



What's Pull Through Doing in My Relevant Product Market? Proper (and Improper) Product Market Definition in *FTC v. LabCorp*



By Richard Cunningham & Jonathan Klarfeld¹
U.S. Federal Trade Commission

This article seeks to shed light on the relatively novel product market issues that arose in the Federal Trade Commission's (FTC) case against Laboratory Corporation of America (LabCorp), which sought to prevent LabCorp's acquisition of Westcliff Medical Laboratories (Westcliff), a competing clinical laboratory based in southern California that was the third largest clinical laboratory in the state. Though the bumper sticker version of the case might well say that the government simply lost (yet again?) on an overly-narrow product market definition,² we continue to believe that an analytically rigorous review of the facts leads unavoidably to the

primary product market that was alleged. Of course, on February 22, 2011, U.S. District Judge Andrew Guilford of the Central District of California issued a 184-paragraph order denying the FTC's request for a preliminary injunction requiring LabCorp to continue to hold Westcliff separate.³ The court appears to have rejected the alleged product market, though it did not state what the product market should have been.⁴ Given our participation as part of the FTC's trial/litigation team, this article should be read with whatever degree of skepticism you deem appropriate. As the tag line goes: "We report, You decide."

¹ Jonathan Klarfeld is a Deputy Assistant Director in the Bureau of Competition at the Federal Trade Commission; Richard Cunningham is a staff attorney in the Bureau of Competition at the Federal Trade Commission. The views expressed here are solely the authors' own, and do not represent the views of the Federal Trade Commission, any Commissioner, or any other Commission staff members. The authors would like to sincerely thank Brendan McNamara, Michael Moiseyev, Chetan Sanghvi, and Jay Srinivasan for their insightful comments and feedback.

² The case can also be read as an equities-focused decision in which the court found that the costs that LabCorp would bear in continuing to hold the Westcliff business separate outweighed the public's interest in antitrust enforcement given the Commission's likelihood of success on the merits and the court's finding that a post-integration divestiture would not be difficult. *See Fed. Trade Comm'n v. Lab. Corp. of Am.*, No. 10-1873, 2011 U.S. Dist. LEXIS 20354, ¶¶ 86-111; 168-83 (C.D. Cal. Feb. 22, 2011). We believe that analysis is deeply flawed, but that discussion is left for another day.

The Not-So-Simple Fact Pattern

Unless you happen to be a Californian or a health economist (or, even better, both), the case requires quite a bit of background to understand the primary product market issues. What follows are the facts needed to accurately analyze the antitrust questions presented by the case.⁵ *LabCorp* involved the sale of clinical laboratory services ("lab services"). Lab services are the cluster of several hundred tests

³ *Id.*

⁴ *Id.* at ¶¶ 23-58.

⁵ The vast majority of these facts were undisputed in the parties' filings. Most of those filings, however, are under seal and not publicly available. We strive to highlight significant factual disputes to the greatest extent possible given our confidentiality obligations.



that physicians routinely use to diagnose and treat patients. A common example is a blood test for cholesterol levels. Lab services are an indispensable component of modern medicine and in that regard, have no meaningful substitutes.

The Buyers: Three general categories of customers purchase lab services in southern California: (1) health plans, such as United Healthcare, Aetna, and Blue Cross of California;⁶ (2) individual patients; and (3) statutorily-created entities known as independent physician associations (IPAs). Health plans, patients, and IPAs have somewhat different needs, purchase lab services using different processes, and have different characteristics from the perspective of the lab. Consequently, prices resulting from transactions between labs and each of these groups vary dramatically.

Health Plans: Because lab services are an integral part of modern medical care, health plans include lab services as a covered service or benefit for their members. Rather than paying labs' very high list prices, health plans seek to leverage their status as volume purchasers in their pricing negotiations with labs. Generally speaking, health plans obtain prices that are significantly lower than the labs' list prices in exchange for including a given lab as an in-network provider.⁷ Health plan

⁶ Medicare and Medicaid are also health plans. In their traditional form, however, the prices they pay for lab services are set by the government rather than through a competitive mechanism. Medicare Advantage and analogous managed care Medicaid plans may purchase lab services like other commercial health plans and, if structured as an HMO, may use the delegated model described herein.

⁷ The two largest clinical labs, Quest Diagnostics and LabCorp, have begun to negotiate national semi-exclusive contracts with the larger health plan providers. These contracts are semi-exclusive in the sense that they require

members receive greater benefits (i.e., lower co-payments, coinsurance rates, or deductibles) when using in-network providers; thus a lab that obtains in-network status receives a greater volume of business than it would as an out-of-network provider. If a health plan does not have a contractual relationship with a lab, that lab is treated as out-of-network and the health plan and its members typically pay the lab's higher list prices.

Patients: Patients who are not part of any health plan or who purchase lab services not covered by their plan, are charged the lab's list prices – the highest prices paid by any purchaser of lab services. If the patient's service is covered by his or her health plan, the amount paid by the patient for the lab service will be determined by the patient's benefits under the health plan and the terms of the health plan's contract with the lab. Typically, the patient's liability for a covered service will be a co-payment, deductible, or co-insurance payment that is a fixed amount or a percentage of the price specified in the contract between the health plan and the lab.

IPAs: IPAs are a creation of the capitated model of health care delivery. In the capitated model, HMO health plans delegate responsibility for patient care to groups of physicians, paying the IPA on a per-member, per-month (PMPM) basis to provide all physician services required by the HMO plan's members. This structure shifts the cost, and hence risk, of unexpected utilization (i.e., HMO enrollees seeing their physicians more often than expected) from the health plan to the physician group. For comparison, under the

the health plan to exclude certain specific labs, but not all other labs, from the health plan's provider networks. These semi-exclusive arrangements are generally at even lower prices than those that have resulted from local or regional negotiations.



traditional model, the health plan pays physicians for services provided to the health plans' members on a per-service rendered basis, resulting in the health plan bearing the risk that the members see their physicians more than expected. The capitated model of health care delivery is particularly common in southern California where more than 5 million people are members of health plans employing a capitated structure.

IPAs are legally-created groups of physicians, who, by contract, have come together to enter into these delegated model relationships with HMO plans. IPAs' member physicians need not share office space, back office operations, or signage. IPAs are non-exclusive, in the sense that member physicians may be part of more than one IPA. Significantly, IPA-member physicians commonly treat patients who are covered by health plans that do not use the delegated structure, such as PPOs, traditional indemnity plans, or Medicare. It is this fact – that IPA-member physicians have patients beyond their IPA affiliation – that adds a layer of complexity to the product market analysis. But more on that later.

IPAs purchase lab services in order to provide the physician care for which they have accepted responsibility under the capitated arrangement with the HMO plan. IPAs pay prices that are negotiated between the IPA and the lab, often after the IPA has solicited proposals from one or more labs in a process that resembles an informal auction. The contracts, which cover the vast majority of clinical lab tests offered by and routinely requested by the IPAs' member physicians, are between the IPA and the lab and almost always are structured on a capitated basis. This means that the IPA pays the lab on a PMPM basis (i.e., a monthly price per head regardless of the frequency of use) and it is the lab that is left to bare the costs if utilization is

higher than expected. IPAs prefer capitation because it reduces the risk associated with treating patients under the delegated model (remember that the IPAs are being paid for these HMO patients' care on a PMPM basis too), it reduces administrative expense (because the claims process is simplified), and it is less costly for the IPA than purchasing on a fee-for-service (FFS), i.e., per test basis, which is how health plans, patients, and the few outlier IPAs⁸ pay for lab services. It also eliminates labs' incentives to market to physicians to increase their testing utilization.

IPAs' prices are significantly lower than the negotiated prices obtained by health plans and Medicare rates, and far lower than labs' list prices, in part due to what the lab industry refers to as the "pull through" dynamic.⁹ Pull through describes a certain category of referrals – those received by a lab that is an IPA's capitated lab services provider from IPA-member physicians for those member physicians' non-HMO patients. Winning an IPA's capitated contract often results in a significant stream of incremental pull through business because servicing the IPA's delegated patients provides a lab with the opportunity to build a relationship with the IPA's member physicians and to become part of those physicians' normal work and referral patterns. These referrals are particularly sought after because these patients' tests are paid for by health plans, Medicare, or the patients themselves at high average rates (far

⁸ A small minority of IPAs purchase lab services on a FFS basis, generally because they lack a track record of historical utilization rates so that labs can price a capitated bid (e.g., if the IPA is new), or because some of the IPAs' member physicians insist on using lab providers other than the primary one such that the exclusivity associated with capitation is not feasible.

⁹ It is also because the contracts are exclusive and large, guaranteeing the lab a steady and substantial volume of business.



higher than capitated rates), invariably on a FFS basis. Thus, practically speaking, obtaining pull through referrals is a benefit associated with winning an IPA's capitated contract. IPAs, however, do not require their member physicians to refer non-delegated patients (the IPA-member physicians' other patients) to the capitated lab services provider and, correspondingly, steering pull through is not a tool available to IPAs when negotiating capitated rates with lab services providers.¹⁰

Defining the Relevant Product Market: Is It Really All Lab Services or Should It Be Something Smaller?

The key issue of dispute regarding product market was how the existence of pull through affected product market definition, if at all. LabCorp and its expert argued that the pull through dynamic requires the inclusion in the relevant market of all lab testing, whether paid for by health plans, patients, or IPAs. The Commission's complaint asserted that a subset of LabCorp's proposed market – capitated lab services purchased by IPAs – constituted a relevant product market.¹¹ The Commission's

¹⁰ In the course of discovery, a single IPA administrator claimed to use such steering in negotiations with labs. Whether physicians would be willing to join IPAs that would make such restrictive demands of them is unclear as no other IPA agreed with this assertion either in the course of discovery or the pre-complaint investigation. Moreover, it is unclear whether the state of California would believe such steering to be legal because an explicit link between the level of pricing and the number of referrals may suggest or be considered an improper payment by the lab for the referrals.

¹¹ The Commission's complaint also alleged an alternative market that added the very modest number of FFS sales to IPAs to the primary market. Because so few IPAs buy lab services on a FFS basis, and because these IPAs were generally smaller than average, adding these sales to the market has no material effect on the market shares. The alternative market definition is the same as the relevant product market alleged by the Commission in its 2003

complaint counsel reasoned that sales to health plans and individual patients should be excluded from the market because IPAs are a readily-identifiable customer group that cannot defeat a price increase by arbitrage (there are no resellers available to IPAs) and because IPAs strongly prefer to purchase lab services on a capitated basis. Specifically, complaint counsel examined demand substitutability, i.e., whether IPAs would switch away from purchasing lab services on a capitated basis if currently-prevailing prices increased by a SSNIP.¹² There was no evidence that the pull through dynamic would reduce the profitability or likelihood of a hypothetical monopolist of capitated lab services imposing a SSNIP, nor was there any evidence that the pull through dynamic provided IPAs with a tool to avoid a SSNIP. Based on this analysis, complaint counsel did not believe that the pull through dynamic warranted including lab testing paid for by other purchasers, like health plans and individual patients, in the relevant market.

LabCorp asserted two primary arguments to support its claim that the product market should

consent agreement in Quest Diagnostics Inc.'s acquisition of Unilab Corp. See *In the Matter of Quest Diagnostics Inc. and Unilab Corp.*, File No. 021-0140, Complaint ¶ 8 (Feb. 21, 2003), available at <http://www.ftc.gov/os/2003/02/questcmp.htm>. Market shares in that matter were calculated on the basis of capitated sales to IPAs, which exactly matches the Commission's primary alleged market in *LabCorp*. See *id.*, Analysis of Agreement Containing Consent Orders to Aid Public Comment, available at <http://www.ftc.gov/os/2003/02/questanalysis.htm>. The public materials relating to *Quest/Unilab* are available at <http://www.ftc.gov/os/caselist/c4074.shtm>.

¹² SSNIP stands for "small but significant and non-transitory increase in price" and is defined in the U.S. Dept. of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines § 4.1.1 (issued Aug. 19, 2010) [hereinafter "Horizontal Merger Guidelines"], available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.



be much broader than sales to IPAs.¹³ LabCorp first argued that lab services purchased by health plans and individual patients must be included in the relevant market because the pricing of those sales affects the capitated prices paid by IPAs due to the pull through dynamic. We call this the “Pull Through Affects Pricing!” argument, and it is the one that merits discussion. LabCorp’s second argument, which we refer to as the “Tests are the Same!” argument, was centered on the unremarkable fact that the tests themselves are physically the same regardless of who pays for them, whether they are paid for on a FFS or capitated basis by IPAs, health plans, or individual patients. It is fair to say that we do not think much of the second argument, but the District Court’s opinion sheds no light on whether it rejected this argument or found it to be persuasive.

LabCorp’s presumed goal in arguing for a broader market is the typical one – expanding the market adds participants and likely dilutes LabCorp’s market share. This happens because many small labs provide lab services that are paid for by health plans and individual patients but they generally are not viable alternatives for IPAs. At the very least, these other labs have had very few sales to IPAs in the past or present.¹⁴

¹³ See, e.g., In the Matter of Lab. Corp. of Am. et al., File No. 101-0152, Respondent’s Answer (Dec. 16, 2010), available at <http://www.ftc.gov/os/adjpro/d9345/101216labcorpanswer.pdf>.

¹⁴ The lab services industry is subject to powerful economies of scale. As such, small labs have significantly higher per-test costs than LabCorp or Quest, the largest labs. Small labs are able to win sales paid for by health plans and individual patients despite having higher costs by offering exceptional service to patients and physicians. Providing capitated lab services to IPAs, however, requires scale and the associated (lower) cost structure. Serving an IPA requires a network of patient service centers (i.e., the places patients go to have their

Pull Through Affects Pricing! – Does This Mean That All Sales to Health Plans and Patients Belong in the Relevant Market?

LabCorp’s first argument that the pull through dynamic necessitates including sales to health plans and patients in the product market relies on two premises: (1) that pull through sales – both their quantity and price – affect capitated pricing to IPAs; and (2) that products whose sales volume and pricing affects the pricing of the product at issue must be included in the product market.

There is little doubt (and no disagreement from us) that the pull through opportunities have a significant effect on the price that labs should, and are, willing to bid for IPA business.

Unquestionably, IPAs whose member physicians send the capitated lab provider a larger volume of higher-priced, non-delegated patient referrals would logically receive lower bids from labs for their capitated business. So the facts underlying the “Pull Through Affects Pricing!” argument were not meaningfully in dispute. The implication to draw from that acknowledged reality is where the dispute lies.

We believe that there is no legal or economic basis for concluding that a product that affects the pricing of the product at issue, as pull through unquestionably does, necessarily means those products are in the same market. Indeed, with any given product, the prices and sales volume of inputs and complements for that product are likely to affect the prices of that

blood drawn) that offers convenient access to all of the IPA’s members. Scale is also necessary to bear the utilization risk associated with capitation, as risk is easier to bear when spread across a larger revenue base. Scale also drives lower per-test costs that allows a lab to price capitated IPA business competitively with the largest of the southern California labs – LabCorp and Quest.



product yet, normally, sound antitrust principles would not include these input/complement products (and the product itself) in a single relevant product market. Thus, with regard to lab services, it is clear that changes in the pricing of syringes (an input) or the number of syringes required to perform a test would likely affect the pricing of lab services. Similarly, if a cosmetic procedure that required lab testing (a complement) became much less expensive and hence much more common, it would likely affect the demand for lab services and likely affect the profit maximizing price for lab services. Yet no one would contend that syringes or cosmetic procedures should be included in the relevant market used to assess competition between lab service providers like LabCorp and Westcliff (and the suppliers of these inputs and complements counted as market participants).¹⁵ Plainly the fact that other products affect the price of the product at issue does not compel their inclusion in a common product market.

Pull through is analogous to a negative cost of supplying capitated lab services. It provides value to the lab that wins a capitated IPA contract. We describe pull through as a ‘negative’ cost because it works just like, but in the opposite direction as, an input cost. Pull through makes suppliers willing to charge less

for capitated lab services than they otherwise would charge strictly based on competition for capitated lab services, just as an increased input cost for syringes would (all things being equal) make suppliers more likely to charge higher prices for capitated lab services. But for the same reason that inputs are not ordinarily included in antitrust markets even though their prices affect pricing in antitrust markets, pull through sales should not be included in the relevant market with capitated lab services.

LabCorp’s assertion that *Kentmaster Mfg. Co. v. Jarvis Prods. Corp.*, 146 F.3d 691 (9th Cir. 1998), supports its “Pull Through Affects Pricing!” argument is incorrect. *Kentmaster*, which is part of a line of Sherman Act cases that followed in the wake of the Supreme Court’s decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), addresses whether slaughterhouse equipment and the proprietary replacement blades for that equipment are in the same relevant product market. Critically, the *same customers* – meat processors – purchased both products. The dispositive product market point was whether a single transaction effectively encompassed the purchase of both of the products. The Ninth Circuit determined that the slaughterhouse equipment replacement blades should be in the same market as the slaughterhouse equipment itself precisely because, in purchasing slaughterhouse equipment for which there was only one legal supplier of blades, the meat processors were essentially buying both products at the time they made the initial purchase of the equipment. In *LabCorp*, *separate customers* – IPAs, on one hand, and health plans and patients, on the other hand – purchase the products alleged to be in the same market, and these disparate purchasers do so in unrelated transactions. Rather than rationally considering after-sale purchases at the time of the initial purchases, as the meat processors did

¹⁵ To highlight this point with regard to complements, consider peanut butter and jelly. If peanut butter and jelly are complements, and the price of jelly increases, a peanut butter monopolist will, all other things being equal, reduce the price of peanut butter. This occurs because a higher price for jelly results in lower jelly sales, and because peanut butter and jelly are complements, lower sales of jelly also means lower demand for peanut butter. In the face of lower demand for peanut butter, to continue to maximize its profits, the peanut butter monopolist will lower its prices. Does this mean that the relevant market in which to evaluate a proposed acquisition by the peanut butter monopolist of a likely entrant into peanut butter sales should include jelly suppliers? Of course not.



in *Kentmaster*, the pricing given to the health plans or individuals is irrelevant to IPAs when selecting a capitated lab services provider.

LabCorp also argued that footnote 4 in the Horizontal Merger Guidelines supports its “Pull Through Affects Pricing!” argument for including sales to health plans and patients in the same product market with sales to IPAs.¹⁶ At least to us, the analysis described by footnote 4 and the set of circumstances to which it applies is less than clear, making it difficult to demonstrate that it does or does not support a particular argument. The fairest reading of the footnote – as supported by the example contained in it – is that footnote 4 is designed to address markets where purchasers buy a capital good and subsequent follow-on service or replacement parts. The footnote advises that in such markets, the agencies should not ignore the fact that firms serving the same customers might adopt different pricing strategies with regard to the capital good and related follow-on purchases that could obscure the closeness of competition. For example, there may be significant diversion ratios between two suppliers, call them A and B, of inkjet printers, despite the suppliers having divergent business strategies where supplier A

elects to sell expensive printers but cheap ink cartridges,¹⁷ and supplier B chooses to practically give its printers away but price its proprietary ink cartridges like they are packaged in caviar. Footnote 4 seeks to avoid the mistake of putting A and B’s printers into different product markets by focusing only on the dramatic differences in the prices of the printers themselves. Like *Kentmaster* and its case law brethren, footnote 4 deals with situations where the same customers buy related products in related transactions, such that they are effectively buying both products at the same time. As described above, IPAs are a distinct customer group relative to health plans and patients and pull through simply is not part of IPAs’ decision matrix when purchasing lab services.¹⁸

Ultimately, the link between the value of pull through and capitated pricing does not imply that horizontal competition between suppliers of the output product does not also affect the price for capitated lab services, or mean that a monopolist provider of capitated lab services would price at the same level that would result if multiple labs are competing for capitated business. Hence, the link does not imply that lab services sold to health plans and patients belong in the same relevant market as capitated sales to IPAs. The easiest way to confirm that competition among the suppliers of capitated lab services mattered – even in the presence of the

¹⁶ Footnote 4 states:

“If the pricing incentives of the firms supplying the products in the candidate market differ substantially from those of the hypothetical monopolist, for reasons other than the latter’s control over a larger group of substitutes, the Agencies may instead employ the concept of a hypothetical profit-maximizing cartel comprised of the firms (with all their products) that sell products in the candidate market. This approach is most likely to be appropriate if the merging firms sell products outside the candidate market that significantly affect their pricing incentives for products in the candidate market. This could occur, for example, if the candidate market is one for durable equipment and the firms selling that equipment derive substantial net revenues from selling spare parts and service for that equipment.”

Horizontal Merger Guidelines § 4.1.1 n.4.

¹⁷ Alternatively and with similar effect, supplier A could allow many firms to compete to offer low-price ink cartridges that are compatible with its printers.

¹⁸ In addition, the conditional statement at the outset of footnote 4 makes clear that it only applies in a situation where the pricing incentives of the suppliers of the relevant product differ from that of the hypothetical monopolist of that product. Here, the pull through effect and related pricing incentive applies equally to a hypothetical monopolist of capitated lab services and any existing suppliers.



pull through dynamic – is to examine the documentary evidence. Although the precise language and content of that material is confidential, we certainly believed that it revealed distinct and explicit competition for capitated lab services.¹⁹

The Tests are the Same! – Is Defining Markets Really This Easy?

LabCorp's the "Tests are the Same!" argument amounts to an effort to elevate one of the *Brown Shoe* "practical indicia" of a market into a dispositive test.²⁰ Plainly, the "Tests are the Same!" approach to market definition offers the attraction of simplicity (bright-line tests are always appealing); all one has to do is to identify all commerce involving the same product or service and the product market is defined. The problem is that it fails to provide the right answer a significant portion of the time.²¹ The fact that a product or service is the same clearly militates in favor of including

¹⁹ See *In the Matter of Lab. Corp. of Am. et al.*, File No. 101-0152, Administrative Complaint (Dec. 1, 2010), available at <http://www.ftc.gov/os/adjpro/d9345/101201lapcorpcompt.pdf>.

²⁰ See *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325 (1962).

²¹ In addition to the problem of erroneously defining overly broad markets here, the "Tests are the Same!" approach to market definition can also result in improperly excluding products that are different (physically or otherwise) than those offered by the merging parties but that should be included in the same relevant market because customers perceive them as readily substitutable if the price of the merging parties' products were to increase by a SSNIP. For example, if two sellers of ball point pens sought to merge, customers might consider fountain pens to be a sufficiently close substitute such that fountain pens would appropriately be included with ball point pens in one relevant product market. Applying a "Tests are the Same!" approach would erroneously exclude fountain pens from the antitrust market because they are not physically identical to ball point pens.

those sales in the relevant market, no question, because one would generally expect "sameness" to correlate to cross elasticity of demand. But identifying that fact alone is insufficient for determination of the relevant market analysis, particularly where prices vary widely among customer types.²²

It is always the case that a relevant product market may be defined by a portion of the customers of a product or service who may be profitably targeted for a price increase by a monopoly supplier of that product. If such a group of customers exists, it likely describes a relevant antitrust market. *Horizontal Merger Guidelines*, § 4.1.4. The Supreme Court recognized this in 1962 – "distinct customers, distinct prices, sensitivity to price changes, and specialized vendors" are listed among *Brown Shoe's* "practical indicia" of a market. *Id.* Most courts have implemented this analysis correctly and declined to accept the argument that all sales of a product or service must be in the same product market when there is evidence of a distinct customer group that may be targeted due to its unique requirements or characteristics or preferred sales channel.²³ In *LabCorp*, the

²² The fact that products are similar may also be relevant to supply-side substitution, which is typically analyzed in the identification of market participants and the analysis of competitive effects and entry. *Horizontal Merger Guidelines* § 4. Regardless of the analytical framework applied, complaint counsel alleged that the evidence demonstrated that other labs would not or could not begin to provide capitated lab services on a scale or time frame sufficient to defeat or deter the anticompetitive effects of the transaction.

²³ See *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028 (D.C. Cir. 2008) (premium natural and organic supermarkets may be a relevant product market even though many of items they sell are available at a variety of other stores); *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005) (leisure and business airline passengers may be separate markets even though they travel in the same class of seats on the same flights); *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997)



evidence was uniform and uncontroverted that capitated sales to IPAs were made at very distinct prices and with distinct non-price terms relative to sales to health plans or patients. Sales to IPAs were also made through unique negotiations handled by dedicated lab sales staffs. Given this evidence, “The Tests are the Same!” argument may have sufficed as a starting point, but ultimately it is a misleading argument that should have been abandoned in favor of a richer analysis focused on, among other things, principles of cross-elasticity.

Conclusion

What’s the takeaway here? To us, *LabCorp* reinforces a challenge that complaint counsel recognized from the outset of preparing the case – complex and unusual fact patterns increase the agency’s litigation risk. It is far easier for defendants to obfuscate complex facts than it is for complaint counsel to simply and clearly explain them, particularly in the context of an (appropriately) abbreviated preliminary injunction action. The case also highlights the utility of subordinating technical product market analysis when evidence that is consistent only with an anticompetitive effect (so-called “direct effects” evidence) is available, as it was here.²⁴ At the very least, there should be some reconciliation between that evidence and the relevant product market analysis, a task the District Court never expressly undertook in its written decision. Notwithstanding that particular disappointment, we hope that this piece serves to spark some discussion of the

unusual fact pattern in *LabCorp* and the particular challenges confronted by practitioners on both sides of merger matters in defining proper relevant markets when complex fact patterns arise.

(consumable office supplies sold through office superstores constitute distinct market even though identical reams of paper are sold through dozens of others channels).

²⁴ See Horizontal Merger Guidelines §§ 2.2.1, 4; *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1045-47 (D.C. Cir. 2008).