

## **Antitrust Economics – Law 237-001**

Wednesdays, 6:05-8:05 pm

*Antonin Scalia Law School, George Mason University, Fall 2023*

**Professor Bruce H. Kobayashi**, Hazel Hall-Room 450G · bkobayas@gmu.edu · (703) 993-8034

**Office Hours.** Wednesdays 5:00pm-6:00pm (in-person) & by appointment (virtual)

**Welcome.** The goal of the course is to teach the underlying economic foundations that drive antitrust analyses at the U.S. Federal Trade Commission and Department of Justice, Antitrust Division. We will assess key legal cases and seek an understanding as to how economics influences agency and court decisions.

*Learning Outcome:* By the end of the course, students will have developed skills in the use of economic tools to be able to conduct sophisticated economic analysis of antitrust cases. Students will be able to perform complex problem solving and also to critically identify and assess the central economic issues in antitrust matters.

### **Texts.**

JOHN KWOKA AND LARRY WHITE (eds.), *THE ANTITRUST REVOLUTION* (7<sup>th</sup> edition) (KW).

ROGER BLAIR AND DAVID KASERMAN, *Antitrust Economics*, Second Edition (2009) (BK)

\*\*Denotes. supplemental readings available on TWEN.

### **Course Requirements and Grading.**

*Written Assignments.* There will be two homework assignments. Each assignment is worth **15 percent** of your overall grade—for a total of **30 percent**. *All assignments must be submitted via TWEN before midnight on the due date.* Late submissions will receive zero credit.

- First Assignment: September 20; Due: September 27
- Second Assignment: October 25; Due: November 1

*Final Exam.* The final exam will be administered in class on December 6, 2023 at 6PM (there is no make-up exam) and will count for **70 percent** of your grade. The final exam is open book & notes (internet blocked). It will consist of short answer questions.

*Grading.* This course follows the grading policies outlined in Academic Regulations (AR) 4-5.7, which may be found at ACADEMIC REGULATIONS, <https://www.law.gmu.edu/academics/regulations>.

*Class Participation & Attendance.* Students are expected to come to class prepared and ready to discuss the assigned readings. Your grade is subject to a discretionary class participation adjustment of 1/3<sup>rd</sup> of a grade in either direction. The course adheres to the attendance policy as outlined in AR 4-1.

*Honor Code.* Students are expected to adhere to the Scalia Law HONOR CODE, which may be found at [https://www.law.gmu.edu/academics/honor\\_code](https://www.law.gmu.edu/academics/honor_code).

*Tentative Syllabus,* Last updated 8/1/23. We may deviate from the tentative syllabus for reasons including current events, new cases, scheduling, *et cetera*.

*Intellectual Property.* I own all course content that is created (*e.g.*, slides), regardless of format (electronic, print, audio, video). You are forbidden to use them with, or distribute them to, anyone other than your classmates in this course.

## **Class Schedule**

### **1. Basic Models of Competition (August 23)**

Required:

- KW: Introduction (pp. xxi-xxvi).
- BK Chapter 1-3
- Benjamin Klein, *Brand Names*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS, available at <https://www.econlib.org/library/Enc1/BrandNames.html>

### **2. Horizontal Mergers – Overview (August 30)**

Required:

- BK Chapter 12.

- KW: Case 9: Prices, Market Definition, and the Effects of a Merger, Staples, Office Depot and Office Max. (1997, 2015, and 2016).
- Ashenfelter, et. al, *Empirical Methods in Merger Analysis: Econometric Analysis of Pricing in FTC v. Staples*, 13 INT. J. OF THE ECON. OF BUS. (2006).
- Kenneth Heyer, *Consumer Welfare and the Legacy of Robert Bork*, 57 J.L. & ECON. 19 (2014).
- U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) available at: <https://www.justice.gov/atr/horizontal-merger-guidelines-0>.
- U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, DRAFT HORIZONTAL MERGER GUIDELINES (2023), available at: [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p859910draftmergerguidelines2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf)

Suggested:

- Carl Shapiro, The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in 40 Years, 77 ANTITRUST L.J. 701 (2010).

### 3. Horizontal Mergers – Market Power & Definition (September 6)

Required:

- BK, Chapter 6, Sections 6.1-6.6
- Greg Werden, Demand Elasticities in Antitrust Analysis, 66 Antitrust L. J. 363 (1998).
- Daniel P. O'Brien & Abraham L. Wickelgren, A Critical Analysis of Critical Loss Analysis, 71 ANTITRUST L.J. 161 (2003).
- Benjamin Klein, Market Power in Antitrust: Economic Analysis After Kodak, 3 SUP. CT. ECON. REV. 43 (1993) – focus on pp. 71-82.

Suggested:

- Thomas A. Lambert, Four Lessons from the Whole Foods Case, REGULATION 22 (2008).
- Gregory J. Werden, Why (Ever) Define Markets? An Answer to Professor Kaplow, 78 ANTITRUST L.J. 729 (2013).

### 4. Horizontal Mergers – Unilateral Effects (September 13)

Required:

- Carl Shapiro, Mergers with Differentiated Products, ANTITRUST 23 (1996).
- Charles River Associates, Scoring Unilateral Effects with the GUPPI: The Approach of the New Horizontal Merger Guidelines, CRA COMPETITION MEMO (2010).
- FTC v. Ardagh Group, Saint-Gobain Containers: i) FTC's Complaint (2013), ii) Ardagh's Answer and Defenses (2013), and iii) Dissenting Statement of Commissioner Joshua D. Wright (2014).

Suggested:

- Gregory J. Werden, Unilateral Competitive Effects of Horizontal Mergers I: Basic Concepts and Models, 2 ISSUES IN COMPETITION L. & POL'Y 1319 (2008).

## 5. Retrospectives (September 20)

Required:

- KW, Case 1, Aetna-Humana
- Ashenfelter, et al., Retrospective Analysis of Hospital Mergers, 18 Int'l J. Econ. & Bus. 5 (2011)
- Christopher Garmon, The Accuracy of Hospital Merger Screening Methods, 48 RAND J. Econ. 1068 (2015).
- Vita & Osinski, John Kwoka's Mergers, Merger Control and Remedies: A Critical Review, 82 Antitrust L. J. 361 (2018).

Suggested

- Steven Tenn, Geographic Market Definition in Urban Hospital Mergers: Lessons from the Advocate-NorthShore Litigation, ANTITRUST SOURCE 1 (2017).
- Steven Tenn, Key Takeaways from the Advocate-NorthShore Merger Litigation, CPI ANTITRUST CHRON. 1 (2017).

## 6. Oligopolies, Coordinated Effects, and Efficiencies (September 27)

Required:

- KW: pp. 212-228.
- BK, Chapter 10, 11
- Nathan Miller & Matthew Weinberg, How the MillerCoors Joint Venture Changed Competition in U.S. Brewing, *Microeconomic Insights* (2017), available at: <https://microeconomicinsights.org/millercoors-joint-venture-changed-competition-u-s-brewing/>
- George Stigler, *Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964).
- Janusz Ordover, *Coordinated Effects*, 2 ISSUES IN COMPETITION L. & POL'Y 1359 (2008).

Suggested:

- Nathan Miller & Matthew Weinberg, Understanding the Price Effects of the Miller Coors Joint Venture, 85 *Econometrica* 1763 (2017).
- Nathan H. Miller, Gloria Sheu, and Matthew C. Weinberg, Oligopolistic Price Leadership and Mergers: The United States Beer Industry, 111 *American Economic Review*, 3123 (2021).
- Randal C. Picker, An Introduction to Game Theory and the Law, Coase-Sandor Institute for Law & Economics Working Paper No. 22 (1994).
- Joseph Harrington, Evaluating Mergers for Coordinated Effects and the Role of "Parallel Accommodating Conduct," 78 *ANTITRUST L.J.* 651 (2013).
- Opening Presentation, Department of Justice, *United States v. Apple Inc.* (2013); Direct Testimony of Orley C. Ashenfelter, *United States v. Apple Inc.* (2013).
- KW Case 20 – The Ebooks case Against Apple

## 7. Entry and Competition for the Market, Monopsony (October 4)

- BK Chapter 6.7
- Harold Demsetz, Barriers to Entry, 72 *Am. Econ. Rev* 47 (1982).
- Peter Caradonna, Nathan Miller & Gloria Sheu, Mergers, Entry and Consumer Welfare, available on ssrn at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3537135](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3537135)
- Harold Demsetz, Why Regulate Utilities? 11 *J. L. & Econ.* 55 (1968).

- Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297 (1990-1991).

## 8. Theory of the Firm and Vertical Mergers (October 11)

Required:

- Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).
- BK Chapter 15
- 2020 DOJ & FTC Merger Guidelines, available at [https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical\\_merger\\_guidelines\\_6-30-20.pdf](https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf)
- Judge Richard J. Leon's AT&T-Time Warner Decision, June 12, 2018.
- Shapiro's expert report in AT&T-Time Warner
- Russell Pittman, *Three Economist's Tools for Antitrust Analysis*, EAG Discussion Paper 17-1 (2017).
- Jonathan B. Baker, *Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis*, 25 *ANTITRUST* 36 (2011).

Suggested:

- KW, Case 18: Comcast/TWC.
- Abhinay Muthoo, *A Non-Technical Introduction to Bargaining Theory*, 1 *WORLD ECON.* 145 (2000).
- Enghin Atalay et al., *Vertical Integration and Input Flows*, 104 *AM. ECON. REV.* 1120 (2014).

## 9. Vertical Contracting, and Exclusionary Conduct (October 18)

Required:

- BK, Chapter 14, 16, 17
- James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 *INT'L J. INDUS. ORG.* 639 (2005), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=702961](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=702961).
- BK, Chapter 20, 21
- J. Mark Ramseyer & Eric B. Rasmusen, *Exclusive Dealing: Before, Bork, and Beyond*, 57 *J. L. & ECON.* S145 (2014).

- Dennis W. Carlton & Ken Heyer, Extraction vs. Extension: The Basis for Formulating Antitrust Policy Towards Single-Firm Conduct, 4 COMPETITION POL'Y INT'L 285 (2008).
- KW: Case 22: U.S. v. Microsoft (2001).

Suggested:

- Michael D. Whinston, Exclusivity and Tying in US v. Microsoft: What We Know, and Don't Know, 15 J. ECON. PERSP. 63 (2001).
- Ralph Winter, Vertical Control and Price Versus Nonprice Competition, 108 Q.J. ECON. 61 (1993).
- Ken Heyer, Predicting the Competitive Effects of Mergers by Listening to Customers, 74 ANTITRUST L.J. 87 (2007).

#### 10. Predatory Pricing and the Antitrust Duty to Deal (October 25)

Required:

- BK, Chapter 8
- KW Case 16 – Spirit Airlines v. Northwest Airlines
- Kobayashi and Wright, *Antitrust and Ex-Ante Sector Regulation* (with J Wright) GAI REPORT ON THE DIGITAL ECONOMY (2021) available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3733740](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733740).

Suggested:

- Kobayashi, *The Law and Economics of Predatory Pricing*, in ANTITRUST LAW AND ECONOMICS, K. Hylton, ed. Edward Elgar Publishing, Ltd. (2009), pp. 116- 156.

#### 11. Antitrust Remedies, Standing, and the Economics of Pass Through (November 1)

Required:

- BK, Chapter 7.8, Chapter 9
- Michelle M. Burtis & Bruce H. Kobayashi, *Regarding the Optimality Of Cartel Fines*, 2 CARTEL & CRIM. PRAC. COMMITTEE NEWSL., ABA Antitrust Section (2017).

- Brunswick v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977)
- Kobayashi and Wright, *What's Next in Apple, Inc. v. Pepper: The Indirect-Purchaser Rule and the Economics of Pass-Through*, CATO Sup. Ct. Rev. 249 (2019).

## 12. Price Discrimination & Tying/Bundling (November 8)

Required:

- BK, Chapter 13, 18.
- Hal Varian, *Differential Pricing and Efficiency*, 1 FIRST MONDAY 1 (1996) available at <https://firstmonday.org/ojs/index.php/fm/article/view/473>.
- \*\*James C. Cooper *et al.*, *Does Price Discrimination Intensify Competition? Implications for Antitrust*, 72 ANTITRUST L.J. 327 (2005).
- International Competition Network (ICN), *Chapter 6: Tying and Bundling, in UNILATERAL CONDUCT WORKBOOK* (2015) available at [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG\\_UCW-Ch6.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_UCW-Ch6.pdf).
- Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176 (1980).

## 13. Antitrust & Intellectual Property (November 15)

Required:

- KW Case 15 – Actavis
- B. H. Kobayashi, J. Wright, D. Ginsburg & J. Tsai, *Actavis and Multiple ANDA Entrants: Beyond the Temporary Duopoly*, (with ANTITRUST MAGAZINE, VOL. 29 pp. 89-97 (Spring 2015).
- U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (2017), available at: <https://www.justice.gov/atr/guidelines-and-policy-statements-0/2017-update-antitrust-guidelines-licensing-intellectual-property>.
- Joshua D. Wright & Douglas H. Ginsburg, *Whither Symmetry? Antitrust Analysis of Intellectual Property Rights at the FTC and DOJ*, 9 COMPETITION POL'Y INT'L 41 (2013).

**In Class Final Exam (Wednesday, December 6, 6 pm – 8 pm).**