

Antitrust Law: Case Development and Litigation Strategy

Dale Collins

Georgetown University Law Center, Spring 2019

Tuesdays, 5:45 pm – 7:45 pm

dale.collins@shearman.com

www.appliedantitrust.com

First class: Tuesday, January 15

Welcome to the course! I appreciate that you may only be shopping at this point, so I thought I would tell you about how I intend to approach things. Please see the Modules section of Canvas for the assignment for the first day of class.

PHILOSOPHY

The course explores the process of raising, defending against, and ultimately resolving, antitrust challenges in the U.S. system. Antitrust, as with economic regulation generally, is as much about process as it is about the substance. You were introduced to the substance in the survey class that you undoubtedly took at some point; this course teaches the process of how the law is applied in practice.

Through an in-depth exploration of a few contemporary case studies, we will examine the substantive strategies and procedural tools available to subjects of investigations and to litigants. Since this is only a two-credit class, we will limit our attention to price fixing and merger cases, but those will allow us to cover the full gamut of criminal investigations and prosecutions, private actions (including antitrust class actions), and administrative investigations, prosecutions, and settlements. In the process, we will examine criminal indictments, plea agreements and the DOJ's leniency policy; sufficiency of pleading; presumptions and burdens of proof; the use of expert evidence; dispositive pretrial motions; class actions and class action settlement strategies; premerger notification and DOJ/FTC merger investigations; settlements of agency investigations; temporary restraining orders and preliminary injunctions; administrative litigation; laches and the statute of limitations; treble damage judgments; interlocutory and final appeals; and Supreme Court review.

You might be tempted to think about the course as the criminal and civil procedure of federal antitrust law, but that would be only part of the story. To be successful as a private practitioner or a government prosecutor, you need to know not only what the procedures are but also how and when to invoke them. This usually means understanding the applicable substantive rules, the public policy behind those substantive rules (so that you can argue, if appropriate, that the rules should be changed because the underlying public policy considerations have evolved), the relevant facts, how your opponent is likely to respond to your move, your likelihood of success and what success means for your case, and the consequences of failure. We will see a lot of successes and failures in the cases we consider in this course. Even if your primary interest is not antitrust, what we will do in this course is readily extensible to any type of litigation.

But even if your inclination is toward policy rather than practice, I submit that you will find the course useful. Antitrust policy is effected through the application of the law through litigation (or at least the threat of litigation), whether by a government agency or a private party, and microeconomic outcomes that result will be highly dependent on the process. Indeed, the bulk of Supreme Court innovations in antitrust law over the last 40 years—which have changed antitrust enormously—have been in antitrust procedure, broadly defined here to include not only the Federal Rules of Civil Procedure but also such things as prudential standing, admissibility of expert evidence, and remedies.

THE SYLLABUS

The current syllabus is in Canvas, but I expect to adjust it somewhat depending on how fast we are getting through the materials and the interests of the class.

All of the required reading may be downloaded from my web site, www.appliedantitrust.com, as well as from the modules section in Canvas. There is no required text and indeed nothing for you to buy. A .pdf of the required reading will be at the top of each unit. Although we have a lot to cover, the required reading will not take longer than four hours per class. If you hit four hours and still have more to read, feel free to stop reading. I will send around an email every week that prioritizes the reading. 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.

Read the materials once with some care but do not obsess over them. For the most part, the readings will consist of court documents, such as complaints, motions, briefs, interlocutory orders, trial court decisions, and appeals decisions. These materials are not boiled down to their essence where everything is important (as you would find in a casebook), and there is no need to know everything in them. Of course, the more you know from the reading, the more you will get from the course.

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.

I find the materials in the course fascinating, and I hope you will as well. If you do, I have included a variety of supplemental readings on the web site on the cases we will be studying. In particular, I strongly recommend that you skim the docket sheets for some of the cases we study. They will give you a wealth of information about how cases actually evolve. I have also put together some reference materials on the various topics that we will touch on in the course. These reference materials include not only the significant case precedents but also the major policy pronouncements from the enforcement agencies and some state of the art policy analysis.

Do not be concerned about the amount of materials on the site. Although it started as the web site for this class, I expanded it significantly beyond the scope of the strategy course when I taught a

four-credit antitrust survey course at Yale. It also serves as the place where I park much of my historical source material on antitrust law.

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

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 use 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 Applied Antitrust.com along with the required and supplemental reading materials. I encourage you to bring the “deck” (as it is known in the trade) to class so that you can annotate it.

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.

THE CLASSES

We meet on Tuesdays from 5:45 pm to 7:45 pm. My plan is to take a 10-minute break in the middle of each class.

PAPERS

There is no exam in this class, but a paper is required. I have some [possible paper topics](#) on the Applied Antitrust.com web site, but you can write on anything that interests you on antitrust procedure *provided* that we agree on both the subject matter and the specific question the paper will address. We will find something that can be done in 15-20 double-spaced pages.¹

I would like the papers to be in the form of a memorandum of law (MOL) to me. As you begin thinking about topics, a good structure for a MOL is to start with the sentence: “You have asked me to [state the task].” For example, “You have asked me what standards courts employ in resolving challenges to the relevance or reliability of economic expert testimony in class certification proceedings,” or “You have asked me what more than parallel conduct must be

¹ Some students in past iterations of this course have asked if they can write a paper comparing some aspect of U.S. procedure to that in another jurisdiction. While these types of papers can be extremely interesting, I discourage them for two reasons. First, I do not know much about procedure in most other jurisdictions, and therefore could have some difficulty in helping you work through the paper, not to mention the difficulty I would have in assessing it. Second, and much more importantly, the purpose of the course is for you to learn U.S. antitrust procedure.

pleaded in a price-fixing complaint to make a claim of conspiracy plausible after *Twombly* in order to withstand a motion to dismiss under Rule 12(b)(6).”

This structure imposes a very good discipline for two reasons: (1) it forces you to think how to frame the question concisely, and (2) you can show it to the assigning attorney before you begin your real work just to make sure that you both are on the same page. I assure you that it will frequently be the case that you will not have a common understanding of the assignment (often because the assigning attorney had not thought through the question sufficiently), and agreeing up front on the statement of the task will save you much grief in the long run. It will also help you focus exactly what question you are answering—an imprecise question is likely to result in an imprecise answer.

The forms of MOL differ, but a good rubric to follow is a paragraph starting with the question and then a few sentences motivating the question, a paragraph providing the bottom-line answer to the question, and then the analysis. In a long memorandum, you should also include a third paragraph at the beginning providing a roadmap of the analysis.

It is not a bad idea to start thinking about the paper early in the course. You might be surprised how difficult it can be to frame a question precisely. If experience is any guide, we will probably have several rounds of email exchanges before the question gets settled. We can also talk about it over lunch (see below). Moreover, I will be delighted to look at drafts of your paper as you work through it, although there is no requirement that you show me a draft. If you do show me a draft, I will give you my comments just as I would with a law firm associate. I will grade only the final and not consider the draft, so there is no downside in submitting a draft and there may be a meaningful upside. I will comment on any drafts in the order I receive them, so earlier in the queue probably means a quicker turnaround on my part. Apart from comments on a draft, I am happy to engage in email exchanges on any questions that arise as you research and write the paper.

OFFICE HOURS and LUNCH

Since I do not maintain an office at Georgetown, I do not have regularly scheduled office hours at the law school. However, if you would like to talk, I will arrive roughly half an hour before class and am will to stay after class as long as you want to talk. We also can set something up on an ad hoc basis at the law school or, by far my favorite, over 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 strongly 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. I should be in Washington most days, although I will be in New York on Mondays.

GRADES

We will talk about this on the first day of class.

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. The best way to contact me is through my work email, dale.collins@shearman.com.

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 <http://www.shearman.com/wcollins/>.