

# Antitrust II: Applications

Spring 2025, 162-001

3 Credits

Bilal Sayyed

# Contact Information

- Bilal Sayyed
  - [bsayyed@gmu.edu](mailto:bsayyed@gmu.edu) (primary)
  - [bsayyed@techfreedom.org](mailto:bsayyed@techfreedom.org) (secondary); copy gmu
  - [bilal.Sayyed@cwt.com](mailto:bilal.Sayyed@cwt.com) (secondary); copy gmu
- [Rethinking Antitrust](#) Podcast

# Class Times

- Monday, Wednesday
  - Law 162-001: 9:50 – 11:15 AM

# Office Hours

- I don't have an office at the law school.
- Can meet before or after class.
- Can meet at law school at a scheduled time.

# Textbook

- No assigned text but consider accessing the free [ABA Antitrust Case Book](#) for some case excerpts.
- Will identify/circulate readings, if not linked to in this syllabus.
- Lots of cases repeat the basic points we will discuss in class, so I am not a stickler for reading specific cases, generally, but there are some important ones.
- For our readings, I have tried to pick newer rather than older cases; these cases are not foundational but discuss the principle from the foundational cases.
- Lots of good casebooks, but few cover most of the material we are going to focus on in Antitrust II.

# Learning Outcomes

- Basically, know more antitrust and think more rigorously about antitrust law and policy.
- Initial or better understanding of the antitrust laws: Sherman Act, Clayton Act, Federal Trade Commission Act, and Robinson Patman Act.

# Economics

- Good to know, but not a requirement for the course.
- I enjoy the economics of antitrust but my goal is primarily to teach you the law, not the economics.
- But the cases often include economic reasoning.

# Taping

- 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.



# 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.

# Class Participation

- I don't like to "lecture." I like to discuss the cases and other materials.
- Thus, you must 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 teaching/learning.

# Grading & Class Participation

- I take the bump up / bump down option for class participation seriously.
- I will move the exam grade ranges down to allow me to recognize superior class participation – quality, courage to ask what you do not understand or to take an educated guess, not just quantity (but quantity is okay too).

# Classroom Etiquette

- I try to get here on time. Please do the same. It is just a courtesy, to everyone.
- I am not insulted if you come in late but it can be disruptive, and being very late (or leaving very early) counts as an absence.
- If you come in late, sit somewhere where you do not disturb the class.
- If you have to leave early, sit somewhere where your leaving will not disturb the class.

# Classroom Etiquette

- I like interaction between/among students. It is okay to have a different view than another student and to express that difference.
- Just don't be disagreeable.
- Don't be a jerk. (Most important rule.)
- I will tell you when I think your answer is wrong/not fully thought out. But I hope I will not be harsh, and if I am you should tell me.

# Attendance

- I will take attendance.
- There are rules on attendance – I will follow school policy.
- Don't mess up by not showing up.

# Exam Date

- May 2, 12 pm.
- I may make the exam take-home with some flexibility on when you take it.

# Exam Content

- I try to cover everything in the course in the exam.
- Open book, open notes, open materials.
- No commercially prepared materials.
- Exam likely to be 3-5 essay questions: fact patterns analyzed/evaluated w/r/t law.
- I do not usually ask policy questions.



# Review Session

- I don't like to use a scheduled class for review.
- But, willing to schedule a review for a non-class period, if anyone wants a review.

# Slides

- I may or may not use slides in the course.
- If I use slides, I may or may not post them.
- I want you to read the materials not limit yourself to my slides or use the slides as a crutch.
- This syllabus will be posted and shared.

# My Goal For You (Beyond Antitrust)

- Learn to read cases, statutes, and other materials and identify what is important for your purpose.
- When you practice, you will consult treatises, hornbooks, articles, legislative history and other sources, but you must learn to read cases and statutes and identify what is relevant for your matter/question.
- Do not rely on someone else's work. Sources other than cases or statutes are not enough.

# Topics & Initial Reading Materials

Subject to Change / Time

# Mergers

- 2023 Merger Guidelines
  - 15 USC 18

# Merger Topics

- History of Merger Guidelines
- 2023 Merger Guidelines
  - Presumptions, Unilateral and Coordinated Effects & Trend Toward Consolidation
  - Innovation Effects
  - Rebuttals/Defenses
  - Monopsony
  - Vertical Mergers
  - Potential Entrant/Nascent Competition/Future Competition
  - Entrenchment/Conglomerate Mergers
  - Serial/Cumulative Acquisitions
  - Partial Acquisitions
  - Platforms

# Merger Guidelines

- [1968 Merger Guidelines](#)
- [1982 Merger Guidelines](#)
- [1984 Merger Guidelines](#)
- [1992 Horizontal Merger Guidelines](#)
- [1997 Horizontal Merger Guidelines](#)
- [2006 Commentary on Horizontal Mergers](#)
- [2010 Horizontal Merger Guidelines](#)
- [2020 Vertical Merger Guidelines](#)
- [2020 Commentary on Vertical Merger Enforcement](#)
- [2023 Merger Guidelines](#)

# Modern Horizontal Merger Caselaw

- United States v. Baker Hughes, 908 F.2d 981 (DC Cir. 1990)
- FTC v. Heinz, 246 F.3d 708 (DC Cir. 2001)
- United States v. Oracle, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).



# Presumptions, Unilateral & Coordinated Effects & Trend Toward Consolidation

- Guidelines 1-3, 7, 2023 Merger Guidelines
- Evidence of Adverse Competitive Effects, 2010 Horizontal Merger Guidelines
- Targeted Customers and Price Discrimination, 2010 Horizontal Merger Guidelines

# Presumptions, Unilateral & Coordinated Effects & Trend Toward Consolidation

- [Complaint](#), US v. JetBlue (Mar 2023)
- [Opinion](#), US v. JetBlue (Jan 16, 2024)
- [Admin Complaint](#), FTC v. Kroger / Albertsons (Feb. 26, 2024)
- Opinion, FTC v. Kroger/Albertsons, 2024 U.S. Dist. Lexis 223077 / 2024 WL 5053016(D. Oregon) (December 10, 2024)

# Innovation Effects in Merger Analysis

- US DOJ / FTC [Intellectual Property Guidelines](#) (2017)
  - Section 3.2.2 Technology Markets
  - Section 3.2.3 Research and Development Markets
- Innovation and Product Variety, 2010 Horizontal Merger Guidelines (Section 6.4).
- Innovation and the Assessment of Competitive Effects, [Anticipating the 21<sup>st</sup> Century: Competition Policy in the New High-Tech, Global Marketplace](#) (Chapter 7)
- Sayyed, Non-Price Effects in Mergers, CPI (Jan 2024)

# Rebuttals/Defenses

- Rebuttal Evidence, 2023 Merger Guidelines
- Powerful Buyers, 2010 Horizontal Merger Guidelines
- Opinion, US v. JetBlue (Jan 16, 2024) (con't)

# Monopsony

- Guideline 10, 2023 Merger Guidelines
- Mergers of Competing Buyers, 2010 Horizontal Merger Guidelines
- Marius Schwartz, [Buyer Power Concerns and the Aetna-Prudential Merger](#) (Oct. 1999)
  - [Complaint](#), US v. Aetna (Consolidation of Purchasing Power Over Physician Services) (June 1999)
  - [Complaint](#), US v. Cargill (July 1999)
- Marinescu & Hovenkamp, [Anticompetitive Mergers in Labor Markets](#)

# Vertical Mergers (1)

- 2020 Vertical Merger Guidelines
- Guidelines 5, 7, 2023 Merger Guidelines
- Commentary on Vertical Merger Enforcement (2020)
- [Complaint](#), US v. AT&T/Time Warner
- U.S. v. AT&T, 916 F.3d 1029 (D.C. Cir. 2019)
  - U.S. v. AT&T, 310 F. Supp. 3d 161 (D.D.C. 2018) (supplemental reading)
- [FTC Administrative Complaint](#), In the Matter of Microsoft/Activision (Dec. 8, 2022)
- FTC v. Microsoft, 2023 WL 4443412 (July 10, 2023)
- Rethinking Antitrust Podcast, [Vertical Mergers](#) (supplement)

# Vertical Mergers (2)

- [Complaint](#) & [Settlement](#), Cadence Design Systems (FTC, 1997)
- [Complaint](#) & [Competitive Impact Statement](#), Google/ITA
- [Complaint](#), [Analysis to Aid Public Comment](#) & [Settlement](#), Boeing/Hughes
- [Complaint](#), [AAPC](#) and [Settlement](#), Broadcom/Brocade

# Potential Entrant (1)

- Section II, B (Identification of Firms that Produce the Relevant Product) & Section IV, A (Elimination of Specific Potential Entrants), 1982 Merger Guidelines
- Section 5.1, Market Participants, 2010 Horizontal Merger Guidelines
- Guideline 4, 2023 Merger Guidelines
- US v Penn-Olin Chemical, 378 US 158 (1964)
- US v Penn-Olin Chemical, 246 F. Supp 917 (D. Del. 1965)
- US v Penn-Olin Chemical, 88 S. Ct. 502 (1967)
- US v. Marine Bancorp, 418 US 602 (1974)



# Potential Entrant (2)

- [Amended Complaint for TRO and Preliminary Injunction](#), FTC v. Meta Platforms (July 27, 2022)
- FTC v. Meta Platforms, 654 F. Supp. 3d 892 (N.D. Cal. 2023)
- Rethinking Antitrust Podcast, [Should Revised Merger Guidelines Address Potential and Nascent Competition?](#)

# Nascent Competition/Future Competition

- [Statement of Muris](#), Statement of [Thompson](#) & [Statement of Harbour](#), Genzyme/Novazyme (Jan. 2004)
- [Complaint](#), [Statement of the Commission](#), and [Dissenting Statement](#), Nielsen/Arbitron (Feb. 24, 2014)
- [Admin Complaint](#), Illumina/PacBio (Dec. 17, 2019)
- [Admin Complaint](#), Illumina/Grail (Mar. 30, 2021)
- Illumina v. FTC, 88 F.4<sup>th</sup> 1036 (Dec. 15, 2023)
- [Admin Complaint](#), Sanofi/Maze (Dec. 11, 2023)
- United States, [Start-Ups, Killer Acquisitions and Merger Control](#) (Jun 2020)
- United States, [Non-Price Effects of Mergers](#) (Jun 2018)
- United States, [Merger Control in Dynamic Markets](#) (Dec 2019)

# Entrenchment / Conglomerate Mergers

- Guideline 6, 2023 Merger Guidelines
- Antitrust Division, [Range Effects, the US Perspective](#) (Oct. 12, 2001)
- United States, [Conglomerate Effects of Mergers](#) (June 4, 2020)
- FTC v. Procter & Gamble, 386 US 568 (1967)
- [Admin Complaint](#), [Complaint, Preliminary Injunction](#), and [AAPC](#), Amgen/Horizon (June 22, 2023)

# Serial / Cumulative Acquisitions

- Guideline 8, 2023 Merger Guidelines
- Federal Trade Commission, [Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study](#) (Sep. 2021)
  - Jin, Leccese, Wagman, [M&A and Technological Expansion](#) (Mar. 17, 2023) (supplemental)
  - Jin, Leccese, Wagman, [How Do Top Acquirers Compare in Technology Mergers? New Evidence from an S&P Taxonomy](#) (Oct 31, 2022) (supplemental)
- Complaint & Consent Order, Martin-Marietta Corp., 62 FTC 834 (1963)
- FTC, Enforcement Policy with Respect to Mergers in Dairy Industry: Criteria for Assessing Future Mergers, 38 Fed. Reg. 17770 (Jul. 3, 1973)
- Complaint, St. Regis Paper Company, 68 FTC 57 (1965)
- Note by the United States, [Serial Acquisitions and Industry Roll-Ups](#) (Dec. 4, 2023)
- [Complaint](#), FTC v. USAP (S.D. Texas) (Sept. 21, 2023)

# Partial OwnerShip / Minority Interests

- Guideline 11, 2023 Merger Guidelines
- Section 13, 2010 Horizontal Merger Guidelines
- [Complaint](#), US v. Northwest Airlines/Continental Airlines (Oct. 1998) (unilateral/diversion)
- [Complaint](#) and [AAPC](#), Medtronic/Physio-Control (Dec 1998) (influence).
- [Complaint](#) and [AAPC](#), Hoechst AG/Rhone Poulenc (Dec 1999, Jan 2000) (coordination) (cellulose acetate)
- FTC Blog, [What's the Interest in Partial Interests](#) (May 2016)
- United States, [Common Ownership by Institutional Investors and Its Impact on Competition](#) (Dec. 6, 2017)
- United States, [Antitrust Issues Involving Minority Shareholding and Interlocking Directorates](#) (Feb. 2008)

# Platform Markets

- Guideline 9, 2023 Merger Guidelines
- [The Antitrust Economics of Two-Sided Platforms](#) (David Evans)
- United States, [Roundtable on Two-Sided Markets](#) (June 2009)
- [Disaggregating Market Definition](#) (Daniel Francis and Jay Ezrielev) (2019)
- [Platform Annexation](#) (Susan Athey, Fiona Scott-Morton)
- United States, [Theories of Harm for Digital Mergers](#) (June 2023)
- [Video](#), Economics of Multi-Sided Platforms (David Evans) and Network Effects in Multi-Sided Platforms (Catherine Tucker) (Oct 15, 1978) (filmed at Law School) (starts about 18 minutes into the video)

# Platform Markets (2)

- US v. Visa, 344 F.3d 229 (2d Cir. 2003)
- Ohio v American Express, 138 S. Ct. 2274 (2018)
- [Complaint](#), US v. Google (AdTech) (2023 (download complaint))

# Interlocking Directorates

- [15 USC 19](#)
- [Jurisdictional Thresholds for 2024](#)
- FTC [Complaint](#), QEP Partners/EQT Corporation
- [Statement of FTC Chair Khan](#), QEP Partners/EQT Corporation
- Antitrust Division Press Releases: Recent interlocking directorate matters:
  - [Pinterest](#)
  - [Ongoing Enforcement](#)
  - [5 Companies](#)



# Robinson Patman Act (Price Discrimination)

- [15 USC 13](#)
- U.S. v. U.S. Gypsum, 438 U.S. 422 (1978)
- Falls City Indus., v. Vanco Beverage, 460 U.S. 428 (1983)
- Texaco v. Hasbrouck, 496 U.S. 543 (1990)
- Brooke Group v. Brown & Williamson, 509 U.S. 209 (1993)
- Volvo Trucks N.A. v. Reeder-Simco GMC, 546 U.S. 164 (2006)

# Robinson Patman Act (Price Discrimination) (2)

- [Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products](#) and [related statements](#).
- Note by United States, [Roundtable on Price Discrimination](#) (Nov. 2016)
- [Complaint](#), FTC v. Southern Glaziers (Dec. 12, 2024)
  - [Commission Majority Statement](#)
  - [Dissenting Statement](#) of Comm. Ferguson
  - [Dissenting Statement](#) of Comm. Holyoak

# Criminal Antitrust & DOJ Leniency Program

- [Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For](#)
  - (scroll down to “What is Criminal Antitrust”)
- [Federal Antitrust Crime: A Primer for Law Enforcement Personnel](#)
- [Leniency Program](#)
  - [Leniency Policy](#) (April 2022):
  - [FAQs About the Antitrust Division’s Leniency Policy](#) (Jan. 2023)
- [Criminal Enforcement Trends Charts](#)
- [Criminal Fines and Penalties of \\$10 Million or More](#) (through 2020)
- [US DOJ: Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations](#) (July 2019)
  - (under “other resources”)
- [DOJ Manual: Antitrust Criminal Enforcement](#) (Section 7-3.000 et seq)
- United States, [Roundtable on Challenges and Coordination of Leniency Programmes](#) (June 2018)

# Vertical Agreements

- United States v. Colgate, 250 US 300 (1919)
- Continental TV v. GTE Sylvania, 433 US 36 (1977)
- State Oil v. Khan, 522 US 3 (1997)
- Leegin Creative Leather Products v. PSKS, 551 US 877 (2007)
- Jefferson Parish v. Hyde, 466 US 2 (1984)
- US v. Apple, 791 F.3d 290 (2d Cir. 2015)
- United States, [Roundtable on Vertical Restraints for On-Line Sales](#) (Feb. 2013)

# Unfair Methods of Competition

- Section 5 of the FTC Act: 15 USC 45(a)(1): Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
  - [Policy Statement](#) (2022)
  - [Statement of Chair Khan](#) (2022)
  - [Statement of Comm. Bedoya](#) (2022)
  - [Dissenting Statement of Comm. Wilson](#) (2022)
  - [Policy Statement](#) (2015)
  - [Statement of the Commission, UMC Policy Statement](#) (2015)
  - [Dissenting Statement of Comm. Maureen Ohlhausen, 2015 Policy Statement](#):

# Antitrust Standing and Injury

- Brunswick Corp v. Pueblo Bowl-o-Mat, 429 US 477 (1977)
- Cargill v. Monfort, 479 US 104 (1986)
- Atlantic Richfield v. USA Petroleum, 495 US 328 (1990)
- Illinois Brick v. Illinois, 431 US 720 (1977)
- Apple v. Pepper, 139 S. Ct. 1514 (2019)

# Exemptions and Immunities

- State Action
- Noerr Pennington
- Labor Exemption
- Regulated Industries

# State Action Immunity

- FTC v. Phoebe Putney, 568 US 216 (2013)
- North Carolina Bd of Dentists v FTC, 574 US 494 (2016)



# Noerr-Pennington

- FTC [Complaint](#), Unocal,
- [Decision](#), Unocal,
- Pattern of Petitions
  - Puerto Rico Tel v. San Juan Cable, 874 F.3d 767 (1st Cir. 2017)

# Regulated Industries

- Credit Suisse Securities v Billing 551 US 264 (2007)

# Labor Exemption

- [15 USC 17](#)
- Brown v. Pro-Football, 518 US 231 (1996)

# Application to Conduct Outside US

- [15 USC 6a](#),
- Hoffman-LaRoche v. Empagran, 542 US 155 (2004)
- Empagran v. Hoffman-LaRoche, 417 F3d 1267 (D.C, Cir. 2005)
- Motorola Mobility v. AU Optronics, 775 F.3d 818 (7th Cir. 2015)
- Testimony, [Solutions to Competitive Problems in the Oil Industry](#), Richard Parker (2000) (discussing OPEC)
  - See [Guidelines for International Enforcement and Cooperation](#) (Jan. 2017) (Sections 3 & 4)
  - And, compare to:
    - [Capper-Volstead Act](#) & [Complaint](#), US v Dairy Farmers (Mar 2000)
    - [Webb-Pomerene Act](#) (see Guidelines for International Operations), at 12.