

Antitrust One: Principles
Fall, 2023, 156-002
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Introduction: This course examines the laws that protect consumers by ensuring competition in the marketplace. Specific topics include agreements among competitors, joint ventures, mergers, and monopolization. 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.

The class is intended for those meeting antitrust for the first time: there will be some economics, but no prior knowledge or training in economics or business is required. A willingness to grapple with some competitive microeconomics is all you need.

Learning Outcomes: By the end of the course, you should be able to:

- Understand the goals of antitrust, its basic institutions, and enforcement structures.
- Understand the antitrust laws and enforcement policies governing horizontal mergers, including Section 7 of the Clayton Act, the 2010 Horizontal Merger Guidelines, and the 2020 Vertical Merger Guidelines (or any updated versions of the relevant guidelines).
- Understand the antitrust laws and enforcement policies governing horizontal restraints of trade, including Section 1 of the Sherman Act.
- Understand the antitrust laws and enforcement policies governing monopolization and vertical restraints of trade, including Section 1 and Section 2 of the Sherman Act.

Class: This course meets Tuesday and Thursday from 8:10 pm to 9:35 pm.

Pursuant to Academic Regulation 4-2.2, no portion of a class session or an examination may be preserved by means of a recording device such as an audio recording device or camera. Any exceptions to this policy must be expressly permitted in writing by one of the instructors.

Office Hours: I have none. Please email me if you would like to discuss the class or matters related to the class. You can also catch me before or after class. I am generally accessible, but I do not have office hours because I do not have an office at the law school.

Textbook: Daniel Francis & Christopher Jon Sprigman, ANTITRUST LAW: PRINCIPLES, CASES, AND MATERIALS (2023), a free text that you can download or access from www.antitrustcasebook.org, or print on demand at cost from Amazon Kindle Direct Publishing.

PART ONE: FOUNDATIONS

Class 1: Introduction **READ Chapter I**

- Course overview
- Foundations of U.S. antitrust
- Some orienting questions

Class 2: Antitrust Economics **READ Chapter II**

- Supply and demand; static and dynamic competition; monopoly; and oligopoly
- Some key concepts: substitutes, complements, horizontality, and verticality

Class 3: Market Definition & Market Power I **READ § III.A & B**

- Introduction to markets and market power
- Substitutability and ways of measuring it
- The Hypothetical Monopolist Test (HMT) and *Brown Shoe*

Landmark cases: *DuPont* (the “Cellophane fallacy”); *Brown Shoe* (qualitative market definition); *Herbst-R Block* (market definition applied)

Class 4: Market Definition & Market Power II **READ § III.C to F]**

- Special cases: bundles, clusters, price discrimination, and platforms
- Geographic markets
- Market power and oligopoly

Landmark cases: *Staples / Office Depot I* (market definition applied); *AmEx* (market definition in platform cases); *Whole Foods* (price discrimination)

PART TWO: ANTITRUST’S THREE PILLARS

Class 5: Agreements I **READ § IV.A & B**

- One entity or several?
- The concept of agreement

Landmark cases: *Copperweld* (parent-subsidary collusion); *American Needle* (single entity standard); *Monsanto* (definition of agreement); *Matsushita* (inference of agreement at summary judgment)

Class 6: Agreements II **READ § IV.C.1**

- Thinking further about agreement—reviewing *Monsanto*, *Matsushita*, and *Twombly*
- Section 1’s standards of legality part 1: the *per se* rule

Landmark cases: *Twombly* (plausibility of agreement at MTD); *Text Messaging* (inference of conspiracy); *Socony-Vacuum* (price fixing)

Class 7: Agreements III **READ § IV.C.2 & C.3**

- Section 1’s standards of legality part 2: rule of reason and “quick look”

Landmark cases: *Professional Engineers* (what benefits count under the rule of reason?); *Alston* (unreasonable restraints in a legitimate JV); *Board of Regents* (intermediate scrutiny)

Class 8: Horizontal Agreements I READ § V.A & B

- Price fixing and market division
- Group boycotts and hub-and-spoke conspiracies

Landmark cases: *Palmer* (market division); *Northwest Stationers* (boycotts); *Apple e-books* (hub-and-spoke)

Class 9: Horizontal Agreements II READ § V.C

- The per se / rule of reason boundary

Landmark cases: *Topco* (competitor collaboration condemned as *per se* illegal); *BMI* (joint product); *Todd* (information sharing)

Class 10: Horizontal Agreements III READ § V.D

- The quick look / rule of reason boundary

Landmark cases: *IFD* (clarifying (?) the boundaries of quick look); *California Dental* (advertising restraints not subject to quick-look)

Class 11: Vertical Agreements I READ § VI.A. to C

- The interbrand / intrabrand distinction
- Nonprice distribution restraints
- Resale price maintenance

Landmark cases: *GTE Sylvania* (exclusive distribution territories); *Leegin* (minimum resale price maintenance)

Class 12: Vertical Agreements II READ § VI.D. to G.

- Exclusivity and tying
- MFNs

Landmark cases: *Tampa Electric* (exclusivity); *Jefferson Parish* (tying)

Class 13: Monopolization I READ § VII.A to C.2

- Monopoly power
- The idea of exclusion
- Contribution to monopoly power

Landmark cases: *Facebook* (monopoly power); *Dentsply* (exclusion) *Microsoft* (contribution to monopoly)

Class 14: Monopolization II READ § VII.E to G.1

- Refusal to deal and the freedom (?) of the monopolist
- Justification
- Exclusivity

Landmark cases: *Aspen Skiing* (refusal to deal); *Trinko* (refusal to deal); *McWane* (exclusivity)

Class 15: Monopolization III READ § VII.G.2 & G.3

- Tying
- Pricing practices: predation and price squeeze

Landmark cases: *Microsoft* (again) (monopoly maintenance through various complementary practices); *Brooke Group* (predation); *Linkline* (price squeeze)

Class 16: Monopolization IV READ § VII.G.4. to H

- Bundling
- Monopolization miscellany: abuse of process, misrepresentation. and torts; attempt
- Group exercise on Section 1 & Section 2

Landmark cases: *LePage's* (bundling); *Cascade Health* (bundling); *Walker Process* (fraud on the PTO)

Class 17: Mergers I READ § VIII.A. to B.2.(a)

- Intro to merger review
- Horizontal mergers: theories of harm; the structural presumption and beyond

Landmark cases: *Philadelphia National Bank* (structural presumption); *Baker Hughes* (modern burden-shifting approach); *Staples / Office Depot II* (beyond the presumption)

Class 18: Mergers II READ § VIII.B.2.(b) to B.2.(d)

- More horizontal mergers (including coordinated effects, nascent and potential competition, entry and expansion)

Landmark cases: *H&R Block* (successful coordinated effects showing); *Yamaha Motor* (potential competition)

Class 19: Mergers III READ § VIII.C to D.1

- Vertical mergers
- Efficiencies

Landmark cases: *AT&T* (vertical merger challenge); *Sprint/T-Mobile* (unsuccessful challenge with significant attention to efficiencies)

Class 20: Mergers IV READ § VIII.D.2 & D.3; LIGHTLY SKIM § VIII.E

- EDM
- Failing and flailing firms
- Merger remedies (very briefly)

Landmark cases: *Otto Bock* (failing firm); *General Dynamics* (flailing firm)

PART THREE: ADVANCED TOPICS

Class 21: Immunities and Exceptions READ § IX.A to C; SKIP the rest of Ch. IX

- Petitioning immunity
- State action

Landmark cases: *Professional Real Estate* (petitioning); *Parker* (state-sanctioned cartel); *N Carolina Dental* (occupational regulatory board)

Class 22: Antitrust and IP READ § X.A., § X.B.2, & § X.C; SKIP the rest of Ch. X

- Antitrust and IP policy
- Refusal to license
- Anticompetitive agreements

Landmark cases: *CSU* (refusal to license); *Qualcomm* (“no license no chips”); *Actavis* (“pay for delay”)

Class 23: Government Enforcement I READ § XI.A to D

- The Federal Trade Commission
- The U.S. Department of Justice Antitrust Division

Landmark cases: *du Pont* (Section 5 UMC)

Class 24: Government Enforcement II READ § XI.E to H

- State AGs
- Injunctive remedies

Landmark cases: *Microsoft* (structural relief in monopolization cases); *Shkrelil* (lifetime industry ban)

Class 25: Big Tech Antitrust

Class 26: Pre-Exam Review