

# **Antitrust Law: Case Development and Litigation Strategy**

Dale Collins

Georgetown University Law Center, Spring 2022

Tuesdays, 3:30 pm – 5:30 pm

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## **INTRODUCTION AND “RULES OF THE ROAD”**

First class: Tuesday, January 18

*FIRST TWO CLASSES ON ZOOM*

Welcome to the course! I appreciate that you may only be shopping at this point, so I thought I would tell you 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.

### **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 we only meet in class for two hours each week, we will limit our attention to price fixing with a short detour into merger cases at the end of the course. These two areas will still 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.

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. Each week's materials may be downloaded through the links on the Canvas course site or directly from my website, [www.appliedantitrust.com](http://www.appliedantitrust.com). If you have a problem 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.<sup>1</sup> 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 key topics that we will discuss in class. If you pay attention to the prioritization but run out of time to finish the reading, you will be fine. I will cover in class anything really important in the lower priority reading.

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 essential (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.

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

## CLASS NOTES

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 team: I will distribute 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 the Canvas course home page and on Applied Antitrust.com, along with the required and supplemental reading materials.

The reading assignments for each class include the class notes as well as 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 materials in the class notes.

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

## CLASSROOM POLICIES

*Preparation for class.* I cannot stress enough how important it is for you to follow the reading guidance. 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 they 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. So come prepared!

*Class attendance is mandatory.* We meet on Tuesdays from 3:30 pm to 5:30 pm. My plan is to take a 10-minute break in the middle of each class.

Simply doing the reading and working on the problems will not enable you to master the materials. Students must attend class in person (or, when required, on Zoom). 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 of the classes and review sessions will be recorded and available on Panopto through the Canvas course site, but viewing a class on Panopto 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. On the other hand, meaningful class participation can materially help your grade for the course.

*Laptop policy.* I allow laptops *only* for the limited purpose of accessing the reading materials and class notes. 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 videorecorded—if you want to transcribe a class, do it after class off the video recording.<sup>2</sup>

*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 case is decided 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 will circulate a separate memorandum on papers that includes some possible paper topics, 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.<sup>3</sup>

### *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) addressed 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 out a claim of conspiracy plausible after *Twombly* 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 about how to frame the question concisely, and (2) you can show it to the assigning attorney before you

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<sup>2</sup> 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); 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).

<sup>3</sup> One exception might be the analysis of some aspect of the antitrust legislative proposals pending before Congress.

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). Agreeing upfront on the statement of the task will save you much grief in the long run. It will also help you focus precisely on what question you are answering—an imprecise question is likely to result in an imprecise answer. We will find a question that can be answered in 15-18 double-spaced pages in 12 point Times Roman.<sup>4</sup>

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 end of the opening section providing a roadmap of the analysis.

Here is the schedule for a two-credit paper:

Wednesday, February 2	Need approval of question to be addressed on or before this date
Wednesday, February 9	First draft of introduction; identify key cases
Monday, March 7	Second draft of introduction; first draft of the section providing motivation and background for the question to be addressed
Wednesday, April 6	Complete first draft
Tuesday, May 17	All final drafts are due <sup>5</sup>

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. There is no need to wait for classes to begin. You would be surprised how difficult it can be to find a suitable topic and frame a research question, so I encourage you to start early.

### *Three-credit course*

For those taking the course for three credits, the paper must comply with the Law School's Writing Requirement 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

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<sup>4</sup> 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 usually do not approve 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.

<sup>5</sup> 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.

persuasive. In my experience in legal practice, getting the “right” answer is usually only about 60% of the exercise. Since lawyers are seldom the final decision makers, the remaining 40% 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!

The various technical requirements listed in the Student Handbook include: (1) use of legal forms of citation, consistent with the Bluebook;<sup>6</sup> (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.<sup>7</sup> Unless we otherwise agree, the paper must be written in a form suitable for publication in a legal journal.

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

Wednesday, February 2	Need approval of question to be addressed on or before this date
Wednesday, February 9	Outline; first draft of the introduction; identify key cases
Wednesday, March 8	Second draft of outline; second draft of introduction; first draft of the section providing motivation and background for the question to be addressed
Wednesday, April 6	Complete first draft
Tuesday, May 17	All final drafts are due <sup>8</sup>

This schedule gives the last dates on which the work product is due, but feel free to submit it earlier. I am happy to work with you whenever you would like to start. There is no need to wait for classes to begin. You would be surprised how difficult it can be to find a suitable topic and frame a research question, so I encourage you to start early.

## OFFICE HOURS

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 as long as students want.

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<sup>6</sup> 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 in all submissions (including the early drafts).

<sup>7</sup> Six thousand words is roughly 25 pages doubled-spaced in 12 pt. Times Roman.

<sup>8</sup> See *supra* note 5.

- 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.

## 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 just classes. 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.

As much as I would like to resume these outings this fall, I suspect that my circumstances will preclude in-person get-togethers. My wife and I have three very young unvaccinated grandchildren in the area and we see them for multiple hours each week, so we have not returned to dining in restaurants. Perhaps we can get together later in the semester when we can eat outdoors. In the meantime, I will host some virtual happy hour sessions over Zoom if we can get a critical mass together.

## GRADES

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

## FEEDBACK ON THE COURSE (WITH OR WITHOUT ANONYMITY)

I welcome your thoughts on 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 on anything throughout the course. The form can be found in the “Google forms” section on the course home page in Canvas.

## ASKS BEFORE 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. Please complete the questionnaire before the first day of class.

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

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](mailto: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](https://appliedantitrust.com/collins_bio.pdf).