

Antitrust I: Principles (Fall 2021)

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Welcome to Antitrust I: Principles

This course examines the laws that protect consumers by ensuring competition in the marketplace. Specific topics include agreements among competitors, joint ventures, mergers, and monopolization. We will examine Supreme Court doctrine, influential modern lower court decisions, and government enforcement guidelines. Economic concepts and thinking characteristic of modern antitrust analysis are integrated throughout the course.

This course is a prerequisite for Antitrust II.

No background in economics is necessary or assumed. If you plan on taking the antitrust specialization, or are interested in greater exposure to the economic foundations of antitrust, I do recommend enrolling in Antitrust Economics in conjunction with this course.

Learning Outcomes: By the end of the course students should be able to:

- Understand the goals of antitrust, its basic institutions, and enforcement structures
- Understand the antitrust laws and enforcement policies governing horizontal mergers, including Section 7 of the Clayton Act, the 2010 Horizontal Merger Guidelines, and the 2020 Vertical Merger Guidelines
- Understand the antitrust laws and enforcement policies governing horizontal restraints of trade, including Section 1 of the Sherman Act
- Understand the antitrust laws and enforcement policies governing monopolization and vertical restraints of trade, including Section 1 and Section 2 of the Sherman Act

Class: This course meets Monday and Wednesday from 09:50 am to 11:15 am. We will occasionally run until 11:25 am.

Pursuant to Academic Regulation 4-2.2, no portion of a class session or an examination may be preserved by means of a recording device such as an audio recording device or camera. Any exceptions to this policy must be expressly permitted in writing by me.

Office Hours: All office hours will be via appointment. I will always be available **Tuesday 2–3 pm**. I am also generally available via appointment and email. Please copy Daniel Tonsing on appointment emails: dtonsing@gmu.edu.

Required Casebook: Andrew I. Gavil, William E. Kovacic, Jonathan B. Baker, and Joshua D. Wright, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* (2016) (3d Edition).

We will also read enforcement agency guidelines, scholarly commentary, and other supplementary materials I will post on TWEN or are otherwise available on the web. Optional Reading is truly optional. You will not be tested on optional material.

Powerpoint slides will be posted on TWEN and made available AFTER class.

Grading and Basis of Evaluation & Assessments: The final exam will account for 100% of your grade, subject to a discretionary class participation adjustment of 1/3rd of a grade in **either** direction. The final exam is comprised of essay questions and multiple choice questions.

You should come to class having read and thought about the material and prepared to participate in discussion. The purpose of the lecture is not to review the assigned readings but to use them as a starting point for our learning.

Final Exam: The final exam is scheduled for **DECEMBER 04 at 12:00 PM**. There is no make up exam.

Final Exam Permissible Materials: Open book, open note, and open materials.

Tentative Syllabus: We may deviate from the tentative syllabus with assignments taken from current events, new cases, to accommodate guest speakers, scheduling reasons, etc. Please make sure you are signed up to receive updates via TWEN.

READING ASSIGNMENTS

UNIT 1: Antitrust's Goals, Enforcement Institutions, and Foundational Concepts

August 23

INTRODUCTION TO ANTITRUST LAW

Chapter 1: 1-6; 55-70; 85-92

"The Consumer Welfare Standard in Antitrust Law: Outdated or a Harbor in a Sea of Doubt?": Hearing Before the Subcomm. on Antitrust, Competition Pol'y and Consumer Protection of the S. Comm. on the Judiciary, 115th Cong. (2017) (statement of Joshua D. Wright) (TWEN)

Optional Reading:

Wright, Dorsey, Rybnicek, & Klick, [Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust](#), 51 ARIZ. ST. L.J. 293 (2019)

Video Assignment:

Tad Lipsky, Global Antitrust Institute Online Lecture Series, "[Economics and Antitrust](#)"

August 25

ANTITRUST INSTITUTIONS AND OBJECTIVES

Chapter 1: 41–47 (Brunswick Corp.)

Chapter 8: 1347–61 (Illinois Brick)

Frank H. Easterbrook, [The Limits of Antitrust](#)

Video Assignment:

Judge Douglas Ginsburg, GAI Online Lecture Series, "[Antitrust Standing](#)"

August 30

ECONOMICS PRIMER

Chapter 1: 70–85

Video Assignments:

Professor Bruce Kobayashi, GAI Online Lecture Series, "[Demand](#)"

Professor John Yun, GAI Online Lecture Series, "[Cost, Production, and Supply](#)"

Professor John Yun, GAI Online Lecture Series, "[Equilibrium](#)"

Professor Murat Mungan, GAI Online Lecture Series, "[Perfect Competition and Monopoly](#)"

UNIT 2: Horizontal and Vertical Mergers

September 01

THE STRUCTURAL PRESUMPTION

Clayton Act §§ 7–16

Chapter 5: 671–709, 717–19

Douglas H. Ginsburg & Joshua D. Wright, [Philadelphia National Bank: Bad Law, Bad Economics, Good Riddance](#)

Int'l Center for Law & Econ, [The Competition and Antitrust Law Enforcement Reform Act](#) (Sen. Klobuchar's proposed bill)

Optional Reading:

[Note on Corporate Concentration](#) (OECD)

September 06

NO CLASS—LABOR DAY

September 08 **2010 HORIZONTAL MERGER GUIDELINES & MARKET DEFINITION**

Chapter 5: 719–38

[Horizontal Merger Guidelines](#) (all)

Video Assignment:

Professor Wright, GAI Online Lecture Series, “[Market Definition](#)”

September 13 **UNILATERAL EFFECTS**

Chapter 5: 799–828; 853–58

Jonathan B. Baker, [Econometric Analysis in FTC v. Staples In the Matter of Office Depot, Inc./OfficeMax, Inc. \(Closing Statement\)](#)

Video Assignment:

Professor Wright, GAI Online Lecture Series, “[Intro to Unilateral Effects](#)”

September 15 **HOSPITAL MERGERS**

FTC v. Advocate Health Care: (1) original district court decision; (2) Seventh Circuit decision; (3) final district court decision (TWEN)

Steven Tenn, [Key Takeaways from the Advocate-Northshore Merger Litigation](#)

September 20 **PRODUCT MARKET DEFINITION**

Guest Speaker: Jeffrey Perry & Carrie Mahan (Weil Gotshal)

[FTC v. Sysco](#)

September 22

COORDINATED EFFECTS

Re-read [HMG § 7](#)

Chapter 5: 738–64; 774–79; 788–94

Holcim-Lafarge ([Complaint](#); [Wright Dissent](#))

Guest Lecturer: Professor Jan M. Rybnicek (Freshfields)

FTC v. Rag-Stiftung (TWEN)

September 27

VERTICAL MERGER GUIDELINES AND VERTICAL MERGERS I

Chapter 5: 870–80

[United States v. AT&T, Inc.](#), D.C. Circuit Court of Appeals Opinion (Feb. 26, 2019)

[2020 Vertical Merger Guidelines](#)

Illumina-Grail [complaint](#) (Mar. 30, 2021)

Tad Lipsky, [With Challenge of Illumina-Grail Merger, Biden Antitrust Policy Claims its First Victim: Cancer Patients](#)

Video Assignment:

Professor Bruce Kobayashi, GAI Online Lecture Series, [“Successive Monopoly”](#)

Optional Reading:

[GAI Comment on the Vertical Merger Guidelines](#)

Joshua D. Wright & Jan M. Rybnicek, [United States v. AT&T/Time Warner: A Triumph of Economic Analysis](#), 6 J. ANTITRUST ENFORCEMENT 459 (2018)

United States v. AT&T Inc., 310 F. Supp. 3d 161 (2018) (TWEN)

September 29 NEW YORK, ET AL. V. DEUTSCHE TELEKOM AG

Guest Speaker: George Cary (Cleary Gottlieb Steen & Hamilton)

[New York v. Deutsche Telekom AG](#)

UNIT 3: Horizontal Restraints

October 04 PER SE RULE & THE RULE OF REASON I

Sherman Act § 1

Chapter 2: 101–23; 160–65; 181–84

October 06 PER SE RULE & THE RULE OF REASON II

Chapter 2: 123–60; 184–99; 246–58

October 11 FALL BREAK—NO CLASS

October 12 PER SE RULE & THE RULE OF REASON III

Chapter 2: 217–24

[FTC v. Polygram](#) (pages 13–35 only)

[American Needle, Inc. v. NFL](#)

October 13 MODERN APPLICATIONS I: FTC V. 1-800 CONTACTS

1-800 Contacts v. FTC, 1 F.4th 102 (2d Cir. 2021) (TWEN)

Optional Reading:

Commissioner Phillips [Dissenting Opinion Part I & Part II](#)

Wright, Singer, & Manne, [Antitrust Out of Focus: The FTC's Myopic Pursuit of 1-800 Contacts' Trademark Settlements](#)

October 18 **MODERN APPLICATIONS II: *US v. APPLE*; PROVING AGREEMENT**

Chapter 3: 311–35; 370–71 (Figure 3-3)

[U.S. v. Apple](#)

October 20 **NO CLASS**

October 25 **MODERN APPLICATIONS III: *NCAA v. ALSTON***

[NCAA v. Alston](#), 594 U.S. ____ (2019)

Optional Reading:

[Q&A: Prominent Sports Attorney Breaks Down NCAA's 'Crossroads' Over SCOTUS Shutout, NIL](#)

[NCAA v. Alston–The Wait Is Over...What's Next for the NCAA](#)

UNIT 4: Exclusionary Conduct & Monopolization

October 27 **MONOPOLY POWER, EXCLUSIONARY EFFECTS & RAISING RIVALS' COSTS**

Chapter 1: 47–55

Chapter 4: 437–77; 482–504

November 01 **UNILATERAL REFUSAL TO DEAL**

Chapter 4: 504–22; 625–36

[FTC v. Qualcomm](#) (9th Cir. 2020)

Optional Reading:

Edwards, Ginsburg, & Wright, [Section 2 Mangled: FTC v. Qualcomm on the Duty to Deal, Price Squeezes, and Exclusive Dealing](#), 8 J. ANTITRUST ENFORCEMENT 335 (2019)

- November 03** **EXCLUSIVE AND EXCLUSIONARY CONTRACTS I: TYING**
- Chapter 6: 965–1011
- November 08** **EXCLUSIVE & EXCLUSIONARY CONTRACTS II: EXCLUSIVE DEALING**
- Chapter 6: 1014–46
- FTC v. McWane ([Wright Dissent](#))
- Joshua D. Wright, [Moving Beyond Naïve Foreclosure Analysis](#)
- Optional Reading:**
- Keyte, et al., *The Economics of Foreclosure: A Lawyer’s Guide*, 32 ANTITRUST 49 (2018) (TWEN)
- November 10** **EXCLUSIVE & EXCLUSIONARY CONTRACTS III: PREDATION & DISCOUNTING**
- Chapter 4: 566–84; 593–95
- Chapter 6: 1051–78
- Optional Reading:**
- Derek W. Moore & Joshua D. Wright, [Conditional Discounts and the Law of Exclusive Dealing](#)
- Bruce H. Kobayashi, *The Economics of Loyalty Discounts and Antitrust Law in the United States*, 1 COMPETITION POL’Y INT’L 115 (2005) (TWEN)
- November 15** **BIG TECH & ANTITRUST I: THE FOUNDATIONS**
- Chapter 4: 525–42 (United States v. Microsoft)

Ginsburg & Wong-Ervin, [Challenging Consummated Mergers Under Section 2](#), COMPETITION POL'Y INT'L

November 17

BIG TECH & ANTITRUST II: AFTERMARKETS

Chapter 4: 520–24 (Eastman Kodak)

[Epic Games v. Apple](#)

Optional Reading:

Benjamin Klein, [Market Power in Antitrust: Economic Analysis After Kodak](#), 3 SUP. CT. ECON. REV. 43 (1993)

November 22

BIG TECH & ANTITRUST III: EXCLUSIONARY CONDUCT

Chapter 4: 525-542

[Google Complaint](#)

FINAL EXAM REVIEW: TBD

FINAL EXAM: DECEMBER 4 at 12:00 PM