

**Georgetown University Law Center
Merger Antitrust Law
Fall 2022**

**Professor Dale Collins
Tuesdays and Thursdays, 3:30-5:30 pm**

INTRODUCTION AND “RULES OF THE ROAD”

First class: Tuesday, August 30

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:

- Anheuser-Busch InBev’s acquisition of Grupo Modelo (the maker of Corona beer)
- The contested takeover battle by Hertz and Avis Budget for Dollar Thrifty
- 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
- Penguin Random House’s pending acquisition of Simon & Schuster
- AT&T’s attempted acquisition of T-Mobile
- T-Mobile’s acquisition of Sprint
- Booz Allen Hamilton pending acquisition of Everwatch
- Sirius’ acquisition of XM satellite radio
- Illumina pending acquisition of Grail
- UnitedHealth’s pending acquisition of Change Healthcare
- Facebook’s acquisition of Instagram and WhatsApp
- Visa’s aborted acquisition of Plaid
- Meta’s pending acquisition of Within

- Comcast's acquisition of NBC Universal
- AT&T's acquisition of Time Warner
- Coca-Cola's acquisition of Coca-Cola Enterprises
- Sabre's attempt to acquire FareLogix

If an interesting merger arises during the course (and I expect one almost certainly will), 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:

- Evolving modes of merger antitrust analysis
- 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 substance, so we will spend a meaningful amount of time on the process of merger antitrust reviews, consent settlements, and litigation in addition to substantive rules.

Goals of the course

This high-end course will teach you both the theory and practice of contemporary merger antitrust law. It is designed to prepare you to immediately contribute to a sophisticated antitrust or M&A practice in a major law firm or antitrust enforcement agency. But even if you do not plan to practice antitrust or M&A law, it should materially increase your sophistication as you prepare to enter 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 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 hurdles and the process of 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 senior 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 the investigating agency's expressed concerns about the 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 on the [Merger Antitrust Law \(2022\)](#) page on 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 from cases, almost all of the materials for this course will be in full text. For the most part, you will see what the practitioner sees in the form the practitioner first sees it.

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 Before each class, I will distribute a memorandum ("reading guidance") that prioritizes

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

the reading and highlights the key topics we will discuss. If you reach 4.5 hours and have yet to finish, feel free to stop reading. If you pay attention to the prioritization but run out of time, 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 skim to get a sense of the material. Always read the reading guidance for each class before starting the materials.

The materials in this course are not necessarily works of art. 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 learned the most from what I believe were mistakes or missed opportunities and asking how I would have handled the matter differently.

Class notes

To cut down on the required reading and enable you to participate more in class discussion, I will do here what I did when I was in practice giving defense presentations to the FTC and DOJ staff and did 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 you need 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 and 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 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 time. With one exception, the homework assignments will not be graded (see below on the graded homework assignment). *I will track submissions, however, and failing 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 you could expect to receive in a merger antitrust practice at a government agency or

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 confusing areas that need more explanation in class. Somewhat 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, just as you could in practice. 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 written individually (although you may ask classmates, especially if you work in a group, to critique your work before submitting it).²

You must submit answers to the homework assignments to me before the beginning of the 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 “instructor’s 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.

Please keep in mind that lawyers are rarely the final decision-makers in legal matters: lawyers typically act as advisors or advocates, but someone else— a judge, investigating agency, assigning partner, your client, or your client’s counterparty—will make the final decision. Therefore, most of what you will write in practice will be to persuade others to accept your conclusions or recommendations. 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 that your answer is the right one.³ To that end, one skill we will focus on 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

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 personally 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 spent any time in the timed exam composing an explanation of the theory.

³ When I was in practice, I found that I often spent as much time trying to convince co-counsel for the other merging party that I had 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 or 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.

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 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 they can just read instead. We will spend a significant amount of class time actively discussing 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. I also 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 classes and review sessions will be recorded on Panopto, but viewing a class will not count towards class attendance without advanced permission.

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. The slides 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 in the slides to the materials. I will post the class slides I use after each class.

Laptop policy. I allow laptops and other electronic devices in class *only* to access the reading materials, class notes, and homework problems. If you want to take notes, please do that by hand. The purpose of class is for you to participate in the discussion 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.⁴ I do not usually do cold-calling in class, but I make an

⁴ 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); Colleen P. Murphy, Christopher J. Ryan & Yajni Warnapala, [Note-Taking Mode and Academic Performance in Two Law School Courses](#), 68 J. Leg.

exception for students who I think are using their laptops or other devices for reading emails, looking at sports, checking stock prices, and the like. And I can be a very aggressive Socratic examiner!

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.

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 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 (November 1) and spend all of that class analyzing it in detail. We will do another detailed examination of an exam-type problem—focusing on common mistakes—for Class 20 (November 8).

This year, I will post the graded homework assignment on Wednesday, November 9, after the optional horizontal mergers review session. Answers will be due on Monday, November 21. The following day (Class 24), we will spend all of class reviewing the graded homework assignment. 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).⁵ 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,

Ed. 207 (2019); 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).

⁵ My postmortem discussions with students in the last three years revealed an almost universal preference for a five-hour exam. The nature of the hypotheticals will not be different than in a four-hour exam; the only difference is that you will have more time to prepare your answer.

December 6, through Thursday, December 15). 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 may be made for failing 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 class in three different ways.

First, I will arrive early before class and stay after class to talk for 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 10, one on formal theories of anticompetitive harm and defenses in horizontal mergers after Class 20 (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 classes alone. 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 improving the course—making it more educationally efficient, as an economist might say—and 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 I am wasting your time or not getting through, I definitely want to know in order to correct it. You are paying a lot for your legal education at Georgetown, and I want to ensure 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 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 website.

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 we will build some sense of class community throughout the semester. To enable me to get to know you better, I have created a 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 before class starts, even if you are just shopping.

Finally, I have created an anonymous Google form for you to tell me 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.

I look forward to seeing you in class on August 30.

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.

P.P.S. I will try mightily not to reschedule classes. But I have a family commitment in Minnesota and will have to reschedule Class 10 (which normally would meet on September 29). I have tentatively set the rescheduled date for Wednesday, September 18. If this is a problem for you, please let me know by email.

