

**Georgetown University Law Center
Merger Antitrust Law
Fall 2023**

**Professor Dale Collins
Tuesdays and Thursdays, 1:10 am – 1:10 pm**

INTRODUCTION AND “RULES OF THE ROAD”

First class: Tuesday, August 29

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:

- TransDigm’s acquisition of Takata’s passenger restraint systems business
- Anheuser-Busch InBev’s acquisition of Grupo Modelo (the maker of Corona beer)
- Assa Abloy’s acquisition of Spectrum Brands’ Hardware and Home Improvement division
- The contested takeover battle by Hertz and Avis Budget for Dollar Thrifty
- H&R Block’s attempt to acquire TaxACT
- U.S. Sugar’s acquisition of Imperial Sugar
- Sysco’s attempt to acquire U.S. Foods
- Staples’ attempt to acquire Office Depot
- AT&T’s attempted acquisition of T-Mobile
- T-Mobile’s acquisition of Sprint
- Steris’ acquisition of Synergy Health
- Facebook’s acquisition of Instagram and WhatsApp
- Meta’s acquisition of Within
- Comcast’s acquisition of NBC Universal
- AT&T’s acquisition of Time Warner

- Illumina’s acquisition of Grail
- Coca-Cola’s acquisition of Coca-Cola Enterprises
- UnitedHealth’s acquisition of Change Healthcare
- Amgen’s pending acquisition of Horizon Therapeutics

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:

- 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 defense of a transaction
- Anticipating and structuring consent decree settlements
- Litigating merger antitrust cases (including “litigating the fix”)
- Negotiating provisions in merger agreements to allocate antitrust risk between the merging parties

In addition, the merger guidelines issued jointly by the Antitrust Division of the Department of Justice and the Federal Trade Commission contain important information about the techniques and standards the federal enforcement agencies use in assessing the competitive effects of mergers they review. The agencies have been reviewing the existing guidelines for the last 18 months, and on July 19, 2023, the agencies released a draft set of guidelines for public comment.¹ These draft guidelines, which are likely to be finalized in much the same form, revive theories from the 1960s and early 1970s, create new “presumptions,” “thresholds,” or “factors” that significantly expand the reach of the approaches that have been in use over the last 30 years, and introduce new theories of anticompetitive harm. The guidelines, which are not legislative rules and hence not binding on the courts, are often at odds with established modern judicial precedent and are likely to receive a hostile reception from the courts. We will examine how the agencies are trying to change merger antitrust law through the revised guidelines and their enforcement actions throughout the course and how the courts are likely to react.

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.

¹ See U.S. Dep’t of Justice & Fed. Trade Comm’n, [Draft Merger Guidelines](#) (July 19, 2023).

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 equip you with the skills to immediately contribute to a sophisticated antitrust or M&A practice in a major law firm or antitrust enforcement agency. Even if you do not plan to specialize in antitrust or M&A law, the course will enhance 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. Conduct a preliminary merger analysis to identify potential substantive issues, defenses, and remedies in typical transaction scenarios involving public companies, utilizing only publicly available information.
2. Explain the merger review process to a client, starting from the filing of an HSR premerger notification report, and progressing through preliminary and second request investigations, concluding with final arguments presented to the heads of the investigating agency. If the agency determines that the deal raises antitrust concerns, you will also be able to describe the challenges involved and the process of negotiating consent decree relief.
3. Understand the key formal theories of antitrust harm applicable to mergers and acquisitions and the principal defenses available to the merging parties. You will develop the ability to apply these theories and defenses to any given transaction.
4. Prepare 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 enforcement agencies in light of the investigating agency's expressed concerns about the transaction.
6. Advise a client on the primary considerations and timing implications of litigating a merger antitrust case, including the standards for granting preliminary and permanent injunctive relief, the burdens of proof and persuasion for litigating parties, and the strategic and tactical implications of these factors in 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 \(2023\)](#) 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.² Before each class, I will distribute a memorandum (“reading guidance”) that prioritizes the reading and highlights the key topics we will discuss. If you follow the reading guidance and reach 4.5 hours without finishing the materials, 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 approach the materials critically. I have found that I learned the most from what I believe were mistakes or missed opportunities and thinking about 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 approach eliminates the need for you to focus on writing down every detail during class, allowing for better engagement.

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 will

² I understand that this is the minimum requirement for Georgetown to satisfy the ABA accreditation standards.

include the class notes and the primary source materials. The reading guidance will assist you in efficiently navigating these materials as you prepare for class.

A word of caution: Although the class notes contain crucial information for your understanding, I may not explicitly cover every point during class unless specifically prompted by your questions. My aim is to utilize our class time to delve into the strategic and tactical aspects of our case studies rather than delivering lectures based on the class notes.

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

Homework problems

You will be required to submit a written assignment before most classes. These assignments are generally designed to be completed within a short time frame, although a few will require a more extensive effort. 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 a vital component of the course and will emulate the types of tasks you would encounter in a merger antitrust practice within a government agency or major law firm. They serve to ensure your comprehension of essential concepts and methodologies covered in the course, as well as help me identify areas that may require further explanation during class. Somewhat to my surprise, students in past classes have repeatedly told me how much they learned (and even enjoyed!) doing the homework assignments.

With the exception of one graded homework assignment, I encourage you to collaborate with fellow classmates. Indeed, I encourage you to work in groups on the homework problems. Additionally, you may consult external resources, including online materials, just as you would in a real-world practice setting. The objective is for you to engage with the problems and prepare for class discussions. However, it is necessary that you individually write and submit your own work (although you may seek feedback from classmates, particularly if you are working in a group).³

You must submit answers to the homework assignments to me before the beginning of the class for which they are assigned. We will discuss the answers to most homework problems in class. Following our discussion, I will provide an “instructor’s answer” to each assignment. If you disagree with any aspect of my response, I encourage you to challenge it. There is often more than one valid approach to problem-solving, especially in this area of law, and I do not claim that my way is the only correct way.

³ 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.

It is important to remember that lawyers typically act as advisors or advocates and rarely have the final decision-making authority in their matters. The ultimate decisions are typically made by judges, investigating agencies, assigning partners, clients, or the counterparty to your client. Therefore, much of your writing in practice will be aimed at persuading 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.⁴ A key focus of the homework assignments will be developing clear, concise, and persuasive writing skills that effectively present a compelling linear argument.

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 you failed to do the assignment.

Classroom policies

Preparation for class. Preparation for class is of utmost importance, and I cannot emphasize it enough. Following the reading guidance and completing the homework problems will greatly enhance your learning experience in this course. Previous students have consistently expressed how much more they enjoy the class and effectively grasp the subject matter when we analyze case studies instead of relying solely on lectures that simply repeat materials that you can read outside of class. Therefore, after a few classes on the institutional structure of merger antitrust law, we will dedicate most of our class time to discussions centered around case studies and homework assignments.

While the reading materials and class notes will provide the necessary factual background, institutional context, and rules for each case study, the classroom discussions will focus on analytical approaches, strategies, and tactics. Not surprisingly, you will derive limited benefit from the class discussions if you have not completed the required readings and reviewed the class notes. Furthermore, I have designed the homework problems to facilitate your preparation and active participation in the class discussions. To maximize your learning experience in this course, it is essential to actively engage with the reading materials, diligently complete the homework assignments, and actively participate in class discussions. I strongly encourage you to come fully prepared and ready to contribute to our discussions. Your active involvement will not only deepen your comprehension but also enrich the learning environment for the entire class.

⁴ 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.

Class attendance is mandatory. Merely completing the assigned readings 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 prevent you from attending some or all of the classes, please get in touch with me to discuss the situation. Together, I am sure we can find a solution.

All classes and optional review sessions will be recorded on Panopto for reference purposes. However, please note that viewing a recorded class will not be count as attending the class without advanced permission. If you anticipate missing a class, unless there is an emergency, please inform me via email in advance. Multiple unexcused absences will have a negative impact on your grade.

Class participation. I do not include class participation as a component in your final course grade. On the other hand, actively engaging in class discussions can positively influence your final grade.

Class slides. 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.

I will frequently use PowerPoint slides during our class sessions. These slides serve as an organizational tool to structure the topics we will cover. At times, the class slides may contain similar content to the class notes, but I will strive to present the material from a different perspective in the slides. After each class, I will post the class slides on Canvas.

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.⁵ I do not usually employ cold-calling in class, but I make an 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 class schedule on Canvas and AppliedAntitrust.com. The regular order can easily be thrown off if an

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

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 (October 31) and spend both Class 18 and Class 19 analyzing the assignment in detail.

I will post the graded homework assignment on Friday, November 10, after an optional horizontal mergers review session earlier that day. Answers will be due by 8:00 pm on Monday, November 20. 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).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 5, through Thursday, December 14). 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 or unexcused absences from class.

⁶ My postmortem discussions with students in the last four 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.

Office hours and optional review sessions

I am delighted to discuss questions, clarify concepts, delve into topics in greater detail, or engage in conversations about law and law practice outside of class. While I do not have an office on campus and therefore do not have scheduled office hours, there are three ways we can connect:

1. *Before and after class*: I will arrive early before class and will stay after class to talk for as long as students want.
2. *Zoom sessions*: I am more than happy to arrange Zoom meetings for individual or group discussions.
3. *Email*: You can always reach out to me via email with your questions.

In addition, I will hold at least three optional review sessions during the course to provide additional support and clarify any lingering questions:

1. *Friday, September 29*: Review session on competition economics.
2. *Friday, November 10*: Review session on formal theories of anticompetitive harm and defenses in horizontal mergers.
3. *Friday, December 1*: Final review session.

Please note that attendance for these sessions is entirely optional, and you are free to leave whenever you like.

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. I would like to resume these outings this fall, so if you are interested in a late lunch after class, let me know.

Feedback on the course (with or without anonymity)

Your legal education at Georgetown involves a significant investment, and I want to ensure you receive the utmost value from this course. I value your feedback on how to improve the course and enhance your learning experience. Your input is crucial in ensuring the course is effective

and meets your educational needs. Whether it pertains to the course structure, reading materials, class notes, lectures, homework assignments, or my presentation style, clarity, and effectiveness, I welcome your thoughts and suggestions.

You can reach out to me before or after class, via email, or on a private Zoom conference. Additionally, I have created a Google form, accessible at the top of the “Home” page on the Canvas course website, which allows you to provide feedback anonymously if you prefer. If at any point you feel that your time is not being utilized optimally or if there are areas where improvements can be made, I genuinely want to hear about it so that I can address those concerns.

Final thoughts

These remain trying times and the course is a demanding one. If you encounter personal circumstances 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.

To facilitate this, I have created a Google form that you can find at the top of the “Home” page of the Canvas course. It will provide me with an opportunity to get to know you better. Feel free to skip any question you prefer not to answer. The questionnaire should only take a few minutes to complete, and I would appreciate it if you could respond before the start of class, even if you are just shopping.

Lastly, I have created another anonymous Google form for you to provide feedback on teaching styles you have experienced thus far in law school. This is an excellent opportunity to share your thoughts. While your responses will not alter the course content, I will strive to adapt my teaching style to better align with the preferences of the class.

I look forward to seeing you in class on August 29.

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.