

**Georgetown University Law Center
Merger Antitrust Law
Fall 2021**

**Professor Dale Collins
Tuesdays and Thursdays, 3:00-5:00 pm**

INTRODUCTION AND “RULES OF THE ROAD”

First class: Tuesday, August 31

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. The schedule of topics for each class, which is subject to revision throughout the course, 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. What we will cover is state-of-the-art in merger antitrust analysis. Unlike the usual law school course, which is organized around doctrinal elements of the law and utilizes case excerpts to illustrate these elements, we will organize the course around case studies of recent mergers and acquisitions. These transactions range 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
- 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 a merger antitrust analysis when information becomes more available
- Navigating the DOJ/FTC merger review process
- Constructing a challenge to oppose a merger
- 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 a high-end course that will teach you both the theory and the practice of merger antitrust law. It is designed to prepare you to make an immediate contribution to a sophisticated antitrust or M&A practice in a major law firm or to an antitrust enforcement agency. But even you do not plan to practice antitrust or M&A law, it should materially increase your sophistication as you 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 to 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 to a client the primary 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, as well as the strategic and tactical implications of these factors to the prosecution and defense of a merger antitrust case in court.
7. Describe to 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. You can download the materials for each week through the links on Canvas or directly from my website, www.appliedantitrust.com. If you have a problem 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. I will cover in class anything that is really important in the lower priority reading

I cannot stress enough that familiarity with the required reading will make the classes far more meaningful to you, but this does not mean 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 learned the most from what I believe were mistakes or missed opportunities and asking how I would have done the issue differently.

Class notes

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 will distribute PowerPoint presentations (“class notes”) 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 in class and thinking about it later (if you get to it at all). The PowerPoint presentations will be available on Canvas and AppliedAntitrust.com along with the required and supplemental reading materials.

The reading assignments for each class include the class notes as well as the primary source materials. The reading guidance will help you navigate these materials most efficiently as you prepare for class.

A note of warning: While the class notes contain important information for you to know, I will not necessarily cover everything in the notes explicitly in class (unless you ask a question about it). I hope to spend our time in class focusing on the strategic and tactical aspects of our case studies and not on lectures on the class notes.

Bottom line: It will be important to read both the primary source materials and the class notes before each class.

Homework problems

You should expect that you will need to submit a written assignment before most classes. Most of 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 submit homework assignments 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. The problems will ensure that you assimilate some of the essential concepts and methods we are covering at the time. They will also help me (and you) identify areas that are confusing and need more explanation in class. Much to my surprise, students in past classes have repeatedly told me how much they learned (and even enjoyed!) doing the homework assignments.

Except for the one graded homework assignment, you are free to work collaboratively with other members of the class. Indeed, I encourage you to work in groups on the homework problems. You also may consult any outside materials you like (including anything 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 submit it).²

Answers to the homework assignments 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. After our discussion in class, I will post my answer to the problem. If you see something with which you disagree 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, please 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, or co-counsel—that your answer is the right one.³ To that end, one of the skills on which we will focus in the homework assignments is clear, concise, persuasive, 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

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 instead of 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

² You will find an investment in the homework assignments can pay great dividends during the final exam. Not only is the exam open book, you can cut-and-paste “boilerplate” *you have prepared* directly into the exam answer. So if an exam question calls for the application of the unilateral effects theory of anticompetitive harm and one of the homework assignments required you to write a short memo explaining this theory, you can cut-and-paste that explanation into the exam answer. You will still have to apply the theory to the facts of the problems, but you will not have to spend any time in the timed exam composing an explanation of the theory.

³ While in practice, I found that I often spent as much time trying to convince co-counsel for the other merging party that I have the right approach to defending the transaction than I did in 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 the deal done and the ability to execute a plan. 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.

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 on the problems will not enable you to master the materials or adequately prepare for the exam. Students must attend class in person. If your circumstances do not permit you to attend some or all of the classes, let's talk about it. I appreciate that the current environment may make attendance difficult, if not impossible, for some students. All of the classes and review sessions will be recorded, but viewing a class will not count towards class attendance without advanced permission.⁴

If you have 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.

Class participation. 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 your grade for the course.

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 on track than they are 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 class slides I use after each class.

Laptop policy. I allow laptops in class *only* for the limited purpose of accessing the reading materials, class notes, and homework problems. 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.⁵

Syllabus changes. If there are changes, I will notify you by posting revisions to the Canvas and AppliedAntitrust.com sites and 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.

⁴ For this semester only, the Law School has adopted a policy eliminating any mandatory-attendance requirement for first or first and second class sessions. The school expects a number of students will have to miss class this year—particularly in the first week—because of mandatory quarantines, travel restrictions and visa delays. I strongly urge you to attend class in the first week if you can. If you cannot, please view the classes with care on Panopto.

⁵ 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, and David Cole, [Opinion, Laptops vs. Learning](#), Wash. Post, Apr. 7, 2007. 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).

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).

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% based on a timed final exam.

I will give you at least ten days to complete the assignment. In the past, most students spent four to six hours on the problem. To help you prepare for the graded homework assignment, we will first do an ungraded homework assignment of the same form for Class 18 and spend all of that class analyzing it.

This year, I will post the graded homework assignment on Friday, November 5 (after Class 19), and it will be due on Monday, November 16. We will spend all of class the following day (Class 23) going over the graded homework assignment in detail. The ungraded and graded homework assignments should be excellent preparation for the final exam.

This course has a five-hour take-home exam that will be available throughout the take-home exam period. I will write the exam so that you should be able to complete it within four hours (assuming adequate preparation).⁶ 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 assignments, cases, outlines (commercial or otherwise), books, treatises, the Internet, Westlaw, and Lexis-Nexis. The exam will be available throughout the take-home exam period (Tuesday, December 7, through Thursday, December 16). You may take the exam anything during this period, but once you start you must complete it within five hours.

The graded homework assignment and the final exam will set your base grade. As noted above, upward adjustments may be made for class participation, while downward adjustments will be made for a failure to submit the homework assignments.

Office hours and optional review sessions

I welcome the opportunity to talk to you outside of class to answer questions, explain concepts, explore some topics in more depth, or just talk about law and law practice. Since I do not have an office on campus, I do not have regularly scheduled office hours at the law school. But we can talk outside of call in three different ways.

⁶ My postmortem discussions with students in the last two classes 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.

First, I will arrive early before class and stay after class to talk as long as students want.

Second, I am happy to set up a Zoom session during the week with anyone who would like to talk (either individually or in a group).

Finally, you can also always email your questions to me.

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

More formally, I will hold at least three optional review sessions during the course: one on competition economics after Class 9, one on formal theories of anticompetitive harm and defenses in horizontal mergers after Class 19 (immediately before the posting of the graded homework assignment), and a final review session after the last class. These sessions are entirely optional and, if you attend, you are free to leave any time the spirit strikes you.

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.

Lunch and drinks

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 us to get to know 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. Depending on how things develop on the COVID front, I would like to resume these outings this fall. If circumstances do not permit that, I will host some virtual happy hour sessions over Zoom.

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 an excellent 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 remain trying times and the course is a demanding one. If personal circumstances arise that prevent you from adequately 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 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 to it even if you are just shopping.

I look forward to seeing you in class.

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.