

ANTITRUST LAW
UNIVERSITY OF FLORIDA LEVIN COLLEGE OF LAW
SPRING 2023 SYLLABUS – LAW 6550 – 3 CREDITS

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Office Hours: Tuesday, 5:00 p.m.–6:00 p.m. (virtual), or by appointment
Friday, 8:45 a.m.–9:45 a.m. (in-person)

MEETING TIME: Thursday, 5:30 p.m.–6:55 p.m.
Friday, 10:00 a.m.–11:25 a.m.

CLASS LOCATION: MLAC 106

COURSE DESCRIPTION AND OBJECTIVES:

Welcome to antitrust! This class is about the law of competition, monopoly, and markets – the laws that protect consumers by ensuring competition in the marketplace. We will discuss many questions, some of which are front and center in today’s biggest antitrust challenges. What is the policy behind the antitrust laws and why? What makes a monopoly unlawful? What rules limit businesses in dealing with their competitors and those in their supply chain? When does tough competition become unlawful exclusion? And how does all this work when applied to massive entities like Big Tech and Big Pharma? Are some companies blatantly violating the antitrust laws? When should one entity be prevented from buying or merging with another? We will explore these and other important questions throughout the course, with a focus on some of the most burning issues of today.

The class is aimed towards those who are new to antitrust law and concepts. Topics for discussion will include agreements among competitors, joint ventures, mergers, and monopolization. We will examine Supreme Court doctrine, influential modern lower court decisions, and government enforcement guidelines. There will be a class on economics, but no prior knowledge or training in economics or business is required.

STUDENT LEARNING OUTCOMES:

At the end of this course, students should be able to:

- Understand the goals of antitrust, its basic institutions, and enforcement structures;
- Understand the antitrust and enforcement policies governing mergers, including Section 7 of the Clayton Act, the 2010 Horizontal Merger Guidelines, and vertical merger analysis;
- Understand the antitrust laws and enforcement policies governing horizontal restraints of trade, including Section 1 of the Sherman Act; and
- Understand the antitrust laws and enforcement policies governing monopolization and vertical restraints of trade, including Section 1 and 2 of the Sherman Act.

REQUIRED READING MATERIALS:

You do not need to buy a casebook for this course! We are using an open-source publication by the American Bar Association (ABA), *Antitrust Principles, Cases, and Materials* (Working Draft - Spring 2023), by Daniel Francis and Christopher Jon Sprigman, which will be available on Canvas. Please be sure to register for the Canvas course and have any required materials with you in print or easily accessible electronic form in class. You are responsible for checking your Canvas page and the e-mail connected to the page on a regular basis for any class announcements or adjustments.

We will also read enforcement agency guidelines and other supplementary materials and articles that will be posted on Canvas or otherwise available online.

Note: The authors have made their working draft of *Antitrust Principles, Cases, and Materials* available to you solely for use in this course. You are prohibited from disseminating or otherwise sharing or publishing its contents for any purpose. Likewise, any articles assigned as additional reading are not to be reproduced or redistributed for any purpose.

COURSE EXPECTATIONS AND GRADING EVALUATION:

You should come to class having read and thought about the material and prepared to participate in discussion. The assigned readings are starting points for our learning. You are welcome to bring laptops to class: absent a formal accommodation from UF, we prefer that they be closed for discussion, but it is up to you.

Your course grade will be based entirely on your performance on the final examination. The final exam will be in-person, with the date TBD.

CLASS ATTENDANCE POLICY:

Attendance in class is required by both the ABA and the Law School. Attendance will be taken at each class meeting. Students are allowed 4 absences during the course of the semester. Students are responsible for ensuring that they are not recorded as absent if they come in late. A student who fails to meet the attendance requirement will be dropped from the course. The law school's policy on attendance can be found [here](#).

UF LEVIN COLLEGE OF LAW STANDARD SYLLABUS POLICIES:

Other information about UF Levin College of Law policies, including compliance with the UF Honor Code, Grading, Accommodations, Class Recordings, and Course Evaluations can be found at this link: <https://ufl.instructure.com/courses/427635/files/74674656?wrap=1>.

ABA OUT-OF-CLASS HOURS REQUIREMENTS:

ABA Standard 310 requires that students devote 120 minutes to out-of-class preparation for every “classroom hour” of in-class instruction. Each weekly class is 3 hours in length (two 1.5-hour classes), **requiring at least 6 hours of preparation** outside of class, including reading the assigned materials and preparing for any additional class exercises.

COURSE SCHEDULE OF TOPICS AND ASSIGNMENTS:

This syllabus is offered as a guide to the direction of the course. Our pace will depend in part on the level of interest and the level of difficulty of each section and is subject to change.

MODULE 1: INTRODUCTION	
1 1/19	<p><i>Class 1: Introduction and Overview, Part I (Profs. Conners, Sarrine, Hoffman)</i></p> <ul style="list-style-type: none"> • Course overview • History of antitrust law • Foundations of U.S. antitrust <p><i>Required Reading:</i> Chapter I, The Antitrust Project; Press Release, Dep’t. of Just., Justice Department Sues Monopolist Google for Violating Antitrust Laws (Oct. 20, 2020); Matthew Perlman, <i>Meta Blasts FTC Deal Challenge and Chair’s ‘Agenda,’</i> LAW360 (Aug. 29, 2022); Andrew Goudsward, <i>Judge Blocks Proposed Merger of Major Book Publishers in Win for DOJ Antitrust Effort,</i> NAT’L L. J. (Oct. 31, 2022); Press Release, Fed. Trade Comm’n, FTC Seeks to Block Microsoft Corp.’s Acquisition of Activision Blizzard, Inc. (Dec. 8, 2022).</p>
2 1/20	<p><i>Class 2: Introduction and Overview, Part II and Transition into Economics (Profs. Hoffman, Conners, Sarrine)</i></p> <ul style="list-style-type: none"> • Foundational review continued • Landmark cases: <i>Von’s Grocery</i>; <i>Utah Pie</i>; and <i>Cargill</i> • Introduction to economics / why do we use economics in antitrust? <p><i>Required Reading:</i> Re-read Chapter I, The Antitrust Project, pp. 26-33; William Kolasky, <i>The Warren Court: A Distant Mirror? Part III – “So we beat on, boats against the current,”</i> 34 ANTITRUST 81 (2020); <i>United States v. Great Atlantic & Pacific Tea Co.</i>, 173 F.2d 79, 82-88 (7th Cir. 1949); Carl Shapiro, <i>Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets</i>, 33 J. OF ECON. PERSP. 69 (2019).</p>

MODULE 2: ANTITRUST ECONOMICS, MARKET DEFINITION, AND MARKET POWER

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Class 3: Antitrust Economics and Market Definition and Market Power, Part I (Profs. Hoffman and Akleman)

- Supply and demand; static and dynamic competition; monopoly; and oligopoly
- Some key concepts: substitutes, complements, horizontality, and verticality
- Introduction to markets and market power
- Substitutability and ways of measuring it

Required Reading: Chapter II, Antitrust Economics: A Nontechnical Introduction; Chapter III, Market Definition and Market Power, Section A.

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Class 4: Market Definition and Market Power, Part II (Profs. Hoffman and Akleman)

- The Hypothetical Monopolist Test (HMT) and *Brown Shoe*
- Landmark cases: *DuPont* (the “Cellophane fallacy”); *Brown Shoe* (qualitative market definition); *H&R Block* (market definition applied)
- Geographic markets
- Oligopoly

Required Reading: Chapter III, Market Definition and Market Power, Sections B, D, and F.

MODULE 3: ANTITRUST INSTITUTIONS AND TODAY’S ANTITRUST DEBATE

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Class 5: Antitrust Institutions and Objectives: Federalism and Government Enforcement (Profs. Conners, Hoffman, and Sarrine)

- The Federal Trade Commission
- The U.S. Department of Justice – Antitrust Division
- State Attorneys General

Required Reading: Chapter XI, Government Enforcement, Sections A through D and F.

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Class 6: The Chicago School, Neo-Brandeisians, and the Tweens (Guest Speaker – John Newman, Deputy Director, FTC (virtual), introduced by Prof. Akleman)

Required Reading: Timothy J. Muris & Jonathan E. Nuechterlein, *Antitrust in the Internet Era: The Legacy of United States v. A&P* (May 29, 2018), George Mason Law & Economics Research Paper No. 18-15; John M. Newman, *Reactionary Antitrust*, CONCURRENTS REVUE, No. 4 (2019).

MODULE 4: MERGERS	
7 2/9	<p><i>Class 7: Merger Control, Part I (Prof. Akleman)</i></p> <ul style="list-style-type: none"> • Clayton Act, Section 7 • Burden-shifting framework for evaluating mergers • Structural presumption of illegality • Unilateral effects <p><i>Required Reading:</i> Chapter VIII, Mergers and Acquisitions, Sections A through B.2(a); Chapter XI, Government Enforcement, Section E.</p>
8 2/10	<p><i>Class 8: Merger Control, Part II (Prof. Akleman)</i></p> <ul style="list-style-type: none"> • Unilateral effects (cont'd) • Coordinated effects • Potential competition <p><i>Required Reading:</i> Chapter VIII, Mergers and Acquisitions, Sections B.2(b) (pp. 447-453) and B.2(c); <i>FTC v. Elders Grain, Inc.</i>, 868 F.2d 901 (7th Cir. 1989).</p>
9 2/16	<p><i>Class 9: Merger Control, Part III (Prof. Akleman)</i></p> <ul style="list-style-type: none"> • Vertical merger analysis • Competitive responses to mergers <p><i>Required Reading:</i> Chapter VIII, Mergers and Acquisitions, Sections B.2(d), C (pp. 475-486), and D.2 (pp. 507-510).</p>
10 2/17	<p><i>Class 10: Merger Control, Part IV (Prof. Akleman)</i></p> <ul style="list-style-type: none"> • Efficiencies and other defenses • Remedies to unlawful mergers <p><i>Required Reading:</i> Chapter VIII, Mergers and Acquisitions, Sections D.1, D.3 through E.1, and E.3.</p>

MODULE 5: SHERMAN 1 – AGREEMENTS	
11 2/23	<p><i>Class 11: Sherman Act, Section 1: Agreements (Prof. Rosman and Guest Prof. Daniel Sokol)</i></p> <ul style="list-style-type: none"> • What is an agreement? • Landmark cases: <i>Copperweld</i> (parent-subsidary collusion), <i>American Needle</i> (single entity standards); <i>Monsanto</i> (definition of agreement); <i>Matsushita</i> (inference of agreement at summary judgment)

	<ul style="list-style-type: none"> Standards of legality: the per se rule, rule of reason and “quick look” Landmark cases: <i>Twombly</i> (plausibility of agreement at MTD); <i>Professional Engineers</i> (what benefits count under the “rule of reason”); <i>Board of Regents</i> (intermediate scrutiny) <p>Required Reading: Chapter IV, Agreements, Sections A through B (through <i>Twombly</i>) and Section C (Introductory text; <i>Professional Engineers</i>; <i>Board of Regents</i>).</p>
12 2/24	<p>Class 12: Sherman Act, Section 1: Horizontal Agreements, Part I (Profs. Connors and Sarrine)</p> <ul style="list-style-type: none"> Price fixing and market division Group boycotts and hub-and-spoke conspiracies Landmark cases: <i>Palmer</i> (market definition); <i>Klor’s</i> (boycotts); <i>Apple e-books</i> (hub-and-spoke) <p>Required Reading: Chapter V, Horizontal Restraints, Sections A and B.</p>
13 3/2	<p>Class 13: Sherman Act, Section 1: Horizontal Agreements, Part II (Profs. Connors and Sarrine)</p> <ul style="list-style-type: none"> The per se/rule of reason boundary Landmark cases: <i>Topco</i> (competitor collaboration condemned as per se illegal); <i>BMI</i> (joint product) The quick look/rule of reason boundary Landmark cases: <i>Indiana Federation of Dentists</i> (clarifying (?) the boundaries of quick look); <i>Cal. Dental</i> (advertising restraints not subject to quick look) <p>Required Reading: Chapter V, Horizontal Restraints, Sections C and D.</p>
14 3/3	<p>Class 14: Sherman Act, Section 1: Vertical Agreements (Guest Speaker – Andrew Finch, Antitrust Practice Group Co-Chair and Partner, Paul, Weiss, Rifkind, Wharton & Garrison LLP, introduced by Profs. Connors and Sarrine)</p> <ul style="list-style-type: none"> The interbrand vs. intrabrand distinction Nonprice distribution restraints Resale price maintenance Landmark cases: <i>GTE Sylvania</i> (exclusive distribution territory); <i>Leegin</i> (minimum resale price maintenance) <p>Required Reading: Chapter VI, Vertical Restraints, Sections A through C.</p>

MODULE 6: SHERMAN 2 – MONOPOLIZATION AND EXCLUSIONARY CONDUCT	
15 3/9	Class 15: Monopolization/Anticompetitive and Exclusionary Conduct, Part I (Profs. Hoffman and Akleman)

	<ul style="list-style-type: none"> • When does Section 2 come into play? The idea of monopoly power. • What does Section 2 prohibit? Acquisition or maintenance vs. abuse or exploitation. • But how do we know whether a monopolist’s conduct is lawful? The concept of anticompetitive vs. procompetitive conduct/exclusion and predation. • Landmark cases: <i>Facebook</i> (monopoly power); <i>Trinko</i> (acquisition/maintenance vs. abuse/exploitation); <i>Dentsply</i> (exclusion); <i>Microsoft</i> (contribution to monopoly); <i>Alcoa</i> (older views of exclusionary conduct) <p>Required Reading: Chapter VII, Monopolization, Sections A through C.3; Susan A. Creighton et al., <i>Cheap Exclusion</i>, 72 ANTITRUST L. J. 975 (2005).</p>
16 3/10	<p>Class 16: Monopolization/Anticompetitive and Exclusionary Conduct, Part II (Profs. Hoffman and Akleman)</p> <ul style="list-style-type: none"> • Refusal to deal and the freedom (?) of the monopolist • Justification • Exclusivity • Landmark cases: <i>Aspen Skiing</i> (refusal to deal); <i>Trinko</i> (refusal to deal); <i>Microsoft</i> (justifications); <i>McWane</i> (justifications and exclusivity) <p>Required Reading: Chapter VII, Monopolization, Sections C.3 through D.1.</p>
SPRING BREAK: 3/13–3/17	
17 3/23	<p>Class 17: Monopolization/Anticompetitive and Exclusionary Conduct, Part III (Profs. Hoffman and Akleman)</p> <ul style="list-style-type: none"> • Tying • Pricing practices: predation and squeezing • Landmark cases: <i>Brooke Group</i> (predation); <i>Microsoft</i> (monopoly maintenance through various complementary practices); <i>Linkline</i> (price squeeze) <p>Required Reading: Chapter VII, Monopolization, Sections D.2 and D.3.</p>
18 3/24	<p>Class 18: Monopolization/Anticompetitive and Exclusionary Conduct, Part IV (Profs. Hoffman and Akleman)</p> <ul style="list-style-type: none"> • Bundling • Monopolization miscellany; abuse of process, misrepresentation and torts, self-preferencing; attempt • Landmark cases: <i>LePage’s</i> (bundling); <i>Cascade Health</i> (bundling); <i>Walker Process</i> (fraud on the Patent Office); <i>Spectrum Sports</i> (attempt and conspiracy) <p>Required Reading: Chapter VII, Monopolization, Sections D.4 through E; D. Bruce Hoffman & Garrett D. Shinn, <i>Self-Preferencing and Antitrust: Harmful Solutions to an Improbable Problem</i>, CPI ANTITRUST CHRON. (June 2021), https://www.clearlygottlieb.com/-/media/files/cpi--hoffman--final-pdf.pdf.</p>

MODULE 7: CRIMINAL ENFORCEMENT	
19 3/30	<p><i>Class 19: Criminal Enforcement, Part I (Prof. Rosman)</i></p> <ul style="list-style-type: none"> • Grand jury indictments and DOJ enforcement • Proving a conspiracy • Scope of criminal antitrust <p><i>Required Reading:</i> Grand Jury Indictment, <i>United States v. Northcutt</i>, Case No. 07-60220-CR-HURLEY; <i>United States v. Aiyer</i>, 33 F.4th 97 (2d Cir. 2022); <i>United States v. AU Optronics Corp., et al.</i>, 758 F.3d 1074 (9th Cir. 2014); <i>United States v. Nippon Paper Indus.</i>, 109 F.3d 1 (1st Cir. 1997).</p>
20 3/31	<p><i>Class 20: Criminal Enforcement, Part II (Prof. Rosman)</i></p> <ul style="list-style-type: none"> • What counts as a cartel? • Antitrust in labor and employment – no-poach enforcement <p><i>Required Reading:</i> DEP’T OF JUST. & FED. TRADE COMM’N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016); Order Denying Motion to Dismiss, <i>United States v. DaVita Inc.</i>, 2022 WL 266759 (D. Colo. Jan. 28, 2022); Heather Vogell, <i>Department of Justice Opens Investigation into Real Estate Tech Company Accused of Collusion with Landlords</i>, PROPUBLICA (Nov. 23, 2022).</p>

MODULE 8: ADVANCED TOPICS	
21 4/6	<p><i>Class 21: Antitrust and Intellectual Property/Patent Law (Guest Speaker – Anna Neill, Shareholder, Kenny Nachwalter, P.A., introduced by Prof. Sarrine)</i></p> <ul style="list-style-type: none"> • Antitrust and intellectual property overview • Market power and intellectual property • The Hatch-Waxman Act • Refusal to license • Unilateral “abuse” of the patent system: thicketing, trolling, and hopping • Landmark cases: TBD <p><i>Required Reading:</i> Chapter X, Antitrust and Intellectual Property, Sections TBD.</p>
22 4/7	<p><i>Class 22: Immunities and Exemptions (Profs. Connors and Sarrine)</i></p> <ul style="list-style-type: none"> • Petitioning immunity • State action • Landmark cases: <i>Noerr Motor Freight, Inc.</i> (petitioning); <i>North Carolina Dental</i> (state-sanctioned cartel); <i>Trinko</i> (effect of sectoral regulation on antitrust) <p><i>Required Reading:</i> Chapter IX, Immunities and Exemptions, Sections A through C; Skim Chapter IX, Section E.</p>

<p>23 4/13</p>	<p><i>Class 23: Private Enforcement (TBD Guest Speaker)</i></p> <ul style="list-style-type: none"> • Antitrust standing • Antitrust injury • The indirect purchaser rule • Remedies <p><i>Required Reading:</i> Chapter XII, Private Enforcement, Sections TBD.</p>
<p>24 4/14</p>	<p><i>Class 24: International Antitrust Enforcement – Mergers and Criminal Cartels (Guest Panel (virtual), introduced by Prof. Rosman)</i></p> <p>Guest speakers:</p> <ul style="list-style-type: none"> • Stephen Mavroghenis and Zena Prodomou, Quinn Emanuel Urquhart & Sullivan, Brussels (EU/UK) • Daniel Oliveira Andreoli, Demarest Advogados, Sao Paulo (Brazil) • Ye Sun Han, Kim & Chang, Seoul (Korea) • Yusuke Takamiya, Mori Hamada & Matsumoto, Tokyo (Japan) <p><i>Required Reading:</i> TBD.</p>
<p>25 4/20</p>	<p><i>Class 25: Bringing it Forward to Today: Amex, Google, Facebook, Apple, and the Morphing of Antitrust Policy – Are the Current Laws and Institutions Enough? (Profs. Conners, Hoffman, and Akleman)</i></p> <p><i>Required Reading:</i> TBD.</p>
<p>26 4/21</p>	<p><i>Class 26: Course Overview and Exam Preparation (Profs. Conners, Hoffman, and Akleman)</i></p> <p><i>NO READING REQUIRED</i></p>