

ANTITRUST LAW
FALL 2021
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CONTACT INFORMATION

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COURSE OVERVIEW

The focus of this course is market competition. We will consider the role competition plays in protecting consumer welfare, how competition may break down, and how the law intervenes to preserve and enhance market competition. Our primary focus will be the federal antitrust laws, particularly the Sherman Act of 1890 and the Clayton Act of 1914. As we will see, judicial precedents and economic analysis have greatly fleshed out those somewhat “bare bones” statutes.

Antitrust is an interdisciplinary subject. Accordingly, we will consider the historical context in which the antitrust laws were enacted, the economic theories underlying the statutes and their changing interpretations, and the political forces motivating enforcement trends. In terms of substantive law, we will cover horizontal restraints (between competitors), vertical restraints (franchise or distributional restrictions), monopolies (market power), and mergers. In addition, we will consider the procedural issues relevant in private and public enforcement suits.

The objective of the course is to teach: (1) the substantive law of antitrust, (2) the relevant procedural and litigation issues, (3) the economic analysis of antitrust issues, and (4) the historical development of antitrust doctrine.

ASSIGNMENTS

I will give specific reading assignments every day. In most cases, they will track the readings listed below. Occasionally, however, I will subtract from or add to the assigned reading, so *it is important that you follow the assignment given in class*.

The casebook for the class is E. THOMAS SULLIVAN, HERBERT HOVENKAMP, HOWARD A. SHELANSKI & CHRISTOPHER R. LESLIE, ANTITRUST LAW, POLICY, AND PROCEDURE: CASES, MATERIALS, PROBLEMS (8th ed. 2019).

In addition to the required casebook, I strongly recommend, as a supplement, HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE (6th ed. 2020).

The following is a *tentative* (and very ambitious) list of the topics this course will cover. We will address the topics in the order in which they are listed below. As noted, I will give daily reading assignments. If you'd like to read ahead, consult with me before doing so, and I'll give you my best guess as to exactly what we'll cover and what we'll skip.

I. Foundations

- a. Overview of the Antitrust Statutes and the Unique Way They Are Interpreted** (Sherman Act §§ 1, 2, 4, 8 [Casebook pp. 1223-24]; Clayton Act §§ 4, 7 [Casebook pp. 1226, 1228]; Casebook pp. 1-15, 28-36)
- b. Antitrust Economics** (Casebook pp. 41-62)

II. Issues in Antitrust Enforcement

- a. Overview of Enforcement** (Casebook 63-70)
- b. Limitations on Private Enforcement**
 - i. The Indirect Purchaser Rule** (Casebook pp. 95-103, Apple v. Pepper)
 - ii. The Antitrust Injury Requirement** (Casebook pp. 117-28)
 - iii. Antitrust Standing** (Casebook pp. 135-44; In re Microsoft Corp. Antitrust Litig.)

III. Horizontal Restraints of Trade

- a. Determining the Reasonableness of a Restraint**
 - i. Development of the Rule of Reason and the Per Se Rule** (Casebook pp. 194-213)
 - ii. Data Exchanges (and Lessons for Analyzing Likely Competitive Effect)** (Casebook pp. 215-35; Todd v. Exxon)
 - iii. The Modern Approach to the Per Se Rule, Rule of Reason, and Quick-Look** (Casebook pp. 236-99)
- b. The Agreement Element**

- i. Inferring Agreement from Parallel Conduct** (Casebook 323-32)
- ii. Procedural Implications of the *Interstate Circuit* Doctrine**
 - 1. Summary Judgment** (Casebook pp. 349-63)
 - 2. Motions to Dismiss** (Casebook pp. 334-44)
- iii. Intra-Enterprise Conspiracies** (Casebook 398-415)

IV. Vertical Restraints of Trade

- a. Intra-brand** (Handout on “The Lay of the Land”)
 - i. Resale Price Maintenance**
 - 1. Minimum** (Handout on *Dr. Miles*; Casebook pp. 493-514)
 - 2. Maximum** (Casebook pp. 526-30)
 - ii. Vertical Non-Price Restraints** (Casebook pp. 541-47)
 - iii. Avoiding Vertical Intra-brand “Agreements” (The *Colgate* Doctrine)** (Casebook pp. 524-26; Ping Amicus Brief)
- b. Interbrand**
 - i. Exclusive Dealing** (Casebook pp. 557-70)
 - ii. Tying** (Casebook pp. 592-97, 607-20, 648-56)

V. Monopolization

- a. The Power Element** (Casebook pp. 691-702; 714-30)
- b. The Exclusionary Conduct Element**
 - i. Exclusionary Lease Terms** (Casebook pp. 705-12)
 - ii. Predatory Pricing and Bidding** (Casebook pp. 799-810, 829-35)
 - iii. Loyalty Rebates and Bundled Discounts** (Casebook pp. 835-46, 848-52 (n. 3))

iv. **Unilateral Refusals to Deal** (Casebook pp. 857-64, 872-80; excerpts from *Qualcomm*)

v. **Price Squeezes, Revisited** (Casebook pp. 896-902)

VI. **Business Combinations**

a. **Horizontal Mergers** (Excerpts from 2010 Horizontal Merger Guidelines)

b. **Vertical Mergers** (Excerpts from 2020 Vertical Merger Guidelines)

ATTENDANCE AND CLASSROOM PARTICIPATION

Attendance – Regular attendance is expected. Unlike many other subjects taught in law school, Antitrust Law is very difficult to “self-teach.” Accordingly, *if you do not attend class regularly, you will score poorly on the exam.* I reserve the right to adjust a student’s grade downward a point or two for excessive unexcused absences.

Class participation – I expect that you will do the reading assignment each day and be prepared to discuss it in class. I will “cold call” on students to discuss the reading. When a student is called on and is unprepared, the entire class suffers. Accordingly, if you have not done the reading, please let me know in advance of class that you would like to take a “pass” for the day. You may avail yourself of this option *twice* without it affecting your grade. Thereafter, or if you are unprepared when called upon, you risk being penalized for deficient classroom performance. In general, I reserve the right to reward exceptional class participation or penalize poor or inappropriate class participation in determining the final grade.

OFFICE HOURS

I maintain an “open door” office policy, which means that you may come by my office (Room 316) any time to discuss questions concerning the course material. I trust you’ll be understanding if I’m busy at the moment and suggest that we get together later. I am frequently out of the office, so feel free to call or email me to set up a pre-arranged meeting time (either in-person or via Zoom). You’re always welcome to call or text my mobile number, 773-580-7123. I turn the phone off when I don’t want to be disturbed.

GRADING

The grade for this class will be based on a student’s examination grade, potentially adjusted for class participation, as noted. The examination will be a mix of “issue spotter” essay questions and short-answer questions. It will be administered on an open book basis.

LEARNING OUTCOMES

In this course, you will:

- Learn the substance of the federal Sherman Act and Clayton Act, as well as Section 5 of the Federal Trade Commission Act.
- Master basic price theory, including the law of demand, the concept of marginal costs and equilibrium at the margin, the notion of price elasticity, and the monopoly pricing model.
- Master basic concepts in industrial organization, including the concepts of long-run average costs and economies of scale.
- Examine the history of antitrust enforcement.
- Learn to assess the efficiency of horizontal and vertical restraints of trade.
- Practice oral communication and arguing both sides of an issue.

As stated above, assessment in this course will be summative (a final examination). The course is not Standard 303 compliant (field placement/law clinic/simulation).

INFORMATION REGARDING DISABILITIES

If you anticipate barriers related to the format or requirements of this course, if you have emergency medical information to share, or if you need to make arrangements in case the building must be evacuated, please contact Associate Dean Ben Trachtenberg as soon as possible.

If disability related accommodations are necessary (e.g., a note taker, captioning), please register with the Disability Center (<http://disabilitycenter.missouri.edu>), S5 Memorial Union, 573-882-4696, and then notify Dean Trachtenberg or Law School Registrar Denise Boessen of your eligibility for reasonable accommodations. (Please do not discuss examination accommodations with me. Notice of special accommodations may impair the “blind grading” policy we use at the law school.) For other MU resources for persons with disabilities, click on “Disability Resources” on the MU homepage.

DECREASING THE RISK OF COVID-19 IN THE CLASSROOM

MU cares about the health and safety of its students, faculty, and staff. To provide safe, high-quality education amid COVID-19, we will follow several specific campus policies in accordance with the advice of the Center for Disease Control and Boone County health authorities. These policies may be updated as information changes.

- **If you are experiencing any COVID-related symptoms**, or are otherwise feeling unwell, do not attend in-person classes and contact your health care provider and/or student health immediately. COVID symptoms include: fever greater than 100.4 or chills; cough, shortness of breath or difficulty breathing; fatigue; unexplained muscle or body aches; headache; new loss of taste or smell; sore throat; congestion or runny nose; nausea or vomiting; diarrhea.

- We will all wear **face coverings while in the classroom**, unless you have a documented exemption due to a disability or medical condition.
- Online office hours will be available for all students.
- This course may be recorded for the sole purpose of sharing the recording with students who can't attend class. The instructor will take care not to disclose personally identifiable information from the student education records during the recorded lesson.

Compliance with these guidelines is required for all; anyone who fails to comply will be subject to the accountability process, as stated in the University's Collected Rules and Regulations, Chapter 200 Student Code of Conduct.

STATEMENT REGARDING ACADEMIC INQUIRY, COURSE DISCUSSION, AND PRIVACY

University of Missouri System Executive Order No. 38 lays out principles regarding the sanctity of classroom discussions at the university. The policy is described fully in Section 200.015 of the Collected Rules and Regulations. In this class, students may make audio or video recordings of course activity unless specifically prohibited by the faculty member. However, the redistribution of audio or video recordings of statements or comments from the course to individuals who are not students in the course is prohibited without the express permission of the faculty member and of any students who are recorded. Students found to have violated this policy are subject to discipline in accordance with provisions of section 200.020 of the Collected Rules and Regulations of the University of Missouri pertaining to student conduct matters.

STATEMENT REGARDING INTELLECTUAL PLURALISM

The School of Law community welcomes intellectual diversity and respects students' rights. Students who have questions concerning the quality of instruction in this class may address concerns to either the Dean or the Director of the Office of Students' Rights and Responsibilities. All students will have the opportunity to submit an anonymous evaluation of the instructor at the end of the semester.

You are encouraged to think for yourself in this course. You need not agree with me, and you are most welcome—encouraged, even—to argue different sides on the issues we will confront. I will endeavor to treat you with respect, even when I disagree with your arguments, and I will expect you to afford similar treatment to me and your classmates. Participants in this course—including me—should endeavor to *understand* each other, not necessarily to *agree* with one another. If you believe at any point that your point of view (or that of another student) is being stifled or is not being given a fair hearing, please let me know. But please do not expect to avoid all offense; lawyers (and all adults, really) must learn to deal with offensive ideas.

ACADEMIC INTEGRITY

Academic integrity is fundamental to the activities and principles of the School of Law. All members of the Law School community must be confident that each person's work has been responsibly and honorably acquired, developed and presented. Any effort to gain an advantage not given to all students is dishonest whether or not the effort is successful. The Law School Community regards breaches of the Law School's Honor Code as extremely serious matters. In the event that you violate our Academic Integrity Rules on any portion of the work required for this class, you may expect a failing grade, as well as possible disciplinary sanctions ranging from probation to expulsion.

PIVOT PLAN

In the event that law school classes may not continue in person due to Covid-19 (or for any other reason), we will continue our course via Zoom. The course will be taught synchronously (i.e., at the regularly scheduled time), and sessions will be recorded and posted to Canvas for those who are unable to participate synchronously.