

**Georgetown University Law Center**  
**Merger Antitrust Law**  
**Professor Dale Collins**  
**Fall 2017**  
**Tuesdays and Thursdays, 3:30-4:55 pm**

**Contact Information and Office Hours**

The best way to reach me is through my Sherman & Sterling email address:  
[dale.collins@shearman.com](mailto:dale.collins@shearman.com).

Since I do not have an office on campus, I do not have regularly scheduled office hours at the law school. I am always reachable by email for questions. I am happy to meet after class on a scheduled or ad hoc basis and I plan to stay around until everyone has their questions answered. I can also come in by appointment for a late morning meeting or a meeting over lunch.

**Course Description**

The course explores the process of raising, defending against, and ultimately resolving antitrust problems that arise in mergers and acquisitions in the U.S. system. Unlike the usual law school class, which is organized around doctrinal elements of the law and uses case excerpts to illustrate these elements, we will organize the course around case studies. These case studies will range from simple negotiated acquisitions to hard-fought contested takeovers. Some of the case studies we will examine include such recent high-profile transactions as Hertz/Avis Budget/Dollar Thrifty, H&R Block/TaxACT, Walgreens/RiteAid (ongoing), Sysco/US Foods, Staples/Office Depot, Anthem/Cigna, Halliburton/Baker Hughes, Comcast/NBCUniversal, Anheuser-Busch InBev/Grupo Modelo, Sirius/XM, and Nielsen/Arbitron.

In each case study, we will examine the antitrust problems presented by the transaction. Depending on the case study, these will include predicting antitrust problems and identifying possible defenses and solutions at the earliest stages of a deal when information is scarce, performing detailed analyses when information is more available, organizing the defense of the transaction, navigating the DOJ/FTC merger review process, anticipating and structuring consent decree settlements, litigating merger antitrust cases, and negotiating provisions in merger agreements to allocate antitrust risk between the merging parties. Antitrust, as with economic regulation generally, is as much about process as it is about the substance, so we will spend a meaningful amount of time on the process of merger antitrust reviews, consent settlements, and litigation.

The course will be self-contained on substance, procedure, and economics. Prior or concurrent enrollment in Antitrust Law or Antitrust Economics and Law is not a prerequisite to this course. By far and away, the most important thing to bring to the course is an interest in understanding business and legal strategy.

**Course Goals/Student Learning Outcomes**

By the end of the course, students should be able to do the following:

1. Be able to perform a preliminary merger analysis, spotting at a high-level both potential substantive issues and possible remedies, in common transaction scenarios involving public companies given only publicly available facts.
2. Be able to describe the merger review process from the filing of an HSR premerger notification report through a preliminary investigation, second request investigation, and final arguments to the heads of the investigating agency. If the agency concludes that the deal has antitrust problems, be able to describe the process for negotiating consent decree relief.
3. Understand the major theories of antitrust harm that apply to mergers and acquisitions and the major types of defenses available to the merging parties, and be able to apply them to an arbitrary transaction.
4. Be able to structure a merger antitrust challenge (as a member of the investigating staff) and a merger antitrust defense (as a member of the defense team) before the decision-making officials at the DOJ and FTC.
5. Be able to anticipate and structure a consent decree remedy (at least in principle) minimally satisfactory to the DOJ and FTC in light of their expressed concerns about a transaction.
6. Be able to describe the basic considerations and timing implications of litigating a merger antitrust case, the standards for granting preliminary and permanent injunctive relief, what the government and the merging parties each must show to prevail, and the allocation of the burden of proof (both persuasion and going forward) between the two sides, and the strategic and tactical implications of these factors to the prosecution and defense of a merger antitrust case in court.
7. Be able to describe the legal and strategic significance of the antitrust-related provisions in an Agreement and Plan of Merger (e.g., reps and warranties on antitrust-related consents and approvals, merger control and litigation conditions precedents, general efforts covenants, conduct of business covenants, merger control filing covenants, investigation and litigation cooperation covenants, shift-shifting covenants (including covenants to divest businesses or assets if necessary to avoid an agency challenge or settle a litigation), antitrust reverse termination fees, purchase price adjustments for divestitures, damages for breach of antitrust-related covenants, ticking fees, “take or pay” provisions, termination provisions).

## **Grading**

Grades will be based on several short graded assignments throughout the course (30% collectively) and a three-hour, open book, take-home examination at the end of the course (70%). Meaningful class participation can increase a grade.

## **Course Materials/Course Website**

There is no textbook for this course. The materials for each week may be downloaded through the links on Canvas and also directly from my website, [www.appliedantitrust.com](http://www.appliedantitrust.com). Consistent with the case study approach of the course, the readings will consist mostly of press releases, investor presentations, SEC documents, merger agreements, complaints, consent decrees, and the occasional trial court and appellate decision.

The materials for this course will be in full text, which means there will be a significant amount of reading. You should expect to spend three hours reading the materials and preparing for each class. If you reach three hours and still have more to read, feel free to stop reading. Before the weekend, I will distribute an email (“reading guidance”) that prioritizes the reading and highlights the keys topics of what we will discuss in class the following week. If you pay attention to the prioritization and run out of time to finish the reading, you will be fine. Anything that is really important in the lower priority reading I will cover in class.

## **CLASSROOM POLICIES**

### **Attendance and Class Participation**

Students are to attend class. As with most case study materials, the materials give the necessary background, but they will not give you the analysis. That is what we will do in class. If you are going to miss the occasional class, please let me know in advance. Multiple absences without good justifications will be detrimental to your grade.

### **Laptop policy/Course recording policy**

I allow laptops for the limited purpose of accessing the case study materials. To the extent you take notes, please do that by hand. The purpose of class is for you to participate in the analysis of the case studies, not to transcribe what I say in class on your computer. All classes will be video-recorded—if you want to transcribe a class, do it after class off the video recording.

### **Syllabus Changes**

Expect there to be changes to the syllabus as the class proceeds. I will notify you of any changes by posting revisions to the Canvas site and in the reading guidance that I will circulate at the end of every week for the following week.

## CLASS SCHEDULE

### Unit 0. Introduction

Class 1	August 29	Tuesday	Introduction to merger antitrust law
Class 2	August 31	Thursday	Introduction to merger antitrust law

### Unit 1. Hertz/Avis Budget/Dollar Thrifty

Class 3	September 5	Tuesday	The 2010 Hertz/Dollar Thrifty deal
Class 4	September 7	Thursday	Antitrust considerations and the merger agreement
Class 5	September 12	Tuesday	The bidding war
Class 6	September 14	Thursday	FTC review and settlement

### Unit 2. Competition Economics

Class 7	September 19	Tuesday	Basic concepts
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### Unit 3. The Evolution of Merger Antitrust Law: Statutes, Seminal Cases, Merger Guidelines

Class 8	September 21	Thursday	Sherman Act (1890) Clayton Act (1914) Celler–Kefauver Act (1950) Review of the seminal substantive cases 1968 DOJ Merger Guidelines
Class 9	September 26	Tuesday	1982 DOJ Merger Guidelines 1992 DOJ/FTC Horizontal Merger Guidelines 1997 DOJ/FTC efficiencies revision
Class 10	September 28	Thursday	2010 DOJ/FTC Horizontal Merger Guidelines

### Unit 4. H&R Block/TaxACT

Class 11	October 3	Tuesday	H&R Block/TaxACT
Class 12	October 5	Thursday	H&R Block/TaxACT

### Unit 5. Sysco/U.S. Foods

	October 10	Tuesday	NO CLASS
Class 13	October 12	Thursday	Sysco/US Foods
Class 14	October 17	Tuesday	Sysco/US Foods

### Unit 6. Staples/Office Depot

Class 15	October 19	Thursday	Staples/Office Depot
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**Unit 7. Anthem/Cigna**

Class 16 October 24 Tuesday Anthem/Cigna

**Unit 8. Short Horizontal Case Studies**

Class 17 October 26 Thursday ABI/Grupo Modelo

Class 18 October 31 Tuesday Sirius/XM  
SGI/Alias/Wavefront

**Unit 9. Nonhorizontal Mergers**

Class 19 November 2 Thursday Medtronic/Covidien  
Mallinckrodt (Questcor)/ Novartis  
Nielsen/Arbitron

Class 20 November 7 Tuesday Comcast/NBCUniversal (vertical foreclosure)  
AT&T/Time Warner

Class 21 November 9 Thursday Coca-Cola/Coca-Cola Enterprises  
General Electric/Avio  
Merck/Medco and other Pharma/PBM mergers

**Unit 10. The DOJ/FTC Merger Review Process**

Class 22 November 14 Tuesday The HSR Act review process  
DOJ model second request/second request  
investigations

**Unit 11. Multijurisdictional Transactions**

Class 23 November 16 Thursday Dow/DuPont

**Unit 12. Pulling It All Together**

Class 24 November 21 Tuesday Energy Solutions/Waste Control Specialists  
November 23 Thursday NO CLASS—THANKSGIVING  
Class 25 November 28 Tuesday Catch-up/short case studies  
Class 26 November 30 Thursday Catch-up/short case studies

**FINAL EXAM:** Dec. 6 – Dec. 16 (3-hour take home)