

Antitrust Law: Case Development and Litigation Strategy

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Georgetown University Law Center, Spring 2021

Tuesdays, 5:30 pm – 7:30 pm

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www.appliedantitrust.com

First class: Tuesday, January 26

Welcome to the course! I appreciate that you may only be shopping at this point, so I thought I would tell you about how I intend to approach things. Please see the course home page on Canvas for the assignment for the first day of class.

PHILOSOPHY

The course explores the process of raising, defending against, and ultimately resolving, antitrust challenges in the U.S. system. Antitrust, as with economic regulation generally, is as much about process as it is about the substance. You were introduced to the substance in the survey class that you undoubtedly took at some point; this course teaches the process of how the law is applied in practice.

Through an in-depth exploration of a few contemporary case studies, we will examine the substantive strategies and procedural tools available to subjects of investigations and to litigants. Since this is only a two-credit class, we will limit our attention to price fixing, with a short detour into merger cases, but those will allow us to cover the full gamut of criminal investigations and prosecutions, private actions (including antitrust class actions), and administrative investigations, prosecutions, and settlements. In the process, we will examine criminal indictments, plea agreements and the DOJ's leniency policy; sufficiency of pleading; presumptions and burdens of proof; the use of expert evidence; dispositive pretrial motions; class actions and class action settlement strategies; premerger notification and DOJ/FTC merger investigations; settlements of agency investigations; temporary restraining orders and preliminary injunctions; administrative litigation; laches and the statute of limitations; treble damage judgments; interlocutory and final appeals; and Supreme Court review.

You might be tempted to think about the course as the criminal and civil procedure of federal antitrust law, but that would be only part of the story. To be successful as a private practitioner or a government prosecutor, you need to know not only what the procedures are but also how and when to invoke them. This usually means understanding the applicable substantive rules, the public policy behind those substantive rules (so that you can argue, if appropriate, that the rules should be changed because the underlying public policy considerations have evolved), the relevant facts, how your opponent is likely to respond to your move, your likelihood of success and what success means for your case, and the consequences of failure. We will see a lot of successes and failures in the cases we consider in this course. Even if your primary interest is not antitrust, what we will do in this course is readily extensible to any type of litigation.

But even if your inclination is toward policy rather than practice, I submit that you will find the course useful. Antitrust policy is effected through the application of the law through litigation (or at least the threat of litigation), whether by government agencies or private parties, and the regulatory outcomes that result will be highly dependent on the process and the skill of the

advocates in using the procedural tools available to them. Indeed, the bulk of Supreme Court innovations in antitrust law over the last 40 years have been in antitrust procedure, broadly defined here to include not only the Federal Rules of Civil Procedure but also such things as prudential standing, admissibility of expert evidence, and remedies.

THE CLASS SCHEDULE

The current [class schedule](#) is in Canvas, but I expect to adjust it somewhat depending on how fast we are getting through the materials and the interests of the class.

COURSE MATERIALS/COURSE WEBSITE

There is no textbook for this course. The materials for each week may be downloaded through the links on Canvas or directly from my website, www.appliedantitrust.com. If you have a problem in downloading something, let me know and I will email it to you.

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. Anything that is really important in the lower priority reading I will cover in class.

Read the materials once with some care but do not obsess over them. For the most part, the readings will consist of court documents, such as complaints, motions, briefs, interlocutory orders, trial court decisions, and appeals decisions. These materials are not boiled down to their essence where everything is important (as you would find in a casebook), and there is no need to know everything in them. Of course, the more you know from the reading, the more you will get from the course.

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 encourage you to be critical of the materials. I have found that I learn the most from what I believe are mistakes or missed opportunities and asking how I would have done it differently.

Do not be concerned about the amount of materials on the site. Although it started as the web site for this class, I expanded it significantly beyond the scope of the strategy course when I taught the antitrust survey course. It also serves as the place where I park much of my historical source material on antitrust law.

If you have a problem in downloading something, let me know and I will email it to you.

CLASS NOTES

In order 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

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

team—I am going to use PowerPoint presentations that capture all of the salient points that we will cover. This is much better than having you concentrate on writing down everything and thinking about it later (if you get to it at all). The PowerPoint presentations are available on canvas course home page and on Applied Antitrust.com along with the required and supplemental reading materials.

Thinking about this a little more, I fear I could be accused of deceptive advertising in using the term “class notes.” While the decks do contain information that is important for you to know, some of what is there will not be covered explicitly in class (unless you ask a question about it). Moreover, while some classes will follow the decks reasonably closely, other classes will not follow the decks at all. So maybe I should call them something other than “class notes.”

Bottom line: It will be important to read both the required reading and the class notes.

CLASSROOM POLICIES

NB: Given the pandemic, I will be teaching solely on Zoom this semester. However, this is a synchronous class and it is mandatory for you to attend class at the scheduled time unless you have my permission to miss it.

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 as opposed to having me lecture on something that you can just read instead. 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. 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. We meet on Tuesdays from 5:30 pm to 7:30 pm. My plan is to take a 10-minute break in the middle of each class.

Simply doing the reading and working the problems will not enable you to master the materials or adequately prepare for the exam. Students must attend synchronous lectures in real time either on Zoom or in-person (depending on what the school permits and your own preferences). If your circumstances will not permit you to attend some or all of the classes in real time, let’s talk about it. I appreciate that the current environment may make attendance difficult if not impossible. All of the classes and review sessions will be recorded, but do not count towards attendance without specific permission.

You should have your camera on while in class. If you do not have access to a webcam, your internet connection will not handle video, or you are unable to participate via video for any other reason, please contact me so that we can talk about it. Video participation is essential to the classroom learning experience and to class cohesion. If you have your video off without permission, there will be consequences.

If you are going 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. If you have to miss most or all of the classes (say, because you live in Asia), let me know and we will work out an alternative arrangement.

Laptop policy. I allow laptops *only* for the limited purpose of accessing the reading materials, class notes, and homework problems (and now, of course, participating on Zoom). 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.²

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.

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

PAPERS

There is no exam in this class, but a paper is required. I have some [possible paper topics](#) on the Applied Antitrust.com web site, but you can write on anything that interests you on antitrust procedure *provided* that we agree on both the subject matter *and* the specific question the paper will address. Paper topics should address a procedural question, although I have made exceptions in the past and will undoubtedly do so in the future when a good reason (or a particularly interesting question) is presented.

Two-credit course

For students taking the two-credit course, I would like the papers to be in the form of a reasoned memorandum of law (MOL) to me. As you begin thinking about topics, a good structure for a MOL is to start with the sentence: “You have asked me to [state the task].” For example, “You have asked me what standards courts employ in resolving challenges to the relevance or reliability of economic expert testimony in class certification proceedings,” or “You have asked me what more than parallel conduct must be pleaded in a price-fixing complaint to make a claim of conspiracy plausible after *Twombly* in order to withstand a motion to dismiss under Rule 12(b)(6).”

This structure imposes a very good discipline for two reasons: (1) it forces you to think how to frame the question concisely, and (2) you can show it to the assigning attorney before you begin your real work just to make sure that you both are on the same page. I assure you that it will frequently be the case that you will not have a common understanding of the assignment (often because the assigning attorney had not thought through the question sufficiently), and agreeing

² 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. 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).

upfront on the statement of the task will save you much grief in the long run. It will also help you focus exactly what question you are answering—an imprecise question is likely to result in an imprecise answer. We will find something that can be done in 15-20 double-spaced pages.³

The forms of MOL differ, but a good rubric to follow is a paragraph starting with the question and then a few sentences motivating the question, a paragraph providing the bottom-line answer to the question, and then the analysis. In a long memorandum, you should also include a third paragraph at the beginning providing a roadmap of the analysis.

Here is the schedule for a two-credit paper:

Wednesday, February 10	Need approval of question to be addressed on or before this date
Wednesday, February 17	First draft of introduction; identify key cases
Monday, March 8	Second draft of introduction First draft of background
Wednesday, April 7	First draft
Monday, May 17	All final drafts are due ⁴

This schedule gives the last dates on which the work product is due, but feel free to submit it to me earlier. I am happy to work with you whenever you would like to start. Indeed, I have had students who have completed much of their papers over the winter break.

Three-credit course

For those taking the course for three credits, the paper must meet the prerequisite for complying with the Law School's Writing Requirement as outlined in the Student Handbook. The purpose of the writing requirement is to “develop[] students’ ability to independently engage in a sustained, in-depth research and writing project for a legal audience.” To that end, there will be extensive back-and-forth with the instructor throughout the semester on all aspects of the paper, including the specification of the question to be addressed, the analytical approach to researching and answering the question, the organization of the paper and the writing of the introduction (critical parts of any persuasive paper or brief), and a critique of the analytics and rhetoric of the first draft. The emphasis throughout will be on producing a paper that is complete, clear, analytically rigorous, and persuasive. In my experience in legal practice, getting the “right” answer is usually only about 40% of the exercise. Since lawyers are seldom the final decision makers, the remaining 60% is convincing the relevant decision maker—whether it be a partner in a law firm, an enforcement agency on a prosecutorial decision, or a judge in litigation—that your answer is in fact the right one. Accordingly, there will be a heavy emphasis on clarity of exposition and persuasiveness as we work on these papers. Be forewarned!

³ Some students in past iterations of this course have asked if they can write a paper comparing some aspect of U.S. procedure to that in another jurisdiction. While these types of papers can be extremely interesting, I discourage them for two reasons. First, I do not know much about procedure in most other jurisdictions, and therefore could have some difficulty in helping you work through the paper, not to mention the difficulty I would have in assessing it. Second, and much more importantly, the purpose of the course is for you to learn U.S. antitrust procedure.

⁴ This is a day *earlier* than the last date set in the academic calendar. In years past, papers for May graduates have been due on an earlier date. Not this semester—everyone’s paper is due on the same date.

In addition, students must comply with various technical requirements listed in the Student Handbook, which include: (1) use of legal forms of citation, consistent with the Bluebook;⁵ (2) submission of an outline; (3) submission of a first draft of at least 6,000 words (excluding footnotes); and (4) submission of a revised final paper of at least 6,000 words (excluding footnotes) based on the professor's comments.⁶ Subject to discussion with me and my approval, the paper may take the form of a reasoned memorandum of law *or* a paper in a form suitable for publication in a legal journal. Generally speaking, papers with positive conclusions about what the law is (the kind of conclusion you would argue to a court) should be the form of a memorandum of law. Papers with some normative conclusions about what the law should be in the form of a law journal article.⁷

Here is the schedule for a three-credit paper that satisfies the upperclass writing requirement:

Wednesday, February 10	Need approval of question to be addressed on or before this date
Wednesday, February 17	Outline (including identification of key cases) and first draft of introduction; identify key cases
Wednesday, March 8	Second draft of outline and introduction + first draft of section providing motivation and background for question
Wednesday, April 7	First draft
Monday, May 17	All final drafts are due ⁸

This schedule gives the last dates on which the work product is due, but feel free to submit it to earlier. I am happy to work with you whenever you would like to start. Indeed, I have had students who have completed much of their papers over the winter break.

VIRTUAL OFFICE AND HAPPY HOURS

I have some potential conflicts this semester that will prevent me from having regular office offices. That said, I would be happy to schedule Zoom conferences at a mutually convenient time whenever you have questions about the course or would like to talk about your paper. I will also try to sign onto Zoom ten minutes before class and stay as long as you like after class until we kicked off if there is a class behind us. Finally, I hope to host some virtual happy hours just so

⁵ There are two types of people in the world: those who Bluebook and those who don't. If you are writing for someone who does not Bluebook and fail to use the correct forms of citation, it usually does not matter. If you are writing for someone who does Bluebook (characteristic of those who were law review editors) and fail to use the correct form of citation, the reader will take this as a signal that you have been insufficiently inculcated into the law, which will materially undermine your persuasiveness. (Consider this a form of Pascal's wager in the legal world.) It is easy to learn to Bluebook and we will follow it strictly.

⁶ Six thousand words is roughly 25 pages doubled-spaced in 12 pt. Times Roman.

⁷ Another possibility we can discuss is a paper in the form of a brief to a court. To keep us out of the difficulties of dealing with the record, the question(s) should be one of pure law. Papers in the forms of brief would have to comply with all of court requirements on form.

⁸ See *supra* note 4.

we all get to know one another better. If you do not want to wait for me to schedule a happy hour, get a group together and propose a time to me.

GRADES

We will talk about this on the first day of class.

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, or classes. 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 or a private Zoom conference, I have also created a Google form that you can use to reach me anonymously anything throughout the course. The form can be found in the “Google forms” section on the course home page in Canvas.

ASKS PRIOR TO THE BEGINNING OF CLASS

First, I would like to get to know more about you. To facilitate that, I have created a “Getting to Know You” Questionnaire for you to fill out to tell some things about yourself. You can find this in the “Google forms” section on the course home page in Canvas.

Second, 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 a good 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

I welcome a dialogue about how to make the course better—more educationally efficient, as an economist might say—and, equally important, more engaging. So starting with this memorandum, please feel free to contact me with any thoughts you have on what we should be doing in the course and what you would like to get out of it. The best way to contact me is through my email, wdc30@georgetown.edu.

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 https://appliedantitrust.com/collins_bio.pdf.