MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
Fall 2026

Tuesdays and Thursdays, 3:30 pm – 5:30 pm

Dale Collins
wdc30@georgetown.edu
www.appliedantitrust.com

Class 22 (November 10): *AT&T/Time Warner*—The Factual Case (Unit 12)

In this class, we turn to the first part of the *AT&T/Time Warner* opinion. This portion covers the industry, the merger, the governing law, and the government's non-expert evidence. The DOJ tried to show that combining a major distributor with key programming would change bargaining incentives and raise rivals' costs. Judge Leon found the government's documents, regulatory statements, and competitor testimony insufficient to establish that prediction.

Comcast/NBCUniversal. This 2011 DOJ case deserves attention as the precursor to *AT&T/Time Warner*. Comcast, the nation's largest cable and broadband provider, proposed to acquire NBCUniversal, a major programmer and content producer with broadcast networks, cable channels, and a stake in Hulu (slides 39-42). The DOJ and FCC identified risks that Comcast could foreclose or disadvantage rival multichannel video distributors and online video providers by restricting access to NBCU programming or raising content prices (slide 43). The DOJ consent decree and FCC order imposed access obligations and dispute-resolution procedures, together with protections concerning online distribution and Hulu (slide 44). The case exemplified reliance on conduct remedies to address vertical harms. The settlement did not adjudicate the legality of the unmodified transaction.

The AT&T transaction and the parties' positions. The transaction closely paralleled *Comcast/NBCUniversal* in structure: both combined a major distributor with a major programmer and content producer. AT&T, the nation's largest multichannel video distributor through DirecTV and a leading wireless carrier, proposed to acquire Time Warner, owner of Turner Broadcasting, HBO, and Warner Bros. (slides 45-48). Like Comcast/NBCU, the merger joined a large distribution platform with important programming, creating potential leverage over rival distributors and online video services. The class notes describe the parties' business rationale and their positions in the distribution chain (slide 49). The Division, however, rejected the proposed behavioral settlement—which was modeled on the Comcast/NBCU protections—and chose to litigate. The Division's complaint alleged that AT&T would have both the ability and incentive to raise content prices to competing distributors and to disadvantage emerging online distributors, including through coordination with *Comcast/NBCUniversal* (slides 50-52). These were the government's theories to be proved, not established consequences of the merger.

The deal-announcement materials describe the parties' commercial rationale; the government's public statements and complaint explain its theory of harm. Senator Franken's letter illustrates congressional engagement in a high-visibility transaction, and AT&T's public response shows how the merging parties framed their defense. Please read the AT&T press release announcing the transaction (pp. 87-93). You may skim or skip the remaining deal-announcement materials (pp. 94-113). Read Senator Franken's letter to Attorney General Jeff Sessions (pp. 114-21) and the Department of Justice press release announcing its suit (pp. 122-23), but you may skim or

skip the complaint itself (pp. 124-46). Read AT&T's public response and accompanying background statements (pp. 147-51).

The industry, the parties, and the merger. Traditional multichannel video programming distributors (MVPDs), such as cable companies and DirecTV, purchase programming from content owners and sell bundles to subscribers. Online video distributors (OVDs) include on-demand services such as Netflix and virtual MVPDs such as Sling, which distribute packages of live channels over the internet. These business models compete in different ways, so the terms are not interchangeable. Turner's sports, news, and entertainment programming mattered because losing it could cause subscribers to leave a distributor. The competitive issue was the magnitude of that loss and the fraction of departing subscribers who would move to AT&T, rather than the mere popularity of Turner's content. Read the opinion's introduction and industry and transaction background (pp. 152-91).

Procedural history and governing law. Judge Leon adapted the *Baker Hughes* burden-shifting framework to the vertical setting. In horizontal mergers, the government can rely on the *Philadelphia National Bank* structural presumption to establish its prima facie case. That presumption does not follow merely from combining firms at different levels of the supply chain. The DOJ therefore needed evidence connecting this transaction to a likely substantial lessening of competition. Defendants could rebut that prediction, and the government retained the ultimate burden of persuasion. Read the procedural history and legal standard (pp. 191-210).

The opinion also explains why the transaction had to be evaluated against the likely future of a changing industry. The parties presented the merger as a response to online competition and changing advertising and distribution models. The government principally advanced an increased-bargaining-leverage theory, but it also pursued claims concerning harm to virtual MVPDs and restrictions on HBO promotions. The court's discussion of industry change and the increased-leverage theory supplies the setting for its evaluation of the evidence. Read that discussion as part of this class's assignment (pp. 210-25).

The government's non-expert evidence. The DOJ relied on prior regulatory submissions by AT&T and DirecTV, internal business documents, and testimony from rival distributors to support its increased-leverage theory. Earlier statements opposing other vertical transactions could be used as admissions that common ownership creates foreclosure incentives. Internal documents could reveal how the businesses understood competition and bargaining, while competitors could explain the commercial importance of programming. Judge Leon nevertheless required a connection between that evidence and a likely change in bargaining outcomes caused by this merger.

The court discounted the regulatory statements because they addressed different transactions, sometimes concerned different mechanisms, or expressed general possibilities rather than predictions supported by this record. It examined the internal documents in context, including their authors, purpose, and relationship to actual business decisions. It also distinguished evidence that Turner's programming was valuable from evidence that integration would enable Turner to obtain higher fees. The absence of an explicit plan to raise rivals' costs is not itself a legal defense: Section 7 concerns likely effects, and an economic incentive can exist without an internal document describing it. Read the discussion of programming popularity, regulatory submissions, and internal documents (pp. 225-42).

The competitor testimony presented a related evidentiary problem. Executives described concerns about blackouts and increased bargaining leverage, but the court found much of their testimony speculative, unsupported by analysis, or inconsistent with other evidence. Some concerns involved conduct already possible before the merger. Others assumed actual withholding even though Shapiro's principal theory predicted higher negotiated fees while programming continued to be supplied. The court also considered the witnesses' incentives to oppose a transaction that might make AT&T a stronger competitor. This does not mean competitor testimony is inherently uninformative; its weight depends on the basis for the witness's prediction and how well it fits the theory being litigated. Read through the conclusion of the competitor-testimony discussion, stopping immediately before Section III.B.4, "Real-World Evidence Indicating That Prior Vertical Integration . . . ." (pp. 242-50).

From incentives to evidence. The new class-note comparison connects the Class 21 examples to the AT&T theory. Downstream recapture could strengthen the merged firm's bargaining position over programming fees, while internalizing upstream profit could encourage lower prices to its own subscribers. Comparing those predictions requires translating input-cost changes into retail prices, accounting for opportunity cost and pass-through, and weighting price changes by the affected subscriber counts. A profitable strategy, an input-fee increase, and net consumer harm are different propositions. The classroom examples supply the logic; they do not establish the relevant magnitudes in AT&T. Read the comparison (slide 54).

Looking ahead. Class 22 ends with the court's analysis of the government's non-expert evidence. The government also presented expert testimony from Professor Carl Shapiro, who developed a Nash bargaining model to quantify predicted harm from the merger. Class 23 examines the model, the government's economic theory, and the court's critique, and then begins Professor Dennis Carlton's empirical comparison of earlier transactions. This sequence differs from the order of the opinion, which discusses Carlton's retrospective evidence before Shapiro's model. Apart from the class-note comparison just assigned, the detailed expert analysis remains for Class 23.

Enjoy the reading. As always, if you have any questions, please send me an email.