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Fall 2021 Syllabus
University of North Carolina School of Law
Room 3025
MTu 10:25 – 11:50 (3 credit hours)

ANTITRUST LAW

Description

This course provides an introduction to the legal doctrines, public policies, and economic perspectives that inform the practice and administration of federal antitrust law. Throughout the semester, you will encounter problems posed by monopolies, mergers, joint ventures, tying arrangements, exclusive dealing, collaboration in pricing, and other business behavior, as they have arisen in a wide variety of industries and markets. We will discuss these problems together, applying the recurring terms and elements of antitrust law, including geographic market definition, product market definition, entry barriers, market foreclosure, antitrust injury, legitimate business purposes, market structure, market concentration, market performance, market failure, monopoly power, market power, the rule of reason, and the per se rule. After taking this course, you will be familiar with the historical development of the law, its present state, and the ideologies and policy choices that will shape its future paths. You will also be able to apply the principles of antitrust law to new industries and markets, so that you can be an informed observer, or even a participant, in its future development.

Teaching Approach

My classroom instruction employs a combination of lecture and Socratic questioning, with the aim of providing the conceptual scaffolding necessary for you to engage the material before inviting you to inform the discussion. My aim in questioning you is to provoke critical thinking, self-directed learning, and a search for the connections between the detailed facts of a case and the deeper principles it illustrates. Eventually, such questioning should become a habit of mind, so that you will know and be able to apply the core substantive and procedural legal doctrines and rules in your independent work product.

Learning Outcomes

Students shall know and be able to apply the core substantive and procedural legal doctrines and rules. Students shall be able to find, analyze, and use relevant legal materials (including, among others, statutes, cases, regulations, and other administrative materials) in order to identify and resolve problems and communicate legal analysis in a variety of written and oral formats.

Casebook, Supplement, and Additional Materials

The casebook is MELAMED ET AL., *ANTITRUST LAW AND TRADE REGULATION: CASES AND MATERIALS* (7th ed. 2018), published by Foundation Press. Further required materials will be posted on the course Web site at <http://unclaw.com/chin/teaching/antitrust/>, as indicated in the reading assignments below (“Web”) or as announced in class. I will not be using Sakai except to email the class and distribute materials between class sessions.

Prerequisites

None.

Web-Based Simulations

Accompanying certain topics are Web-based simulations that may assist you in visualizing some of the more technical concepts in the course. In each case, try inputting different values and options and see if you can predict the outcomes of the simulation before they happen. This mode of learning may be new to many of you. If you experience any difficulties, try asking a classmate for help, or come by during office hours and we’ll work through it together.

Class Participation

The class session numbers indicated in the Order of Topics table are approximate; you are assured of “safety” by reading and being prepared to discuss the materials one unit ahead.

If you are unprepared and wish to be spared being cold-called, you may email or speak to me before class and I will do my best to remember not to call on you.

There will be occasional, unannounced, very short mock quizzes, which will be graded by one of your fellow students, but no grades will be reported to me, and there will be no consequences for absences or failures.

Grading

There will be a three-hour open book, open notes final examination on Tues., Dec 7 at 2 p.m., which will be graded in accordance with the Law School’s curve for small classes. Past examinations are available via the Law Library Web site and My Carolina Law. Your exam grade will be combined in a weighted average with an A+ for your participation grade, the latter of which will be weighted between 0% and 20%, depending on the overall quality of your participation. The law school curve will be applied to the resulting average. (High-quality participation reflects time, effort and study on *your* part, as contrasted with reliance on the efforts of others.) The examination likely will consist of three or four questions, at least one of which will involve some discussion of theoretical and/or policy issues, and the remainder of an issue-spotting variety similar to the assigned problems.

Attendance

As a small class exploring a specialized area of law, our class will require the attendance, punctuality and consistent participation of all students. Each time you attend class, please check yourself in at <http://unclaw.com/chin/teaching/checkin/> (linked from the homepage at <http://unclaw.com>). All classes will be recorded.

The names of students who have accumulated six or more absences during the semester will be brought to the attention of the Associate Dean for Academic Affairs. Under the Law School’s attendance policy (<https://law.unc.edu/academics/academic-policies/>), a student must attend at least 80% of the required meetings; i.e., 21 of our 26 meetings. A student who does not do so presumptively fails the course. To avoid failing the course, students can make up certain missed course meetings, as described below.

Some absences are excused. Excused absences include personal/family illness or emergency including COVID-related situations, pregnancy or disability as approved by Accessibility and Resource Services, and up to two religious observances under the Law School’s policy.

If you accumulate so many excused absences that you cannot meet the 80% minimum, you may make up excused absences. Making up an excused absence includes viewing the entire recorded class, turning all assignments and any other written work completed by the students in attendance, and working with your partner as necessary to ensure that both of you can timely complete all subsequent coursework. If possible, you should view the recording for a missed class session before the next class session.

Please send me a timely email notifying me of any absence, whether excused or unexcused. Please also send me an email once you have completed the necessary work to make up any excused absence(s).

If you have attendance-related questions or concerns, please contact Assistant Dean for Student Development John Kasprzak (kasprzak@email.unc.edu).

Honor Code

The Honor Code is in effect in this class and all others at the University. I am committed to treating Honor Code violations seriously and encourage all students to become familiar with its terms set out

at <http://instrument.unc.edu>. If you have questions, it is your responsibility to ask me about the Code's application. All exams, written work and other projects must be submitted with a statement that you have complied with the requirements of the Honor Code in all aspects of the submitted work.

Office Hours

Room 5079, Mondays and Tuesdays, noon to 1:30, preferably with advance notice. Please email me at chin@unc.edu if you need to schedule a different time. Please do not rely on my office voicemail for time-sensitive matters.

Diversity and Inclusion

In this course we will study law as it has been written, interpreted, and enforced in the past, but we will also study the value choices that have influenced the creation of that law and how it could be reformed to achieve different and perhaps more effective forms of justice. When discussing such topics, as with discussions on all topics, I value the perspectives of individuals from all backgrounds reflecting the diversity of our students. The term "diversity" in this statement refers to race, gender identity, national origin, ethnicity, religious, social class, age sexual orientation, political beliefs, and physical and learning ability.

In class discussion, students are encouraged to share their own experiences as they relate to the course; however, no student is expected to speak for anyone or anything other than their own experience or point of view. Please remember to give one another the benefit of the doubt, including in situations in which we inadvertently fail to express ourselves as sensitively as we might. We must also never forget that another person's humanity cannot be up for debate.

I am given a class roster with students' legal names, and I will gladly honor a request to address you by whatever name or gender pronoun you prefer. Please advise me of this preference early in the semester so that I may make appropriate changes to my records. Please also let me know if there is anything I can do to improve.

Accommodations and Accessibility

The University of North Carolina at Chapel Hill facilitates the implementation of reasonable accommodations, including resources and services, for students with disabilities, chronic medical conditions, a temporary disability or pregnancy complications resulting in difficulties with accessing learning opportunities. Accommodations are determined through the Office of Accessibility Resources and Service (ARS) for individuals with documented qualifying disabilities in accordance with applicable state and federal laws. See the ARS Website for contact information:

<https://ars.unc.edu> or email ars@unc.edu. Relevant policy documents as they relate to registration and accommodations determinations and the student registration form are available on the ARS website under the About ARS tab.

Discrimination and Harassment

Acts of discrimination, harassment, interpersonal (relationship) violence, sexual violence, sexual exploitation, stalking, and related retaliation are prohibited at UNC-Chapel Hill. If you have experienced these types of conduct, you are encouraged to report the incident and seek resources on campus or in the community. Resources include the Director of Title IX Compliance or Director of Equal Opportunity and Compliance and Title IX Coordinator (eoc@unc.edu), Report and Response Coordinators (reportandresponse@unc.edu), Counseling and Psychological Services (CAPs) (confidential) in Campus Health Services, or the Gender Violence Services Coordinators (gvsc@unc.edu) to discuss your specific needs. Additional resources are available at safe.unc.edu.

Counseling and Psychological Services

Counseling & Psychological Services (CAPS) is strongly committed to addressing the mental health needs of a diverse student body through timely access to consultation and connection to clinically

appropriate services, whether for short or long-term needs. Go to CAPS or visit their facilities on the third floor of the Campus Health Services building for a walk-in evaluation or call (919) 966-3658 to learn more.

Major Topics Covered

- I. Monopoly power¹ and its potential for harm
- II. Market definition and merger analysis²
- III. Horizontal restraints³ on competition⁴
 - A. Cartels (regulating price and/or production)
 - B. Concerted refusals to deal (group boycotts)
 - C. Market division
- IV. Characterization of restraints for adjudication under the per se rule⁵ or rule of reason⁶
 - A. Horizontal restraints
 - B. Joint ventures
 - C. Vertical restraints
- V. Inferring concerted action⁷
- VI. Vertical restraints⁸ on competition⁹
 - A. Resale price maintenance
 - B. Customer/territorial restraints
- VII. Exclusionary conduct by a single firm
 - A. Monopolization and attempted monopolization¹⁰
 - B. Exclusive dealing¹¹
 - C. Predatory pricing¹²

¹ See *U. S. v. E. I. du Pont de Nemours & Co.*, TRADE REGULATION ["TR"] at 133 ("Monopoly is the power to control prices or exclude competition.").

² See Clayton Act § 7, TR at 971; Introduction to the Horizontal Merger Guidelines, TR at 976-77 ("The process of assessing market concentration, potential adverse competitive effects, entry, efficiency and failure is a tool that allows the Agency to answer the ultimate inquiry in merger analysis: whether the merger is likely to create or enhance market power or to facilitate its exercise.").

³ See *NCAA v. Board of Regents of U. of Okla.*, TR at 234 (defining a horizontal restraint as "an agreement among competitors on the way in which they will compete with one another").

⁴ See Sherman Act § 1, TR at 5 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.").

⁵ See *NCAA*, TR at 236 ("Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.").

⁶ See, e.g., *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 343 (1982) ("As its name suggests, the rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition."); *Chicago Board of Trade*, TR at 190 ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

⁷ See Sherman Act § 1, TR at 5 (limiting prohibition to restraints effected by "contract, combination or conspiracy"); *Theatre Enterprises*, TR at 481 ("The crucial question is whether [the challenged] conduct ... stemmed from independent decision or from an agreement, tacit or express.").

⁸ See, e.g., *United States v. Topco Associates, Inc.*, TR at 286 (defining vertical restraints as "combinations of persons at different levels of the market structure, e.g., manufacturers and distributors").

⁹ See Sherman Act § 1, TR at 5.

¹⁰ See Sherman Act § 2, TR at 5-6 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...").

¹¹ See Clayton Act § 3, TR at 859 ("It shall be unlawful ... to make a sale ... of goods ... on the condition ... that the ... purchaser ... shall not use or deal in the goods ... of a competitor ... where the effect ... may be to substantially lessen competition or tend to create a monopoly...").

¹² See Sherman Act § 2, TR at 5-6; see also *Robinson-Patman Act* § 2(a), TR at 1265 (prohibiting price discrimination that threatens to injure competition).

D. Tying arrangements¹³

Detailed Course Coverage Table

The principal cases are listed for your convenience; however, you are responsible for all of the material on the pages listed, whether or not it is covered in class. ***Minor revisions to this syllabus are likely; they will be announced in class and posted on the class Web site as early as possible. Pagination is based on a draft version of the casebook and is subject to change when the print version is released.***

<i>Unit</i>	<i>Topics</i>	<i>Principal Cases/ Statutes</i>	<i>Pages and Statutes</i>	<i>Problems</i>
1	The Sherman Act and its legislative history; early Sherman Act cases	Sherman Act, Trans-Missouri Freight	1-31	
2	The economic aims of antitrust; market and monopoly power	Appalachian Coals	43-72; Web exercise	
3	Market definition concepts	DuPont (Cellophane); Merger Guidelines; Lorain Journal	76-107	
4	Market definition concepts in technology markets	Microsoft (§ I, II.A, III)	996-1003, 1016-17	
5	Price-fixing under the per se rule	Trenton Potteries, Socony Vacuum	117-37	3.1
6	Market division	Palmer, Topco	141-45, Handout	
7	Per se rule vs. rule of reason	Chicago Board of Trade, BMI	Handout, 145-62	
8	The ancillary restraints approach	Joint Traffic, Addyston Pipe, Rothery	Handout, 162-68	
9	Inferring concerted action	Interstate Circuit, Theatre Enterprises, Twombly	195-216	
10	Framing the rule of reason	NCAA	231-48	3.2
11	Concerted refusals to deal	Clayton Act; Fashion Originators' Guild	43-46, 286-92	
12		Associated Press, Northwest Stationers	293-305	
13		Superior Court Lawyers, Toys "R" Us	Handout, 502-16	
14		NYNEX, Rambus	1054-59, 940-51	3.9

¹³ See Sherman Act § 1, TR at 5

15	Vertical restraints	Dr. Miles, Colgate, Monsanto	361-73
16		Sylvania, Leegin	376-87, 393- 4.2 418
17	Monopolization	Alcoa, Spectrum Sports	421-45
18	(Nov. 1) Kevin Anderson, Senior Deputy Attorney General and Director, Consumer Protection Division, North Carolina Department of Justice (Handouts to come)		
19	Exclusive dealing (asynchronous)	Standard Fashion, Microsoft	Handouts
20		Tampa Electric, Dentsply	483-97
21	Unilateral refusals to deal	Aspen Skiing, Trinko	445-75
22	Mergers	Staples I, Staples II	Handouts
23	Predatory pricing	Brooke Group	516-35
24	Tying	Jefferson Parish, Kodak	553-93
25	Tying and Platform Markets	Microsoft, American Express	1003-31, 968-93