

Antitrust Law: Case Development and Litigation Strategy

Dale Collins

Georgetown University Law Center, Spring 2023

Tuesdays, 3:30 pm – 5:30 pm

wdc30@georgetown.edu

www.appliedantitrust.com

First class: Tuesday, January 17

SEMINAR PAPERS: GETTING STARTED

Welcome to the course. I hope that everyone is having a safe and restful break.

This course does not have an exam, but it does require a paper. Even though you are probably still recuperating from last semester, I encourage you to be thinking about your paper for this course. All of you know—probably all too painfully—how fast the semester goes by and how swamped you are at the end of the semester as you are completing papers and studying for exams. A little work now can save you much grief later.

The introductory email on Canvas explains in some detail the paper requirements for both the two-credit and three-credit sessions of the course (pp. 4-6). For now, three things are important:

1. While this is a course on procedure and case strategy, you can write on any U.S. antitrust topic that interests you. I used to require that papers address a procedural question, but I allowed so many exceptions that I decided to drop the requirement. Paper topics are not exclusive—more than one student can write on the same topic.
2. We must agree on the question the paper will address. History suggests that this usually takes several rounds of discussions or emails. The introductory memorandum to the course explains more about this. The deadline for approval is Wednesday, February 1—about two weeks into the course.
3. Unless we agree otherwise, two-credit papers should be in the form of a reasoned memorandum of law and three-credit papers should be in a form suitable for publication in a law journal.

Here are some popular questions from prior years to help you think about what the paper might address. The following questions (in a form suitable for a memorandum of law) ask for an assessment of the current state of the law in a procedural context:

1. You have asked me to review the law in the various circuits as to whether and, if so, under what conditions a Rule 23(b)(3) class may be certified where the class definition encompasses some unidentified putative class members that were not injured by the challenged conduct.
2. You have asked me what needs to be alleged in a horizontal price-fixing complaint in addition to consciously parallel conduct to withstand a motion to dismiss under Rule 12(b)(6) on the element of conspiracy in a claim alleging a violation of Section 1 of the Sherman Act.
3. You have asked me to examine the FTC invitation-to-collude complaints and accompanying consent decrees to determine the circumstances under which the FTC is

likely to challenge a firm for issuing an unaccepted invitation to collude in violation of Section 5 of the FTC Act.

4. You have asked me whether the standard for obtaining a preliminary injunction in federal district court against the consummation of an allegedly anticompetitive merger is lower for the Federal Trade Commission (“FTC”) than it is for the Department of Justice (“DOJ”). You have also asked, if the FTC’s standard is lower, what arguments can the merging parties make to the court to bring the standard in an FTC action closer to the standard in a DOJ action?
5. You have asked me to (1) identify the rule in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), regarding class certification; (2) determine why the majority rejected the plaintiffs’ evidence as insufficient to sustain class certification; (3) determine how and why the dissent differed from the majority; and (4) evaluate how Comcast has been applied in subsequent antitrust cases.
6. You have asked me whether a price-fixing plaintiff may withstand a motion to dismiss under Rule 12(b)(6) where the complaint seeks “umbrella damages” under Section 4 of the Clayton Act and alleges that (1) the plaintiff purchased its product from a nonconspiratorial competitor (2) at a supracompetitive price (3) enabled by the conspiracy.

Alternatively, you can write a paper that considers the strategic aspects of an appropriate case. Here are some possibilities:

1. A complaint has been filed against your client. How should the client defend? For complaints, consider:

[*Colorado v. Google, Inc.*](#), No. 1:20-cv-03715-APM (D.D.C. filed Dec. 17, 2020)

[*Texas v. Google, Inc.*](#), No. 4:20-cv-00957 (E.D. Tex. filed Dec. 16, 2020)

[*FTC v. Facebook, Inc.*](#), No. 1:20-cv-03590 (D.D.C. filed Dec. 9, 2020)

[*New York v. Facebook, Inc.*](#), No. 1:20-cv-03589-JEB (D.D.C. filed Dec.9, 2020)

[*United States v. Google LLC*](#), No. 1-20-cv-03010 (D.D.C. filed Oct. 20, 2020)

Henry v. Brown Univ., No. 1:22-cv-00125 (N.D. Ill. filed Jan. 9, 2022) (financial aid price-fixing case)

If you would like to write from a plaintiff’s perspective, analyze both the elements of the prima facie case and the defenses likely to be raised and how the client should respond to them.

2. The government has lost several major cases recently. Why did the government lose and was there a better way to prosecute the case? For cases, consider:

[*United States v. AT&T Inc.*](#), 310 F. Supp. 3d 161 (D.D.C. 2018) (AT&T/Time-Warner)

[*United States v. Sabre Corp.*](#), 452 F. Supp.3d 97 (D. Del. 2020) (Sabre/Farelogix)

[*New York v. Deutsche Telekom AG*](#), 439 F. Supp.3d 179 (S.D.N.Y. 2020) (T-Mobile/Sprint)

[*United States v. U.S. Sugar Corp.*](#), C.A. No. 21-1644 (MN), 2022 WL 4544025 (D. Del. Sept. 9, 2022) (U.S. Sugar/Imperial Sugar)

[*United States v. UnitedHealthcare Group Inc.*](#), No. 1:22-CV-0481 (CJN), 2022 WL 4365867 (D.D.C. Sept. 21, 2022) (United Health/Change)

3. Some areas of law are unsettled. We can create a hypothetical that requires you to analyze the law and propose a strategy for prosecuting (or defending) a case to which the law applies. A good example is the extraterritorial reach of the Sherman Act under the [Foreign Trade Antitrust Improvements Act](#). The circuits that have addressed the issue are split.

You also can write on an issue of law raised in a case. Some cases to consider:

[*Axon Enter., Inc. v. FTC*](#), No. 21-86 (U.S. docketed July 20, 2021) (argued Nov. 7, 2022)¹

[*FTC v. AMG Capital Mgmt.*](#), 141 S.Ct. 1341 (U.S. Apr. 22, 2021) (9-0 decision that FTC Act § 13(b) does not authorize the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement)

[*Apple Inc. v. Pepper*](#), 139 S. Ct. 1514 (U.S. May 13, 2019) (a 5-4 decision on the application of the indirect purchaser doctrine)

[*Ohio v. American Express Co.*](#), 138 S.Ct. 2274 (June 25, 2018) (a 5-4 decision on nonprice vertical restraints)

[*FTC v. Actavis, Inc.*](#), 570 U.S. 136 (2013) (June 17, 2013) (a 5-3 decision on pay-for-delay prescription drug monopolization)

Finally, on January 5, 2023, the FTC, by a 3-1 vote, proposed a new rule to make noncompetition covenants outside the sale of a business an “unfair method of competition” under Section 5 of the FTC Act.² This blanket prohibition of noncompetition covenants rejects 400 years of jurisprudence holding that the legality of such covenants is to be determined by whether they were “reasonable” in scope, duration, and geographic coverage in the circumstances. The proposal also raises the question of whether the FTC has the power under the FTC Act to promulgate substantive legislative rules defining methods of unfair competition, as well as serious constitutional questions about whether the rule is outside the scope of the commission’s authority under the “major question” and nondelegation doctrines. The issues

¹ This case challenges the constitutionality of the FTC adjudicative power and process. The petition for a writ of certiorari posed two questions. The Supreme Court granted a writ on one question regarding the use of administrative law judges, which was argued on November 7, 2022. Following the success of Axon in reaching the Supreme Court, constitutional challenges to the FTC are likely to be raised in every FTC administrative adjudication until the issues are resolved definitively. *See, e.g., Answer and Defenses of Respondent Microsoft Corp., Affirmative and Other Defenses ¶¶ 17-22, In re Microsoft Corp.*, No. 9412 (F.T.C. Dec. 22, 2022). On January 4, 2023, Microsoft filed an [amended answer](#) striking its constitutional defenses. I have not yet been able to find out why it abandoned these defenses, although I suspect it thought that they would detract from the main thrust of Microsoft’s substantive defense and that the constitutional challenges could always be raised collaterally anyway.

² Press Release, Fed. Trade Comm’n, [FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition](#) (Jan. 5, 2023). The proposed rule can be found [here](#).

raised by the rule could not be more timely. I welcome any students who would like to write a paper addressing any of the issues raised by the proposed rule.³

These are just suggestions. Feel free to come up with your own ideas. Just remember that we have to agree on the question before you start writing. Also, when thinking about a question, it is important to match the amount of work to the credits you are taking.

If you start thinking about a paper topic, I would be delighted to discuss it with you over email, the phone, or Zoom. Just let me know when is a convenient time for you. If we do not talk beforehand, I look forward to meeting you at our first class on Tuesday, January 17.

Dale Collins

³ I have collected the proposed rule, the FTC fact sheet, and the supporting and dissenting statements of the commissioners [here](#). If you are interested in exploring the FTC's proposed noncompete rule for a possible paper topic, be sure to read [Commissioner Christine Wilson's dissenting statement](#). It tees up a number of the issues admirably.