill* 1 Urban Furnishing	1 HarvestMart 1 Nature's Pantry 1 Sam's Market
1 MaxMart	1 MaxMart	1 MaxMart	1 MaxMart
4 Ridgefield stores	4 Ridgefield stores	4 Ridgefield stores	4 Ridgefield stores
		If Urban Furnishing follows through and purchases Sam's Market	If Urban Furnishing fails to purchase Sam's Market

No change

* Actually, two year later

Likely the consumer welfare-maximizing market structure

Extra credit for spotting possibility

2. Quick read to spot the issues

- The problem will have multiple issues
- Some issues may be substantively more important than others
- DO NOT get hung up spending too much time on the small issues at the cost of not adequately addressing the major issues
- ALLSO, as a general rule, you will earn more credit for identifying and briefly analyzing multiple issues than for providing a detailed analysis of only a few while overlooking others

So what do I need to spot?

Typical structure of a formal merger analysis

■ Part 1: The prima facie case (of gross anticompetitive effect)

1. Relevant product market

- *Brown Shoe* “outer boundaries” and “practical indicia” for the product market
- Merger Guidelines hypothetical monopolist test
 - *Homogeneous products*: Critical loss implementations
 - *Differentiated products*: One-product/uniform SSNIP recapture implementations

2. Relevant geographic market

- “Commercial realities” test
- Merger Guidelines hypothetical monopolist test

3. *PNB* presumption

- Market participants and market shares
- Applicability of the *PNB* presumption
 - Judicial precedent support
 - Merger Guidelines support

Some courts are also citing *PNB* itself when the challenged merger’s market share and concentration statistics are larger than those in *PNB*.

4. Explicit theories of anticompetitive effect

- Unilateral effects (may include GUPPI/2 merger simulation)
- Coordinated effects
- Elimination of a maverick
- As hoc theories
- [Elimination of actual or perceived potential competition or of a nascent competitor]
- [Foreclosure/raising rivals’ costs for vertical transactions]

Typical structure of a formal merger analysis

■ Part 2: Defendants' rebuttal

- Direct challenges to prima facie case (no upward pressing pressure)

- Traditional defenses (offsetting downward pricing pressure)

- Entry/expansion/repositioning
- Efficiencies
- Countervailing buyer power ("power buyers")
- Failing company/division
- Other ad hoc defenses

To show sufficient offsetting procompetitive pressure to create a genuine issue of fact on the merger's net competitive effect

■ Part 3: Weighing evidence to resolve any genuine factual disputes

- Alternatively, you can integrate the resolution into the discussion of each disputed issue [probably a better way in most cases]

■ Conclusion on merits

■ [If appropriate] Discussion of relief in court

Typical structure of a formal merger analysis

■ Contingent questions

1. If you conclude that the Section 7 claim is likely to be upheld by the court—
 - Whether the Attorney General should exercise his prosecutorial discretion and not challenge the acquisition or settle the matter with a consent decree
2. If you recommend a consent decree—
 - A detailed proposal of the specific terms and conditions that the Attorney General should demand to address the competitive concerns raised by the acquisition

Typical structure of a formal merger analysis

- *Works in many cases:* When writing, resolve each genuinely disputed issue as it arises
 - Resolve direct challenges to the prima facie in Part 1
 - Resolve challenges raised by traditional defenses in Part 2
 - Resolve genuine disputed issues in Part 2
- *Works better in some cases:*
 - Discuss and resolve all defenses—including direct challenges to the prima facie case—in a separate section

Do not follow Baker-Hughes in organizing your writing, but keep the allocations of the burden in mind when resolving disputed issues as they arise

Be sure to state your conclusions on all genuine issues when you resolve them. Also, summarize your conclusions (with no analysis) in a summary in the introduction as well as at the end of the memorandum

3. Annotate/Outline

■ Some facts to note:

- ❑ HarvestMart is acquiring Sam's Market—both traditional supermarkets located in the same town
- ❑ Two types of grocery stores: Supermarkets and club stores
 - *Query*: Should supermarkets be further subdivided into traditional and premium stores?
 - Appears to be limited diversions from supermarkets to club stores
- ❑ Three geographic areas of interest: Wilton, Ridgefield, and in-between Wilton and Ridgefield
 - Appears to be low diversions from Wilton supermarkets to Ridgefield supermarkets from one-product SSNIPs
- ❑ Grocery stores are cluster markets
 - Use trips as “quantities” and average prices as “prices” in formulas (from footnote 3)
- ❑ Supermarkets are differentiated in price and other attributes
 - Think one-product/uniform SSNIP tests/unilateral effects
- ❑ Premerger, Wilton is highly concentrated with only three (traditional) supermarkets
 - *HarvestMart* : Suffers from overcrowding due to attractive prices and good products
 - *Nature's Pantry*: Comparable to HarvestMart but a larger store with somewhat higher prices → Takes some of the excess demand for HarvestMart that diverts because of overcrowding
 - *Sam's Market*: Seriously declining customer demand, highest prices, in need to renovation
- ❑ Competition in Wilton driven largely by competition between HarvestMart and Nature's Pantry
 - Low to no diversion to Sam's Market, MaxMart, and Ridgefield stores in response to one-product SSNIPs
 - High diversion ratios between HarvestMart and Nature's Pantry → Suggests substantial competition between the two supermarkets
 - ❑ BUT HarvestMart is constrained by overcrowding → Has excess demand that spills over to Nature's Pantry
 - Nature's Pantry has tried to lead prices increases → HarvestMart has resisted to preserve chain reputation

3. Annotate/Outline

■ Some facts to note (con't):

- ❑ Sam's Market is being sold: Aggressively marketed, but only two bids
 - *Urban Furnishing*: Would convert Sam's Market to a home furnishings store
 - *HarvestMart*: Would retain Sam's Market as a supermarket, but promises to renovate it, rebanner it as a HarvestMart, and lower the prices to the level of the existing HarvestMart store
 - ❑ NB: No current legal obligation to do the things HarvestMart promises or maintain the premerger prices of the existing HarvestMart
- ❑ Defenses
 - *Entry/repositioning/expansion*: No facts to support
 - *Countervailing buyer power*: No facts to support
 - ❑ Traditional supermarkets charge rack prices uniformly to all customers
 - ❑ All customers are small with presumably no buyer power
 - *Efficiencies*: Some efficiencies would result from the merger
 - ❑ Integrating rebannered Sam's Market into HarvestMart would decrease COGS in that store by 22%
 - ❑ Fixed cost savings of 3%
 - ❑ HarvestMart promises to pass efficiencies on to customers by lowering prices for comparable products at Sam's Market by 10% to the level of the existing HarvestMart store
 - ❑ Also, some efficiencies from alleviating overcrowding
 - *Failing firm*: Likely to be raised as a defense, but facts do not support
 - ❑ Sam's Market is currently profitable, although earning a low level of profits
 - ❑ In the absence of a sale, there is no indication that Sam's Market would be closed in the next few years

} Worth a footnote, but no discussion necessary in the text given the assignment

3. Annotate/Outline

■ Some facts to note (con't):

- Old Mill
 - Committed to build a new premium supermarket but only IF HarvestMart does NOT acquire Sam's Market
 - That is, if Sam's is sold to Urban Furnishing or if Sam's is not sold at all
 - NB: IF HarvestMart purchases Sam's Market, Old Mill will NOT Wilton → “but for” causation (proximate causation?)
 - Would have significantly higher prices than HarvestMart and Nature's Pantry
 - BUT still would attract 30% of Wilton's households currently shopping at Wilton supermarkets (but in unknown proportions from each existing supermarket)
 - And 20% of the Wilton customers who now shop in Ridgefield
 - To the extent customers switch from HarvestMart to Old Mill, customers who now shop at Nature's Pantry because of HM's overcrowding would fill the gap at HM
 - No change expected in HarvestMart's and Nature's Pantry's prices with Old Mill's entry
- Consumer welfare implications: No merger compared to with the merger—
 - Sam's Market ceases to exist in either case
 - 30% of local Wilton grocery shoppers who switch to Old Mill from HarvestMart or Nature's Pantry would be better off
 - NB: For an intra-market efficiency, Old Mill will have to be in the relevant market
 - Nature's Pantry customers who switch to HarvestMart would be better off
 - Nature's Pantry customers who do not switch would not be materially affected
 - Wilton grocery shoppers who switch from Ridgefield stores to Old Mill would be better off
 - Wilton grocery shoppers who stay with a Ridgefield store would not be affected

“No merger” yields higher consumer welfare than “merger”

3. Annotate/Outline

■ Outline

- Assignment
- Conclusion (for introduction)
 - State is likely to win and should bring the case
 - Should seek a blocking permanent injunction
 - Should not settle with a consent decree
 - No consent decree could make Wilton consumers as well off as no merger
- The prima face case
 - *Relevant market*: The sale of products by Wilton supermarkets to Wilton customers
 - *Horizontal transaction*: Both HarvestMart and Sam's Market currently compete in the relevant market
 - *PNB presumption*: Triggered—Compare the market concentration and deltas going forward with and without the transaction
 - *Explicit theories of anticompetitive harm*
 1. Acquisition would exclude Old Mill and result in a two-firm duopoly (a 3-to-2 merger)
 2. Coordinated effects
 3. Ad hoc unilateral effects
 - BUT not recapture unilateral effects (Sam's Market will exit)
 4. Elimination of a maverick
 - No evidence in the traditional sense
 - BUT HarvestMart's expanded size with the merger may give it more of an incentive to accommodate Nature's Pantry's price increases postmerger

3. Annotate/Outline

■ Outline (con't)

□ Defenses to be raised

1. *Relevant market*: The sale of products by Wilton supermarkets not a proper relevant market
2. *Failing firm*: Sam's Market is a failing firm
3. *Zero HHI delta*: The HHI delta should be calculated based on combining the shares of HarvestMart and Sam's Market, which will be zero since Sam's Market will cease operations whether the merger goes forward or not—A transaction with zero delta cannot trigger the *PNB* presumption
- 4. *Old Mill causation*: If the acquisition proceeds, Old Mill's abandonment of its plans to enter Wilton would not be legally caused by the acquisition and hence not a cognizable Section 7 harm
5. *Speculative benefits from blocking the merger*: The benefits of blocking the acquisition are speculative and too distant in time to be cognizable
6. *HarvestMart's pricing*: HarvestMart will not increase prices anticompetitively postmerger
- 7. *Efficiencies*: The acquisition would create significant efficiencies that would be passed on to customers

Notes

- Defense 4 is most formidable and needs a rigorous rebuttal argument
- Defense 7 is the second most formidable and requires a careful rebuttal argument
- Other defenses are relatively straightforward to defeat

3. Annotate/Outline

■ Outline (con't)

□ Conclusion on the merits

- The State is likely to prevail on its Section 7 claim

□ Recommended enforcement action

- The State should challenge the acquisition in federal district court and seek a permanent blocking injunction

- The State should not exercise prosecutorial discretion to—

- Decline to challenge the deal and allow the original deal to go forward, or
- Accept a consent decree and allow a restructured deal to go forward

- Benefits of blocking the acquisition

- Benefits to the residents of Wilton in blocking the acquisition and thereby preserving Old Mill's entry into the market are both certain and substantial
- Old Mill's entry would—
 - significantly deconcentrate the market, and also
 - introduce a premium supermarket optionproviding Wilton residents with a premium selection of grocery products—a selection that a significant portion of the community would like to purchase but is currently unavailable and not likely to be offered in the foreseeable future without Old Mill's entry
- Furthermore, no consent decree—
 - could preserve Old Mill's entry if the acquisition proceeds
 - nor could it replicate the consumer benefits that Old Mill's entry would bring

4. Write

- Be organized

Exam instructions:

Present your analysis in a well-organized, linear, and concise manner. Think about your answers before writing. **Remember Pascal's apology: "I am sorry that this was such a long letter, but I did not have the time to write you a short one."** Clarity of thinking and exposition are much more important than throwing in the kitchen sink. Penalties will be levied for excessive length, verbosity, or lack of organization.

4. Write

- Structure your analysis of an issue using “IRAC”
 - The components
 - *Issue*: Identify the legal issue
 - *Rule*: State the governing law clearly
 - *Application*: Apply rule to facts in the hypothetical
 - *Conclusion*: State your answer clearly and explicitly
 - Some common pitfalls to avoid
 - Failure to state the issue
 - For example, applying *Brown Shoe* factors to exclude club stores from a market with superstores but failing to state at the beginning this is what you are analyzing
 - *Do NOT force the reader to infer what you are about to analyze*
 - Failure to analyze separate issues separately
 - For example, separate out the analysis of the relevant product market from the relevant geographic market when applying the judicial tests
 - However, you may analyze the product and geographic dimensions of the relevant market together when you are applying the hypothetical monopolist test
 - Failure to collect ALL the supporting facts before drawing your conclusion
 - *Do NOT write like you are selling Ginsu knives on TV: "But wait, there's more!"*
 - *Do NOT leave probative facts on the table—Use all the relevant facts*
 - Failure to draw a clear line from the rule to the facts to the conclusion
 - Failure to state the conclusion at the end

4. Write

- Structure your analysis of an issue using “IRAC”

Remember: Clear organization helps readers follow your reasoning and makes your memorandum more persuasive

All other things being equal, the difference between a well-organized paper and one not so well-organized can be one-third of grade

4. Write

- Final caution

Do not cite facts that are not in the hypothetical unless the problem cannot be answered without them

- Exam Instruction 3:

This exam is final. No clarifications or corrections will be provided. If you are convinced that there is an error, inconsistency, or omission in the exam, please identify the problem, give your reasons why you believe there was a mistake, provide what you believe the correct information should be, and write your answer accordingly. If you have good reasons for believing there was a mistake in the problem (even if I disagree) and provide a sensible correction in the context of the hypothetical as a whole, I will accept the correction and grade your paper accordingly.

The Memorandum

4. Organizing the memorandum

- The introduction
 - Assignment
 - Short conclusion
 - Roadmap
- Applicable statutes
 - Section 7 (substantive violation)
 - Section 16 (cause of action)
 - *Baker Hughes* (allocations of burden of proof)
- Analysis
- Conclusion on merits
- Recommended enforcement action

4. Organizing the memorandum

■ The roadmap

□ Instructor's organization

I will develop the analysis under the usual judicial framework for horizontal mergers:

1. Applicable statutes
2. The prima facie Section 7 case
 - a. The relevant product market
 - b. The relevant geographic market
 - c. Market shares, concentration, and the *PNB* presumption
 - d. Explicit theories of anticompetitive harm
 - e. Inapplicable theories
3. The defendants' rebuttal arguments
 - a. Market definition
 - b. Failing firm
 - c. Zero HHI delta
 - d. Proximate causation
 - e. Speculative benefits of blocking the acquisition
 - f. HarvestMart will not increase prices
 - g. Efficiencies
4. Conclusion on the merits
5. Recommended enforcement action

} Decided to
address all
defenses in
one section

4. The prima facie case

- The relevant product market: Supermarkets
 - The strategy:
 1. Show supermarkets are in the relevant market through *Brown Shoe* factors
 2. Show that club stores are not in the relevant market through *Brown Shoe* factors
 3. Use the hypothetical monopolist test to provide further support to supermarkets as the relevant product markets

This is how Judge Howell approached product market definition in H&R Block/TaxACT

4. The prima facie case

■ The relevant product market: Supermarkets

1. Supermarkets are in the relevant market

- a. *Brown Shoe* “outer boundaries” and “practical indicia” (test and application): High cross-elasticity and reasonable interchangeability of use as shown by—
 - i. Industry or public recognition
 - Supermarkets are widely recognized as the primary grocery shopping destination capable of fulfilling most or all of a shopper’s food and household needs in a single trip
 - ii. Similar product characteristics
 - Offer a broad product selection across food and household goods, with 30,000 to 50,000 stock-keeping units (SKUs) across numerous product types, package sizes, and brands
 - Core grocery offerings are nearly identical across stores
 - Satisfy convenience-oriented, one-stop shopping needs
 - Offer a variety of specialized service departments, such as in-store bakeries, butcher counters, delis, prepared meal sections, and floral departments
 - iii. Similar service characteristics
 - Emphasize enhanced customer service, which may include personalized assistance, loyalty programs, or community-oriented initiatives.
 - iv. Similar facilities
 - Large retail stores averaging 38,000 square feet
 - Designed to provide a convenient one-stop shopping experience
 - Designed to facilitate convenience and make shopping enjoyable

4. The prima facie case

■ The relevant product market: Supermarkets

1. Supermarkets are in the relevant market (con't)

- a. *Brown Shoe* “outer boundaries” and “practical indicia” (test and application): High cross-elasticity and reasonable interchangeability of use as shown by—
 - v. Consistent pricing and margins
 - Price data shows similar average spend per trip across supermarkets in Wilton
 - Supermarkets maintain comparable gross margins (30-35%)
 - vi. High diversion to other supermarkets
 - Individual supermarkets in Wilton experience high diversion to other local supermarkets when prices increase

4. The prima facie case

■ The relevant product market: Supermarkets

2. Club stores are not in the same relevant market as supermarkets

- a. *Brown Shoe* “outer boundaries” and “practical indicia” (test and application): Low cross-elasticity and reasonable interchangeability of use with supermarkets as shown by—
 - i. Industry or public recognition
 - Club stores are recognized as distinct due to their focus on bulk purchasing with a focus on cost savings and limited variety.
 - ii. Dissimilar product characteristics
 - Club stores have a narrower selection with fewer SKUs, customers large quantities of high-turnover items
 - Do not satisfy one-stop shopping needs
 - Do not offer a variety of specialized service departments, such as in-store bakeries, butcher counters, delis, prepared meal sections, and floral departments
 - iii. Dissimilar service characteristics
 - Operate with a no-frills, self-service approach and require membership fees for access.
 - iv. Dissimilar facilities
 - Large, warehouse-style layouts with wide aisles and high shelves, optimizing for bulk storage rather than shopper convenience
 - v. Lower pricing and margins
 - Offer lower prices per unit than supermarkets, although they require larger quantity purchases
 - Operate with lower gross margins around 15%, focusing on high-volume, low-margin sales strategies
 - vi. Low diversion from supermarkets to club stores

4. The prima facie case

- The relevant product market: Supermarkets

- 3. The hypothetical monopolist test confirms that supermarkets are a relevant product market

- Approach

- Supermarkets are differentiated → Use a recapture test
 - Have one-product SSNIP diversion ration → Use a one-product SSNIP recapture test
 - Apply the one-product SSNIP recapture test on two supermarkets in Wilton that have the largest diversion (recapture) ratios with one another
 - If the two-product candidate market satisfies the test, use the “superset theorem” to expand the product market to all three Wilton supermarkets

- Alternatives

- Use a “sufficiency” test
 - Use “brute force” accounting

Do not get lost in the details. Think about what your intuitions tell you are the correct relevant markets. When you do the details (especially the HMT), if you are getting an answer different from your intuitions, double check your work!

4. The prima facie case

■ The relevant product market: Supermarkets

3. The hypothetical monopolist test confirms that supermarkets are a relevant product market—Setting up the tests

■ Supermarkets are a cluster market

- ❑ Offer a broad product selection across food and household goods, with 30,000 to 50,000 stock-keeping units (SKUs) across numerous product types, package sizes, and brands
- ❑ Core grocery offerings are nearly identical across stores
- ❑ Satisfy grocery shoppers' preference for one-stop grocery shopping

■ Competitive analysis for cluster markets

- ❑ Focuses on the aggregated set of products and services offered by a store, making the overall shopping trip the relevant unit of analysis

■ Can use number of annual shopping trip as “quantities” and average purchase price per trip as “price” in the HMT formulas

- ❑ The problem says you can (see footnote 3 in the hypothetical)
- ❑ Separately, the approach is consistent with analyzing competitive effects at the shopping trip level rather than individual product level
 - An alternative would be to explicitly analyze a basket of specific goods (a “composite product”)
- ❑ In this hypothetical, we have the data for quantities and average prices for shopping trips but not for any basket of specific goods, so we are constrained to use the former
 - The former is probably better anyway since grocery shopping (in this hypothetical) requires a trip to the grocery store but does not require the shopper to purchase any basket of specific goods on each trip

This is all you need

4. The prima facie case

■ The relevant product market: Supermarkets

3. The hypothetical monopolist test confirms that supermarkets are a relevant product market

a. HavestMart/Nature's Pantry two-product candidate market + “superset theorem”

□ Test 1: HarvestMart as Firm 1

- δ : 5%
- p_1 : \$142.50
- p_2 : \$150.00
- $\%m_2$: 30%

$$R^1_{Critical} = \frac{\$SSNIP_1}{\$m_2} = \frac{\delta p_1}{\%m_2 p_2} = \frac{(0.05)(142.50)}{(0.30)(150.00)} = 15.83\%.$$

- Actual $R^1 = D_{12} = 86.03\%$

Since $R^1 > R^1_{Critical}$, the HMT is satisfied

- Use the “superset theorem” to expand the market to include Sam’s Pantry

4. The prima facie case

■ The relevant product market: Supermarkets

3. The hypothetical monopolist test confirms that supermarkets are a relevant product market

b. One-product SSNIP “sufficiency” recapture test (R_{Suff}^1)

□ Test 1: HarvestMart as Firm 1

- δ : 5% $\$SSNIP_1 = \delta \times p_1 = \7.13
- p_1 : \$142.50
- p_2 : \$150.00 p_3 : \$157.50
- $\%m_2$: 30% $\$m_2 = \%m_2 \times p_2 = \45.00
- $\%m_3$: 25% $\$m_3 = \%m_3 \times p_3 = \$39.38 = \$m_{Min}$

Remember: $\$m_{RAve} \geq \m_{Min} , so using $\$m_{Min}$ in the denominator will produce a R_{Suff}^1 as large or larger than $R_{Critical}^1$.

$$R_{Critical}^1 = \frac{\$SSNIP_1}{\$m_{RAve}} \leq \frac{\$SSNIP_1}{\$m_{Min}} = \frac{7.13}{39.38} = 18.11\% = R_{Suff}^1$$

So if $R^1 > R_{Suff}^1$, then R^1 necessarily will be greater than $R_{Critical}^1$

- Actual $R^1 = D_{12} + D_{13} = 100.00\%$

Since $R_1 > R_{Suff}^1 \geq R_{Critical}^1$, the HMT is satisfied

□ Notes

- A 100% recapture rate is not sufficient to ensure that the HMT is satisfied
- For example, consider a 100% recapture rate from a high dollar margin good to a low dollar margin good

4. The prima facie case

■ The relevant product market: Supermarkets

3. The hypothetical monopolist test confirms that supermarkets are a relevant product market

c. “Brute force” accounting

HarvestMart (Firm 1)		Nature's Pantry		Sam's Market	
Original units	280,702 Table 1				
%Loss	14.29% Table 2				
Inframarginal sales	240,589 Calculated	Diversion ratio	86.03% Table 2	Diversion ratio	13.97% Table 2
Marginal sales	40,112 Calculated	Total units recaptured	34,509 Calculated	Total units recaptured	5,604 Calculated
HM price	\$142.50 Table 1	NP price	\$150.00 Table 1	SM price	\$157.50 Table 1
%HM margin	35.00% Table 1	%NP margin	30.00% Table 1	%SM margin	25.00% Table 1
\$HM margin	\$49.88 Calculated	\$NP margin	\$45.00 Calculated	\$SM margin	\$39.38
%SSNIP	5.00% Hypo				
\$SSNIP	\$7.13 Calculated				
<i>Gain on inframarginal sales</i>					
\$SSNIP	\$7.13				
Inframarginal sales	240,589				
GROSS GAIN	\$1,714,200				
<i>Loss on marginal sales</i>					
\$HM margin	\$49.88				
Marginal sales	40,112				
GROSS LOSS	\$2,000,600				
Net gain	-\$286,400				
		<i>Gain on recaptured sales</i>			
		N	\$1,552,887	SM	\$220,645
		HM + NP	\$1,266,487	HM + NP + SM	\$1,487,132
		HMT	PASSES	HMT	PASSES

4. The prima facie case

■ The relevant geographic market: Wilton

□ Judicial considerations

- The relevant geographic market is “where . . . the effect of the merger on competition will be direct and immediate.”¹
 - Must correspond to the commercial realities of the industry and be economically significant²
- “Courts generally measure a market's geographic scope, the area of effective competition, by determining the areas in which the seller operates and where consumers can turn, as a practical matter, for supply of the relevant product.”³
 - Look for high substitutability within the market and low substitutability across the market boundary
 - Must contain the sellers or producers who are able to “deprive each other of significant levels of business” and is where the merger's effect on competition will be “direct and immediate”⁴
- Does not need to include all of the firm's competitors; it needs to include the competitors that would “substantially constrain [the firm's] price-increasing ability”⁵
- Price differences
 - Differences in prices of the same products in different areas indicate that the areas are not in the same geographic market
 - BUT price differences are not a requirement—ice cream cones sold to consumers in New York and Los Angeles may be the same, but they are not in the same geographic markets
- Often specified by a political boundary (e.g., a town, country, MSAs, state)

¹ United States v. Philadelphia Nat. Bank, 374 U.S. 321, 357 (1963).

² See Brown Shoe Co. v. United States, 370 U.S. 294, 336-37 (1962) (footnote omitted).

³ Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 227 (2d Cir. 2006) (citations and internal quotation marks omitted).

⁴ FTC v. Advoc. Health Care Network, 841 F.3d 460, 468 (7th Cir. 2016).

⁵ *Id.* at 469.

4. The prima facie case

- The relevant geographic market: Wilton
 - Judicial considerations—Applied
 - Wilton is recognized by the public as a grocery shopping area distinct from Ridgefield
 - Ridgefield is located about 8 miles from Wilton's town center, which translates to a 15-minute drive under normal traffic conditions
 - Less than 5% of Wilton residents' grocery spending occurs at Ridgefield supermarkets
 - When any single Wilton supermarket increases its price by 5%, none of its customers divert to Ridgefield

4. The prima facie case

- The relevant geographic market: Wilton
 - Hypothetical monopolist test
 - The HMT for the relevant product market also applies to Wilton as the relevant geographic market
 - Showed that a hypothetical monopolist of Wilton supermarkets could profitably increase the price for at least one supermarket by 5%

*No more than this is necessary!**

* Or, at least, that is what I told you in class. As I was working on this problem, it occurred to me that the one-product SSNIP recaptured tests define a market for the purpose of determining whether anticompetitive unilateral effects could result from the merger, but they are not sufficient to establish that anticompetitive coordinated effects could result. For that, I think you need to apply some form of uniform SSNIP test. Still, given the class discussion, you will get full credit for the above answer.

4. The prima facie case

■ The relevant geographic market: Wilton

□ Hypothetical monopolist test

■ Alternative HMT for a uniform price increase by Wilton supermarkets

□ To show: A hypothetical monopolist could profitably increase prices uniformly by 5% in all Wilton supermarkets

□ Apply a “brute force” critical loss sufficiency test

- Hypothetical: A uniform price increase of 5% by all three Wilton supermarkets would cause them collectively to lose 10% of their customers to Ridgefield supermarkets
- Loss of customers is equivalent to loss of trips
 - Wilton supermarkets collectively account for 674,353 trips annually
 - Loss of 10% = 67,345 trips
- In the worst case, all the lost sales come from the supermarket with the highest dollar margin loss per trip
- Some data:

	Trips	Annual Spend/Trip	Percentage Gross Margin	Dollar Margin	
HarvestMart	280,702	\$142.50	35.00%	\$49.88	← Highest \$margin
Nature's Pantry	266,667	\$150.00	30.00%	\$45.00	
Sam's Market	126,984	\$157.50	25.00%	\$39.38	
Total Wilton trips	674,353				
%trips lost to Ridgefield	10.00%				
Trips lost to Ridgefield	67,435				
%SSNIP	5.00%				

4. The prima facie case

- The relevant geographic market: Wilton
 - Hypothetical monopolist test
 - Alternative HMT for a uniform price increase by Wilton supermarkets (con't)
 - Brute force calculation
 - Increase the price to all Wilton supermarkets by 5%
 - Decrease HarvestMart's trips by 67,435 (accounting for 100% of the lost trips)
 - Keep the sales of Nature's Pantry and Sam's Market constant

	HarvestMart	Nature's Pantry	Sam's Market
Incremental gain on inframarginal and recaptured sales			
Initial trips	280,702	266,667	126,984
Trips lost to Ridgefield	67,435	0	0
Inframarginal sales	213,266	266,667	126,984
Original price	\$142.50	\$150.00	\$157.50
\$SSNIP	\$7.13	\$7.50	\$7.88
Incremental gain (by firm)	\$1,519,524	\$2,000,000	\$1,000,000
Incremental loss on marginal sales			
Marginal sales	67,435		
\$margin	\$49.88		
Incremental loss (by firm)	\$3,363,333		
Net gain (by firm)	-\$1,843,810	\$2,000,000	\$1,000,000
Hypothetical monopolist net gain:	\$1,156,190		

So the hypothetical monopolist could profitably increase prices by 5% in all Wilton supermarkets

4. The prima facie case

- Market shares, concentration, and the *PNB* presumption
 - *PNB* presumption (boilerplate for judicial presumption and Merger Guidelines)
 - Use revenues for market shares
 - Supermarkets are differentiated
 - Calculate the premerger and postmerger HHIs:
 - HarvestMart and Nature's Pantry will be the only supermarkets in the relevant market
 - Assume that neither loses trips when Sam's closes
 - Scenarios (comparing postmerger with premerger):

HHI	Delta	Scenario
3600	—	
5000	1400	Minimum HHI (equal shares postmerger)
5183	1583	HarvestMart captures Sam's Market's customers
5187	1587	Nature's Pantry captures Sam's Market's customers
5762	2162	HarvestMart captures Sam's Market + 25% of Nature's Pantry

So the postmerger HHI and delta will be at least 5000 and 1400, respectively, and probably materially larger

4. The prima facie case

- Market shares, concentration, and the *PNB* presumption
 - Illustrative calculations (HHIs calculated using revenue shares*)
 - Premerger

	Trips	Revenues	Share	HHI
HarvestMart	281,000	\$40,000,000	40.00%	1600
Nature's Pantry	265,000	\$40,000,000	40.00%	1600
Sam's Market	130,000	\$20,000,000	20.00%	400
TOTAL	676,000	\$100,000,000	100.00%	3600

The HHI is minimized when the shares are equal

- Postmerger:

	HarvestMart Absorbs All of Sam's Market's Customers					Minimum HHI	
	Trips	Price	Revenues	Share	HHI	Share	HHI
HarvestMart	411,000	\$142.50	\$58,567,500	59.57%	3549	50.00%	2500
Nature's Pantry	265,000	\$150.00	\$39,750,000	40.43%	1635	50.00%	2500
Sam's Market							
TOTAL	676,000		\$98,317,500	100.00%	5183	100.00%	5000

* In this hypothetical, revenue shares and trip shares are sufficiently close to one another that, the HHIs and deltas will differ by only a small amount and the outcome of the analysis will be the same.

4. The prima facie case

- Market shares, concentration, and the *PNB* presumption
 - Comparing HHIs with and without the acquisition
 - Typically, the postmerger HHI without the acquisition will be the same as the HHI premerger
 - In this case, however, assuming Sam's Market exits, the HHI without the merger with differs from the premerger HHI
 - Scenarios going forward with and without the acquisition (compared to premerger)
 - To find the delta between with and without the acquisition, subtract the HHI shown with the acquisition from the HHI shown without the acquisition

HHI	Delta	Scenario
Premerger		
3600	—	
Scenarios without the acquisition:		
3387	-213	Old Mill enters with resulting shares shown in Table 3
3335	-265	Old Mill 30%, HarvestMart 35%, Nature's Pantry 35%
Scenarios with the acquisition:		
5000	1400	Minimum HHI (equal shares)
5183	1583	HarvestMart Absorbs Sam's Market
5187	1587	Nature's Pantry Absorbs Sam's Market
5762	2162	HarvestMart Absorbs Sam's Market +25% of Nature's Pantry
HHIs with the acquisition compared to without the acquisition:		
5762	2412	Maximum
5000	1613	Minimum

4. The prima facie case

- Market shares, concentration, and the *PNB* presumption
 - Illustrative calculations (HHIs calculated using revenue shares*)
 - Without acquisition

	Table 3 Shares			Min HHI with 30% Old Mill	
	Revenue	Revenue Share	HHI	Revenue Share	HHI
HarvestMart	\$40,042,500	37.95%	1440	35.00%	1225
Nature's Pantry	\$29,250,000	27.72%	768	35.00%	1225
Sam's Market					
Old Mill	\$36,225,000	34.33%	1179	30.00%	900
TOTAL	\$105,517,500	100.00%	3387	100.00%	3350
Premerger HHI			3600		3600
Postmerger HHI			3387		3350
Delta (compared to premerger)			-213		-250

* In this hypothetical, revenue shares and trip shares are sufficiently close to one another that, the HHIs and deltas will differ by only a small amount and the outcome of the analysis will be the same.

4. The prima facie case

- The *PNB* presumption in the Wilton supermarket market
 - Second, support the *PNB* presumption with judicial precedent
 - Since the investigating agency is the Connecticut Attorney's Office, the Merger Guidelines are less significant than the judicial precedent, so I put them first
 - “The postmerger HHI of 5183 and delta of 1583 triggers the *PNB* presumption under modern judicial precedent.”
 - See, e.g., *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1 (D.D.C. Nov. 15, 2022) (postmerger HHI of 3111 and delta of 891)
 - *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160 (3d Cir. 2022) (postmerger HHI of 2835 and delta of 841)
 - *FTC v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016) (postmerger HHI of 3517 and delta of 1423)
 - *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011) (postmerger HHI of 4691 delta of 400).

There is nothing magic in these four cases. Any case applying the PNB presumption with lower a lower HHI and delta works.

4. The prima facie case

- The *PNB* presumption in the Wilton supermarket market
 - Third, support the *PNB* presumption with the Merger Guidelines
 - “Moreover, these HHI statistics trigger a presumption of Section 7 anticompetitive effect under the 2010 and 2023 Merger Guidelines.”
 - The 2010 Merger Guidelines, which were effective when much of the judicial precedent was created and have been cited by multiple courts, presumes an anticompetitive effect when the postmerger HHI over 2500 and the delta is at least 200.
 - The 2023 Merger Guidelines lowered these thresholds to 1800 and 100.

If the mergers triggers the PNB presumption under both sets of Guidelines, I would cite them both

4. The prima facie case

■ Additional evidence supporting the prima facie case

□ Coordinated effects—Applies

■ State the test (prepared in advance)

1. Premerger, the market is susceptible to tacit coordination
2. The merger will increase the likelihood or effectiveness of tacit coordination

■ Apply the test

1. The Wilton supermarket market is susceptible to tacit coordination premerger
 - a. Only three firms with an HHI of 3600 (a highly concentrated market)
 - b. One firm (Sam's Market) is declining, so that most price competition takes place between HarvestMart and Nature's Pantry
 - c. Grocery products are largely standardized and prices are transparent, facilitating monitoring
 - d. Attempted efforts by Nature's Pantry to increase prices (although resisted by HarvestMart) demonstrates a willingness of one of the two firms to tacitly coordinate
 - e. High barriers to entry
 - i. Limited land available in Wilton Town Center zoned for a supermarket
 - ii. Existing stores provide sufficient capacity for current demand and projected demand
 - iii. Strong customer loyalty to current suppliers limits the willingness of customers to switch absent a compelling reason (e.g., significant price reductions)
 - iv. [Presumably] Significant construction costs
2. Merger will increase the probability, stability, and effectiveness of tacit coordination
 - a. Merger reduces the number of firms from three to two
 - b. HarvestMart's significant expected increase in sales will increase its incentive to tacitly coordinate (larger returns due to larger base of inframarginal customers)—possibly eliminating its incentive to resist Nature's Pantry's price leadership now or in the future

4. The prima facie case

■ Additional evidence supporting the prima facie case

□ Unilateral effects on price

■ Test (prepared in advance)

1. The products of the merging firm must be differentiated and have different dollar margins (premerger, postmerger, or both)
2. The products of the merging parties must be close substitutes for one another
 - That is, they have high cross-elasticities of demand or diversion ratios with one another
3. The products of (most) other firms must be much more distant substitutes
 - That is, they have low cross-elasticities of demand or low diversion ratios with the products of the merging firms
4. Repositioning into the products of the merging firms must be difficult
 - That is, other incumbent firms and new entrants in the market cannot easily change their product's attributes or introduce a new product that would be a close substitute to the products of the merged firm

■ Recapture unilateral effects—Does not apply

- HarvestMart will close Sam's Market, renovate and rebanner it as a HarvestMart store, and carry the same products and charge the same prices in both stores
- Premerger, although Sam's Market charges a higher price than HarvestMart, HarvestMart has a larger dollar margin → HarvestMart gains more by diverting more former Sam's Market's customers to its store postmerger at premerger prices and increasing prices and losing more of Sam's Market's customers (and its own marginal customers) to Nature's Pantry

■ Auction unilateral effects—Does not apply

- Products are sold to all customers at a displayed price—there are no auctions involved in supermarket sales

4. The prima facie case

■ Additional evidence supporting the prima facie case

□ Unilateral effects on price

■ However, an ad hoc unilateral effects theory likely applies

- Postmerger, HarvestMart will operate two locations, alleviating overcrowding and attracting customers who previously avoided HarvestMart due to congestion
- Those Nature's Pantry customers who prefer HarvestMart's lower prices but shopped elsewhere due to overcrowding, are likely to switch to HarvestMart postmerger
- Some Sam's Market customers, accustomed to higher prices, may choose to shop at Nature's Pantry or switch to HarvestMart for the improved shopping experience and lower prices
- Customers who divert from Nature's Pantry and Sam's Market, all of whom paid higher prices at their previous store, are less likely to be sensitive to small price increases by HarvestMart than HarvestMart's pre-existing customers
- Consequently, the percentage HarvestMart's customers who are inframarginal will be larger postmerger than premerger
- This increase in the percentage of inframarginal customers creates a profit-maximizing incentive for HarvestMart unilaterally to increase its price postmerger even if Nature's Pantry maintains its premerger prices
 - That is, premerger HarvestMart's incremental profit gain from a SSNIP on its inframarginal customers was just equal to its incremental loss on its marginal customers (the first-order condition for profit-maximization)
 - Postmerger, however, with a greater percentage of inframarginal customers, HarvestMart's incremental profit gain from a SSNIP on its inframarginal customers was be greater than its incremental loss on its marginal customers
 - Accordingly, HarvestMart has an incentive to increase its prices, thereby decreasing the percentage of inframarginal customers and increasing the number of marginal customers until the first-order condition is reestablished

We did not cover this in class, so I did not expect anyone to spot this theory

This is the unilateral effect



4. The prima facie case

- Additional evidence supporting the prima facie case
 - Elimination of a maverick—Likely applies
 - Premerger, HarvestMart can be considered a “maverick” since it has resisted Nature’s Pantry’s efforts at price leadership notwithstanding the susceptibility of the market to tacit coordination
 - Postmerger, however, HarvestMart has an increased incentive to unilaterally increase its prices for the reason just discussed
 - This adds to the whatever incentive HarvestMart had premerger to tacitly coordinate with Nature’s Pantry (an incentive HarvestMart resisted)
 - According, HarvestMart also has an increased incentive postmerger to accommodate Nature’s Pantry price increases
 - Another second theory
 - In class, we discussed that even when the maverick’s management controls the merged firm, it has an incentive to cease being a maverick because postmerger it has more inframarginal customers on which it would lose profits if it lowered its price
 - **If you applied this argument here, you received full credit on this issue**
 - However, as the ad hoc unilateral analysis above shows, the analysis is more subtle
 - The incentive to continue or cease being a maverick depends on the how, if at all, the split between inframarginal and marginal customers changes between premerger and postmerger
 - I need to fix this for next year’s class.

4. Defendants' rebuttal arguments

- First, make sure you know what defenses need to be addressed:
 1. *Relevant market*: The sale of products by Wilton supermarkets not a proper relevant market
 2. *Failing firm*: Sam's Market is a failing firm
 3. *Zero HHI delta*: The HHI delta should be calculated based on combining the shares of HarvestMart and Sam's Market, which will be zero since Sam's Market will cease operations whether the merger goes forward or not—A transaction with zero delta cannot trigger the *PNB* presumption
 4. *Old Mill causation*: If the acquisition proceeds, Old Mill's abandonment of its plans to enter Wilton would not be legally caused by the acquisition and hence not a cognizable Section 7 harm
 5. *Speculative benefits from blocking the merger*: The benefits of blocking the acquisition are speculative and too distant in time to be cognizable
 6. *HarvestMart's pricing*: HarvestMart will not increase prices anticompetitively postmerger
 7. *Efficiencies*: The acquisition would create significant efficiencies that would be passed on to customers

4. Defendants' rebuttal arguments

1. *Relevant market*: The sale of products by Wilton supermarkets not a proper relevant market
 - Likely arguments
 - All grocery stores (including MaxMart) should be included in the relevant product market
 - MaxMart sells \$20 million of groceries to Wilton residents
 - MaxMart accounts for 250,000 annual shopping trips by Wilton residents
 - All Ridgefield stores should be included in the relevant geographic market
 - Ridgefield is only eight miles away—a 15-minute drive—from Wilton
 - Some Wilton residents buy their groceries in Ridgefield

4. Defendants' rebuttal arguments

1. *Relevant market*: The sale of products by Wilton supermarkets not a proper relevant market

□ Response

■ Overall

- Well-established judicial precedent holds that proof of an anticompetitive effect in any one relevant market is sufficient to find a Section 7 violation
- The sale of products by Wilton supermarkets as a proper relevant market is supported by judicial factors and the hypothetical monopolist test
- It is irrelevant that larger markets may also be relevant markets

■ MaxMart should not be included in the relevant market with the Wilton supermarkets

- Exhibits almost no cross-elasticity with Wilton supermarkets—no diversion from Wilton supermarkets to MaxMart either from a one-product or uniform SSNIP
- Including MaxMart in the relevant product market would not change the result—the *PNB* presumption would still be triggered

■ The Ridgefield supermarkets should not be included in the relevant market with the Wilton supermarkets

- A 15-minute drive—30 minutes round trip—is a significant burden on a shopper when three supermarkets are available in Wilton
- Exhibit no diversion from Wilton supermarkets in response to a one-product 5% SSNIP
- Although 10% of Wilton customers would divert to Ridgefield in response to a uniform 5% SSNIP in Wilton, this diversion is insufficient to make a 5% price increase in all Wilton stores unprofitable
→ Indicates minimal price-constraining effect by Ridgefield supermarkets on Wilton supermarkets

Conclusion: The defense fails

4. Defendants' rebuttal arguments

2. *Failing firm*: Sam's Market is a failing firm

- ❑ Likely argument
 - Sam's Market is declining rapidly, and Sam Easten is committed to selling the supermarket
- ❑ Response
 - Requirements for the failing company defense: 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
 - Even assuming *arguendo* requirements 2 and 3 are satisfied, Sam's Market fails requirement 1
 - ❑ Courts are generally hostile to the failing company defense and apply its requirements strictly
 - ❑ Sam's Market remains profitable and able to meet its financial obligations for at least several more years if it stays in operation
 - ❑ Easten's decision to sell Sam's Market because of the supermarket's declining profitability is irrelevant to the defense

Conclusion: The defense fails

4. Defendants' rebuttal arguments

3. *Zero HHI delta*

□ Likely arguments

- The HHI delta should be calculated based on combining the shares of HarvestMart and Sam's Market, which will be zero since Sam's Market will cease operations whether the merger goes forward or not
- A transaction with zero HHI delta cannot trigger the *PNB* presumption

4. Defendants' rebuttal arguments

3. Zero HHI delta

□ Response

■ This argument misunderstands the HHI delta

- The HHI delta is the difference on a going forward basis between the HHI in the market with the merger and the HHI in the market without the merger
- In the absence of the acquisition, Sam's Market will continue to operate for at least several years if Urban Furnishing does not acquire it
- The fact that Sam's Market will cease to exist going forward with or without the merger is irrelevant
 - All Sam's Market's Wilton customers will continue to shop for groceries and most if not all these customers are likely to switch to another Wilton supermarket
- With the acquisition, the only two supermarkets in Wilton will be HarvestMart and Nature's Pantry
 - Old Mill will not enter and HarvestMart and Nature's Pantry collectively will have 100% of the Wilton supermarket market
 - As shown above, the resulting postmerger HHI will be at least 5000 with a delta of at least 1400 and probably materially higher

4. Defendants' rebuttal arguments

4. *Old Mill causation*: HarvestMart's acquisition of Sam's Market cannot legally be attributed to Old Mill's decision not to build in Wilton
- ❑ Likely argument
 - The decision to abandon Wilton would be made independently by Old Mill
 - Nothing in the acquisition precluded Old Mill from building in Wilton
 - Old Mill's premium offerings typically attract a distinct customer segment less price-sensitive to traditional supermarket competition, suggesting it could still succeed even with the acquisition
 - ❑ Response
 - Prior to the announcement of the acquisition, Old Mill was committed to open a store in Wilton
 - ❑ Part of Old Mill's business plan
 - ❑ Had conducted extensive market research on Wilton
 - ❑ Had an option on land in Wilton Town Center zoned for a supermarket
 - ❑ Had announced plans to build a new 35,000 square foot store on this property within three years
 - ❑ Expected to open within two years
 - Wilton was attractive to Old Mill because of—
 - ❑ Its demographics
 - ❑ Sam's Market's decline
 - ❑ Wilton's projected population growth

4. Defendants' rebuttal arguments

4. *Old Mill causation*: HarvestMart's acquisition of Sam's Market cannot legally be attributed to Old Mill's decision not to build in Wilton
- Response (con't)
 - Sam's Market's decline presumably was important because it would—
 - Reduce the number of supermarkets operating in Wilton from 3 to 2
 - Remove significant supermarket capacity from Wilton
 - Increase crowding in the two remaining Wilton supermarket
 - HarvestMart's acquisition, renovation, and rebanner of Sam's Market would—
 - Preserve if not increase supermarket capacity in Wilton
 - Alleviate crowding in Wilton supermarkets
 - In any event, Old Mill—
 - Suspended its plans to build in Wilton because of changed conditions due to the prospect of HarvestMart acquiring Sam's Market
 - Announced it would resume building and open in Wilton with two years if HarvestMart did not make the acquisition and Sam's Market was sold to Urban Furnishings instead
 - Presumably, Old Mill representatives would be prepared to testify at trial to their original plans, the impact of the acquisition on these plans, and their intent to proceed if the acquisition does not go forward
 - *Bottom line*: The acquisition would create conditions that made Old Mill's opening in Wilton unattractive and therefore would be the proximate cause of Old Mill's decision not to build in Wilton

Conclusion: The defense fails

4. Defendants' rebuttal arguments

5. *Speculative benefits from blocking the merger*: The benefits of blocking the acquisition are speculative and too distant in time to be cognizable

□ Likely argument

- Old Mill's entry relies on uncertain market conditions over the next two to three years, making benefits from blocking the merger speculative
- Even if the benefits are not speculative, by its own projections Old Mill would not open in Wilton for two to three years, which is too distant in time for benefits to be considered in the analysis

□ Response

- The evidence shows that Old Mill has the ability, incentive, and commitment to enter Wilton if the acquisition does not go forward
- The evidence shows that the benefits to Wilton consumers are very substantive and not speculative—

- | | | |
|---------------------------------|---|---|
| Improves
consumer
welfare | { | □ Old Mill's opening would provide a premium grocery option currently unavailable to Wilton consumers—Old Mill's research shows that 30% of Wilton households would choose it if it became available |
| | | □ The shift of 30% of Wilton households to Old Mill would alleviate the current overcrowding conditions at HarvestMart, allowing those current Nature's Pantry customers who prefer HarvestMart if not overcrowded to switch to HarvestMart |
| Causes
no harm | { | □ The evidence indicates that prices at HarvestMart and Nature's Pantry would not be affected by the opening of Old Mill, so that current customers who remained at these stores would not be worse without the acquisition than with it |

4. Defendants' rebuttal arguments

6. *HarvestMart's pricing*: HarvestMart will not increase prices anticompetitively postmerger

- Likely argument
 - Has a reputation as a chain providing “good value at good prices”
 - Is the lowest price supermarket currently operating in Wilton, with prices 5% lower than Nature's Pantry and 10% lower than Sam's Market
 - Has resisted Nature's Pantry efforts in the past to increase prices
- Response
 - Merger antitrust law operates on market structure and not on the good intentions of firms
 - Conditions—or management—can change over time, and good intentions today may become less than good intentions tomorrow
 - Consequently, if a merger creates (or enhances) the ability or incentive of firms to act anticompetitively to the harm of consumers—as the evidence shows it does here—the law will block the merger notwithstanding the firm's sincere promises not to act anticompetitively

Conclusion: The defense fails

4. Defendants' rebuttal arguments

7. *Efficiencies*: The acquisition would create significant efficiencies that would be passed on to customers and negate any anticompetitive tendencies of the acquisition

□ Likely argument

- Significant cost savings: Integrating Sam's Market into HarvestMart's operations will reduce Sam's Market's costs of goods sold by approximately 22%, achieved through:
 - 10% savings by eliminating wholesaler markups
 - 7% savings from better supplier terms due to HarvestMart's greater purchasing power
 - 5% savings through distribution efficiencies from HarvestMart's network
- Improved operational efficiency
 - HarvestMart expects additional savings of 3% at the acquired location through shared management, combined advertising, and optimized staffing
- Pass-on to customers
 - These cost savings will allow HarvestMart to reduce prices at the newly renovated store by 10%, matching the pricing structure of its current location while maintaining a 35% gross margin
- Improved consumer experience
 - The acquisition resolves overcrowding at HarvestMart's current store, reducing congestion, improving inventory availability, and enhancing customer satisfaction
- Net increase in employment
 - HarvestMart plans to hire 65 to 70 full-time employees at the renovated location, compared to the current 45 employees at Sam's Market, resulting in a net employment gain

4. Defendants' rebuttal arguments

7. *Efficiencies*: The acquisition would create significant efficiencies that would be passed on to customers and negate any anticompetitive tendencies of the acquisition

- Response

- Requirements for an efficiencies defense: The claimed efficiencies must be—
 1. Merger specific
 2. Verifiable
 3. Sufficient to negate the likely anticompetitive effect
 4. Not anticompetitive
- Leaving aside the other requirements, the claimed efficiencies taken at face value are not sufficient to negate the likely anticompetitive effect of the transaction
 - In other words, the efficiencies would have to improve consumer welfare to the level that would have been attained in the absence of the transaction
 - NB: HarvestMart's plan to lower the prices in the rebannered store to the level of its existing store, does not benefit the customers at the existing store and improves the welfare of any customers who switch to HarvestMart only to same extent as would alleviating overcrowding
- Even with the claimed efficiencies, consumer welfare is lower with the acquisition than without

*Let's examine the welfare effects on Wilton shoppers
with and without the acquisition*

4. Defendants' rebuttal arguments

7. *Efficiencies*: The acquisition would create significant efficiencies that would be passed on to customers and negate any anticompetitive tendencies of the acquisition

- Response (con't)

- Shoppers who would switch to Old Mill if available

- *No acquisition*: 30% of shoppers at Wilton supermarkets, and 20% of Wilton shoppers at Ridgefield supermarkets, would shift to Old Mill, which would provide a premium grocery option distinct from HarvestMart and Nature's Pantry. Prices at HarvestMart and Nature's Pantry would likely remain unchanged due to their limited competition with Old Mill.
- *Acquisition*: Old Mill would not enter, leaving these shoppers without their preferred premium option. Moreover, these shoppers would be harmed if prices at HarvestMart and Nature's Pantry increased as a result of the acquisition, as indicated by the prima facie case

This group's welfare would be harmed by the acquisition

4. Defendants' rebuttal arguments

7. *Efficiencies*: The acquisition would create significant efficiencies that would be passed on to customers and negate any anticompetitive tendencies of the acquisition

- Response (con't)

- Shoppers who would switch from Nature's Pantry to HarvestMart if not overcrowded

- *No acquisition*: Old Mill's entry would alleviate overcrowding at HarvestMart by shifting 30% of Wilton shoppers to Old Mill. HarvestMart and Nature's Pantry would likely remain unchanged due to their limited competition with Old Mill.
 - *Acquisition*: Renovating and rebannered Sam's Market as a HarvestMart store would alleviate overcrowding directly. However, these shoppers would be harmed if prices at HarvestMart and Nature's Pantry increased as a result of the acquisition, as indicated by the prima facie case.

This group's welfare would not be helped but could be harmed by the acquisition

4. Defendants' rebuttal arguments

7. *Efficiencies*: The acquisition would create significant efficiencies that would be passed on to customers and negate any anticompetitive tendencies of the acquisition

- Response (con't)

- Shoppers who would remain at their original store with or without the acquisition

- *No acquisition*: With the entry of Old Mill drawing off 30% of Wilton shoppers and relieving overcrowding at HarvestMart, prices at HarvestMart and Nature's Pantry would likely remain unchanged due to their limited competition with Old Mill.
 - *Acquisition*: Renovating and rebannered Sam's Market as a HarvestMart store would alleviate overcrowding directly. However, these shoppers would be harmed if prices at HarvestMart and Nature's Pantry increased as a result of the acquisition, as indicated by the prima facie case.

This group's welfare would not be helped but could be harmed by the acquisition

4. Defendants' rebuttal arguments

7. *Efficiencies*: The acquisition would create significant efficiencies that would be passed on to customers and negate any anticompetitive tendencies of the acquisition
- Response (con't)
 - Employment (to the extent considered)
 - *No acquisition*: Old Mill's entry would create new employment opportunities in Wilton. The investigation did not obtain specific figures, a high-priced premium supermarket with 35,000 square feet are not provided, it is likely that the store would require at least as many employees as the rebannered HarvestMart store.
 - *Acquisition*: Employment in the rebannered HarvestMart store will increase to 65-70 from 45, resulting in a net employment gain of 20-25 employees

This group's welfare would not likely be different with or without the acquisition

4. Defendants' rebuttal arguments

7. *Efficiencies*: The acquisition would create significant efficiencies that would be passed on to customers and negate any anticompetitive tendencies of the acquisition

- Response (con't)

- Urban Furnishings

- *No acquisition*: Urban Furnishings would buy Sam's Market and convert it to a large furniture store. Wilton residents would benefit from the greater choice and perhaps greater competition in furniture resulting from the opening of this store.
- *Acquisition*: Urban Furnishing would not open a store in Wilton.

*This group's welfare would be harmed by the acquisition (but since the benefit is not in the relevant market, it may not be cognizable as consumer benefit in the merger antitrust analysis)**

** Still, the State should make this point since it may influence the judge's "heart" when making her decision, even if not technically cognizable*

Conclusion: No consumer group benefits from the merger, one group will be harmed, and the other groups may be harmed

The defense fails

4. Conclusion on merits

You can use some boilerplate here—but be sure to customize it to the problem!

4. Enforcement action

- The State should seek a permanent blocking injunction
 - Available under Clayton Act § 16
 - Four requirements
 1. The plaintiff has demonstrated a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue
 - Satisfied by showing an impending violation of Section 7 on the merits if the pending acquisition does forward
 - The requisite threat of injury is the competition that would likely be substantially lessened by the acquisition in the relevant market

Satisfied

2. Remedies available at law, such as monetary damages, are inadequate to compensate for that injury
 - The case law holds that money damages are inadequate to compensate a state for an injury to its general economy resulting from an antitrust violation

Satisfied

4. Enforcement action

■ The State should seek a permanent blocking injunction

□ Requirements (con't)

3. Considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted

- If the acquisition goes forward, the State and the public will be harmed by a likely lessening of competition in the relevant market
- If the acquisition goes forward, Wilton grocery shoppers, in particular, will be harmed by Old Mill's cancellation of its plans to build a much-desired premium supermarket in Wilton as well as by possibly higher prices
- If the acquisition goes forward, Urban Furnishing will not buy Sam's Market and convert it into a new large furniture store, depriving Wilton residents of the additional choice and greater competition in home furniture the opening of the new store would create
 - Even if not cognizable as a benefit in the merger analysis, this factor should be cognizable in the hardship analysis
- If the acquisition is blocked, no Wilton grocery shopper is likely to be harmed
- If the acquisition blocked, HarvestMart is deprived on the profits it would have made from an expanded operation

Satisfied

4. The public interest would not be disserved by a permanent injunction

- The State has an compelling interest in protecting its economy and residents from antitrust violations
- There is no public interest in allowing an acquisition that violates the antitrust laws to proceed

Satisfied

5. Conclusion

5. Conclusion

For the reasons stated above, the State should prevail in Section 7 claim for a permanent injunction under Section 16 of the Clayton Act blocking HarvestMart's acquisition of Sam's Market.

- ❑ No need to be elaborate if the conclusion paragraph in the introduction answers the specific questions asked