

Georgetown University Law Center
Merger Antitrust Law
Professor Dale Collins
Fall 2018
Tuesdays and Thursdays, 3:30-4:55 pm

INTRODUCTION

First class: Tuesday, August 28

Welcome to the course! I appreciate that you may only be shopping at this point, so I thought I would tell you a few things about how I intend to approach things. I will send another email shortly with the assignment for the first day of class.

Course description

This three-credit course explores the process of raising, defending against, and ultimately resolving antitrust problems that arise in mergers and acquisitions in the U.S. system.

This is an “applied” course in the sense that it approaches the subject as a sophisticated practitioner would. 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 of recent mergers and acquisitions ranging from simple negotiated acquisitions to hard-fought contested takeovers. Some of these case studies will include:

- The contested takeover battle by Hertz and Avis Budget for Dollar Thrifty
- AT&T’s attempt acquisition of T-Mobile
- Dow’s acquisition of DuPont
- Walgreens’ efforts to acquire Rite-Aid
- Disney’s acquisition of 21st Century Fox
- H&R Block’s attempt to acquire TaxACT
- Sysco’s attempt to acquire U.S. Foods
- Staples’ attempt to acquire Office Depot
- Anthem’s attempt to acquire Cigna
- Anheuser-Busch InBev’s acquisition of Grupo Modelo (the maker of Corona beer)
- Sirius’ acquisition of XM satellite radio
- Halliburton’s attempt to acquire Baker Hughes
- Comcast’s acquisition of NBC Universal
- AT&T’s acquisition of Time Warner
- Coca-Cola’s acquisition of Coca-Cola Enterprises

If an interesting merger arises during the course, we may add it to the discussion.

In each case study, we will examine the antitrust problems presented by the transaction. Depending on the case study, we will address:

- 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
- Preparing the defense of the transaction
- Navigating the DOJ/FTC merger review process
- Anticipating and structuring consent decree settlements
- Litigating merger antitrust cases
- 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.

Goals of the course

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 formal 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 the investigating staff) and a merger antitrust defense (as defense counsel) 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-relation 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, risk-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, and termination provisions).

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. If you have a problem in downloading something, let me know and I will email it to you.

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 trial court and appellate opinions. Unlike a casebook, which just contains excerpts, the materials for this course will be in full text.

Since the materials for this course will be in full text, 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 each 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 but 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.

While I cannot stress enough that familiarity with the materials will make the classes far more meaningful to you, this does not mean that you have to obsess over the materials. I will tell you in the reading guidance what you need to read with care and what you can just skim to get a sense of the material. Always read the reading guidance for each class before you start on the materials.

The materials in this course are not necessarily works of art and you undoubtedly will find some of them lacking, but what we will be reading are the actual documents that appeared in the case. I encourage you to be critical of the materials. I have found that I learn the most from what I believe are mistakes or missed opportunities, and asking how I would have done it differently.

Class notes

In order to cut down on the required reading and enable you to participate in more discussion in class, I am going to do here what we do when we give defense presentations at the FTC and DOJ and do not want to rely on the note-taking abilities of the government attorneys on the case team—I am going to distribute PowerPoint presentations that capture all of the salient points that we will cover. This is much better than having you concentrate on writing down everything and

thinking about it later (if you get to it at all). The PowerPoint presentations are available on Canvas and Applied Antitrust.com along with the required and supplemental reading materials.

Thinking about this a little more, I fear I could be accused of deceptive advertising in using the term “class notes.” While the decks do contain information that is important for you to know, some of what is there will not be covered explicitly in class (unless you ask a question about it). Moreover, while some classes will follow the decks reasonably closely, other classes will not follow the decks at all. So maybe I should call them something other than “class notes.”

Bottom line: It will be important to read both the required reading and the class notes.

Homework problems

You should expect a short written assignment to be submitted prior to most classes. For the most part, the problems should take only a short time to complete. A few of the assignments, however, will take some investment of time. With one exception (see below), the assignments will not be graded. I will track submissions, however, and a failure to do the problems will adversely affect your grade.

These assignments are an essential part of the course. Not only will they ensure that you assimilate some of the essential concepts and methods we are covering at the time in the course, they will help me (and you) identify areas that are confusing and need more explanation. They also will help you prepare for the class discussion. I am confident that you will find them invaluable in preparing for the exam.

Except for the graded assignment you are free to work collaboratively with other members of the class and to consult any outside materials you like (including on the Internet). The idea is for you to think about the problems and prepare for the class discussion. The only thing I require is that the submissions be individually written.

Problems must be submitted by email to me before the beginning of class for which they are assigned. We will cover the answers to most homework problems in class as part of the case study analysis. For many homework problems, after a discussion of the problem in class I will post my answer to the problem. If you see something with which you do not agree, I encourage you to challenge it. There is often more than one “right” way to approach a problem.

Important: Please email your answer to dale.collins@shearman.com. The subject line should read “Merger Antitrust Analysis: Assignment for Class [Number],” which will help me manage the inflow since I am going to set up a rule that sorts the submissions into the appropriate email folder.

Classroom policies

Preparation for class. I cannot stress enough how important it is for you to follow the reading guidance and do the homework problems. Students in the past have consistently told me how much more they enjoy the class—and therefore learn the subject—when we analyze a case study as opposed to having me lecture on something that you can just read instead. With this in mind, this year I am going to significantly increase the amount of class time to active class discussions of the

case studies. The reading materials and the class notes will supply the factual background, institutional environment, strategies, tactics, and rules that we will apply in class to the case study. Not surprisingly, you will not get much out of the class discussion if you have not read them. Equally, I am using the homework problems to help you prepare for and participate in the class discussion. So come prepared!

Attendance and class participation. Class attendance is mandatory. Simply doing the reading and working the problems will not enable you to master the materials or adequately prepare for the exam. As with most case studies, while the materials give the necessary background 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. On the other hand, class participation shows me that you are reading the materials and involved in the course.

Laptop policy/course recording policy. I allow laptops *only* for the limited purpose of accessing the reading materials, class notes, and homework problems. 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 practice stenography. All classes will be video-recorded—if you want to transcribe a class, do it after class off the video recording.¹

Syllabus changes. This is the second year that I have taught this course, so the order of the course and the pace at which we can cover the materials should be much more settled than it was last year. Even so, 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.

Grades, exams, and a graded take-home assignment

Subject to some discussion in class, grades will be based primarily on your performance on a graded take-home assignment (1/3 of the grade) and the final exam (2/3 of the grade). I do not grade for class participation, at least in the sense that a lack of class participation will not harm your grade. Meaningful class participation, on the other hand, can materially help.

The written take-home assignment will ask you to write a memorandum of law analyzing an exam-type hypothetical. I gave the class such an assignment last year and I think they found it very valuable. It essentially gave them an exam problem but without the time pressure of an exam. Everyone completed the assignment in four to six hours and they had ten days in which to do it. You probably will be able to complete the assignment even more quickly, since you will have the benefit of seeing last year's assignment and the two exam questions and the "instructor's answers" to use as models.² I told the class last year—and the same will be true this

¹ There is compelling research on this. For a summary, see, for example, Susan Dynarski, [Laptops Are Great. But Not During a Lecture or a Meeting](#), NYTimes.com, Nov. 22, 2017.

² I gave two "instructor's answers" to each problem. The "memorandum of law" format was much longer and more detailed on the explanation than anything I would expect—or you could possibly write—for an exam answer. I prepared this to further explain the law and the reasoning. This is the model to use for the written take-home

year—that the first of the two problems on the exam will be similar both analytically and in level of difficulty to the hypothetical in the take-home assignment. My expectation, which was confirmed by my post-exam anecdotal survey of the class, was that the take-home assignment would enable the class to learn the material and perform significantly better on the exam than they would have otherwise.

This course has a four-hour take-home exam that will be available throughout the exam period. The exam will be written so that you should be able to complete it within three hours. I have allowed the extra time so that you do not need to rush and to enable you to better organize your answers. This is an open book exam. You may consult any written source, including without limitation the reading materials, class notes, homework problems (and answers), cases, outlines (commercial or otherwise), books and treatises. The only limitation is that you may not access the Internet during the exam.

Office hours/lunch

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. I plan on being available after class for as long as anyone has questions or wants to talk. I can also come in by appointment for a late morning meeting. The best way to reach me is through my Sherman & Sterling email address: dale.collins@shearman.com.

Another opportunity for getting together is lunch. I love to eat, and, not insignificantly, I pay the tab. There is no agenda for these lunches. We can talk about questions you have about the class, the practice of antitrust law, current events—everything is fair game. I encourage each of you to gather up a couple of fellow members of the class and start proposing dates. Nor are you limited to only one lunch. The first year I taught, about half the class organized to have me take them out to lunch almost every other week throughout the semester.

Final thoughts

I welcome a dialogue about how to make the course better—more educationally efficient, as an economist might say—and, equally important, more engaging. So starting with this memorandum, please feel free to contact me with any thoughts you have on what we should be doing in the course and what you would like to get out of it.

I look forward to seeing you in class.

Dale

P.S. If for some reason you want to learn more about me, my firm bio is at <https://www.shearman.com/people/c/collins-wayne-dale>.

assignment. I also prepared an “instructor’s answer” in an exam format, which is much shorter and more focused on spotting and analyzing the issues without much (or any) background on the legal principles.