

Georgetown University Law Center
Merger Antitrust Law
Fall 2024

Professor Dale Collins
Tuesdays and Thursdays, 3:30 am – 5:30 pm

INTRODUCTION AND “RULES OF THE ROAD”

First class: Tuesday, August 27

Welcome to the course! I appreciate that you may only be shopping at this point, so I thought I would tell you a few things about how I intend to approach the course. This memorandum also includes the “rules of the road” for the course, including classroom policies, homework assignments, and grading. The schedule of topics for each class, subject to revision throughout the course, is a separate document.

Course description

This four-credit course explores the process of raising, defending against, and ultimately resolving antitrust problems that arise in mergers and acquisitions in the U.S. system.

This is an “applied” course in that it approaches the subject as a sophisticated practitioner would. What we will cover is state-of-the-art in merger antitrust analysis. Unlike the usual law school course, which is organized around doctrinal elements of the law and utilizes case excerpts to illustrate these elements, we will organize the course around case studies of recent mergers and acquisitions. These transactions range from simple negotiated acquisitions to hard-fought contested takeovers. Some of these case studies will include:

- TransDigm’s acquisition of Takata’s passenger restraint systems business
- Anheuser-Busch InBev’s acquisition of Grupo Modelo (the maker of Corona beer)
- Kroger’s pending acquisition of Albertsons
- AB Inbev’s acquisition of Grupo Modelo
- Assa Abloy’s acquisition of Spectrum Brands’ Hardware and Home Improvement division
- The contested takeover battle by Hertz and Avis Budget for Dollar Thrifty
- H&R Block’s attempt to acquire TaxACT
- U.S. Sugar’s acquisition of Imperial Sugar
- Sysco’s attempt to acquire U.S. Foods
- Staples’ attempt to acquire Office Depot
- AT&T’s attempted acquisition of T-Mobile
- T-Mobile’s acquisition of Sprint
- Steris’ acquisition of Synergy Health
- Facebook’s acquisition of Instagram and WhatsApp
- Meta’s acquisition of Within

- Comcast's acquisition of NBC Universal
- AT&T's acquisition of Time Warner
- Illumina's aborted acquisition of Grail
- Coca-Cola's acquisition of Coca-Cola Enterprises
- UnitedHealth's acquisition of Change Healthcare
- Amgen's acquisition of Horizon Therapeutics

If an interesting merger arises during the course, we may add it to the discussion.

In each case study, we will examine the antitrust problems presented by the transaction. Depending on the case study, we will address:

- Evolving modes of merger antitrust analysis
- Predicting antitrust problems and identifying possible defenses and solutions at the earliest stages of a deal when information is scarce
- Performing detailed a merger antitrust analysis when information becomes more available
- Navigating the DOJ/FTC merger review process
- Constructing a challenge to oppose a merger
- Preparing the formal defense of a transaction
- Anticipating and structuring consent decree settlements
- Litigating merger antitrust cases (including "litigating the fix")
- Negotiating provisions in merger agreements to allocate antitrust risk between the merging parties

In addition, the merger guidelines issued jointly by the Antitrust Division of the Department of Justice and the Federal Trade Commission contain essential information about the techniques and standards the federal enforcement agencies use in exercising their prosecutorial discretion in investigating and challenging mergers. The Biden antitrust agencies issued revised merger guidelines on December 18, 2023,¹ updating the horizontal merger guidelines issued by the Obama administration on August 19, 2010,² and the vertical merger guidelines issued by the Trump administration on June 30, 2020.³ As you know, the Biden agencies are attempting to make merger antitrust law more restrictive, and the 2023 merger guidelines reflect this perspective. The Biden guidelines attempt to revive theories from the 1960s and early 1970s and introduce new theories of anticompetitive harm that would significantly expand the reach of the approaches that have been in use over the last 30 years or more. The guidelines are not legislative rules and are not binding on the courts. When the guidelines are at odds with established modern judicial precedent, they will likely receive a hostile reception from the courts. We will examine how the agencies are trying to change merger antitrust law through the revised guidelines and their enforcement actions throughout the course and explore how the courts have reacted to the agencies' efforts.

¹ U.S. Dep't of Justice & Fed. Trade Comm'n, [Merger Guidelines](#) (July 19, 2023) ("2023 MG").

² U.S. Dep't of Justice & Fed. Trade Comm'n, [Horizontal Merger Guidelines](#) (Aug. 19, 2010) ("2010 HMG").

³ U.S. Dep't of Justice & Fed. Trade Comm'n, [Vertical Merger Guidelines](#) (June 30, 2020) ("2020 VMG").

In addition to substantive law, merger antitrust law relies heavily on economics and economists. Section 7 of the Clayton Act, the provision in federal law that governs the antitrust legality of mergers, prohibits mergers and acquisitions whose effect “may be substantially to lessen competition, or to tend to create a monopoly.”⁴ Since the 1980s, merger antitrust law has evaluated transactions under Section 7 by examining the markets in which the merging firms operate and comparing, on a forward-looking basis, the competitive outcomes in these markets with and without the merger. Because most mergers are investigated and challenged before closing, there is rarely direct evidence of a transaction’s actual effects. Instead, the parties, the investigating agencies, and the court must make predictions about the merger’s potential impact. Economics is essential in predicting a merger’s competitive effects, and economists play a central role in investigations and litigation.

Accordingly, we will devote considerable time exploring the economic tools used in merger antitrust analysis and their application in investigations and in court. No prior knowledge of economics is required for this course—it is entirely self-contained, and we will cover everything you need to know. However, modern economics uses mathematics, and this course uses graphs and algebra to explain the underlying economic concepts and derive the formulas used in merger antitrust analysis. If you can recall a bit of high school algebra, you should be fine. Rest assured, hundreds of law school students who went to law school because they hated math have successfully completed this course.

Finally, as with economic regulation generally, antitrust is as much about the process as it is with substance, so we will spend a meaningful amount of time on the process of merger antitrust reviews, consent settlements, and litigation in addition to substantive rules.

Goals of the course

This high-end course will teach you the theory and practice of contemporary merger antitrust law. It is designed to equip you with the skills to immediately contribute to a sophisticated antitrust or M&A practice in a major law firm or antitrust enforcement agency. Even if you do not plan to specialize in antitrust or M&A law, the course will enhance your sophistication as you prepare to enter the practice of law. By the end of the course, you should be able to do the following:

1. Conduct a preliminary merger analysis to identify potential substantive issues, defenses, and remedies in typical transaction scenarios involving public companies, utilizing only publicly available information.
2. Explain the merger review process to a client, starting from the filing of an HSR premerger notification report, progressing through preliminary and second request investigations, and concluding with final arguments presented to the heads of the investigating agency. If the agency determines that the deal raises antitrust concerns, you will also be able to describe the challenges involved and the process of negotiating consent decree relief.

⁴ 15 U.S.C. § 18.

3. Understand and be able to apply the formal legal and economic theories of antitrust harm applicable to mergers and acquisitions and the principal defenses available to the merging parties.
4. Prepare a merger antitrust challenge (as part of the investigating staff) and a merger antitrust defense (as defense counsel) before the senior decision-making officials at the DOJ and FTC.
5. Anticipate and structure a consent decree remedy satisfactory (at least in principle) to the enforcement agencies in light of the investigating agency's expressed concerns about the transaction.
6. Advise a client on the primary considerations and timing implications of litigating a merger antitrust case, including the standards for granting preliminary and permanent injunctive relief, the burdens of production and persuasion for litigating parties, and the strategic and tactical implications of these factors in the prosecution and defense of a merger antitrust case in court.
7. Describe to a client the legal and strategic significance of the antitrust-related provisions in an Agreement and Plan of Merger, including reps and warranties on antitrust-related consents and approvals, merger control and litigation conditions precedents, general efforts covenants, conduct of business covenants, merger control filing covenants, investigation and litigation cooperation covenants, risk-shifting covenants (including covenants to divest businesses or assets if necessary to avoid an agency challenge or settle a litigation), antitrust reverse termination fees, purchase price adjustments for divestitures, damages for breach of antitrust-related covenants, ticking fees, "take or pay" provisions, and termination provisions.

Course materials/course website

There is no textbook for this course. You can download the materials for each week through the links on Canvas or the [Merger Antitrust Law \(2024\)](#) page on my website, www.appliedantitrust.com. If you have a problem downloading something, let me know and I will email it to you.

Consistent with the course's case study approach, the readings will consist mostly of press releases, investor presentations, SEC documents, merger agreements, complaints, consent decrees, and trial court and appellate opinions. Unlike a casebook, which just contains excerpts from cases, almost all of the materials for this course will be in full text. For the most part, you will see what the practitioner sees in the form the practitioner first sees it.

Since the materials for this course will be in full text, there will be a significant amount of reading. You should expect to spend at least 4.5 hours reading the materials and preparing for each class. Before each class, I will distribute a memorandum ("reading guidance") that prioritizes the reading and highlights the key topics we will discuss. If you follow the reading guidance, reach 4.5 hours without finishing the materials, and don't have the time or interest to read further, please stop reading. I will cover everything important in the lower-priority reading

in class. That said, the more you read, the more you will get out of the class and increase your sophistication as a practitioner.

I cannot stress enough that familiarity with the required reading will make the classes far more meaningful to you. But this does not mean you have to obsess over the materials. I will tell you in the reading guidance what you need to read with care and what you can skim to get a sense of the material. *Always read the reading guidance for each class before starting the materials.*

The materials in this course are not necessarily works of art. You undoubtedly will find some of them lacking, but what we will be reading are the actual documents that appeared in the case. I encourage you to approach the materials critically. I have found that I learned the most from what I believe were mistakes or missed opportunities and thinking about how I would have handled the matter differently.

As a matter of full disclosure, some students in prior years have reported that this course involves significantly more reading than other four-credit courses in the law school. The reading guidance is designed to limit your reading time to 4.5 hours per class if you do not have the time or energy to do more. The substantial amount of reading results from using materials in full text, as opposed to the excerpts usually found in casebooks. As a practitioner, you will have to learn how to assimilate voluminous amounts of written material quickly. The more you read, the more you will get out of the course.

Class notes

To cut down on the required reading and enable you to participate more in class discussion, I will do here what I did when I was in practice giving defense presentations to the FTC and DOJ staff and did not want to rely on the note-taking abilities of the government attorneys on the case team: I will distribute PowerPoint presentations (“class notes”) that capture all of the salient legal and economic concepts you need to know. This approach eliminates the need for you to focus on writing down every detail during class and allows you to be more engaged in the class discussions.

The PowerPoint presentations will be available on Canvas and AppliedAntitrust.com, along with the required and supplemental reading materials. The reading assignments for each class will include the class notes and the primary source materials. The reading guidance will assist you in efficiently navigating these materials as you prepare for class.

A word of caution: Although the class notes contain crucial information for your understanding, I may not explicitly cover every point during class unless specifically prompted by your questions. My aim is to utilize our class time to delve into the strategic and tactical aspects of our case studies rather than delivering lectures based on the class notes.

Bottom line: It is important to read both the primary source materials and the class notes before each class.

Homework problems

You will be required to submit a written assignment before most classes. These assignments are generally designed to be completed within a short time frame, although a few will require a more extensive effort. With one exception, the homework assignments will not be graded (see below on the graded homework assignment). *I will track submissions, however, and failing to submit homework assignments will adversely affect your grade.*

These assignments, which emulate the tasks you would encounter in a merger antitrust practice within a government agency or major law firm, are essential to the course. They will help ensure your comprehension of essential concepts and methodologies covered in the course and help me identify areas that may require further explanation during class. Somewhat to my surprise, students in past classes have repeatedly told me how much they learned (and even enjoyed!) doing the homework assignments.

Except for one graded homework assignment, I encourage you to collaborate with fellow classmates. Indeed, I encourage you to work in groups on the homework problems. Additionally, you may consult external resources, including online materials, just as you would in a real-world practice setting. The objective is for you to engage with the problems and prepare for class discussions. However, it is necessary that you individually write and submit your own work (although you may seek feedback from classmates).⁵

You must submit answers to the homework assignments to me before the beginning of the class for which they are assigned. We will discuss the answers to most homework problems in class. Following our discussion, I will provide an “instructor’s answer” to each assignment. If you disagree with any aspect of my response, I encourage you to challenge it. There is often more than one valid approach to problem-solving, especially in this area of law, and I do not claim that my way is the only correct way.

It is important to remember that lawyers typically act as advisors or advocates and rarely have the final decision-making authority in their matters. The ultimate decisions are typically made by judges, investigating agencies, assigning partners, clients, or the counterparty to your client. Therefore, much of your writing in practice will be aimed at persuading others to accept your conclusions or recommendations. My rule of thumb is when you are convinced that you have found the “right” answer or approach to a complex practice situation, you have only completed about 60 percent of the problem. The remaining 40 percent is convincing the relevant decision-maker that your answer is the right one.⁶ In writing the homework assignments, you should focus

⁵ You will find an investment in the homework assignments can pay great dividends during the final exam. Not only is the exam open book, you can cut-and-paste “boilerplate” *you personally have prepared* directly into the exam answer. So if an exam question calls for the application of the unilateral effects theory of anticompetitive harm and one of the homework assignments required you to write a short memo explaining this theory, you can cut-and-paste that explanation into the exam answer. You will still have to apply the theory to the facts of the problems, but you will not have to spend any time in the exam composing an explanation of the theory.

⁶ When I was in practice, I found that I often spent as much time trying to convince co-counsel for the other merging party that I had the right approach to defending the transaction than I did in actually defending the transaction before the investigating agency. You will find that the best prosecuting or defending strategies are rarely created through a committee approach or achieved through compromise with co-counsel. Rather, the best strategies come from someone with a clear vision of how to get the deal done and the ability to execute a plan. Your job will

not only on providing a correct answer but also on developing clear, concise, and persuasive writing skills that effectively present a compelling linear argument to the reader that your answer should be adopted.

Important: Please email your answers to me at wdc30@georgetown.edu. The subject line should read “Merger Antitrust Law: Assignment for Class [Number],” which will help me manage the inflow. I have set up a rule in Outlook that looks to this subject line to sort the submissions into the appropriate email folder. If you do not use the correct subject line, you risk me thinking you failed to do the assignment.

Classroom policies

Preparation for class. Preparation for class is of utmost importance, and I cannot emphasize it enough. Following the reading guidance and completing the homework problems will greatly enhance your learning experience in this course. Previous students have consistently expressed how much more they enjoy the class and effectively grasp the subject matter when we analyze case studies instead of relying solely on lectures that simply repeat materials you can read outside of class.

While the reading materials and class notes will provide the necessary factual background, institutional context, and rules for each class, the classroom discussions will focus on analytical approaches, strategies, and tactics. Not surprisingly, you will derive limited benefit from the class discussions if you have not completed the required readings and reviewed the class notes. Furthermore, I have designed the homework problems to facilitate your preparation and active participation in the class discussions. To maximize your learning experience in this course, it is essential to actively engage with the reading materials, diligently complete the homework assignments, and actively participate in class discussions. I strongly encourage you to come fully prepared and ready to contribute to our discussions. Your active involvement will not only deepen your comprehension but also enrich the learning environment for the entire class.

Class attendance is mandatory. Merely completing the assigned readings and working on the problems will not enable you to master the materials or adequately prepare for the exam. Students must attend class in person. If your circumstances prevent you from attending some or all of the classes, please contact me to discuss the situation. Together, I am sure we can find a solution.

All classes and optional review sessions will be recorded on Panopto for reference purposes. However, please note that viewing a recorded class will not count as attending the class without advanced permission. If you anticipate missing a class, please inform me via email in advance. Multiple unexcused absences will have a negative impact on your grade.

Class participation. I do not usually cold call students in class, so I depend on student initiative in class discussions. If you have a comment or question about something in class or the materials—especially if you think what I said was wrong or did not make sense—I assure you

be to convince co-counsel—or if not them, then their client—that you are that person and that they should follow your lead.

that at least 50% of your classmates will have the same question. That said, I do not count a lack of class participation against your final grade, but active engagement in class discussions can positively influence your final grade.

Class slides. I will typically use PowerPoint slides during our class sessions. The slides are more to keep me on track than they are for you. Sometimes the class slides will duplicate materials in the class notes, but often I will try to take a different approach in the slides than in the class notes. I will post the class slides I use after each class.⁷

Laptop policy. I allow laptops and other electronic devices in class *only* to access the reading materials, class notes, and homework problems. If you want to take notes, please do that by hand. The purpose of class is for you to participate in the class discussions, not to practice stenography. All classes will be video-recorded—if you want to transcribe a class, do it after class off the video recording. I do not usually employ cold-calling in class, but I make an exception for students who I think are using their laptops or other devices for reading emails, looking at sports, checking stock prices, and the like. And I can be a very aggressive Socratic examiner!⁸

Syllabus changes. If there are changes, I will notify you by posting revisions to the class schedule on Canvas and AppliedAntitrust.com. The regular order can easily be thrown off if an interesting transaction is announced during the semester, and we take a day off the schedule to analyze it. If something comes up quickly, I will send you an email.

Grades, exams, and a graded take-home assignment

Grades will be based primarily on your performance on a graded take-home assignment (1/3 of the grade) and the final exam (2/3 of the grade).

The graded take-home assignment will ask you to write a memorandum of law analyzing an exam-type hypothetical. In effect, this assignment gives you an exam problem but without the pressure of a timed exam. Students in the past have told me that they found having the graded homework assignment invaluable for assimilating the content of the course and preparing for the exam. They also liked having 1/3 of the grade depend on an untimed homework assignment rather than 100% based on a timed final exam.

⁷ Students in past years have asked that I collect all of the class slides in a single searchable document. I will post a running cumulative deck on Canvas and AppliedAntitrust.com that I will update after each class.

⁸ There is compelling research on the detrimental effects of taking notes on laptops during class. For a summary, see, for example, Susan Dynarski, [Laptops Are Great. But Not During a Lecture or a Meeting](#), NYTimes.com, Nov. 22, 2017, and David Cole, [Opinion, Laptops vs. Learning](#), Wash. Post, Apr. 7, 2007. For something more formal, see, for example, Pam A. Mueller & Daniel M. Oppenheimer, [The Pen Is Mightier Than the Keyboard: Advantages of Longhand Over Laptop Note Taking](#), 25 Psychol. Sci. 1159 (2014); Colleen P. Murphy, Christopher J. Ryan & Yajni Warnapala, [Note-Taking Mode and Academic Performance in Two Law School Courses](#), 68 J. Leg. Ed. 207 (2019); Susan Payne Carter, Kyle Greenberg & Michael Walker, [The Impact of Computer Usage on Academic Performance: Evidence from a Randomized Trial at the United States Military Academy](#) (May 2016).

To help you prepare for the graded homework assignment, we will first do an ungraded homework assignment of the same form for Class 18. We will spend both Class 18 and Class 19 analyzing the assignment in detail.

I will post the graded homework assignment on Friday, November 8, after an optional horizontal mergers review session earlier that day. Answers will be due by 8:00 pm on Monday, November 18. The following day (Class 25), we will spend all of class reviewing the graded homework assignment.

This course has a five-hour take-home exam that will be available throughout the take-home exam period. Like the graded take-home assignment, the final exam will ask you to write a memorandum of law analyzing a merger hypothetical.

I will write the exam so that you should be able to complete it within four hours (assuming adequate preparation). I have allowed the extra time so that you do not need to rush and to enable you to better organize your answers. This is an open book exam. You may consult any written source, including without limitation the reading materials, class notes, homework assignments, cases, outlines (commercial or otherwise), books, treatises, the Internet, Westlaw, and Lexis-Nexis. The exam will be available throughout the take-home exam period (Friday, December 6, through Friday, December 13). You may take the exam anything during this period, but once you start you must complete it within five hours.

The graded homework assignment and the final exam will set your base grade. As noted above, upward adjustments may be made for class participation, while downward adjustments may be made for failing to submit homework assignments or unexcused absences from class.

Office hours and optional review sessions

I am delighted to discuss questions, clarify concepts, delve into topics in greater detail, or engage in conversations more generally about law and law practice outside of class. While I do not have an office on campus and therefore do not have scheduled office hours, there are three ways we can connect:

1. *Before and after class:* I will be available both before and after class for discussions. I generally arrive outside the classroom at least 15 minutes early, so you are welcome to join me then. If you prefer a guaranteed time to talk before class without other students present, please let me know, and I can arrive as early as 3:00 pm. After class, I will stay to talk for as students would like.
2. *Zoom sessions:* In place of office hours, I am more than happy to arrange Zoom meetings for individual or group discussions.
3. *Email:* You can always reach out to me via email with your questions.

In addition, I will hold at least three optional review sessions during the course to provide additional support and clarify any lingering questions:

1. *Friday, September 27*: Review session on competition economics.
2. *Friday, November 8*: Review session on formal theories of anticompetitive harm and defenses in horizontal mergers.
3. *Wednesday, December 4*: Final review session.

Please note that attendance for these sessions is entirely optional and, if you come, you are free to leave whenever you like.

Course recording policy

All classes and review sessions will be recorded on Panopto. Please do not make your own recordings of classes, review sessions, office hours, or any other Zoom meeting in connection with the course.

Lunch and drinks

I am delighted to take groups of students out to lunch or for a beer at The Dubliner throughout the semester. These outings let us get to know each other better than we could through classes alone. There is no agenda for these sessions and we can talk about the course, the practice of antitrust law, working in law firms or at the enforcement agencies, clerkships, or anything else you want to discuss. If you are interested, get a group of your classmates together and let's set a date.

Feedback on the course (with or without anonymity)

Your legal education at Georgetown involves a significant investment, and I want to ensure you receive the utmost value from this course. I value your feedback on how to improve the course and enhance your learning experience. Your input is crucial in ensuring the course is effective and meets your educational needs. Whether it pertains to the course structure, reading materials, class notes, lectures, homework assignments, or my presentation style, clarity, and effectiveness, I welcome your thoughts and suggestions.

You can reach out to me before or after class, via email, or on a private Zoom conference. Additionally, I have created a Google form, accessible at the top of the "Home" page on the Canvas course website, which allows you to provide feedback anonymously if you prefer. If at any point you feel that your time is not being utilized optimally or if there are areas where improvements can be made, I genuinely want to hear about it so that I can address those concerns.

Final thoughts

We will be spending a lot of time together this semester, and I would like to get to know each of you. As a start, I have created a "Getting To Know You" Google form that you can find at the top of the Canvas "Home" page for the course. The questionnaire should only take a few minutes

to complete. I would appreciate it if you could respond before the start of class, even if you are just shopping. Feel free to skip any question you prefer not to answer.

I have created another anonymous Google form for you to provide feedback on teaching styles you have experienced thus far in law school. This is an excellent opportunity to share your thoughts. While your responses will not alter the course content, I will strive to adapt my teaching style to better align with the preferences of the class.

Lastly, this course is a demanding one. If you encounter personal circumstances that prevent you from adequately preparing for class, doing homework assignments, attending class, or anything else, please let me know and we will work something out that will allow you to get the most out of the course.

I look forward to seeing you in class on August 27.

Dale Collins

P.S. If, for some reason, you want to learn more about me, you can find my bio at http://www.appliedantitrust.com/collins_bio.pdf.