

Antitrust II (Spring 2023)

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Syllabus

Welcome to Antitrust II

This course examines advanced topics in antitrust law. Specific topics include vertical restraints, criminal enforcement, innovation markets, exemptions and immunities, the territorial scope of U.S. antitrust law, and remedies. 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. No background in economics beyond what you learned in Antitrust I is necessary or assumed.

Antitrust I is a prerequisite for this course. L.L.M. students may seek a waiver of this requirement.

Class: We will meet on Thursdays from 9:00 am to 11:55 am.

Office Hours: I am available via remote appointment and email.

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* (2021) (4th Edition). We will also read recent cases, enforcement agency guidelines, scholarly commentary, and other supplementary materials that I will post on TWEN or that are otherwise available on the web.

Grading: 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. You should come to class having read and thought about the material, and ready to participate in the discussion.

Final Exam: The final exam is scheduled for May 5 at 12:00 PM. There is no make-up exam.

Final Exam Permissible Materials: Open book; your own notes; no commercial publications.

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

Learning Outcomes: By the end of the semester, students should (i) be able to analyze antitrust issues from a legal and an economic perspective; (ii) understand the most prominent antitrust issues of the day; and (iii) be fully conversant with the interplay between antitrust and intellectual property.

READING ASSIGNMENTS

Class 1: January 19 – Introduction / Class Overview

Class 2: January 26 – Non-Horizontal Mergers and Potential Competition

- Casebook: 906-920
- US v. United Health Group/Change Healthcare
- FTC v. MS/ABK Complaint and Responses
- FTC v. Meta/Within Complaint and Responses
- Hemphill & Wu, *Nascent Competitors*

Class 3: February 2 – Vertical Restraints

- Casebook: 930 - 987
- Ben Klein, Competitive Resale Price Maintenance in the Absence of Free-Riding

Class 4: February 9 – Multi-Sided Markets

- Ohio v. American Express, 138 S. Ct. 2274 (2018)
- Casebook: 1128 - 1138
- Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*
- Wright & Yun: *Burdens and Balancing in Multisided Markets: The First Principles Approach of Ohio v. American Express*

Class 5: February 16 – Criminal Enforcement [Guest Lecturer]

- Werden, Hammond, and Barnett, *Deterrence and Detection of Cartels*
- Ginsburg & Wright, *Antitrust Sanctions*
- DOJ Criminal Enforcement Trends (2022)

No Class: February 23 – Register for Spring Meeting

- No class, but please register for the ABA Spring Meeting (free for law students) and plan to attend 2 panels.

Class 6: March 2 – Section 2 and Merger Enforcement [Guest Lecturer]

- United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001)
- Ginsburg & Wong-Ervin, *Challenging Consummated Mergers Under Section 2*
- Muris & Nuechterlein, *First Principles for Review of Long-Consummated Mergers*
- Hoffman, *Antitrust in the Digital Economy: A Snapshot of FTC Issues*
- Jeffrey M. Wilder, *Potential Competition in Platform Markets*

Class 7: March 9 – First Amendment

- Casebook: 1388 -1398

- Eastern R.R. Presidents Conference v. Noer Motor Freight, Inc.
- United Mine Workers v. Pennington
- California Motor Transp. Co. v. Trucking Unlimited
- Prof'l Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc, (1993)

No Class: March 16 – Spring Recess

Class 8: March 23 – State Action Immunity & Relation to Other Federal Laws

- Casebook: 1354-1388
- Parker v. Brown, 371 U.S. 341 (1943)
- Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264 (2007)
- Ginsburg & Haar, *Resolving Conflicts Between Competition and Other Values*

Class 9: March 30 – Civil Remedies

- Casebook: 1438 - 1486
- *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021)

Class 10: April 6 -- Robinson Patman

- Casebook: 1138-1149
- FTC v. Morton Salt
- FTC v. Borden
- Texaco v. Hansbrouck
- Brooke Group v. Brown & Williamson Tobacco

Class 11: April 13 – FTC Rulemaking and Section 5 of the FTC Act

- Section 5 Unfair Methods of Competition Policy Statement (2022)
- Commissioner Wilson dissent
- *Official Airline Guides Inc v FTC*, 630 F 2d 920, 927 (2d Cir 1980)
- *Boise Cascade Corp v FTC*, 637 F 2d 573, 582 (9th Cir 1980)
- *El du Pont de Nemours & Co v FTC*, 729 F 2d 128, 139 (2d Cir 1984) (*Ethyl*)
- Kovacic and Marc Winerman, Competition Policy and the Application of Section 5 of the Federal Trade Commission Act (2010) 76 Antitrust LJ 929.

Class 12: April 20 -- Review

EXAM: May 5 at 12:00pm