

Antitrust

University of Oklahoma College of Law
Spring 2019

Course/section no.: 5703-600
Mondays & Tuesdays, 2:30 - 3:45 p.m.

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SYLLABUS

1. ORIENTATION, GOALS, LEARNING OUTCOMES: I intend for this class to provide meaningful training for the practice of law relating to antitrust, including litigation, transactional practice, government lawyering for the DOJ or FTC, representing clients before the DOJ or FTC, and advising and counseling clients with regard to the potential antitrust implications of contemplated business decisions. By the end of the course, you should have a broad grasp of the principal doctrines, have a basic understanding of the relevant economic principles, be able to approach antitrust analysis like courts do, be able to spot potential antitrust problems in various kinds of business dealings, and be able to have a general discussion of antitrust policy and theory.

Compared to many other areas of law you have studied, you will find that antitrust is less about learning rules and more about learning a way of thinking. In particular, it's about anticipating how courts tend to approach antitrust problems and developing a sense of judgment about what courts will find persuasive. And that necessarily involves economics. The centrality of economics antitrust sets it apart from other fields of law. To be sure, there are law-and-economics proponents who want to bring economic theory to bear on everything in the law. Some have claimed, for instance, that torts and even family law are all about economics. That's an academic debate – and an interesting one. But in practice, lawyers approaching torts or family law disputes rarely need to use economic theory. Antitrust is different. With antitrust, there's no avoiding economic theory. It's everywhere all the time, and it has to be argued in court.

If economics doesn't come naturally to you or if you have an aversion to anything vaguely math-related, do not worry. We will take the economics slowly. No prior knowledge is assumed or even preferred. And we will only take the economic theory so far. You don't need to be an economist or an economics

nerd to do antitrust law. Far from it. And you won't need to do more than a trivial amount of easy math, for which you can use a calculator. All you'll need is a roll-up-your-sleeves-and-engage-with-it attitude. It's well within the realm of general lawyer competency.

The following is a non-exclusive list of specific learning outcomes for this course:

1. Broadly know and be able to apply the principal doctrines of United States antitrust law, particularly the Sherman Act §1 and §2.
2. Be able to approach antitrust analysis like courts do.
3. Be able to spot potential antitrust problems in the kinds of decision-making that regular businesses must do in their dealings with competitors, suppliers, and customers.
4. Be able to fashion persuasive appellate-level or scholarly arguments, grounded in theoretical and policy perspectives, for and against propositions involving antitrust law.

2. COVERAGE: This course is concerned with U.S. federal antitrust law. Our focus will be §1 and §2 of the Sherman Act, plus aspects of the FTC Act, the Clayton Act, and the Robinson-Patman Act. In terms of subject matter, we will cover monopolies, horizontal restraints (such those involved in price-fixing cartels), and vertical restraints (such as loyalty discounts and resale restrictions). We will also learn something about the role of the government in reviewing mergers and acquisitions. There is a course outline at the end of this syllabus.

3. CLASS WEBSITE: The central repository for class materials and information is the class website. It is not password protected. Go to [ericejohnson.com](http://www.ericejohnson.com) and find the link on the upper left. The direct URL is: http://www.ericejohnson.com/courses/antitrust_19/

4. MATERIALS:

There's one book to purchase. Other key reading materials are freely downloadable.

Note that on the essay portion of the exam you will be allowed to have with you any printed materials you'd like to reference, so long as you are not sharing them with anyone else. That's why I've specified the paper-based copy of the required book, and it is why I suggest printing out any supplemental readings available by download.

4-1. Required Book for Purchase:

A physical, paper copy of this book is required:

United States Antitrust Law and Economics
(University Casebook Series)
3rd Edition

by Einer Elhauge
ISBN-13: 978-1634593526
ISBN-10: 1634593529

There is no requirement that the above book be in any kind of condition (new, used, etc.). It just has to be a physical, paper copy.

4-2. Other Readings:

Other materials that will be part of the required reading will be downloadable from links on the class webpage and/or Chart of Assignments. It is also possible that readings may be handed out in class, placed on the course's Canvas page, or placed on reserve in the library. If that's the case, I'll note that on the Chart of Assignments.

4-3. Technology Expectation:

Please bring an internet-connected/web-browsing-capable laptop, tablet, phone, or other portable general computing device to class for use in interactive polling. It is my hope is that all students will be able to do so without incurring any additional expense; if you don't already have such a device you can bring to class, please let me know so we can discuss how I can otherwise accommodate your polling participation in class. (Note that an iClicker or other similar proprietary clicker device will not work for this course.)

4-4. Study Aids and Unassigned, Additional Reading: Beyond the required materials, you are encouraged to use any other materials you find helpful or interesting. The more you learn about antitrust law, the better.

I have found that commercial outlines and other study aids are a great way of gaining a basic understanding of the blackletter law in a subject. That being said, I think the best time to read such an unassigned secondary source is right at the beginning of the semester. That way, you may give yourself a better foundation of knowledge for learning the material presented in the cases and in class. Reading such a book along the way might be helpful as well, as it may explain the material in a different voice.

On the other hand, I recommend extreme caution in reading an unassigned treatise or commercial outline *as exam preparation* for this class. I suspect it may be a waste of your time and mental energy, because all such study aids will go into much more detail than we will about some things and will gloss over other things we will dig into deeply. But it's up to you, of course, to judge for yourself.

If you do use outside study aids or other resources, I would be interested in hearing about your experience with them – whether good or bad. I'm always keen to know what is contributing to people's learning.

5. ASSIGNMENTS:

5-1. Posting: Readings will be posted to the Chart of Assignments, which is online.¹ You may need to hit refresh or reload the page to see the most recent updates. Ordinarily, readings for the any given week will be posted by the day after the last class of the preceding week. Thus, readings for Monday will generally be posted by the preceding Wednesday.

5-2. Out-of-Class Workload Expectation: The vast majority of your law-school education is meant to take place outside of class. For this class, you should be doing out-of-class work that averages at least six hours per week – roughly twice the amount of time you spend in class. This is in line with ABA standards.² I am putting together the assignments with this minimum expectation in mind. Note that this out-of-class workload expectation is an average across the semester. Some classes might require less time than the average, other classes more. But when planning your semester in terms of employment, volunteer obligations, commuting, or other demands on your time, you should keep the minimum expectation in mind. And likewise, during the semester, you should keep the numerical expectation in mind when gauging whether you are devoting adequate time to preparing, studying, and reviewing.

5-3. Approach: My aim is to avoid making the raw amount of reading unduly burdensome. Given this, I ask that you do the reading conscientiously. What does that mean? You could, of course, brief the cases, use a highlighter, make margin notes, or do any of a number of other things. And, of course, you should do what works for you. But the most important thing is to read the material with interest. “With interest” means you should be having thoughts going through your head such as, “Mmmm, interesting!” “Ah ha! That makes sense!” or “What is wrong with this judge?!?!?”

More to the point, don’t waste the case merely looking for a rule to put in your outline or to commit to memory. If a rule were the only thing to get out of a case, I would just assign the rule. The point of reading cases and other assigned materials is to help you develop a lawyerly intuition about the law. The ideal is to be able to speak in sentences like, “I’m not aware of a case exactly on point, but my sense is that in a situation like this, a court would ...” That’s particularly important with antitrust, since it is not a very rule-based subject. Instead, it’s about a way of approaching issues.

One way to approach reading cases, suggested by Professor Scott Brewer, is to be aware of “the literary drama of the law,” that is, to “be alert to the

¹ http://www.ericejohnson.com/courses/antitrust_19/Antitrust_Chart_of_Assignments.html

² The American Bar Association (ABA) is the accrediting body for American law schools. Regarding the out-of-class workload expectation, see Standard 310 at https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABASStandardsforApprovalOfLawSchools/2017_2018_standards_chapter3.authcheckdam.pdf.

narratives of the hopes, aims, fears, aspirations and frustrations of the litigants ... ” Behind every case there is a real story. The more you allow yourself to be absorbed into that story, the more you will get out of the case, and the more you will get a concrete sense of abstract notions of competition and markets.

Also, you should attempt to put yourself in the position of the judge. Force yourself to confront the challenge of trying to interpret the law in a way that is fair, unbiased, beneficial for society, as well as true to precedent and statute.

6. GRADING:

6-1. Overview: Your grade for the course will be based on your exam performance, with class participation potentially raising or lowering this grade to form the final grade for the course. In addition, attendance (including tardiness) and academic misconduct/dishonesty can result in grading penalties, failing grades, and/or involuntary withdrawal.

6-2. Assigning of Exam Grades and Grade Distributions: In assigning grades, I will not use a pre-determined grade distribution or pre-determined grade-point average. So you are not in competition with your fellow students for a limited pool of grades. Accordingly, you should favor cooperation and generosity with your classmates in terms of sharing notes and studying together.

I will assign grades as follows: When I have the raw point totals from the exam, I will use my discretion to draw grade cut-offs based on natural breaks and clumps that occur in the point totals, a developed sense of how a given letter grade corresponds to levels of performance and achievement, and precedent set by grade distributions and grade-point averages in the past. But I treat precedent lightly. If the whole class does well, then the grade-point average will skew higher. Of course, the reverse could be true. Bottom line, I aim for grading that is fair, so the class should neither be harsh nor an “easy A” and so that everyone is incentivized to work cooperatively.

6-3. Alternative Minimum Grading:

(a) In addition to the method of the initial assignment of grades discussed in §6-2, I will also calculate an alternative minimum grade for each student in terms of a percentage of possible points for the exam, according to this schedule:

A+	97% to 100%
A	93% to 96.99%
A-	90%to 92.99%
B+	87%to 89.99%
B	83%to 86.99%
B-	80%to 82.99%

C+	77%to 79.99%
C	73%to 76.99%
C-	70%to 72.99%
D+	67%to 69.99%
D	63%to 66.99%
D-	60%to 62.99%

If the alternative minimum grade according to this schedule is higher for any student than the assignment of grade under the method disclosed in §6-2, that student's initial assignment of grade will be the alternative minimum grade.

(b) Note that through the alternative minimum grading approach described here, it is possible that one or more students' grades might end up higher than they would have been otherwise. But nothing in this §6-3 can work to make a student's grade lower than it would be otherwise.

(c) For clarity, note that this alternative minimum grade applies prior to any discretionary adjustments made upward or downward, including for class participation, attendance, misconduct, etc.

6-4. Class Participation and Grading:

(a) In talking about class participation, I mean to refer to that part of the class that is not the exam. Thus class participation for grading purposes is mostly in-classroom discussion. But to the extent we have anything along the lines of short quizzes, in-class exercises, or minor bring-to-class or turn-in-by-e-mail assignments, those are embraced within class participation as well.

(b) Class participation will potentially count in calculating your final grade. I may add or subtract from some students' exam grades on a non-anonymous, discretionary basis, with the result forming the grade for the course. Such adjustment will ordinarily be no more than one step, such as from a B to a B+ or from an A to an A-. In extraordinary cases, which I anticipate to be rare, I may make an adjustment of two steps, such as from a C to a B- or from a B+ to a B-. (For instance, a student who was one of the best ever in class but who did extremely poorly on the exam might get a two-steps-up adjustment.)

(c) Class-participation evaluation is, of course, subjective. I make adjustments at the end of the semester with a view to the context of other students in the same class and my experience with other classes over time. Thus, assessing an upward or downward adjustment is largely a matter of determining whether a given student is a stand-out in a positive or negative sense. It can also matter where a student's grade falls. I'm often more likely to bump up a student's grade if that student is at the top of her or his grading band. For instance, a student with strong classroom performance is more likely to be

bumped up from a B+ to an A- if that student already has the highest score among the B+ grades.

(d) I cannot say in advance what effect class participation might have on grades in this class. I can say that in the past, how many adjustments I have made has varied greatly with the class. I have found that the smaller a class is, the more adjustments I have tended to make. And I can say that in past classes, I have made upward adjustments far more often than downward adjustments. There have been some classes where I made quite a few downward adjustments, but there have often been classes where I made no downward adjustments at all.

(e) Reasons for a positive effect of class participation on the course grade may include habitual preparedness and engagement, volunteering in discussions, excellence in contributions to discussions, and various conduct that contributes positively to the educational process.

(f) Reasons for a negative effect of class participation on the overall course grade may include exhibiting poor performance or visible disengagement in the classroom, being unprepared for class, disruptive behavior (including, but not limited to, a pattern of appearing distracted by a computer or phone), conduct contrary to the Classroom Conduct Rules (listed below), conduct contrary to other admonitions communicated in the syllabus or otherwise, and any conduct that detracts from the educational process. Tardiness and deficient attendance, if substantial enough, may also have a negative effect. (For more on attendance, see §9, *infra*.)

(g) Positive and negative effects may, of course, offset.

(h) Please keep in mind that, despite the fact that class participation may factor into grading, you should not worry unduly about the quality of your responses in class discussion. Law school, like all other educational environments, is a place to learn, and that necessarily implies that it is a place to fumble and make mistakes. I do not ask questions or conduct discussion as a way of judging you; I do it as a way of challenging you and helping everyone to learn. So put aside your fears and engage in the conversation. Once you are a full-fledged lawyer, having a confident voice under pressure will be indispensable. Now is the time to find that voice. So, be bold.

6-5. Attendance and Grading: Attendance issues—including tardiness and absences—if substantial, can affect your grade. If attendance issues are severe enough, they can even result in a failing grade or involuntary withdrawal. See §9 on attendance, *infra*.

6-6. Academic Misconduct/Dishonesty and Grading: Cheating, dishonesty, or serious academic misconduct of any kind in this class will presumptively result in a failing grade (e.g., a letter grade of F) for the semester. To be clear, failing to follow final exam instructions in a way that might give a student an advantage—even if done without intent to gain such an advantage

and even if inadvertent—constitutes, in my judgment, serious academic misconduct, and it will presumptively result in a failing grade and a referral for discipline. It is your responsibility to treat exam instructions with diligence and care.

In any instance of misconduct, I reserve the right in my discretion to request involuntary withdrawal or award a lower grade other than a failing grade if I find there to be extraordinary mitigating circumstances. Despite my reservation of rights in this regard, however, do not expect leniency.

Please note that the awarding of a lower grade or a failing grade for misconduct is not to the exclusion of other sanctions, and I intend, in virtually all instances, to refer cheating or serious academic misconduct to the College of Law and/or the administration of the University of Oklahoma for being dealt with under applicable policies, including the Code of Academic Responsibility.

7. COMMUNICATIONS AND OFFICE HOURS:

7-1. Invitation to Chat: At least once during the semester, I hope you will take advantage office hours, an appointment, or some other opportunity to chat—even if you have no questions or nothing specific to discuss. That’s not a requirement, just a request. Ideally, I would like to spend some informal time with everyone.

7-2. Questions About the Exam: If you have any questions about the exam, please ask them in open class. In the aims of fairness, I do not discuss the exam on an *ex parte* basis.

7-3. Office and Office Hours: My office is on the third floor, room number 3034. My phone is 405-325-2273. I post open office hours on my website at ericejohnson.com. I may post a sign-up sheet outside my office for students to reserve slots ahead of time. If office hours are not convenient, please do not hesitate to e-mail me to make an appointment to talk, and when you do, it helps if you include some suggested times that work for you. I am happy to meet students after the completion of the course, either by appointment or during open office hours, for review and consultation, including reviewing exam results.

7-4. E-mail: My e-mail address is eric.e.johnson@ou.edu. Please note that I do not answer or discuss substantive questions through e-mail. Why not? The answer to a substantive question is almost always, “It depends ...”, and thus it becomes very difficult to draft satisfying written responses to substantive questions. Answering those questions in person is much easier, because I can ask clarifying questions and we can go back and forth until there’s an answer you find satisfactory. So please bring substantive questions to class or to office hours.

Please do not ask questions for which the answers are clearly found in this syllabus. And if you miss class, please ask other students what you may have missed.

Any e-mail communications you have with me should be prepared in a professional manner, including the use of a meaningful subject line. Also please note that, perhaps unlike many students, I do not read e-mail on a constant basis. So please be patient for a reply.

7-5. Faculty Reporting Obligations; Lack of Confidentiality; No Legal Advice:

(a) It is important for students to understand that faculty are subject to various mandatory reporting obligations stemming from federal law, state law, and university policies adopted to make our community safer. Information a student shares with me, that I may be obligated to report, may include, but is not necessarily limited to, that which relates to sexual harassment; gender-based discrimination; sexual-orientation discrimination; other forms of discrimination; sexual assault; stalking, dating or domestic violence; child abuse or neglect; and various crimes. This might include third-hand accounts of claims or allegations of these things. Mandatory reporting obligations can cover things that happened in the past, on or off campus, involving university-affiliated persons or not. The requirements can be complex. More information can be found here: <http://www.ou.edu/eoo/reporting-responsibilities>. Bottom line, **you should assume that nothing you tell me will be kept in confidence.**

(b) Please do not ask me for legal advice. I am not licensed to practice law in Oklahoma, and I cannot be your attorney. It is my job to prepare you eventually to give legal advice to others, and I am obviously happy to talk through hypotheticals with you, as that is a key way of exploring and learning the law. But giving legal advice upon which someone should be able to rely generally takes working up an in-depth understanding of the facts and taking a careful appraisal of the client's interests – all of which calls for working in the context of a confidential relationship. It also often requires doing legal research. I'm not in a position to do any of that for you.

7-6. Letters of Recommendation, Serving as a Reference: It's important to me to do a good job as a reference for my students. So if you might wish for me to serve as a reference for you or write a letter of recommendation for you in the future, then I ask you to let me know that on the last day of class with an e-mail that attaches your résumé. **Take a moment to put this on your calendar now.** This will allow me to file away some notes about my recollections of you, and then I can use those notes in the future as a basis for writing a letter for you or taking a telephone call on your behalf. I also refer you to a memo I've written about references and recommendations: Find the link on the left side of my homepage.³ If you review that memo, you can help me to do the best possible job in helping you.

³ The direct URL is http://ericejohnson.com/docs/Memo_to_Students_re_References.pdf

8. IN THE CLASSROOM:

8-1. Classroom Conduct Rules:

In general:

- (a) Avoid behavior that might disrupt class or distract your fellow students.

Some specifics:

- (b) Do not eat in class. Do not chew gum audibly or with your mouth open.
- (c) Refrain from any use of a digital device where such use could reasonably disrupt class or distract fellow students. All digital devices must be operated without audio volume. Screens must not display any distracting content, including, but not limited to, moving images (video), animation or flashing graphics (including animated gifs), distracting images, disturbing images, and indecent content. **If you are being distracted by a classmate's digital device usage, please let me know!** Unless there's more to it, it's not going to hurt anyone's grade or get anyone into trouble for me to be told that they are causing a distraction. And my sense is that nine times out of 10, the student causing the distraction doesn't even realize they're doing it. Moreover, if you are being distracted, it is almost certain that multiple people are being distracted at the same time. Once you let me know, I can communicate with the student tactfully in a way that avoids causing anyone embarrassment.
- (d) You may use digital devices (including, without limitation, computers, phones, and tablets) in class; however, from the time of class's scheduled beginning until class ends: (1) You may not engage in any digitally enabled network communications with anyone else in class, including, but not limited to, e-mail, text messaging, and IM'ing. (2) You may not engage in any web publication or any live-updating/realtime digitally enabled network communications with anyone at all, including, but not limited to, live chat, Facebook (including, but not limited to, Facebook groups), Twitter, Snapchat, Instagram, What's App, and the like. The prohibitions of this subparagraph (d) are not limited by context and apply without regard to whether the activity in question can be characterized as disruptive or distracting. Any violation of the policy in this subparagraph (d) will presumptively result in a lowered course grade and may also be referred for disciplinary action. The prohibitions of this subparagraph (d) do not apply if and when you are absent from class and not on campus, nor do they apply to communications with OU

information-technology staff for technical-support purposes.
Bottom line: Keep the discussion in class, where it is productive and beneficial for all.

8-2. Classroom Participation:

Your participation in classroom discussion should be meaningful and appropriate. Raise your hand to have a say in discussion when you have a comment that will contribute to the experience of the class as a whole, or when you have a question, the clarification of which will benefit the entire class. On occasion there are students who raise their hands too often and take up too much of the class's time. And in nearly every class, there are people who sit passively and rarely, if ever, contribute to classroom discussion. Try to not fall into either extreme.

Even if you don't volunteer, I'll expect you to be ready to participate meaningfully if called on. If you cannot participate fully for a particular class, for whatever reason (and there's no need to tell me why), please tell me before class, in person, so that I can avoid calling on you. Reasonable requests of this sort are entirely understandable and will not adversely affect your grade.

8-3. How to Think About Class Time:

Class time is about deepening understanding, not trying to create a verbatim transcript of what is said.

I intentionally structure the course so that the written materials are the source of the "information" or "content" of the course. I'm a strong believer in need-to-know information being made available to students in writing. To begin with, there's the assigned reading – and I've adopted the materials I have because they impressed me as being straightforward and clear. There will sometimes be slides – and to the extent they carry written words, I will post them after class. So you don't need to transcribe the words off of the screen. I also may provide content in other written forms, and if I do, I will post that online as well.

If you are skeptical of my commitment to putting need-to-know material in writing, check the length of this syllabus!

So if the need-to-know material is already written down for you, what is the use of class? Class is about making the content/information come alive, exploring it, providing context, answering questions, checking your understanding, making connections, etc. That can even involve going down some dead-end paths.

What this all means is that I urge you to avoid transcribing what is said. Instead, relax your mind and try to engage intellectually.

8-4. Audio Recordings and Video:

No one is permitted to make an audio or video recording or transmission (e.g., livestream) of class. Any exception – which I do not anticipate making – would require my express, written permission, and it would require letting the class as a whole know that it’s happening. A key part of class is letting students feel free to stumble and attempt to push past their competency – sometimes with emotionally difficult subject matter. Student recordings of class time would impede that. Now, that being said, I might record various class sessions myself. Sometimes it’s helpful for me in improving my teaching (for example, if I feel I’ve done something particularly well, I can go back and listen to it the following year to try to replicate it.) But to the extent I do make a recording, please don’t ask me for a copy, because I don’t want to distribute any audio that captures student voices. (And, at any rate, focusing on the verbatim of what was said in class is the wrong study strategy – see §8-3, *supra*.) If I do record a class, you’ll be aware, because I will use a clip-on mic or otherwise let you know.

9. ATTENDANCE:

9-1 Communications About Attendance: There is generally no need for you to e-mail me if you are or anticipate being absent. Moreover, there is generally no need for you to explain to me why you have been absent. The only reason I imagine that I would need to know why you are absent is if attendance is approaching a severely deficient level (discussed below) and it becomes necessary to discuss extenuating circumstances, or if your absence is excusable under university or college policy and you wish to have it excused.

9-2. In General: My view is that punctual, regular attendance in class is an essential component of the educational experience. Superior performance on an examination is not enough if you haven’t shown up. Moreover, OU College of Law policy states that “students are expected to attend all classes in those courses for which they are enrolled.”

Notwithstanding the expectation that you will attend all classes, I expect that students may have occasional, isolated absences. But how does one draw the distinction between the well-meaning student who missed some classes with good reason and the student who is not making attendance a priority? It’s not easy. Thus, I am providing this detailed attendance policy. I regret that it is so long. Nonetheless, seriously deficient attendance must incur serious consequences; therefore, I’ve erred on the side of particularity.

9-3. Specifics Concerning Effects of Absence from Class:

(a) **Late Arrivals and Early Departures:** As the expression goes, better late than never. But bear in mind that tardiness is disruptive. For purposes of determining the appropriateness of penalties discussed below, a late arrival or early departure will count as half of a whole absence. In my discretion, however,

a very late arrival or a very early departure may be counted as a whole absence. (For recordation of late arrivals and early departures, see §9-4, *infra*.)

(b) **Comings and Goings; Intraclass Absences:** I understand that you may have an urgent need to leave class for a short time. Bear in mind that leaving and re-entering class is disruptive, so please do so only when necessary.

(c) **Attendance's Effect on Class-Participation Grading Component:** Attendance will be considered in the class-participation component of grading, and absences and tardiness can have a negative effect on your overall course grade. The negative effect may occur either as a drop in your final grade or a decision not to grant a bump up in your grade. The class-participation grading component is discretionary and subjective, and attendance is only one among many factors in determining class-participation grading. In keeping with that, there is no set numerical formula by which absences and partial absences (i.e., late arrivals, early departures, intraclass absences) will be deemed deficient and thus deserving of negative treatment in the class-participation grading component. Factors that will be considered include the number of absences and partial absences, the student's attendance record in comparison with the attendance records of others, courteousness and professionalism in dealing with attendance issues, and extenuating circumstances.

(d) **Automatic Reduction in Grade for Severely Deficient Attendance:** Independent of and cumulative with any effects of attendance on the class-participation grading component, a student's grade will be automatically reduced as follows: **six (6)** or more absences will result in the dropping of a student's final grade by one step (e.g., from a B to a B-); **seven (7)** or more absences will result in the dropping of a student's final grade by one additional step (e.g., from a B- to a C+); **eight (8)** or more absences will result in the dropping of a student's final grade by yet another additional step (e.g., from a C+ to a C). Note that if a student's grade is reduced from a D-, that results in an F.

(e) **Involuntary Withdrawal or Failing Grade for Profoundly Deficient Attendance:** For a student with a profoundly deficient attendance record, I will presumptively have the student involuntarily withdrawn from the course without credit and with a grade of F, have the student involuntarily withdrawn from the course without credit and with some other grade that may be appropriate under university or college policy, or award a failing grade at the end of the semester. For these purposes, I will presumptively regard as profoundly deficient attendance **nine (9)** or more absences. Recall that partial absences (i.e., late arrivals, early departures) each will count as half an absence and may, in my discretion, be construed to constitute a whole absence. **It is your responsibility to keep track of your own absences, including with regard to the presumptive involuntary withdrawal or failing grade.** Thus, do not ask me to calculate your attendance record so that you can weigh whether to miss an

additional class. And do not expect to get independent notice that you are approaching the threshold for failing or being involuntarily withdrawn. **This syllabus provision is your notice.**

(f) **Special Extenuating Circumstances:** In consultation with the Dean, or an associate or assistant dean, I may take account of special extenuating circumstances in deciding whether to drop a grade, award a failing grade, and/or request involuntary withdrawal. Special extenuating circumstances can include weather emergencies, personal illness, illness of a close family member, bereavement, etc. Extracurricular activities, job interviews, court appearances, or the like can be considered in this vein as well. (For absences caused by religious observances, see §9.3(g), *infra*.)

Notwithstanding the foregoing, it is expected that under almost all circumstances students will be able to keep absences within the numerical thresholds identified above—including absences caused by illness, storms, job interviews, etc. Giving students special dispensation on the issue of attendance will only be done if appropriate under the totality of the circumstances. As an example, suppose a student was absent from class a number of times because the student wanted to sleep in; then, at the end of the semester, the student was absent one or more additional times because of an out-of-town job interview. In such a case, if the job-interview absences take the student over the threshold for an automatic reduction in grade, then the grade reduction is appropriate. If the student had been generally conscientious about attendance from the beginning, the student would not have created any issue with missing class for the job interview.

If you wish for me to consider any special extenuating circumstances with regard to your attendance, then you must file an End-of-Semester Attendance Mitigation Statement, as discussed in §9-6. (I suggest you calendar the filing of that statement now, so you'll remember to do it if you need to. See §9-6.)

Note that you should not feel compelled to discuss with me reasons for absences or extenuating circumstances if your attendance is not approaching a severely deficient level.

(g) **Absences Resulting from Religious Observances:** In accordance with University of Oklahoma policy, I will excuse absences that result from religious observances. To have an absence excused on the basis of a religious observance, **you must file an End-of-Semester Attendance Mitigation Statement**, as discussed in §9-6. (Calendar the filing of that statement now if you think you might have an excusable absence this semester because of a religious observation. See §9-6.) You should also separately contact me as appropriate or useful during the course of the semester in regard to such absences.

9-4. Attendance Record: To avoid being distracted in class by constantly noting things like late arrivals and early departures, I generally require students to log their own attendance. Thus, it is of paramount importance that you deal with all attendance issues with utmost honesty, integrity, and care. Inaccuracies in marking an attendance log or late slip will presumptively be treated as academic misconduct and will presumptively result in a lowered grade or a failing grade. If an inaccuracy is inadvertent, prompt self-disclosure is encouraged and will be considered ameliorative.

(a) **Means of Taking Attendance:** Attendance may be taken by means of a log (paper sheet or card) for students to fill out during class, by roll call, by reference to the seating chart, or by some other method.

(b) **Indicating Attendance:** If attendance is taken by means of a paper log, then when the attendance log comes around to you, fill it out as instructed, indicating your attendance for the instant date. ("Instant date" means the current date as you are looking at the log.) Indicating your attendance this way is your responsibility. If the attendance log does not come around to you, then it is your responsibility to make sure you are marked as having attended; simply come up to me immediately after class and ask to fill it in. If you omit to fill in the log during class or immediately afterward and before I leave the room, you will be counted as absent.

This is very important: You may only fill out the attendance log on behalf of yourself and for the instant date. You may not mark the log on behalf of another person, even if that person is in attendance, and you may not permit another person to mark the log on your behalf. You may not make any mark indicating your attendance for any other date other than the instant date, even if you were or will be in attendance on that other date.

(c) **Self-Reporting Partial Attendance:** If an attendance log is used, and if you will need to depart class early and not return, then you must make an appropriate notation of that on the attendance log. Alternatively, if you have a change of plans requiring you to leave early despite not having indicated that in advance on the attendance log, then you must inform me by e-mail as soon as reasonably possible afterward to correct the record.

(d) **Filling Out of Late Arrival Slips:** If you arrive late to class, you must legibly and completely fill out a late arrival slip before you sit down. If a blank late arrival slip is not available for you, then before you take your seat you must leave on the podium (or with me if I am seated at a table, as in a seminar class) a letter-size sheet of paper providing your name, the name of the class, the full date, the day of the week, and the time of your arrival.

(e) **Unrecorded Absences:** At my discretion, I may announce that for a particular class meeting I will not record attendance and that absences from such a class meeting will not count for purposes of the attendance policy. Situations in

which I might deem this appropriate are: (1) if it is necessary to hold a make-up class at an irregular time or (2) if there is the occurrence of a disaster that implicates issues of safety or public necessity. It is also possible that I may omit to record attendance for a class. That being said, recordation of an absence is a distinct issue from the existence of an absence. And for the purposes of self-disclosures of profoundly deficient attendance under §9-5, *infra*, a student's self-disclosure obligation is not relieved by the fact that one or more absences (including partial absences) may be unrecorded. Toward the end of encouraging candor, I will exercise discretion with unrecorded-but-disclosed absences and may choose not to count them for purposes of grade penalties and administrative withdrawal. So err on the side of disclosure.

9-5. Mandatory Immediate Self-Disclosure Statement of Accumulated Absences in Cases of Profoundly Deficient Attendance: I do not add up and calculate accumulated absences on an ongoing basis during the semester. As mentioned previously, it is each student's responsibility to keep track of her or his own absences. In keeping with that: **Upon a student's accumulation of a record of profoundly deficient attendance (see §9-3(e), *supra*), that student is required to disclose such accumulation immediately in writing to me.** The disclosure must be made to me by e-mail (eric.e.johnson@ou.edu) with a paper copy handed to me in person, or, if in-person delivery is not practicable, to a faculty administrative assistant with an explicit explanation of the nature and urgency of the communication. The subject line of the disclosure e-mail must be "Self-Disclosure Statement of Accumulated Absences."

If the student hopes to avoid involuntary withdrawal or the awarding of a failing grade for the course, then the statement must explain the reasons for the student's absences, or at least a portion of the absences sufficient to avoid the profoundly deficient attendance, and must provide a rationale for why the student should be allowed to continue in the course notwithstanding the accumulated absences. Any supporting backup documentation that is to be considered must be provided with the statement, or, if this is not immediately possible, then the student must provide what she or he can with the statement and explain in the statement the nature of the delay and when the remaining documentation will be forthcoming. To this end, the student is referred to §9-3(f), *supra*, regarding special extenuating circumstances.

If a student has already submitted a disclosure under this section and then subsequently accumulates another absence (including a partial absence in the form of a late arrival or early departure), the student must submit a supplemental disclosure, like the original disclosure in form and substance.

For counting absences to determine the necessity of submitting a disclosure under this section, where there are any interpretive questions, a student is instructed to err on the side of inclusiveness. That is, a student who is unsure of whether a given instance will count as an absence or partial absence

should err on the side inclusion of that absence or partial absence in the quantification of deficient attendance. A student is advised to note such interpretive questions and the fact of the student's erring on the side of inclusiveness in the statement. Further to this regard, refer to §9-4(e), *supra*.

9-6. End-of-Semester Attendance Mitigation Statement: In order for me to consider absence excuses and extenuating circumstances, I must be aware of them. It is crucial that this information is readily accessible to me at the moment I am putting together grades at the end of the semester, and, of course, I want to make sure that I don't miss anything. Thus, I require that students provide this information to me in a particular way: **To the extent a student wishes to make a claim of extenuating circumstances for any reason or seek excuse based on religious observance, the student must file an End-of-Semester Attendance Mitigation Statement not earlier than the last day of class, nor later than the day after the last scheduled day of final exams** for the College of Law for the semester. **Take a moment now to calendar this** – so you will remember when the time comes at the end of the semester.

If you file an End-of-Semester Attendance Mitigation Statement, **it must consist of a single PDF document** containing all pertinent information and any supporting backup documentation you wish to be considered. **If you want me to consider any previously sent e-mails in a claim for special extenuating circumstances, then you must include copies of those e-mails within the PDF document constituting the attendance mitigation statement. The statement must be sent to me by e-mail (eric.e.johnson@ou.edu) with the subject line, "End-of-Semester Attendance Mitigation Statement."**

File just one statement – that is, just one e-mail with just one attached PDF document. Do not send multiple e-mails or multiple files. There is no prescribed format for the statement, but it should be prepared in a professional manner. Regarding the substance of what might qualify as extenuating circumstances or excuse, see §9-3(f) & (g), *supra*.

If you have already filed a mandatory disclosure for profoundly deficient attendance under §9-5, *supra*, then you should additionally file an End-of-Semester Attendance Mitigation statement, which should include copies of any previously filed disclosures made pursuant to §9-5.

9-7. No Waiver: No provision of this attendance policy can be waived by me orally. (See §12, *infra*). If you think I said something that relieved you of an obligation under this attendance policy, you misunderstood me. I also note that I cannot imagine a circumstance under which I would grant a written waiver: The policy is already built to be fair and to take into account varied circumstances: It must apply to everyone equally.

10. EXAMINATION:

10-1. General Points:

(a) **Ex Parte Communications:** I will not discuss the exam on an *ex parte* basis. (See §7-2, *supra*.)

(b) **Anonymity:** Each exam will be “blind graded,” so that I will not know the identity of the student as I am grading her or his exam. You may not waive anonymity. Do not include your name in your exam response, and do not write your name on any exam materials. Self-identification on the exam or otherwise compromising anonymity will presumptively result in a deduction from your exam grade and a referral for disciplinary action.

(c) **Distractions:** Do nothing that would distract your fellow students during the exam.

(d) **Obeing Exam Requirements and Instructions:** A failure to follow exam requirements or instructions is an academic misconduct issue, and violations will be treated as such, even if inadvertent.

10-2. The examination will be administered in two parts.

(a) Part I: Multiple Choice Questions

(1) Part I of the exam, worth one third of the total exam grade, will consist of multiple-choice questions. The questions will include, but may not be limited to, bar-exam-style hypotheticals testing the application of law to facts. There may also be questions that test literacy of pure law (e.g., legal doctrines and statutes) and understanding of relevant concepts of legal theory and scholarship.

(2) Part I of the exam may not embrace subject matter across all topics. But in combination with Part II, there will be comprehensive coverage for the entire course. I may have more to say about coverage later.

(3) Part I will be administered on a “closed-book” basis. That is, for Part I, you may not use or reference any materials at all, other than pencils, the answer sheet, and the examination booklet.

(4) I anticipate that Part I will be one hour (1 hour) in duration.

(5) I anticipate that Part I will consist of approximately 25 or so questions.

(6) All multiple-choice questions are written by me.

(7) At least some of the multiple-choice questions may be questions that have been used by me in a previous semester, but which have remained unreleased.

(8) A word about the re-use of multiple-choice questions: Re-use of multiple-choice questions is standard in higher education, and the practice

permits better exam quality and better calibration of the results. This is not trivial: The statistical data that results from a multiple-choice test administration is quite rich, suggesting which questions are valid and probative, and which should be revised or thrown out. Using this data and reusing questions in a careful way helps me improve multiple-choice tests from year to year. That makes exams more fair – and fairness is my ultimate aim in designing examinations. There is, of course, a downside to reusing questions, which is the possibility that some questions may be leaked to some students. I take appropriate steps to prevent the dissemination of unreleased questions. But bear in mind that the security of multiple-choice questions is not just a matter of faculty and staff responsibility; it is a matter of student responsibility as well. If you are aware that detailed information about or copies of unreleased questions are circulating, please let me know. Informing me will allow me to (1) refrain from using the compromised questions on the exam, and (2) release those questions to the public exam archive so that everyone can study from them.

(9) Be aware that the use of unreleased exam materials – whether photocopied, roughly transcribed, or otherwise – as part of your preparation for the exam constitutes academic misconduct/dishonesty. Moreover reproducing or trafficking in unreleased questions is legally actionable. If you find, receive, or are offered unreleased questions, be responsible and act promptly to ameliorate academic unfairness by letting me know; I will pursue no action against you in this regard if you make timely notice to me, which may be made anonymously, specifically identifying the materials, preferably by submission of a copy. The notice is timely if (i) it is near the beginning of the semester, (ii) it is reasonably soon after you come into possession of the materials and there is enough time to prevent such questions from being used on the exam and to release them to the class for their meaningful use in studying, or (iii) it is immediately upon coming into possession of the materials.

(10) Also be aware that a crucial part of exam security is the numbering of exam booklets and the marking of booklets with students' exam identification numbers. I anticipate that booklets will be clearly marked with a space for you to write your exam identification number. Do not omit to do what you are asked in this regard, and do not omit to turn the exam booklet back in. An omission in this regard, even an innocent one, will be catastrophic for your grade, likely resulting in a failing grade.

(b) **Part II: Essay Response**

(1) Part II of the exam, worth two thirds of the total exam grade, will require a written response. This part of the exam will consist of one or more open-ended questions calling for a written essay response to a hypothetical fact pattern.

(2) Part II of the exam may not embrace subject matter across all topics. But in combination with Part I, there will be comprehensive coverage for the entire course. I may have more to say about coverage later.

(3) Part II will be administered on an open-book basis.

You may bring with you any paper-based notes and books you like.

But no electronic, digital, or interactive resources may be used or referenced, with a few exceptions:

These are devices you may have and use:

- (A) the device you are using to type your response (e.g., a laptop running appropriate exam software in accordance with applicable policies),
- (B) a watch with no other functions than timekeeping, and
- (C) a regular calculator that can add, subtract, multiply, divide, square, and calculate a square root; with no more memory capacity than holding a single number in memory; and with the ability to display results in no other format other than a single line of digits with commas and a decimal point. (I may have more to say about allowed calculators later on.)

The following are some specifics in answer to questions I've gotten in the past about the open-book nature of the essay portion of exams:

- (i) Binders holding paper sheets and tabs in paper sheets are fine. For instance, if your outline is in a binder, that's fine.
- (ii) No phones.
- (iii) No smart watches or other watches with functions other than timekeeping. Nothing that looks like a smart watch.
- (iv) A digital watch that has an alarm function and a stop watch in addition to providing the time of day is permitted. But under no circumstances may your watch beep or emit noise.
- (v) No accessing the internet, e-mail, text messaging, the world wide web, etc.
- (vi) If you want to access a textbook or dictionary, you'll need to have it on paper. You cannot, for instance, access an e-book using an iPad or other tablet.
- (vii) With regard to a computing device you use to type your exam, you may not venture outside the confines of the exam software to access files, etc.

(4) I anticipate that the total duration of Part II will be two hours (2 hours), divided up as follows: (1) a Reading-Outlining Period ("RO Period") of 30 minutes, and (2) an Exam-Writing Period ("EW Period") of 90 minutes.

(5) You may use the RO Period to read the exam booklet (that is, the facts and the question or questions), to take notes, to reference your outlines or books, and to outline your response on scratch paper. During the RO Period you may not begin recording the response upon which you will be graded. That is, if you are taking the exam on computer, you may not type any characters at all into the exam response file on your computer during the RO Period; and if you are taking the exam by handwriting, you may not make any mark in a blue book (that is, an exam-response booklet, which in some places is sometimes labeled a "green book") during the RO Period.

(6) During the EW Period you are permitted to write your response. For the avoidance of doubt, it is acknowledged that during the EW Period you may also continue to do what is allowed during the RO Period (e.g., to refer back to the exam booklet, reference your notes and books, etc.), including notes you created during the RO Period.

(7) Being able to write in a concise, focused, and organized manner is extremely important for the practice of lawyering, and it is important for the bar exam as well. Thus, I encourage concision, focus, and organization in your written response, and I will look upon it favorably when grading.

(8) I anticipate that you will have the choice of typing or handwriting your response to Part II. The typing of exams will be in accordance with any applicable policy for the use of computers to write exams.

(9) I do not re-use essay questions.

10-3. Toward the end of the semester, I may release an exam prospectus that provides additional information about the exam and how I recommend preparing.

10-4. I have an Exam Archive with my exams from past courses. It is publicly accessible online. There is a link on ericejohnson.com, or you can use the direct URL: http://ericejohnson.com/exam_archive/.

11. GENERAL INFORMATION IN CONNECTION WITH UNIVERSITY POLICIES:

Disability Accommodation: Students requiring academic accommodation should contact the Disability Resource Center for assistance at 405-325-3852 or TDD: 405-325-4173. I encourage students to do this early in the semester. For more information please see the Disability Resource Center website <http://www.ou.edu/drc/home.html>. The OU Faculty Handbook §5.4 states that the Disability Resource Center "is the central point of contact to receive all requests for reasonable accommodation and all documentation required to

determine disability status under law. This center will then make a recommendation concerning accommodation to the appropriate administrative unit.”

Language Accommodation: Students desiring language accommodations for the exam or otherwise where there is not an issue of disability should see me during office hours or by appointment early in the semester, and at the very latest by the fourth week of classes. Any language accommodation must be authorized by me in writing.

Religious Holidays/Observances: The OU Faculty Handbook §3.13.2 states: “It is the policy of the University to excuse the absences of students that result from religious observances and to provide without penalty for the rescheduling of examinations and additional required classwork that may fall on religious holidays.”

Title IX Resources and Reporting Requirement: For any concerns regarding gender-based discrimination, sexual harassment, sexual assault, dating/ domestic violence, or stalking, the University offers a variety of resources. To learn more or to report an incident, please contact the Sexual Misconduct Office at 405-325-2215 (8:00 a.m. to 5:00 p.m., Monday through Friday) or smo@ou.edu. Incidents can also be reported confidentially to OU Advocates at 405-615-0013 (phones are answered 24 hours a day, seven days a week). Also, please be advised that professors are required to report instances of sexual harassment, sexual assault, and discrimination to the Sexual Misconduct Office. (See §7-5, *supra*, in this regard.) Inquiries regarding non-discrimination policies may be directed to the University Equal Opportunity Officer and Title IX Coordinator. Up-to-date contact information for the University Equal Opportunity Officer and Title IX Coordinator may be found at <http://www.ou.edu/eoo/institutional-equity-and-title-ix-office>. For more general information, visit <http://www.ou.edu/eoo.html>.

Adjustments for Pregnancy/Childbirth Related Issues: Should you need modifications or adjustments to your course requirements because of documented pregnancy-related or childbirth-related issues, please contact the Disability Resource Center at 405-325-3852 as soon as possible. Also, see <http://www.ou.edu/eoo/faqs/pregnancy-faqs.html> for answers to commonly asked questions.

Final Exam Preparation Period: Pre-finals week will be defined as the seven calendar days before the first day of finals. Faculty may cover new course material throughout this week. For specific provisions of the policy please refer to OU’s Final Exam Preparation Period policy at <https://apps.hr.ou.edu/FacultyHandbook#4.10>.

12. REVISIONS TO THIS SYLLABUS, WAIVERS OF STUDENT OBLIGATIONS: This syllabus may be amended or revised, and if it is, the most recent syllabus will be posted to the class website. No student obligation under this syllabus can be waived by me orally. If you think I said something that allows you different treatment under this syllabus, you must have misunderstood me. The syllabus needs to apply to everyone equally. (See also §9-7 regarding attendance.)

13. COURSE ORGANIZATION: The planned organization of the course is below. Note that the structure below is subject to some adjustment. Readings will be posted to the Chart of Assignments, which is online.⁴ You may need to hit refresh or reload the page to see the most recent updates. Ordinarily, readings for the any given week will be posted by the day after the last class of the preceding week. Thus, readings for Monday will generally be posted by the preceding Wednesday.

PART I: Preliminaries

0. About the Course
1. Key Concepts
2. Antitrust Law Overview
3. Economics for Antitrust
4. Remedies, Standing, Jurisdiction, Enforcement

PART II: Horizontal Restraints

5. Relevant Laws and General Legal Standards
6. Horizontal Price Fixing
7. Horizontal Output Restrictions
8. Horizontal Market Divisions
9. Horizontal Agreements Not to Deal with Particular Firms
10. Social Welfare Justifications
11. Intellectual Property Justifications
12. Buyer Cartels

PART III: Monopolization

13. Relevant Laws and Basic Legal Elements
14. First Element: Monopoly Power
15. Second Element: Exclusionary Conduct
16. Causality Between Power and Conduct
17. Attempted Monopolization

⁴ http://www.ericejohnson.com/courses/antitrust_19/Antitrust_Chart_of_Assignments.html

PART IV: Vertical Restraints

SUBPART A: Restrictions on Dealings with Rivals

- 18. Introduction
- 19. Exclusive Dealing
- 20. Tying
- 21. Loyalty and Bundled Discounts

SUBPART B: Distorting Downstream Distribution

- 22. Introduction
- 23. Intrabrand Distributional Restraints on Resale
- 24. Price Discrimination

PART V: Proof of Concerted Action or Agreement

- 25. Are the Defendants Separate Entities?
- 26. Standards for Finding Vertical Agreements
- 27. Standards for Finding Horizontal Agreements

PART VI: Mergers and Acquisitions

- 28. Introduction
- 29. Horizontal Mergers
- 30. Vertical Mergers

PART VII: Trends and Controversies[◇]

[Topics to be determined][◇]

[◇] *May or may not be included, depending whether time permits.*

14. FEEDBACK: If you have feedback for me – suggestions, ideas, commendations, or criticisms – please do not hesitate to tell me in person or by e-mail. If sending something to me anonymously would make you feel more comfortable, then I invite you to do just that. I hope you enjoy the course!

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