

**Antitrust II (Spring 2022)**

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**Syllabus**

**Welcome to Antitrust II**

This course examines advanced topics in antitrust law. Specific topics include vertical restraints, criminal enforcement, innovation markets, exemptions and immunities, the territorial scope of U.S. antitrust law, and remedies. We will examine Supreme Court doctrine, influential modern lower court decisions, and government enforcement guidelines. Economic concepts and thinking characteristic of modern antitrust analysis are integrated throughout the course. **No background in economics beyond what you learned in Antitrust I is necessary or assumed.**

**Antitrust I is a prerequisite for this course. L.L.M. students may seek a waiver of this requirement.**

**Class:** We will meet on **Tuesdays and Thursdays from 9:50 am to 11:50 am.**

**Office Hours:** I am available via remote appointment and email.

**Casebook:** Andrew I. Gavil, William E. Kovacic, Jonathan B. Baker, and Joshua D. Wright, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* (2016) (3rd Edition).

We will also read recent cases, enforcement agency guidelines, scholarly commentary, and other supplementary materials that I will post on TWEN or that are otherwise available on the web.

**Grading:** The final exam will account for 100% of your grade, subject to a discretionary class participation adjustment of 1/3<sup>rd</sup> of a grade in **either** direction. **You should come to class having read and thought about the material, and ready to participate in the discussion.**

**Final Exam:** The final exam is scheduled for May 6 at 12:00 PM. There is no make-up exam.

**Final Exam Permissible Materials:** Open book; your own notes; no commercial publications.

**Tentative Syllabus:** We may deviate from the present syllabus with assignments based upon current events or new cases, to accommodate guest speakers, or for other scheduling reasons, etc. Please make sure you are signed up to receive updates via TWEN.

**Learning outcomes:** By the end of the semester, students should:

Be able to analyze antitrust issues from a legal and an economic perspective;

Understand the most prominent antitrust issues of the day;

Be fully conversant with the interplay between antitrust and intellectual property.

## READING ASSIGNMENTS: Part I, Classes 1-10

### Vertical Restraints:

#### **Class 1: Tues. Jan. 18 – Non-Price**

- a. Figures 6-1 and 6-2, Casebook at 898-99
- b. *Sylvania* and notes, Casebook at 902-23
- c. Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, Supplement at 2-16
- d. JD Supra, *The Coty Case – CJEU rules in favour of selective distribution networks against third-party online platforms*, Supplement at 17-20
- e. Reuters, *Canal+ wins court fight against EU, Paramount movie-licensing deal*, Supplement at 21-22

#### **Class 2: Thurs. Jan 20 – Minimum Price**

- a. *Leegin*, Casebook at 923-52
- b. Benjamin Klein, *Competitive Resale Price Maintenance in the Absence of Free-Riding* Supplement at 23-44
- c. Problem 6-1, Casebook at 1090-92

#### **Class 3: Tues. Jan. 25 – Multi-sided Markets**

- a. *Ohio v. American Express* case, Supplement at 45-62.
- b. Wright & Yun: *Ohio v. American Express: Implications for Non-Transaction Multisided Platforms*, Supplement at 63-70
- c. Herbert Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, Supplement at 71-100
- d. Sullivan & Cromwell memo on *Epic Games v. Apple*, Supplement at 101-11

### Antitrust Standing and State Antitrust Law:

#### **Class 4: Thurs. Jan. 27 –**

Hour 1: Antitrust Standing

- a. *Illinois Brick Co.*, Casebook at 1351-61
- b. *Apple v. Pepper*, Supplement at 112-27
- c. Wright & Kobayashi, *What's Next in Apple v. Pepper?*, Supplement at 128-43
- d. *In re NFL Sunday Ticket Antitrust Litigation* (9th Cir.), Supplement at 144-55

Hour 2: State Antitrust Law

- d. *O'Brien v. Leegin Creative Leather Prods., Inc.* (Kan.), Supplement at 156-65
- e. *Partee v. San Diego Chargers* (Cal.), Supplement at 166-68
- f. Richard Posner, *Federalism and the Enforcement of Antitrust Law by State Attorneys General*, Supplement at 169-79
- g. Law 360, *T-Mobile's Promises to States in Merger Fight Called Hollow*, Supplement at 180-81

## Antitrust Exemptions:

### **Class 5: Tues. Feb.1 – First Amendment:**

- a. *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, Supplement at 182-91
- b. *United Mine Workers of Am. v. Pennington*, Supplement at 192-95
- c. *California Motor Transp. v. Trucking Unltd.*, Supplement at 196-99
- d. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, Casebook at 1341-45.
- e. Law 360: 3rd Circuit Limits Scope of FTC Judicial Enforcement Authority, Supplement at 200-03
- f. *FTC v. Abbvie* (sham petitioning excerpt), Supplement at 204-22
- g. Bryan Cave client note on *AMG Capital v. FTC*, Supplement at 223-225
- h. *FTC drops antitrust case against Abbvie, but still decries the company's 'ill-gotten gains'*, Supplement at 226-27

### **Class 6: Thurs. Feb. 3 (Class ends at 11:30) – Relation to Other Federal Laws:**

- a. Note on Antitrust Federalism, Casebook at 1303-06
- b. *Brady v. Nat'l Football League*, Supplement at 228-237
- c. *USS-POSCO Indus. v. Contra Costa Cty. Bldg. & Const. Trade Council*, Supplement at 238-43
- d. Sanjukta Paul, *The Antitrust Case for Gig Worker Rights*, Supplement at 244-46
- e. *Credit Suisse v. Billing*, Supplement at 247-53
- f. Douglas H. Ginsburg & Daniel Haar, *Resolving Conflicts Between Competition and Other Values* (excerpt), Supplement at 254-58

### **Class 7: Tues. Feb. 8 – State Action Immunity:**

- a. Note on State Regulation, Casebook at 1306-10
- b. *Parker v. Brown*, Supplement at 259-63
- c. Phoebe Putney, Casebook at 1310-19
- d. Law360, Uber, Chamber drop fight over Seattle's driver's union law, Supplement at 264-65

### **Class 8: Thurs. Feb. 10 (Class ends at 11:30) – State Action Immunity, continued:**

- a. *North Carolina Dental*, Casebook at 1319-32
- b. *Teladoc, Inc. v. Texas Medical Board*, Supplement at 266-73
- c. FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants (2015), Supplement at 274-282
- d. GCR: *Don't panic, FTC lawyer tells states after NC Dental*, Supplement at 283-84
- e. Rebecca H. Allensworth, *The New Antitrust Federalism*, Supplement at 285-92
- f. Joseph M. Miller, *Comments on Competition in Healthcare & Certificates of Need*, Supplement at 293-301
- g. Dissenting Statement of Commissioner Brill, Supplement at 302-306
- h. Wall Street Journal, *For Hospital Chains, Competition is a Bitter Pill*, Supplement at 307-309

## International Antitrust:

### **Class 9: Tues. Feb. 15 – Foreign Trade Antitrust Improvements Act (FTAIA)**

- a. Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, Supplement at 310
- b. *Hartford Fire*, Casebook at 1262-70

- c. *Empagran*, Casebook at 1271-82
- d. *Minn-Chem, Inc. v. Agrium, Inc.*, Supplement at 311-27
- e. *Motorola Mobility LLC v. AU Optronics Corp.*, Supplement at 328-39
- f. *In re Capacitors Antitrust*, Supplement at 340-347

**Class 10: Tues. Feb. 17– International Comity and Cooperation**

- a. Note on Act of State doctrine, Sovereign Immunity, and Comity, Casebook 1282-88
- b. Davis Polk client letter re: Vitamin C Antitrust Litigation, Supplement at 352-59.
- c. *Animal Science Products, Inc. v. Hebei (In re Vitamin C Antitrust Litigation)*, 585 U.S. \_\_\_, 138 S. Ct. 1865 (2018) (Syllabus), Supplement at 360-62.
- d. *In re Vitamin C Antitrust Litigation* (2d Cir.), Supplement at 363-391
- e. Edward Swaine, *Cooperation, Comity, and Competition Policy: United States*, Supplement at 392-98
- f. Pallavi Guniganti, *Courts Are Wrong Audience for Comity Arguments, Says Judge Wood*, GLOBAL COMPETITION REVIEW, Supplement at 348-51.
- g. Note on International Convergence, Casebook 1288-91.
- h. ABA Presidential Transition Report (International Section), Supplement at 399-406
- i. Hollman & Kovacic, *The International Competition Network: Its Past, Current and Future Role*, Supplement at 407-14

## READING ASSIGNMENTS: Part II, Classes 11-14

### Antitrust Remedies:

#### **Class 11: Tues. Mar. 1 – Criminal Enforcement: Cartels and Compliance**

- a. Gregory Werden, Scott Hammond, Belinda Barnett, *Deterrence and Detection of Cartels* (2012), Supplement at 415-435.
- b. DOJ Press Release Concerning Changes to the Division’s Carve-Out Practice, Supplement at 436-37.
- c. Douglas H. Ginsburg and Joshua Wright, *Antitrust Sanctions*, Supplement at 438-57 [Note: The Appendix at Supplement pages 458-474 is optional].
- d. Faegre Drinker, *New Antitrust Whistleblower Statute May Enhance Criminal Enforcement Efforts*, Supplement at 475-77.
- e. Morgan Lewis LLP, *Global Cartel Enforcement Report 2021*, Supplement at 478-83.
- f. DOJ Antitrust Division, Assistant Attorney General Makan Delrahim Delivers Remarks “Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs” (July 2019), Supplement at 484-90.
- g. DOJ Antitrust Division, *Criminal Enforcement Trends Charts (through FY2021)*, Supplement at 491-92.
- h. European Commission, *Cartel Statistics 2017-2021*, Supplement at 493-502.

#### **Class 12: Thurs. Mar. 3 – Criminal Enforcement: Sentencing and Wage-fixing**

- a. CPI, *25 Years of Leniency Programs: A Turning Point in Cartel Prosecution*, Supplement at 503-15.
- b. John Taladay, *Time for a Global “One-Stop Shop” for Leniency Markers*, Supplement at 516-22.
- c. Douglas H. Ginsburg and Cecilia (Yixi) Cheng, *The Decline in U.S. Criminal Antitrust Cases: ACPERA and Leniency in an International Context*, Supplement at 523-547.
- d. Criminal sanctions; *Hoffman-LaRoche* sentencing submission, Casebook pp. 1371-76
- e. *United States v. VandeBrake*, Supplement at 548-60
- f. Plea Agreements with Antitrust Division Post-VandeBrake, Law360, Supplement at 561-64.
- g. Albert Foer, Douglas H. Ginsburg, Robert Lande, and Joshua Wright, *How DOJ Can Fix the Price Fixers*, USA TODAY (May 29, 2015), Supplement at 565-66
- h. Pallavi Guniganti, *DoJ Alumni Assail Ginsburg, Wright, Foer and Lande Proposal*, GLOBAL COMPETITION REVIEW, Supplement at 567-71.
- i. Gov.uk, *Pharma company director disqualified for competition law breaches*, Supplement at 572-74.
- j. DOJ/FTC, *Antitrust Guidance for H.R. Professionals* (Oct. 2016) – excerpt, Supplement at 575-79.
- k. Latham and Watkins, *DOJ’s First Criminal Charges for Wage-Fixing and No-Poach Labor Agreements: 6 Key Takeaways*, Supplement at 580-86.
- l. Koenig, *DOJ Wants to Build on DaVita Win in No-Poach Cases*, LAW 360, Supplement at 587-89.

#### **Class 13: Tues. Mar. 8 – Civil Remedies**

- a. *Nat’l Soc’y Prof’l Eng’rs*; note on treble damages, Casebook pp. 1376-1397
- b. Excerpt of Complaint in *United States v. Google, Inc.* (the Google/ITA case, 2011), Supplement at 590-92.
- c. Press Release for Google-ITA Consent Decree, Supplement at 593-94.

- d. *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021), Supplement at 595-604.
- e. Douglas H. Ginsburg & Joshua Wright, *Antitrust Settlements: A Culture of Consent*, Supplement at 605-17.

### **Antitrust and High Tech Markets**

#### **Class 14: Thurs. Mar. 10 – Section 2 in *Microsoft* and in challenging consummated mergers**

- a. Casebook pp. 1095-1111.
- b. *United States v. Microsoft*, Casebook pp. 525-559; 1190-94.
- c. Douglas H. Ginsburg & Koren Wong-Ervin, *Challenging Consummated Mergers under Section 2*, Comp. Pol’y Int’l, Supp. at 618-27.
- d. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 Univ. Penn. L. Rev. 1879 (2020), Supplement at 628-36.
- e. *FTC v. Facebook*, Complaint, Supp. at 637-75

## READING ASSIGNMENTS: Part III, Classes 15-20

**Tues. Mar. 15 – No Class – Spring Recess**

**Thurs. Mar. 17 – No Class – Spring Recess**

### **Class 15: Tues. Mar. 22 – Emerging issues in high tech**

- a. *United States v. Google*, Complaint, N.D. Cal. (2020), Supp. at 676-713
- b. Thom Lambert, *Why the Federal Government’s Antitrust Case Against Google Should – and Likely Will – Fail*, Truth on the Market, Supp. at 714-19
- c. Lawrence J. White, *US v. Google: A Tough Slog, But Also An Intriguing Possibility*, Regulation, Supp. at 720-23
- d. *Google and Alphabet v. Commission*, EGC Decision (2021), Supp. at 724-39
- e. Ryan Bourne & Brad Subramaniam, *The “Big Tech” Self-Preferencing Delusion*, CATO, Supp. at 740-48
- f. Sam Bowman, *U.S. Senate Self-Preferencing Bill Offers Perfect Recipe for Regulatory Overreach*, Truth on the Market, Supp. at 749-51

### **Class 16: Thurs. Mar. 24 – FTC rulemaking and Precautionary Antitrust (Guest speaker Aurelien Portuese in the second hour)**

- a. *Nat’l Petrol. Refiners Ass’n v. FTC*, Supp. at 752-78
- b. Khan and Chopra, *The Case for Unfair Methods of Competition Rulemaking*, CHICAGO L. REV., Supp. at 779-801
- c. Maureen Ohlhausen & James Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking*, Chamber of Commerce Report, Supp. at 802-19

### **Antitrust and Intellectual Property:**

#### **Class 17: Tues. Mar. 29 – Patents and Standard Setting**

- a. Overview of the Patent System – Selected readings from CHISUM ON PATENTS, Supplement at 820-29.
- b. Casebook pp. 1148-59.
- c. Intellectual Property and Standard Setting, Note by U.S. to OECD Competition Committee, Supplement at 830-37.
- d. *Broadcom Corp. v. Qualcomm Inc.*, Casebook pp. 1223-36.
- e. *Rambus v. FTC*, Supplement at 838-42.
- f. Covington Client Alert, European Court of Justice’s Judgment in *Huawei v. ZTE*, July 21, 2015, Supplement at 843-45.

**Thurs. Mar. 31 – No Class**

#### **Class 18: Tues. Apr. 5 – The SEP Holdup Issue**

- a. Statement of the FTC, *In re Google (Motorola Mobility)*, Supp. at 849-53.
- b. GCR: Huawei rejects IEEE policy for some ethernet patents (May 20, 2019), Supplement at 854-56.
- c. Intellectual Asset Management, *IEEE opens review of controversial patent policy* (Feb. 25, 2021), Supp. at 857.

- d. Douglas H. Ginsburg, Taylor Owings, and Joshua Wright, *Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunctions*, Supp. at 858-64.
- e. Gregory Sidak, *Is Patent Holdup a Hoax?*, CRITERION J. INNOV (2018) (excerpt), Supplement at 865-94.
- f. Makan Delrahim, *New Madison Approach* speech 2018, Supp. at 895-909.
- g. Letter to USPTO from Ericsson, Nokia, Philips, and Qualcomm, *RE: Promote R&D spending and long-term investments in innovation*, Supp. at 910-16.
- h. Apple, tech firms urge PTO to not change course of standards-essential patents (Reuters article and Apple letter to PTO) (April 2019), Supp. at 917-18.
- i. Douglas H. Ginsburg, Joshua Wright, & Camila Ringeling, *Growing Convergence: The Limited Role of Antitrust in Standard Essential Patent Disputes*, CPI, Supp. at 919-34.
- j. DOJ-PTO-NIST Joint Statement: Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (2021), Supp. at 935-45.
- k. Comment of the Global Antitrust Institute, On DOJ-PTO-NIST Draft Policy Statement (2022), Supp. at 946-55.

**Thurs. Apr. 7 – No Class**

**Class 19: Tues. Apr. 12 – Pay for Delay, a/k/a Patent Settlements**

- a. *Fed. Trade Comm’n v. Actavis, Inc.*, Casebook pp. 1163-75.
- b. Agreements Filed with the FTC under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, FY2017 Overview, Dec. 2020, Supp. at 956-61.
- c. *In re Impax Labs., Inc.*, (5th Cir. 2021), Supp. at 962-86.
- d. Damien Geradin, Douglas H. Ginsburg, and Graham Safty, *Reverse Settlements in the European Union and the United States*, Supp. at 987-1024
- e. GCR, *First EU pay-for-delay fines survive ECJ challenge*, Supp. at 1025-27.

**Class 20: Thurs. Apr. 14 – “Product Hopping”**

- a. *New York ex rel. Schneiderman v. Actavis PLC*, Supplement at 1028-38.
- b. *Mylan Pharma. Inc. v. Warner Chilcott PLC*, Supplement at 1039-46.
- c. Dennis Carlton & Yoad Shefi, *A Critical Evaluation of the FTC’s Theory of Product Hopping as a Way to Promote Competition*, Supplement at 1047-54.
- d. Douglas H. Ginsburg, Koren Wong-Ervin, & Joshua Wright, *Product Hopping and the Limits of Antitrust: The Danger of Micromanaging Innovation*, Supplement at 1055-59.
- e. Michael Carrier & Steve Shadowen, *Product Hopping: A New Framework*, Supplement at 1060-68.
- f. Timothy Muris & Jonathan Nuechterlein, *Generic Drugs, Used Textbooks, and the Limits of Liability for Product Improvements*, CRITERION J. INNOV (2019), Supplement at 1069-83.

**FINAL EXAM: May 6, 2022 at 12:00 P.M.**