

Antitrust II: Applications

Spring 2024, 162-001, 002

3 Credits

Bilal Sayyed

Contact Information

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- [Rethinking Antitrust Podcast](#)

Class Times

- Monday, Wednesday
 - Law 162-001: 9:50 – 11:15 AM
 - Law 162-002: 8:10 – 9:35 PM
 - Will try to align the lectures so day and evening classes cover the same material at the same time.

Office Hours

- I don't have an office at the law school.
- Can meet before or after class
- Can meet at law school at a scheduled time
- Can meet at law firm office (DC) at a scheduled time.

Textbook

- No assigned text but consider accessing the free [ABA Antitrust Case Book](#) for some case excerpts.
- Will identify/circulate readings, if not linked to in this syllabus.
- Lots of cases repeat the basic points we will discuss in class, so I am not a stickler for reading specific cases, generally, but there are some important ones.
- For our readings, I have tried to pick newer rather than older cases; these cases are not foundational but discuss the principle from the foundational cases.
- Lots of good casebooks, but few cover most of the material we are going to focus on in Antitrust II.

Learning Outcomes

- Basically, know more antitrust and think more rigorously about antitrust law and policy.
- Initial or better understanding of the antitrust laws: Sherman Act, Clayton Act, Federal Trade Commission Act, and Robinson Patman Act.

Economics

- Good to know, but not a requirement for the course.
- I enjoy the economics of antitrust but my goal is primarily to teach you the law, not the economics.
- But the cases often include economic reasoning.

Taping

- 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 me.

Grading

- The final exam will account for 100% of your grade, subject to a discretionary class participation adjustment of 1/3rd of a grade in either direction.

Class Participation

- I don't like to "lecture." I like to discuss the cases and other materials.
- Thus, you must come to class having read and thought about the material and prepared to participate in discussion.
- The purpose of the lecture is not to review the assigned readings but to use them as a starting point for teaching/learning.

Grading & Class Participation

- I take the bump up / bump down option for class participation seriously.
- I will move the exam grade ranges down to allow me to recognize superior class participation – quality, courage to ask what you do not understand or to take an educated guess, not just quantity (but quantity is okay too).

Classroom Etiquette

- I try to get here on time. Please do the same. It is just a courtesy, to everyone.
- I am not insulted if you come in late but it can be disruptive, and being very late (or leaving very early) counts as an absence.
- If you come in late, sit somewhere where you do not disturb the class.
- If you have to leave early, sit somewhere where your leaving will not disturb the class.

Classroom Etiquette

- I like interaction between/among students. It is okay to have a different view than another student and to express that difference.
- Just don't be disagreeable.
- Don't be a jerk. (Most important rule.)
- I will tell you when I think your answer is wrong/not fully thought out. But I hope I will not be harsh, and if I am you should tell me.

Attendance

- I will take attendance.
- There are rules on attendance – I will follow school policy.
- Don't mess up by not showing up.

Exam Date

- Monday, April 29, 6 pm.
 - Ugh.
- I may make the exam take-home with some flexibility on when you take it.

Exam Content

- I try to cover everything in the course in the exam.
- Open book, open notes, open materials.
- No commercially prepared materials.
- Exam likely to be 3-5 essay questions: fact patterns analyzed/evaluated w/r/t law.
- I do not usually ask policy questions.

Review Session

- I don't like to use a scheduled class for review.
- But, willing to schedule a review for a non-class period, if anyone wants a review.

Slides

- I may or may not use slides in the course.
- If I use slides, I may or may not post them.
- I want you to read the materials not limit yourself to my slides or use the slides as a crutch.
- This syllabus will be posted and shared.

My Goal For You (Beyond Antitrust)

- Learn to read cases, statutes, and other materials and identify what is important for your purpose.
- When you practice, you will consult treatises, hornbooks, articles, legislative history (ugh) etc. but you must learn to read cases and statutes and identify what is relevant for your matter/question.
- Do not rely on someone else's work. Sources other than cases or statutes are not enough.

Topics & Initial Reading Materials

Subject to Change / Time

Mergers

- [2023 Merger Guidelines](#)
 - [15 USC 18](#)

Merger Topics

- History of Merger Guidelines
- Innovation Effects
- Presumptions, Unilateral and Coordinated Effects & Trend Toward Consolidation
- Rebuttals/Defenses
- Monopsony
- Vertical Mergers
- Potential Entrant/Nascent Competition/Future Competition
- Entrenchment/Conglomerate Mergers
- Serial/Cumulative Acquisitions
- Partial Acquisitions
- Platforms

Merger Guidelines

- [1968 Merger Guidelines](#)
- [1982 Merger Guidelines](#)
- [1984 Merger Guidelines](#)
- [1992 Horizontal Merger Guidelines](#)
- [1997 Horizontal Merger Guidelines](#)
- [2006 Commentary on Horizontal Mergers](#)
- [2010 Horizontal Merger Guidelines](#)
- [2020 Vertical Merger Guidelines](#)
- [2020 Commentary on Vertical Merger Enforcement](#)
- [2023 Merger Guidelines](#)

Innovation Effects in Merger Analysis

- US DOJ / FTC [Intellectual Property Guidelines](#) (2017)
 - Section 3.2.2 Technology Markets
 - Section 3.2.3 Research and Development Markets
- Innovation and Product Variety, 2010 Horizontal Merger Guidelines (Section 6.4).
- Innovation and the Assessment of Competitive Effects, [Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace](#) (Chapter 7)
- Sayyed, Non-Price Effects in Mergers, CPI (Jan 2024)

Presumptions, Unilateral & Coordinated Effects & Trend Toward Consolidation

- Guidelines 1-3, 7, 2023 Merger Guidelines
- Evidence of Adverse Competitive Effects, 2010 Horizontal Merger Guidelines
- Targeted Customers and Price Discrimination, 2010 Horizontal Merger Guidelines
- [Complaint](#), US v. JetBlue (Mar 2023)
- [Opinion](#), US v. JetBlue (Jan 16, 2024)

Rebuttals/Defenses

- Rebuttal Evidence, 2023 Merger Guidelines
- Powerful Buyers, 2010 Horizontal Merger Guidelines
- Opinion, US v. JetBlue (Jan 16, 2024) (con't)

Monopsony

- Guideline 10, 2023 Merger Guidelines
- Mergers of Competing Buyers, 2010 Horizontal Merger Guidelines
- Marius Schwartz, [Buyer Power Concerns and the Aetna-Prudential Merger](#) (Oct. 1999)
 - [Complaint](#), US v. Aetna (Consolidation of Purchasing Power Over Physician Services) (June 1999)
 - [Complaint](#), US v. Cargill (July 1999)
- Marinescu & Hovenkamp, [Anticompetitive Mergers in Labor Markets](#)

Vertical Mergers (1)

- 2020 Vertical Merger Guidelines
- Guidelines 5, 7, 2023 Merger Guidelines
- Commentary on Vertical Merger Enforcement (2020)
- [Complaint](#), US v. AT&T/Time Warner
- U.S. v. AT&T, 916 F.3d 1029 (D.C. Cir. 2019)
 - U.S. v. AT&T, 310 F. Supp. 3d 161 (D.D.C. 2018) (supplemental reading)
- [FTC Administrative Complaint](#), In the Matter of Microsoft/Activision (Dec. 8, 2022)
- FTC v. Microsoft, 2023 WL 4443412 (July 10, 2023)
- Rethinking Antitrust Podcast, [Vertical Mergers](#) (supplement)

Vertical Mergers (2)

- [Complaint](#) & [Settlement](#), Cadence Design Systems (FTC, 1997)
- [Complaint](#) & [Competitive Impact Statement](#), Google/ITA
- [Complaint](#), [Analysis to Aid Public Comment](#) & [Settlement](#), Boeing/Hughes
- [Complaint](#), [AAPC](#) and [Settlement](#), Broadcom/Brocade

Potential Entrant (1)

- Section II, B (Identification of Firms that Produce the Relevant Product) & Section IV, A (Elimination of Specific Potential Entrants), 1982 Merger Guidelines
- Section 5.1, Market Participants, 2010 Horizontal Merger Guidelines
- Guideline 4, 2023 Merger Guidelines
- US v Penn-Olin Chemical, 378 US 158 (1964)
- US v Penn-Olin Chemical, 246 F. Supp 917 (D. Del. 1965)
- US v Penn-Olin Chemical, 88 S. Ct. 502 (1967)
- US v. Marine Bancorp, 418 US 602 (1974)

Potential Entrant (2)

- [Amended Complaint for TRO and Preliminary Injunction](#), FTC v. Meta Platforms (July 27, 2022)
- FTC v. Meta Platforms, 654 F. Supp. 3d 892 (N.D. Cal. 2023)
- Rethinking Antitrust Podcast, [Should Revised Merger Guidelines Address Potential and Nascent Competition?](#)

Nascent Competition/Future Competition

- [Statement of Muris](#), Statement of [Thompson](#) & [Statement of Harbour](#), Genzyme/Novazyme (Jan. 2004)
- [Complaint](#), [Statement of the Commission](#), and [Dissenting Statement](#), Nielsen/Arbitron (Feb. 24, 2014)
- [Admin Complaint](#), Illumina/PacBio (Dec. 17, 2019)
- [Admin Complaint](#), Illumina/Grail (Mar. 30, 2021)
- Illumina v. FTC, 88 F.4th 1036 (Dec. 15, 2023)
- [Admin Complaint](#), Sanofi/Maze (Dec. 11, 2023)
- United States, [Start-Ups, Killer Acquisitions and Merger Control](#) (Jun 2020)
- United States, [Non-Price Effects of Mergers](#) (Jun 2018)
- United States, [Merger Control in Dynamic Markets](#) (Dec 2019)

Entrenchment / Conglomerate Mergers

- Guideline 6, 2023 Merger Guidelines
- Antitrust Division, [Range Effects, the US Perspective](#) (Oct. 12, 2001)
- United States, [Conglomerate Effects of Mergers](#) (June 4, 2020)
- FTC v. Procter & Gamble, 386 US 568 (1967)
- [Admin Complaint](#), [Complaint](#), [Preliminary Injunction](#), and [AAPC](#), Amgen/Horizon (June 22, 2023)

Serial / Cumulative Acquisitions

- Guideline 8, 2023 Merger Guidelines
- Federal Trade Commission, [Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study](#) (Sep. 2021)
 - Jin, Leccese, Wagman, [M&A and Technological Expansion](#) (Mar. 17, 2023) (supplemental)
 - Jin, Leccese, Wagman, [How Do Top Acquirers Compare in Technology Mergers? New Evidence from an S&P Taxonomy](#) (Oct 31, 2022) (supplemental)
- Complaint & Consent Order, Martin-Marietta Corp., 62 FTC 834 (1963)
- FTC, Enforcement Policy with Respect to Mergers in Dairy Industry: Criteria for Assessing Future Mergers, 38 Fed. Reg. 17770 (Jul. 3, 1973)
- Complaint, St. Regis Paper Company, 68 FTC 57 (1965)
- Note by the United States, [Serial Acquisitions and Industry Roll-Ups](#) (Dec. 4, 2023)

Partial OwnerShip / Minority Interests

- Guideline 11, 2023 Merger Guidelines
- Section 13, 2010 Horizontal Merger Guidelines
- [Complaint](#), US v. Northwest Airlines/Continental Airlines (Oct. 1998) (unilateral/diversion)
- [Complaint](#) and [AAPC](#), Medtronic/Physio-Control (Dec 1998) (influence).
- [Complaint](#) and [AAPC](#), Hoechst AG/Rhone Poulenc (Dec 1999, Jan 2000) (coordination) (cellulose acetate)
- FTC Blog, [What's the Interest in Partial Interests](#) (May 2016)
- United States, [Common Ownership by Institutional Investors and Its Impact on Competition](#) (Dec. 6, 2017)
- United States, [Antitrust Issues Involving Minority Shareholding and Interlocking Directorates](#) (Feb. 2008)

Platform Markets

- Guideline 9, 2023 Merger Guidelines
- [The Antitrust Economics of Two-Sided Platforms](#) (David Evans)
- United States, [Roundtable on Two-Sided Markets](#) (June 2009)
- [Disaggregating Market Definition](#) (Daniel Francis and Jay Ezrielev) (2019)
- [Platform Annexation](#) (Susan Athey, Fiona Scott-Morton)
- United States, [Theories of Harm for Digital Mergers](#) (June 2023)
- [Video](#), Economics of Multi-Sided Platforms (David Evans) and Network Effects in Multi-Sided Platforms (Catherine Tucker) (Oct 15, 1978) (filmed at Law School) (starts about 18 minutes into the video)

Platform Markets (2)

- US v. Visa, 344 F.3d 229 (2d Cir. 2003)
- Ohio v American Express, 138 S. Ct. 2274 (2018)
- [Complaint](#), US v. Google (AdTech) (2023 (download complaint))

Interlocking Directorates

- [15 USC 19](#)
- [Jurisdictional Thresholds for 2024](#)
- FTC [Complaint](#), QEP Partners/EQT Corporation
- [Statement of FTC Chair Khan](#), QEP Partners/EQT Corporation
- Antitrust Division Press Releases: Recent interlocking directorate matters:
 - [Pinterest](#)
 - [Ongoing Enforcement](#)
 - [5 Companies](#)

Robinson Patman Act (Price Discrimination)

- [15 USC 13](#)
- U.S. v. U.S. Gypsum, 438 U.S. 422 (1978)
- Falls City Indus., v. Vanco Beverage, 460 U.S. 428 (1983)
- Texaco v. Hasbrouck, 496 U.S. 543 (1990)
- Brooke Group v. Brown & Williamson, 509 U.S. 209 (1993)
- Volvo Trucks N.A. v. Reeder-Simco GMC, 546 U.S. 164 (2006)

Robinson Patman Act (Price Discrimination) (2)

- [Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products](#) and [related statements](#).
- Note by United States, [Roundtable on Price Discrimination](#) (Nov. 2016)

Criminal Antitrust & DOJ Leniency Program

- [Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For](#)
 - (scroll down to “What is Criminal Antitrust”)
- [Federal Antitrust Crime: A Primer for Law Enforcement Personnel](#)
- [Leniency Program](#)
 - [Leniency Policy](#) (April 2022):
 - [FAQs About the Antitrust Division’s Leniency Policy](#) (Jan. 2023)
- [Criminal Enforcement Trends Charts](#)
- [Criminal Fines and Penalties of \\$10 Million or More](#) (through 2020)
- [US DOJ: Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations](#) (July 2019)
 - (under “other resources”)
- [DOJ Manual: Antitrust Criminal Enforcement](#) (Section 7-3.000 et seq)
- United States, [Roundtable on Challenges and Coordination of Leniency Programmes](#) (June 2018)

Vertical Agreements

- United States v. Colgate, 250 US 300 (1919)
- Continental TV v. GTE Sylvania, 433 US 36 (1977)
- State Oil v. Khan, 522 US 3 (1997)
- Leegin Creative Leather Products v. PSKS, 551 US 877 (2007)
- Jefferson Parish v. Hyde, 466 US 2 (1984)
- US v. Apple, 791 F.3d 290 (2d Cir. 2015)
- United States, [Roundtable on Vertical Restraints for On-Line Sales](#) (Feb. 2013)

Unfair Methods of Competition

- Section 5 of the FTC Act: 15 USC 45(a)(1): Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
 - [Policy Statement](#) (2022)
 - [Statement of Chair Khan](#) (2022)
 - [Statement of Comm. Bedoya](#) (2022)
 - [Dissenting Statement of Comm. Wilson](#) (2022)

 - [Policy Statement](#) (2015)
 - [Statement of the Commission, UMC Policy Statement](#) (2015)
 - [Dissenting Statement of Comm. Maureen Ohlhausen, 2015 Policy Statement:](#)

Antitrust Standing and Injury

- Brunswick Corp v. Pueblo Bowl-o-Mat, 429 US 477 (1977)
- Cargill v. Monfort, 479 US 104 (1986)
- Atlantic Richfield v. USA Petroleum, 495 US 328 (1990)
- Illinois Brick v. Illinois, 431 US 720 (1977)
- Apple v. Pepper, 139 S. Ct. 1514 (2019)

Exemptions and Immunities

- State Action
- Noerr Pennington
- Labor Exemption
- Regulated Industries

State Action Immunity

- FTC v. Phoebe Putney, 568 US 216 (2013)
- North Carolina Bd of Dentists v FTC, 574 US 494 (2016)

Noerr-Pennington

- FTC [Complaint](#), Unocal,
- [Decision](#), Unocal,
- Pattern of Petitions
 - Puerto Rico Tel v. San Juan Cable, 874 F.3d 767 (1st Cir. 2017)

Regulated Industries

- Credit Suisse Securities v Billing 551 US 264 (2007)

Labor Exemption

- [15 USC 17](#)
- Brown v. Pro-Football, 518 US 231 (1996)

Application to Conduct Outside US

- [15 USC 6a](#),
- Hoffman-LaRoche v. Empagran, 542 US 155 (2004)
- Empagran v. Hoffman-LaRoche, 417 F3d 1267 (D.C, Cir. 2005)
- Motorola Mobility v. AU Optronics, 775 F.3d 818 (7th Cir. 2015)
- Testimony, [Solutions to Competitive Problems in the Oil Industry](#), Richard Parker (2000) (discussing OPEC)
 - See [Guidelines for International Enforcement and Cooperation](#) (Jan. 2017) (Sections 3 & 4)
 - And, compare to:
 - [Capper-Volstead Act](#) & [Complaint](#), US v Dairy Farmers (Mar 2000)
 - [Webb-Pomerene Act](#) (see Guidelines for International Operations), at 12.