Antitrust Analysis
Law 252.2
U.C. Berkeley Law School
Spring 2017

Room: 140 Boalt Hall

Time: 8:00 a.m. – 9:50 p.m. Wed./Thurs.

Instructor: Prasad Krishnamurthy (please call me Prasad)

Email: prasad@law.berkeley.edu

Office Hours: 10:00 a.m.-12:00 p.m. Tues. 685 Simon Hall

Course Description:

This course covers the doctrinal basis of antitrust law as well as the underlying legal, economic, and political theory. Topics include (i) horizontal restraints of trade among competitors such as cartels, oligopolies, joint ventures, and other cooperative activities, (ii) monopoly and dominant firm conduct, (iii) vertical restraints of trade between suppliers and customers such as resale price maintenance, territorial and customer restrictions, tying arrangements, exclusive dealing contracts, and (iv) horizontal and mergers.

Textbook:

Gavil, Kovacic, & Baker, Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy (2nd edition (2008) and Summer 2016 Supplement). (Note that there is now a new, third edition of this book, but the second edition is available used at a steep discount.)

While it is not required, I recommend Daniel Crane’s Antitrust in the Aspen Student Treatise Series. It provides a clear and concise description of the key areas of antitrust doctrine.

Exam:

The exam will be in class and open book. Open book means that students can consult (only) the casebook, any other assigned readings for the course, my lecture notes and their own notes/course outline.

Prerequisites (How much economics should I know?):
There are **no prerequisites** for the course. Antitrust, more generally, competition law is saturated with economics, so prior knowledge of intermediate microeconomics and industrial organization\(^1\) is helpful. More than experience, however, having an interest in areas that combine legal and economic analysis is a better indicator of whether a student will get something out of this course and enjoy it. The economic analysis we will use in this class is modeled on how economics is used in business schools—that is, as an aid to making complex decisions in a strategic environment—as opposed to the model development and empirical testing that is the hallmark of economics departments. As a result, the use of economics to inform the legal analysis of specific fact patterns and as a conceptual tool for legal/business decision-making may be new even to those who majored in the subject.

Students with no previous background in economics can expect to do well in the course with a reasonable amount of effort. By reasonable amount of effort, I mean that they will have to be proactive about consulting the instructor and outside sources when they encounter unfamiliar concepts.\(^2\) Informal evidence from previous courses reveals little to no relationship between prior economics background and final grade in the class. In the first few weeks, I will also arrange an optional evening lecture in economics as a refresher course for those interested.

**Assignments:**

There will be three assignments for the class, and students are required to complete two out of the three. These assignments are structured so as to keep students on top of the course material and to provide insurance with respect to grades in the course.

The assignments will consist of short answer questions based on the previous reading. The questions will be designed to mimic the issues that will appear on the final exam, and I will often use questions from previous exams in the assignments. Students will have about 3 weeks to complete an assignment. Not counting the time spent doing the reading, students should budget two to three workdays to complete an assignment. Students should submit assignments electronically through the bcourses course page. You should feel free—indeed you are encouraged—to work in groups, but please submit your answers in your own words. I will provide an outline of suggested answers to the questions after the assignments are submitted.

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\(^1\) Industrial organization is the field of economics that includes the analysis of firms, markets, and regulation.

\(^2\) If students are very concerned about their economics knowledge and/or would like a refresher course on their own, then I recommend reading the chapters on producer theory (theory of supply), competitive markets, and monopoly in any microeconomics textbook. For example Robert Pindyck and Dan Rubinfeld’s *Microeconomics*, David Besanko and Ronald Braeutigam’s *Microeconomics*, Paul Krugman and Robin Wells’s *Microeconomics*, or Greg Mankiw’s *Principles of Microeconomics*. Students interested in practicing antitrust law or working in antitrust policy would be well served owning a copy of Dennis Carlton and Jeffrey Perloff’s *Modern Industrial Organization*, which contains analogous chapters. Students with such interests who also have a strong background in economics or math/science/engineering would also profit from Jean Tirole’s *The Theory of Industrial Organization*, which is one of the best economics textbooks I have come across.
Grading:

Final grades will be based on a combination of assignments and the final exam.

Assignments will determine each student’s class participation score in the following way. At the end of the semester, I will randomly select and read through a subset of each student’s assignments. If a student completes two of the three assignments and the subset of assignments I read indicates reasonable effort, then they will receive an S (satisfactory) for class participation. If either of the two conditions above is not satisfied, then a student receives a U (unsatisfactory) for class participation. This is a discrete metric with a stark cutoff, but it is designed with the goal that almost everyone will receive an S.

If a student receives an S for class participation:

(1) This guarantees them no worse than a pass (P) in the course as long as their final exam passes a willfully reckless standard of conduct,
(2) They will be bumped up to the next level if they are on the borderline of a grade (P/H or H/HH)
(3) They are eligible for high honors (HH) in the course.

If a student receives a U for class participation:

(1) They may receive a substandard pass (NP) or no credit (NC) if they do poorly on the final exam,
(2) They will be bumped down to the lower grade if they are on the borderline of a grade so that someone with an S can be bumped up
(3) They are not eligible for high honors (HH) in the course.

The choice of curve for the instructor (see Berkeley Law grading policy for upper level courses) will be determined by the number of students who receive an S for class participation. If that number is substantial then 45% of students will receive honors (H) and 15% will receive high honors (HH). If that number is not substantial then 40% will receive honors (H) and 10% will receive high honors (HH).

After taking into account class participation, grades will be determined by final exam scores. In this course, class participation is designed to give students the opportunity, shift the mean of the grade distribution to the right, and truncate the left tail.

Attendance and Call System:

Students are expected to attend every class, and attendance will be taken. If you are unable to attend class, please send me an email in advance and let me know. Missing a substantial number of classes without an appropriate reason—such as illness, job
recruitment, family situation, etc.—will result in an Unsatisfactory score for class participation.

I will assign students to be on call for specific days. Call will start during the third week of classes. Students will be notified of their day well in advance so that they can prepare. Please let me know in advance if you are unable to attend class on that day. Alternatively, you can arrange to trade with another student. Please inform me of any such trades so I can update my records. A Satisfactory mark for class participation requires being on call at least one day. The purpose of call is to ensure that our class conversation involves a group of students who have read the materials very carefully. Its purpose is not to be stressful or inquisitorial in any way. If you feel anxious about being on call, for whatever reason, please communicate with me in advance and we will work something out.

**Use of Computers/Internet in Class:**

I consider it to be unprofessional to use your computer in class for any purpose that is unrelated to the class. This is a view that I believe ought to be a general norm for us as students of the law and as members of the U.C. Berkeley community. As such, I am also unwilling to attempt to enforce it with incentives, for the same reason that our honor code at Berkeley Law turns on ethics as opposed to incentives.

**Email/bcourses:**

My email address is prasad@law.berkeley.edu. I will try to respond to emails within a day or two. If I do not respond, please do follow up with another email. I am happy to clarify issues that arise in the course, but for weighty, substantive questions, I will usually ask you to come to office hours. If you have a time conflict with office hours, let me know and we can set up a separate time to meet. I will make extensive use of bcourses to post class materials. You may receive up to 3 to 4 emails from me a week, excluding announcements that lecture notes or other items have been uploaded to bcourses.

I will be sure to indicate what materials refer to information students are expected to know for the final, and what materials are for students with interests in antitrust/competition policy that go beyond the purview of this class. I consider office hours and bcourses to be legitimate fora for both these purposes.
Calendar:

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*(Approximate) date Assignment will be posted

Topics Covered:

Introduction to Antitrust Law

Concerted Action Among Competitors (GKB Chapter 2)
  Per Se Illegality vs. Rule of Reason
  Traditional Per Se Categories
  Rule of Reason
  Structured Rule of Reason

Distinguishing Concerted From Unilateral Action (GKB Chapter 3)
  Inferring Agreement and Cartels
  Inferring Agreement and Invitations to Collude

Mergers Among Competitors (GKB Chapter 5)
  Structural Presumption and Market Concentration
  Market Definition and Market Concentration
  Unilateral Competitive Effects
  Coordinated Competitive Effects
  Efficiencies
  Entry
  Powerful Buyers

Single Firm Exclusionary Conduct (Monopolization) (GKB Chapter 6)
Non-Price Exclusionary Conduct
Predatory Pricing
Refusals to Deal
Attempt to Monopolize
Remedies

Concerted Exclusionary Conduct (GKB Chapter 7)
Exclusionary Group Boycotts
Tying
Exclusive Dealing
Vertical Mergers

Distribution Relationships with Collusive Effects (Vertical Intra-Brand Agreements) (GKB Chapter 4)

Private Rights of Action and Damages (GKB Chapter 9)

Antitrust Federalism and the First Amendment (GKB Chapter 9)

Syllabus:

Class 1-2

Introduction to Antitrust Law
Required
Chapter 1: 2-33, 37-53 (Andreas; Brunswick; JTC Petroleum)

Background Reading (by Class 6)
Required
Chapter 1: 53-72
Recommended:
Chapter 1: 72-80

Class 3

Concerted Action Among Competitors: Per Se vs. Rule of Reason
Required
Chapter 2: 88-95, 97-103 (Trenton Potteries; Socony)
Appendix A: 1251 (Sherman Act §1 and §2)
Recommended
Chapter 2: 95-97, 103-107

Class 4-5

Concerted Action Among Competitors: Traditional Per Se Categories
Required
   Chapter 2: 107-122, 128-138, 144-153  (BMI; Maricopa; Topco; BRG; SCTLA)
Recommended
   Chapter 2: 122-128, 138-144

Class 6

Concerted Action Among Competitors: Rule of Reason
Required
   Chapter 2: 153-165, 175-187  (CBOT, NSPE, NCAA)
Recommended
   Chapter 2: 165-173

Class 7

Concerted Action Among Competitors: Structured Rule of Reason
Required
   Chapter 2: 187-201; 211-223  (CA Dental; Polygram)
   Chapter 2: 125-128  (Dagher)
   Summer 2016 Supp.  (American Needle)
Recommended
   Chapter 2: 202-211
   (skim) Antitrust Guidelines for Collaborations Among Competitors (2000),

Class 8

Distinguishing Concerted From Unilateral Action: Inferring Agreement & Solving Cartel Problems
Required
   Chapter 3: 227-234, 256-264, 283-88, 297-301  (Copperweld, Interstate Circuit, American Column & Lumber, Maple Flooring, Container Corp.)
Recommended
   Chapter 3: 234-47, 251-256

Class 9

Distinguishing Concerted From Unilateral Action: Inferring Agreement & Invitations to Collude
Required
   Chapter 3: 304-11, 337-43  (Foley, Amer. Airlines)
Recommended
   Chapter 3: 301-304, 335-337, 343-349
Class 10

**Mergers Among Competitors: Structural Presumption and Market Concentration**

Required

- Appendix A: 1256 (Clayton Act §7)

Recommended

- Chapter 5: 452-455, 504-507

Class 11

**Mergers Among Competitors: Market Definition and Market Concentration**

Required

- Chapter 5: 472-478, 481-496, 499-504, 507-517 (top) (*du Pont (Cellophane), Cardinal Health*)

Recommended

- Chapter 5: 479-481, 505-506

Class 12

**Mergers Among Competitors: Unilateral Competitive Effects**

Required

- Chapter 5: 517-18, 535-538, 542-54 (Staples)

Recommended

- Chapter 5: 539-542
- Chapter 8: 926-31, 934-37
- Summer 2014 Supp. 111-115

Class 13-14

**Mergers Among Competitors: Coordinated Competitive Effects & Efficiencies**

Required

- Chapter 5: 522-529, 568-73 (*HCA, Staples*)

Recommended

- Chapter 5: 518-521, 529-535
- Summer 2014 Supplement: 115-116, 118
Mergers Among Competitors: Entry and Powerful Buyers
Required
  Chapter 5: 559-564, 455-62 (Waste Management, Baker Hughes)
Recommended
  Chapter 5: 564-566, 574-577,
  Chapter 8: 983-987

Mergers Among Competitors: Problems
  Hospital Merger Fact Pattern (Lecture Slides)
  Chapter 5: 577-578 (Chic Shampoo)

Class 15

Monopolization: Single Firm Exclusionary Conduct:
Required
  Chapter 6: 582-592, 598-607, 615-618 (Lorain Journal, Alcoa)
  Appendix A: 1251 (Sherman Act §2)
Recommended
  Chapter 6: 592-598, 607-615, 618-622

Class 16-17

Monopolization: Non-Price Exclusionary Conduct
Required
  Chapter 6: 622-637, 640-57 (Aspen Skiing, Microsoft)
Recommended
  Chapter 6: 657-659
  Chapter 8: 941-65

Class 18-19

Monopolization: Predatory Pricing
Required:
  Chapter 1: 81-86
  Chapter 6: 659-674 (Brooke Group)
Recommended
  Chapter 6: 675-680

Monopolization: Mixed (Price/Non-price) Conduct
Required
  Chapter 6: 680-699 (Cascade)
Recommended
  Chapter 6: 699-706
**Monopolization: Refusals to Deal**
Required
   Chapter 6: 706-714 (*Trinko*)
Recommended
   Chapter 6: 715-722

**Class 20**

**Monopolization: Attempt to Monopolize & Remedies**
Required
   Chapter 6: 747-762 (*Spectrum Sports, Microsoft*)

**Monopolization: Applications**
Required
   Chapter 6: 762 (Problem 6-1 “Amerinet”)

**Class 21**

**Concerted Exclusionary Conduct: Tying**
Required
   Chapter 7: 788- 808, 815-22 (*United Shoe, IBM, Int’l Salt, Jefferson Parish, Microsoft*)
Recommended
   Chapter 7: 810-815, 875-888

**Class 22**

**Concerted Exclusionary Conduct: Exclusive Dealing**
Required
   Chapter 7: 823, 825-840 (*Jefferson Parish, Omega*)
   Appendix A: 1254 (Clayton Act §3)
Recommended
   Chapter 7: 823-825, 840-851

**Class 23**

**Concerted Exclusionary Conduct: Exclusionary Group Boycotts**
Required
   Chapter 7: 765-777, 778-786 (*FOGA, Klor’s, Northwest Wholesale Stationers, Visa*)
Recommended
   Chapter 7: 786-788
   Chapter 8: 905-909
Class 24-25

**Vertical Intrabrand Agreements**
Required
  Chapter 4: 352-368, 370-392, *Dr. Miles, Colgate, Schwinn, Albrecht, GTE Sylvania, Leegin* (read *Leegin* excerpt eventually but can look at headnotes in short term)
Recommended
  Chapter 4: 369-370, 392-406, 417, 426-428

Class 26

**Private Rights of Action & Damages**
Required
  Chapter 9: 1086-1095, 1098-1105, 1128-1129, 1137-1140 (*Illinois Brick, AGC, Trueitt*)
Recommended
  Chapter 9: 1095-1098, 1111-1113, 1124-1128, 1129-1137, 1146-1148

Class 27

**Federalism & The First Amendment**
Required
  Chapter 9: 1061-1077, 1080-1086 (*Parker, Midcal, Seminole Tribe, Noerr, Pennington, California Motor Transport, Allied Tube, SCTLA, Professional Real Estate*)
Recommended
  Chapter 9: 1078-1080