

# **Antitrust and Unfair Competition Law**

## **Syllabus Spring Semester 2021**

**Sturm College of Law / University of Denver**

**Adjunct Professor Todd R. Seelman**

**Adjunct Professor Christopher H. Wood**

**Monday/Wednesday 6:00 – 7:15 pm**

**Virtual Meeting / Synchronous Online**

### **Adjunct Professors**

Todd Seelman and Chris Wood are partners in Lewis Brisbois Bisgaard & Smith LLP’s Denver and Washington, D.C. offices. Todd is the national chair of the firm’s Antitrust and Competition practice and managing partner of the Denver office. Todd has presented and written extensively on antitrust and competition matters. Since 2008, he has been an Adjunct Professor at the University of Denver teaching the fundamentals of antitrust law to second and third years. Todd is a leader in the antitrust field, having been recognized with distinction for his achievements and client service by a number of organizations including the Denver Post and Martindale-Hubbell.

Chris currently is the chair of the Colorado Bar Association’s Business Law Section’s Antitrust and Consumer Protection subsection. He also serves on the Executive Council of the Business Law Section. Like Todd, he writes and presents on current antitrust developments and is an Adjunct Professor of law at the University of Denver. Chris’ experience dates from the mid-1990s, when he began his career in Washington, DC. His antitrust counseling and litigation has taken him coast-to-coast representing individuals and corporations in high-stakes civil and criminal proceedings.

Todd and Chris each have over 25 years of antitrust practice experience – a combined 50+ years – litigating cases and counseling clients, as well as substantial experience in other forms of complex litigation. Todd’s email address is [todd.seelman@lewisbrisbois.com](mailto:todd.seelman@lewisbrisbois.com). Chris’s email address is [Christopher.wood@lewisbrisbois.com](mailto:Christopher.wood@lewisbrisbois.com).

### **Course Description**

This is a survey course. The goal is for rising lawyers to gain a firm understanding of the fundamentals of antitrust law through case and statutory analysis and experiential learning.

The expansion of the U.S. economy throughout the years has required our federal and state governments to rethink their respective roles in regulating business conduct in the U.S. That process continues to this day with deep scrutiny of dominant industry players such as Facebook and the recent filing of litigation against Google. The laws regulating the business conduct of these multi-billion dollar market entities as well as mom-&-pop businesses are as dynamic as the notion of competition itself. The course teaches the evolution and principles of antitrust and unfair competition law. We will discuss the competitive problems that arise from monopolization, competitor agreements, “naked” cartel activity, and mergers. The course will also examine the interplay between federal, state, and private enforcement of competition laws.

### **Course Textbook/Author**

*Cases and Materials on Modern Antitrust Law and its Origins*, 6<sup>th</sup> Edition, 2018. (West Academic Publishing). Thomas D. Morgan & Richard J. Pierce, Jr.

### **Accommodations Due to Disability/Medical Issues**

If you have a disability/medical issue protected under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act and need accommodation, please visit the Disability Services Program (“DSP”) website at <http://www.du.edu/studentlife/disability/dsp/index.html>. You may also contact DSP by email ([dsp@du.edu](mailto:dsp@du.edu)), phone (303.871.2278) or in person (4th Floor of Ruffatto Hall).

### **Attendance Policy**

Attendance will be taken each class. Students must attend no less than 80% of class meetings.

### **Grading**

As a DU policy, grading in classes with over 10 students will be on a curve. In this class, final grades will be determined from a total of 100 points from three sources: (1) a mid-term exam, (2) a final exam, and (3) class participation.

There will be a mid-term exam (40 points) covering the material from the first half of the semester. There will be a final exam (40 points) covering the material from the second half of the semester.

There also will be points for class participation (20 points). Class participation point awards derive from two sources: (1) attendance and (2) *substantive* participation, which entails reading and studying assigned material prior to class. Participation will impact your grade so stay vigilant on this important grading component.

### **Reading Assignments**

Generally, reading assignments for each class will cover 20-35 pages. For each class you should have a general understanding of the assigned material for that class. We will review the relevant cases and material in each class, emphasizing for you the key “take aways” as we go.

During the first half of the semester, we will focus on the nuts and bolts of the antitrust laws as they have evolved since inception. During the second half of the semester, students will participate and manage mock client interviews and we will include lectures covering current antitrust law developments and the antitrust lawyer’s role in representing clients.

Note: If we do not cover a case or material in class, it will *not* appear on an exam.

DATE	LECTURE TOPICS	READING ASSIGNMENTS
1/18	<b>Martin Luther King Jr. Day (No Class)</b>	
1/20	<b>Course Preview. Antitrust and Unfair Competition Law</b> English Common Law American Antitrust History (4 Periods) (1) Formative Period (1890-1914) (2) Development of the Rule of Reason (1915-1939) (3) The Per Se Rule and Focus on Market Structure (1940-1974) (4) Modern Period (1975-Present)	No Reading
1/25	<b>Introduction. Common Law Antecedents of the Sherman Act</b> <ul style="list-style-type: none"> <li>• The Case of Monopolies</li> <li>• <i>Mitchel v. Reynolds</i></li> <li>• The Sherman Act</li> </ul> <b>Chapter I. The First 25 Years Under the Sherman Act: 1890-1914</b> <p><b>A. Jurisdiction and Scope of the Act</b></p> <ul style="list-style-type: none"> <li>• <i>Gibbons v. Ogden</i> (handout)</li> <li>• <i>United States v. E.C. Knight Company</i></li> <li>• Foreign Commerce: A Case of Bananas</li> </ul>	Pages: 1 - 5; 20 - 23; 30 - 32; 33 - 39 Handout: The Sherman Act Handout: <i>Gibbons v. Ogden</i>
1/27	<b>Chapter I. The First 25 Years Under the Sherman Act: 1890-1914</b> <p><b>B. Horizontal Combinations in Restraint of Trade</b></p> <ul style="list-style-type: none"> <li>• <i>United States v. Trans-Missouri Freight Ass'n</i></li> <li>• <i>The Joint-Traffic Ass'n Case (U.S. v. Joint-Traffic Ass'n)</i></li> <li>• <i>United States v. Addyston Pipe &amp; Steel Co.</i></li> <li>• The Economics and Operation of Cartels</li> </ul>	Pages: 39 - 68
2/1	<b>Chapter I. The First 25 Years Under the Sherman Act: 1890-1914</b> <p><b>C. Monopolization and Merger</b></p> <ul style="list-style-type: none"> <li>• <i>Northern Securities Co v. United States</i></li> <li>• <i>Standard Oil Co. of New Jersey v. United States</i></li> <li>• <i>The American Tobacco Case (U.S. v. American Tobacco)</i></li> <li>• Attempt to Monopolize- <i>The Swift Case (Swift &amp; Co. v. U.S.)</i></li> <li>• <i>The Terminal Railroad Decision (U.S. v. Terminal R.R. Ass'n of St. Louis)</i></li> </ul>	Pages: 70 - 101

2/3	<p><b>Chapter I. The First 25 Years Under the Sherman Act: 1890-1914</b></p> <p><b>D. Vertical Restraints of Trade - Resale Price Maintenance</b></p> <ul style="list-style-type: none"> <li>• <i>Dr. Miles Medical Co. v. John D. Park &amp; Sons Co.</i></li> <li>• <i>The Colgate Case (U.S. v. Colgate &amp; Co.)</i></li> </ul> <p><b>E. Adoption of the Clayton and Federal Trade Commission Acts</b></p> <ul style="list-style-type: none"> <li>• Clayton Antitrust Act</li> <li>• Federal Trade Commission Act</li> </ul>	Pages: 101 - 116
2/8	<p><b>Chapter II. The Rule of Reason Period: 1915 to 1939</b></p> <p><b>A. Cases Giving Definition to the Rule of Reason</b></p> <ul style="list-style-type: none"> <li>• <i>Board of Trade of City of Chicago v. United States</i></li> <li>• <i>United States v. United States Steel Corp.</i></li> </ul> <p><b>B. The Trade Ass'n Cases</b></p> <ul style="list-style-type: none"> <li>• <i>Note on the Problem of Oligopoly</i></li> <li>• <i>The Maple Flooring case (Maple Flooring Mfrs. Ass'n v. U.S.)</i></li> </ul> <p><b>C. The Interplay Between Patents and Antitrust Law</b></p> <ul style="list-style-type: none"> <li>• <i>United States v. General Electric</i></li> <li>• Note on the Patent-Tying "Misuse" Cases</li> </ul> <p><b>D. Testing the Limits of the Rule of Reason</b></p> <ul style="list-style-type: none"> <li>• Antitrust and Regulation, The <i>Keogh Case (Keogh v. Chicago &amp; Nw. Ry. Co.)</i></li> <li>• More on Proof of Agreement: <i>Sugar Institute and Interstate Circuit (Sugar Institute v. U.S.; Interstate Circuit v. U.S.)</i></li> </ul>	Pages: 117 - 132; 146 - 152; 154 - 160; 168 - 169; 174 - 175; 183 - 185
2/10	<b>No Class (Wellness time)</b>	No Reading
2/15	<p><b>Chapter III. The Per Se Rule and Focus on Market Structure: 1940 to 1974</b></p> <p><b>A. Horizontal Combinations in Restraint of Trade</b></p> <p><b>1. Price Fixing</b></p> <ul style="list-style-type: none"> <li>• <i>United States v. Socony-Vacuum Oil Co.</i></li> <li>• <i>Parker v. Brown</i></li> <li>• Antitrust Immunity for Seeking Regulatory Change - <i>Noerr and California Motor Transport (E. R.R. Presidents Conf. v. Noerr Motor Freight; Cal. Motor Transp. v. Trucking Unlimited)</i></li> </ul>	Pages: 187 - 217

2/17	<p><b>Chapter III. The Per Se Rule and Focus on Market Structure: 1940 to 1974</b></p> <p><b>A. Horizontal Combinations in Restraint of Trade</b></p> <p><b>2. Group Boycotts</b></p> <ul style="list-style-type: none"> <li>• <i>Fashion Originators' Guild of America v. FTC</i></li> <li>• A Note on Standards Setting</li> <li>• <i>The Associated Press Case (Associated Press v. U.S.)</i></li> <li>• A Note on Due Process in Exclusion from Organizations</li> </ul> <p><b>3. Market Division</b></p> <ul style="list-style-type: none"> <li>• <i>Timken Roller Bearing Co. v. United States</i></li> <li>• Fixing Maximum Prices</li> <li>• Intra-Enterprise Conspiracy</li> <li>• Conscious Parallelism</li> </ul>	Pages: 217 - 235
2/22	<p><b>Chapter III. The Per Se Rule and Focus on Market Structure: 1940 to 1974</b></p> <p><b>A. Horizontal Combinations in Restraint of Trade</b></p> <p><b>4. Cases Testing the Limits of the Per Se Rule</b></p> <ul style="list-style-type: none"> <li>• <i>United States v. Container Corp. of America</i></li> <li>• <i>United States v. Topco Associates, Inc.</i></li> </ul> <p><b>B. Monopolization</b></p> <ul style="list-style-type: none"> <li>• <i>United States v. Aluminum Co. of America</i></li> <li>• The Supreme Court "Affirms" Judge Hand – <i>American Tobacco v. U.S.</i></li> <li>• The Supreme Court Refines Its Test for Monopolization - <i>United States v. Griffith</i></li> </ul>	Pages: 235 - 262; 268 - 270

2/24	<p><b>Chapter III. The Per Se Rule and Focus on Market Structure: 1940 to 1974</b></p> <p><b>B. Monopolization (continued)</b></p> <ul style="list-style-type: none"> <li>• <i>United States v. United Shoe Mach.</i></li> <li>• Market Definition Revisited - Cellophane Fallacy (<i>U.S. v. E.I. du Pont</i> (1956))</li> <li>• Tailoring a Market Definition- <i>U.S. v. Grinnell</i></li> <li>• Unilateral Refusal to Deal as a Section 2 Offense - <i>Lorain Journal</i> and <i>Otter Tail</i> (<i>Lorrain Journal v. U.S.</i>; <i>Otter Tail Power v. U.S.</i>)</li> <li>• Attempted Exclusion by a Patent Holder - <i>Walker Process Equip. v. Food Mach. &amp; Chem.</i></li> <li>• <i>Utah Pie Co. v. Continental Baking Co.</i></li> <li>• Note on Predatory Pricing</li> <li>• Note on Shared Monopoly</li> </ul>	Pages: 270 - 299
3/1	<p><b>Chapter III. The Per Se Rule and Focus on Market Structure: 1940 to 1974</b></p> <p><b>C. Vertical Arrangements Perceived as Exclusionary- Tying and Exclusive Dealing</b></p> <ul style="list-style-type: none"> <li>• <i>International Salt Co. v. United States</i></li> <li>• <i>Standard Oil Company of California v. United States</i></li> <li>• The Single Product Problem: A Look at <i>Times-Picayune Publ'g v. U.S.</i></li> <li>• <i>Northern Pacific Railway Co. v. United States</i></li> </ul>	Pages: 300 - 329
3/3	<p><b>Chapter III. The Per Se Rule and Focus on Market Structure: 1940 to 1974</b></p> <p><b>C. Vertical Arrangements Perceived as Exclusionary- Tying and Exclusive Dealing (continued)</b></p> <ul style="list-style-type: none"> <li>• <i>United States v. Loew's, Inc.</i></li> <li>• <i>Fortner Enterprises, Inc. v. United States Steel Corp.</i></li> <li>• A Note on Some Procedural Issues Suggested by <i>Fortner</i></li> <li>• A Postscript on <i>Fortner</i></li> </ul>	Pages: 329 - 348  Note: At the end of class we will reserve about 30 minutes for questions in preparation for the midterm exam.
3/8	<b>Midterm Exam Covering First Half of Semester</b>	

3/10	<p><b>Chapter III. The Per Se Rule and Focus on Market Structure: 1940 to 1974</b></p> <p><b>D. Dealing with Dealers</b></p> <ol style="list-style-type: none"> <li><b>1. Group Boycotts of Particular Dealers</b> Klor's, Inc. v. Broadway-Hale Stores</li> <li><b>2. Resale Price Maintenance</b> <i>United States v. Parke, Davis &amp; Co.</i> <i>Simpson v. Union Oil Co. of California</i></li> <li><b>3. Territorial Allocations</b> <i>White Motor Co. v. United States</i> A Note on <i>U.S. v. General Motors</i> And Then There Was <i>Schwinn (U.S. v. Arnold, Schwinn &amp; Co.)</i></li> <li><b>4. Price Discrimination</b> The Robinson-Patman Act Legislative History of Robinson-Patman</li> </ol>	Pages: 348 - 376; 387 - 93
3/15	<p><b>Chapter III. The Per Se Rule and Focus on Market Structure: 1940 to 1974</b></p> <p><b>E. Mergers</b></p> <ul style="list-style-type: none"> <li>• An Introductory Note on <i>U.S. v. Columbia Steel</i></li> <li>• <i>Brown Shoe Co., Inc. v. United States</i></li> <li>• A Note on Vertical Integration-The <i>du Pont-GM</i> case (<i>U.S. v. E.I. du Pont (1957)</i>)</li> <li>• A Note on the Failing Company Doctrine</li> <li>• Move to Presumed Illegality - The <i>Philadelphia Bank</i> Case (<i>U.S. v. Philadelphia Nat'l Bank</i>)</li> <li>• Two Small but Vigorous Competitors: A Note on <i>U.S. v. Von's Grocery</i></li> <li>• Competition for the Market - <i>El Paso Gas (U.S. v. El Paso Nat'l Gas)</i></li> <li>• Section 7 and Conglomerate Mergers: <i>Continental Can</i> and <i>Rome Cable (U.S. v. Cont'l Can; U.S. v. Aluminum Co. of America)</i></li> </ul>	Pages: 396 - 421; 432 - 435
3/17	<p><b>Chapter IV. The Modern Development of Antitrust Law: Since 1975</b></p> <p><b>A. The Transition Cases</b></p> <ul style="list-style-type: none"> <li>• <i>Goldfarb v. Virginia State Bar</i></li> <li>• <i>Continental T.V., Inc. v. GTE Sylvania Inc.</i></li> <li>• <i>Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.</i></li> <li>• The Place of Private Litigation in Antitrust Enforcement</li> <li>• The Problem of "Passing-On"</li> <li>• A Note on Some Other Standing Issues</li> </ul>	Pages: 453 - 483

3/22	<p><b>Chapter IV. The Modern Development of Antitrust Law: Since 1975</b></p> <p><b>B. Emergence of Rule of Reason in Section 1 Cases</b></p> <ol style="list-style-type: none"> <li>1. Horizontal Price Fixing <i>Nat'l Society of Prof. Eng. v. United States Broadcast Music v. Columbia Broadcasting</i></li> <li>2. Group Boycotts by Competitors <i>Northwest Wholesale Stationers v. Pacific Stationery &amp; Printing</i></li> <li>3. Horizontal Market Division <i>Polk Bros. v. Forest City Enterprises</i></li> </ol>	Pages: 483 - 505; 528 - 533; 552 - 57
3/24	<b>No Class (Wellness time in lieu of Spring Break)</b>	No Reading
3/29	<p><b>Chapter IV. The Modern Development of Antitrust Law: Since 1975</b></p> <p><b>B. Emergence of the Rule of Reason in Section 1 Cases (continued)</b></p> <ol style="list-style-type: none"> <li>4. Dealing with Dealers <ul style="list-style-type: none"> <li>• <i>Monsanto Co. v. Spray-Rite Service Corp.</i></li> <li>• Vertical Group Boycotts - <i>NYNEX v. Discon</i></li> <li>• Breaking Down Rule Against Resale Price Maintenance: Maximum Resale Price Fixing</li> <li>• <i>Leegin Creative Leather Products, Inc. v. PSKS</i></li> <li>• Resale Price Maintenance Coordinating a Cartel: The <i>Apple Case (U.S. v. Apple)</i></li> <li>• <i>Bell Atlantic v. Twombly</i>: A New Pleading Standard</li> </ul> </li> </ol>	Pages: 561 - 567; 583 - 609
3/31	<p><b>Chapter IV. The Modern Development of Antitrust Law: Since 1975</b></p> <p><b>C. The Continuing Concern About Exclusionary Conduct</b></p> <ol style="list-style-type: none"> <li>1. Monopolization <i>Aspen Skiing Co. v. Aspen Highlands Skiing Corp.</i> <i>Brooke Group v. Brown &amp; Williamson Tobacco</i></li> <li>2. Tying and Exclusive Dealing <i>Jefferson Parish Hospital District No. 2 v. Hyde</i></li> </ol>	Pages: 649 - 660; 678 - 685; 714 - 727



4/5	<p><b>Chapter IV. The Modern Development of Antitrust Law: Since 1975</b></p> <p><b>D. Merger Review: Antitrust as an Administrative Process</b></p> <ol style="list-style-type: none"> <li>1. Transitional Developments <ul style="list-style-type: none"> <li>• Bringing Realism to Market Analysis - <i>U.S. v. General Dynamics Corp.</i></li> <li>• Moderating the Potential Competition Doctrine in <i>U.S. v. Marine Bancorporation</i></li> <li>• The Hart-Scott Rodino Act</li> </ul> </li> </ol>	Pages: 775 - 781 Handout
4/7	<p><b>Chapter IV. The Modern Development of Antitrust Law: Since 1975</b></p> <p><b>Merger Review: Antitrust as an Administrative Process (continued)</b></p> <ol style="list-style-type: none"> <li>2. The Horizontal Merger Guidelines</li> <li>3. Representative Cases (<i>Cargill v. Monfort of Colorado</i>; <i>FTC v. Staples, Inc. &amp; Office Depot</i>)</li> <li>4. The Vertical Merger Guidelines (adopted 2020)</li> </ol>	Pages: 781 - 811 Handout: Vertical Merger Guidelines (2020)
4/12	<b>Counseling Clients and Negotiating with Antitrust Regulators</b>	Handouts
4/14	<p><b>Observations on “Today’s” Section 1</b></p> <p>The Law Under Section 1 Today Anticipated Developments in Antitrust Law</p> <ul style="list-style-type: none"> <li>• Congressional activity</li> <li>• <i>United States v. Google</i></li> </ul>	Handouts
4/19	<b>Mock Client Interview 1</b>	Handout
4/21	<b>Mock Client Interview 2</b>	Handout
4/26	<b>Course Summary and Final Exam Review</b>	No Reading  Please come prepared with any questions about the final exam
	<b>Reading Days and Exam Period</b>	
4/27-5/4	<b>Reading Days</b>	
5/5-20	<b>Final Exam Period</b>	