

Georgetown University Law Center
Merger Antitrust Law
Professor Dale Collins
Fall 2020
Tuesdays and Thursdays, 3:00-5:00 pm

INTRODUCTION AND “RULES OF THE ROAD”

First class: Tuesday, September 1

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 the course. This memorandum also includes the “rules of the road” for the course, including classroom policies, homework assignments, and grading. Since it is subject to revision throughout the course, the schedule of topics for each class is a separate document.

Course description

This four-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. It is close to state-of-the-art in merger antitrust analysis. Unlike the usual law school course, 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 attempted acquisition of T-Mobile
- T-Mobile’s acquisition of Sprint
- Walgreens’ attempt 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
- Sabre’s acquisition of FareLogix
- Anheuser-Busch InBev’s acquisition of Grupo Modelo (the maker of Corona beer)
- Sirius’ acquisition of XM satellite radio
- 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 becomes more available
- Navigating the DOJ/FTC merger review process
- Preparing the formal opposition and defense of a transaction
- 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 in the course.

Goals of the course

This is high-end course that will teach you both the theory and the practice of merger antitrust law and prepare you to make an immediate contribution to an antitrust or M&A practice in a major law firm or to antitrust enforcement agency. But even you do not plan to practice antitrust or M&A law, it should materially increase your sophistication as to prepare to enter into the practice of law. By the end of the course, you should be able to do the following:

1. Perform a preliminary merger analysis, spotting at a high-level both potential substantive issues, defenses, and possible remedies, in common transaction scenarios involving public companies given only publicly available facts.
2. Describe for a client 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 principal formal theories of antitrust harm that apply to mergers and acquisitions, as well as the principal types of defenses available to the merging parties, and be able to apply them to an arbitrary transaction.
4. 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. Anticipate and structure a consent decree remedy minimally satisfactory (at least in principle) to the DOJ and FTC in light of their expressed concerns about a transaction.
6. Describe for a client 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 production) 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. Describe for a client the legal and strategic significance of the antitrust-related provisions in an Agreement and Plan of Merger, including 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 or 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, almost all of the materials for this course will be in full text. You will see what the practitioner sees.

Since the materials for this course will be in full text, there will be a significant amount of reading. You should expect to spend 4.5 hours reading the materials and preparing for each class.¹ If you reach 4.5 hours and still have more to read, feel free to stop reading. Before each class, I will distribute a memorandum (“reading guidance”) that prioritizes the reading and highlights the keys topics of what we will discuss. 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.

I cannot stress enough that familiarity with the materials will make the classes far more meaningful to you, but 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

¹ I understand that this is the minimum requirement for Georgetown to satisfy the ABA accreditation standards.

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 legal and economic concepts that I want you to know. 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 will be 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 that you will need to submit a written assignment 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. For the most part, the assignments will be of a form that you could expect to receive in a merger antitrust practice at a government agency or a major law firm. 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. Students in the past have told repeatedly me how much they learned (and even enjoyed!) doing the homework assignments.

Except for the graded assignment, you are free to work collaboratively with other members of the class. Indeed, I encourage you to work in groups on the homework assignments. You also may consult any outside materials you like (including on the Internet) in preparing the homework assignments. 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 themselves be individually written (although you may ask classmates, especially if you work in a group, to critique your work before you hand submit it).

Answers to the homework assignments must be submitted by email to me before the beginning of class for which they are assigned. As I mentioned above, we will cover the answers to most

homework problems in class. After our discussion in class, I will post my answer to the problem. If you see something with which you do not agree in my response, I encourage you to challenge it. There is often more than one right way to approach a problem, especially in this area of the law, and I make no claim that my way is the only way.

That said, keep in mind that lawyers are rarely the final decision-makers. You write not to persuade yourself but to persuade others. My rule of thumb is when you are convinced that you have found the “right” answer or approach to a complex practice situation, you have only completed about 60 percent of the problem. The remaining 40 percent is convincing the relevant decision-maker—the judge, the investigating agency, the assigning partner, your client, co-counsel—that your answer is the right one.² To that end, one of the skills on which we will focus in the homework assignments is clear, concise, linear writing.

Important: Please email your answers to wdc30@georgetown.edu. The subject line should read “Merger Antitrust Law: Assignment for Class [Number],” which will help me manage the inflow since I have set up a rule in Outlook to sort the submissions into the appropriate email folder. If you do not use the correct subject line, you risk me thinking that you failed to do the assignment.

Classroom policies

NB: Given the pandemic, I will be teaching solely on Zoom this semester. However, this is a synchronous class and it is mandatory for you to attend class at the scheduled time unless you have my permission.

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. We will spend a significant amount of class time in active class discussions of the case studies and homework assignments. The reading materials and the class notes will supply the factual background, institutional environment, and rules for a case study, but the classroom discussion will provide the analytics, strategies, and tactics. Not surprisingly, you will not get much out of the class discussion if you have not read the required reading materials and class notes. Equally, I am using the homework problems to help you prepare for and participate in the class discussion. So come prepared!

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. Students must attend synchronous lectures in real time either on Zoom or in-person (depending on what the school permits and your own preferences). If your circumstances will not permit you to attend some or all of the classes in real time, let’s talk about it. I appreciate that the current environment may

² In my practice I find that I often spend as much time trying to convince co-counsel for the other merging party that I have the right approach to defending the transaction as I do actually defending the transaction before the investigating agency. You will find that the best prosecuting or defending strategies are rarely created through a committee approach achieved through compromise with co-counsel. Rather, the best strategies come from someone with a clear vision of how to get things done and the ability to execute. Your job will be to convince co-counsel—or if not them, then their client—that you are that person and that they should follow your lead.

make attendance difficult if not impossible. All of the classes and review sessions will be recorded, but do not count towards attendance without special permission.

I have created a separate note on how we will use Zoom in class and suggestions for how you set up your screen. The one thing I would like to point out here is that you should have your camera on while in class. If you do not have access to a webcam, your internet connection will not handle video, or you are unable to participate via video for any other reason, please contact me so that we can talk about it. Video participation is essential to the classroom learning experience and to class cohesion. If you have your video off without permission, there will be consequences (cold-calling is a distinct possibility).

If you are going to miss the occasional class, absent some emergency please let me know by email in advance. Multiple absences without good justifications will be detrimental to your grade. If you have to miss most or all of the classes (say, because you live in Asia), let me know and we will work out an alternative arrangement.

Class slides. I will frequently use PowerPoint in class. I use these to organize what we will cover in the class. These are more to keep me organized and on track than for you. Sometimes the class slides will duplicate materials in the class notes, but often I will try to take a different approach to the materials. I will post the slides I use after each class.

Zoom setup. I will circulate a separate note with my thoughts of how will we will Zoom in the course and my suggestions of how to set up your screen.

Laptop policy. I allow laptops *only* for the limited purpose of accessing the reading materials, class notes, and homework problems (and now, of course, participating on Zoom). To the extent you want to 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.³

Syllabus changes. If there are changes, I will notify you by posting revisions to the Canvas and AppliedAntitrust.com sites and in the reading guidance. The regular order can easily be thrown off if an interesting transaction is announced during the semester and we take a day off the schedule to analyze it.

Grades, exams, and a graded take-home assignment

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).

³ There is compelling research on the detrimental effects of taking notes on laptops during class. For a summary, see, for example, Susan Dynarski, [Laptops Are Great. But Not During a Lecture or a Meeting](#), NYTimes.com, Nov. 22, 2017. For something more formal, see, for example, Pam A. Mueller & Daniel M. Oppenheimer, *The Pen Is Mightier Than the Keyboard: Advantages of Longhand Over Laptop Note Taking*, 25 Psychol. Sci. 1159 (2014); Susan Payne Carter, Kyle Greenberg & Michael Walker, [The Impact of Computer Usage on Academic Performance: Evidence from a Randomized Trial at the United States Military Academy](#) (May 2016).

The graded take-home assignment will ask you to write a memorandum of law analyzing an exam-type hypothetical. In effect, this assignment gives you an exam problem but without the time pressure of an exam. Students in the past have told me that they found having the graded homework assignment invaluable for assimilating the content of the course and preparing for the exam. They also liked the idea of having 1/3 of the grade depend on an untimed homework assignment rather than 100% depend on a timed final exam. Everyone completed the assignment in four to six hours and they had at least ten days in which to do it. This year the graded homework assignment will be posted on Wednesday, November 4, and due on Monday, November 16. We will spend the next day in class going over the graded homework assignment in detail.

This course has a five-hour take-home exam that will be available throughout the take-home exam period.⁴ The exam will be written so that you should be able to complete it within four 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, treatises, the Internet, Westlaw, and Lexis-Nexis. The exam will be available through the take-home exam period (Monday, December 7, through Thursday, December 17). You may take the exam anything during this period, but once you start you must complete it within five hours.

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.

Office hours

I welcome the opportunity to talk to you outside of class to answer questions, explain concepts, or explore some topics in more depth. We can do this in three different ways.

First, I will conduct regular office hours on Zoom on Mondays. We can talk about the most convenient time for everyone for me to do this. My plan is to open a drop-in Zoom session using my personal meeting ID for as many people who want to join.⁵ You can show up just to listen if you like. I may have my video and audio off initially, but you will be able to tell that the session is live and I will turn my video and audio on once someone arrives. This is the first time I have tried this, so if you have ideas of a better way for me to conduct office hours, please let me know.

Second, I know that some students like to talk after class. Given the way Zoom is set up for classes, we will have to terminate the class session at the end of the class period. I will open a Zoom session using my personal meeting ID immediately after each class for anyone who wants to talk. I will stay online until all questions have been addressed.

⁴ In past years, this exam has been four hours. My postmortem discussions with students after last year's class revealed an almost universal preference for a five-hour exam. The nature of the hypotheticals will not change; the only difference is that you will have more time to prepare your answer.

⁵ These sessions will require a password to join. I plan to use the same password for all regular office hour sessions.

Finally, I am happy to set up a private Zoom session during the week with anyone who would like to talk or who cannot make regular office hours.

You can also always email your questions to me or initiate a discussion topic on the question (see below).

If you have questions, I strongly encourage you to take advantage of any or all of these forums.

Course recording policy

All classes and review sessions will be recorded on Panopto. Please do not make your own recordings of classes, review sessions, office hours, or any other Zoom meeting in connection with the course.

Discussion Board

I would like to try the Discussion Board on Canvas this semester. I see two immediate areas for conversation. First, if you have a question about what we are covering in class or about the course generally, this is yet another place to raise it. Second, there are a number of active policy issues in merger antitrust law, and antitrust law more generally, but since this is not a policy course we will spend relatively little time in class on them. We can discuss them, however, using the Discussion Board.

To get things started, I will post a policy question on one of the most important issues in modern antitrust law: should the antitrust laws only prohibit unilateral conduct that involves anticompetitive exclusionary behavior maintaining, creating, or likely to create a monopoly (as is the case under Section 2 of the Sherman Act in the United States) or should the law more broadly prohibit the abuse of a dominant position by a firm (as is the case under Article 102 of the Treaty on the Functioning of the European Union (TFEU))? There is legislation pending in New York State to extend the state antitrust law to prohibit abuses of a dominant position as well as monopolization and attempted monopolization and we may see similar legislation introduced in Congress at some point.

While I will monitor and contribute to the discussions, I hope that this will be more of a forum for you to raise questions and contribute your thoughts on antitrust topics throughout the course.

Lunch

In the prepandemic days, I liked to take groups of students out to lunch or for a beer at The Dubliner. These outings gave us an opportunity to get for me to get to know the students, and for students to get to know me and each other better, than we could through just classes. There was no agenda for these sessions and we talked about the course, the practice of antitrust law, working in law firms or at the enforcement agencies, clerkships, or anything else they wanted to discuss.

I am very disappointed that we will not be able to continue this practice this semester, but I would be delighted to host some virtual sessions over Zoom if there is any interest. I find the best size for these groups is between four and eight students. If we can get a critical mass together, we

could begin the first virtual lunch on Friday, September 11. I will send around a note early next week to see if there is sufficient interest. If you would rather do lunch on another day or if you would like to have a beer instead, get a group together and we will work out a time. Feel free to use the Discussion function on Canvas to solicit interest from your classmates.

Feedback on the course (with or without anonymity)

I welcome a dialogue about how to make the course better—more educationally efficient, as an economist might say—and, equally important, more engaging. I very much would like to hear from you on what is working and, much more importantly, not working, whether with the course generally or with particular reading materials, class notes, classes, or homework assignments. Everything is fair game, including my presentation style, intelligibility, and coherence. If you ever think that I am wasting your time or not getting through, I definitely want to know in order to correct it. You are paying a lot of money for your legal education at Georgetown and I want to make sure that you are getting your money's worth in this course.

So starting with this memorandum and throughout the course, please feel free to contact me with any thoughts. While you can always reach out to me through email, office hours, or a private Zoom conference, I have also created a Google form that you can use to reach me anonymously. The form can be found at the top of the “Home” page of the Canvas course web site.

I do have an ask before classes start. I have created an anonymous Google form for what you like and dislike about teaching styles from your experience so far in law school. If you have something to say, this is a good time to say it. Your responses will not change the content of the course, but I will try to make my teaching style conducive to what works best for the class as a whole.

Final thoughts

These are trying times and the course is a demanding one. If personal circumstances arise that prevent you from properly preparing for class, doing homework assignments, attending class, or anything else, please let me know and we will work something out that will allow you to get the most out of the course.

I also hope to that we will build some sense of class community throughout the semester. To enable me to get to know you better, I have created yet another Google form that you can find on the “Home” page for the Canvas course. Feel free to skip any question you would rather not answer. The questionnaire will only take a few minutes to answer, and I would appreciate it if you would respond it even if you are just shopping.

I look forward to seeing you in class on Zoom.

Dale Collins

P.S. If for some reason you want to learn more about me, you can find my bio at http://www.appliedantitrust.com/collins_bio.pdf.

