

Antitrust

University of Oklahoma College of Law
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http://ericejohnson.com/courses/antitrust_21/

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

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. In addition, I intend for you to have substantial insight into how business managers think and why they make the sorts of decisions they do.

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 to 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 you don't currently know anything about economics, or if you have an aversion to anything vaguely math-related, that's excellent! **No prior economics knowledge is assumed or even preferred.** We will take the economics slowly. 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.

If you have no economics background, that's ideal, because then the economics content of the course will be real added value for you. In particular, the economics content in this course will help you understand how business managers make decisions about pricing products, responding to competitors, whether to enter new lines of business, etc. Having that insight into business thinking will be valuable for any future business litigation or business transactional practice.

As far as math goes, take heart. Economics, is not really about math at all. Instead, it's about logic and incentives in decision-making. And since you got a good enough score on the LSAT to get into law school, you've got more than enough capacity to flourish in thinking about things economically. It's true that professional economists like using a lot of math. But for our purposes, you won't need to do more than a trivial amount of easy math. 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 those used with 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 arguments, both for and against propositions involving antitrust law, for judges and regulators.
 5. Have a basic understanding of how business managers make decisions about things like marketing, prices, production, and competition
2. **COVERAGE:** This course focuses on U.S. federal antitrust law, in particular §1 and §2 of the Sherman Act. We will encounter other federal statutes in a limited way. 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 briefly discuss state law concerning the enforceability of non-compete agreements. And time

permitting, we may 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_21/

4. MATERIALS:

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

For at least a major portion of the exam, you will at a minimum 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. But note that if we have exams remotely, as we did in the Fall semester, then I may allow reference to electronically stored materials.

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. Study Aids and Unassigned, Additional Reading: Beyond the required materials, you are encouraged to use any other materials you find helpful or interesting. I am aware that some professors discourage the use of commercial outlines or various study aids. I don't. The more you learn about antitrust law, I figure, the better.

But a word of caution is in order.

In my experience, 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. But 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. Chart of Assignments: Assignments (i.e., readings, problems to prepare, etc.) are posted to the Chart of Assignments online at http://www.ericejohnson.com/courses/antitrust_21/Antitrust_Chart_of_Assignments.html. At the beginning of the semester you will find the projected assignments for the entire course listed on a topic-by-topic basis, but not yet on a day-by-day basis. I wait to make day-by-day assignments so that I can adjust the pacing of the course to the class's needs. Ordinarily, the particular day-by-day assignments for any given week will be posted by the next school day after the last class of the preceding week. You may need to hit refresh or reload the page to see the most recent updates.

5-2. Minimum 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.¹ I put 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

¹ 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/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf.

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 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. Using this kind of viewpoint, you are bound to get something extra out of every case you read.

See §8-2(c), *infra*, for a list of specific questions about a given day’s reading that you should be to be prepared to answer in class, if called on.

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 should not view yourself as being in competition with your fellow students for a limited pool of grades, and 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 prior semesters in this and other courses. 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-class 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 also matters 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 in-class 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, visible disengagement from class, having your video off in Zoom, conduct contrary to the In-Class 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 other 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 other 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 of 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: I post open office hours on my website at ericejohnson.com, and there's a link from the main class webpage. 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 with 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 live and 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 do 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. Lack of Confidentiality; Faculty Reporting Obligations; No Legal Advice:

(a) **Tell me nothing that is confidential.** 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>. Moreover, I do not wish to take on any confidences from

students, even to the extent I might be able to do so. Bottom line: **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. You might 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.² If you review that memo, you can help me to do the best possible job in helping you.

8. IN CLASS:

8-1. In-Class Conduct Rules:

- (a) Keep your video on. (Regarding the effect of having your video off on attendance, see §9-3A, *infra*.)
- (b) Avoid behavior that might disrupt class or distract your fellow students.
- (c) Avoid distractions on video. If you eat, eat discretely. Dress appropriately.
- (d) Remember to stay muted when you're not talking or about to speak.
- (e) You can use artificial backgrounds, but avoid distracting content.
- (f) Refrain from private communications with others in class. Keep the discussion in class, where it is productive and beneficial for all.

² The direct URL is http://ericejohnson.com/docs/Memo_to_Students_re_References.pdf.

8-2. Classroom Participation:

(a) *Appropriate levels of voluntary 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 hand too often and take up too much of the class's time. And in nearly every class, there are people who sit passively and almost never contribute to classroom discussion. Aim to avoid either extreme.

(b) *Getting called on:* Even if you don't volunteer, I'll expect you to be ready to participate meaningfully if called on.

(c) *Questions to always be prepared to answer:* Here are questions you should always be ready to answer about primary-source readings (cases, for example):

- What does this teach us? What lesson can we take away from this?
- Do you agree with the argument being made and the conclusion being drawn?
- What is a strength in the analysis or presentation?
- What is a potential weak point in the analysis or presentation?
- What jumped out at you as interesting?

I'd suggest you use these questions as a checklist to make sure you are reading deeply.

(d) *If you aren't prepared:* If you cannot participate fully for a particular class, for whatever reason (and there's no need to tell me why), I ask that you tell me before class via a private message through the videoconferencing platform. That way I can avoid calling on you. If I missed your message and call on you anyway, please just remind me that you requested not to be called on.

8-3. How to Think About Class Time:

Class time should be 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 have useful text, I will post the slides after class. Thus, you don't need to transcribe 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 (other than me) is permitted to make an audio or video recording of class, nor make any transmission (e.g., livestream) of class, or any reproduction of any class recordings. Any exception – which I do not anticipate making – would require my express, written permission.

The OU College of Law has provided the following language for inclusion in syllabi. This language is applicable to this course.

Sessions of this course may be recorded or live streamed by the professor. These recordings are the intellectual property of the individual faculty member and may not be shared or reproduced without the explicit, written consent of the faculty member. Students may not share any course recordings with individuals not enrolled in the class or upload them to any other online environment.

In general, a video and audio recording will be made of all class sessions. But I do not intend to make any recordings available to students. At one point, the administration urged the making of recordings as a contingency related to the pandemic. If circumstances warrant – presumably related to changing pandemic conditions – I would consider making recordings available, but only in a way that limits distribution to the class. At any rate, there's two key points here: (1) You cannot rely on recordings as a way of getting class content. (And, at any rate, focusing on the verbatim of what was said in class is would be the completely wrong study strategy! See §8-3, *supra*.) (2) In class discussion you should feel liberated to make mistakes, ask dumb questions, and not worry about a recording of that being put up on YouTube or something.

8-5 Hazardous Attention-Critical Activity During Class Time

(a) During class, no student may drive a motor vehicle, operate a bicycle or scooter, operate heavy machinery, or undertake any other task where distractions could lead to personal injury, loss of life, damage to property, or other loss. This includes harms to the student and to third persons. Such

conduct and activity is herein referred to as “Hazardous Attention-Critical Activity.” Hazardous Attention-Critical Activity during class is prohibited.

(b) During class, students are expected to be able to devote their full attention to class. Part of the instructional method for this class involves cold-calling on students, directing students to interact with one another, directing students to look at things, directing students to type words into their digital device, and so on. It is not acceptable for students to put themselves in situations where meeting these and other expectations of class could be a distraction that creates real-world hazards.

(c) It is acceptable for students to be seated in a car or other motor vehicle during class. It may indeed be that a car is a good quiet place to go to be able to concentrate on class, but **do not sit in the driver’s seat.**

(d) If a student chooses to drive or engage in any other Hazardous Attention-Critical Activity during class notwithstanding its prohibition, the student must communicate this to me before class and must get a confirmation from me that I’ve received and understood the communication. That way, I can avoid calling on the student. In such a case: (1) the student must refrain from participation in class, (2) the affected class will be counted as a full absence, and (3) the conduct will be considered a violation of in-class conduct rules and may affect the class-participation grading component.

(e) If any student drives or engages in any other Hazardous Attention-Critical Activity without having first notified me and gotten my confirmation of understanding the same, the student’s conduct will be construed as serious academic misconduct. Consequences may and presumably will include a failing grade and/or involuntary withdrawal, and a disciplinary referral to the administration. (See Syllabus §§ 6-1, 6-6 in this regard.) In addition, expect that I will report known hazardous behavior to law enforcement.

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:** For purposes of determining the appropriateness of penalties discussed below, a late arrival or early departure will presumptively 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.

(b) **Intraclass Absences:** I understand that you may have an urgent need to leave class for a short time; however, leaving and re-entering may be counted as a whole or half absence.

(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: **nine (9)** 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-); **ten (10)** or more absences will result in the dropping of a student's final grade by one additional step (e.g., from a B- at nine absences down to a C+); **eleven (11)** or more absences will result in the dropping of a student's final grade by yet another additional step (e.g., from a C+ at ten absences down to a C). So for a student that started with a B but has eleven (11) absences, the automatic grade reduction is three steps (e.g., from B, to B-, to C+, to C). Note that if a student's grade is reduced from a D-, that results in an F.

Special pandemic/context note: In pre-pandemic times for a twice-a-week class, my absence policy provided for automatic reductions at six, seven, and eight absences – instead of, as provided above, nine, ten, and eleven. Thus, I have already added in a large amount of forgiveness for absences on account of the coronavirus pandemic.

(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 twelve (12) or more absences. Recall that partial absences (i.e., late arrivals, early departures) presumptively 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 – e.g., 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.**

Special pandemic/context note: Previously (e.g., in 2019), my absence policy provided for involuntary withdrawal or failing grade at nine absences instead of, as provided above, twelve. Thus, again, I have already added in a large amount of forgiveness for absences on account of the coronavirus pandemic.

(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., and even the coronavirus pandemic. 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 additional time because of an

out-of-town job interview. In such a case, if the job-interview absence takes 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.

9-3A Effect of Having Video Off on Attendance

(a) **Having your video off during class time will presumptively cause you to be counted as absent.** If your video is off, I may worry that you could be engaged in Hazardous Attention-Critical Activity, and thus, I may be inhibited from calling on you. In that case, it becomes unfair to count you as in attendance. I'll likely take screenshots of Zoom at various times to make a record.

(b) Even if you are not engaged in Hazardous Attention-Critical Activity, you still must have your video on. Students in the past have contacted me about their desire to keep their video off during class so they could go about non-driving errands or other activities during class. Multi-tasking may seem like a good way to make more time in the day, but I will not compromise class-time expectations to accommodate it. The idea of our current online format, which has been compelled by the circumstances of the pandemic, is to replicate as closely as possible an in-person class experience. Following through on that means conducting class with the expectation that students give it the same focus that would be compelled by sharing a physical classroom.

(c) If you experience connectivity problems that cause your video to drop out, or if you are having bandwidth problems that compel you to you're your video off as a mitigating measure, please let me know. Then, work to rectify those problems. If extenuating circumstances prevent you from rectifying those

problems, and if you wish to inform me about those extenuating circumstances for grading purposes, address that in an end-of-semester mitigation statement (see Syllabus §9-6).

9-4. Attendance Record:

(a) **Means of Taking Attendance:** Attendance may be taken by means of a roll call, taking a screenshot of Zoom, reviewing automatically generated videoconference records, or by some other method. It is possible I may take attendance by means of students recording their own attendance.

(b) **Indicating Attendance:** If attendance is taken by means of students recording their own attendance, then be aware that it is of paramount importance that you deal with all attendance issues with utmost honesty, integrity, and care. Inaccuracies in marking an attendance record or disregard of instructions for doing so 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.

(c) [Omitted.]

(d) [Omitted.]

(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: It is not my practice to 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). 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, **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.”** Provide all pertinent information and any supporting backup documentation you wish to be considered. If you want me to consider any previously sent e-mails, then include

copies of those e-mails. File just one statement – that is, just one e-mail with whatever attachments you wish to include. 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 §13, *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) **Obeying 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. (See §6-6, *supra*.)

10-2. Your Responsibility With Regard to Handling and Returning Exam Materials and Using Your Exam Identification Number: You bear the burden of properly, legibly, and correctly marking exam materials with your exam identification number. (Your examination identification number, of course, means your examination number for this semester – not one from a prior semester.) You must also obey instructions on the handling and non-mutilation of examination materials. Do not omit to do what you are asked in this regard. Any omissions, even if inadvertent, will be treated harshly, including resulting in a failing grade and a referral for discipline. Once we set a format for the exam, I may say more about this.

10-3. Decorum: *Assuming we have a live, in-person exam administration,* then you must refrain from conduct which could reasonably be distracting to the students sharing the room with you, including by generating noise and smells.

(We've had problems with loud crunching and pungent essential oils in the past.) Once we've set a format for the exam, I may have more to say about this.

10-4. Format:

The format of the exam is in part dependent on how it is administered. At the time of writing this syllabus, I do not know how the exam will be administered. The lack of certainty about how the exam will be administered stems from the ongoing coronavirus pandemic.

Here's what I can say about the exam for now:

The exam will have at least an open-book/open-note essay portion consisting of one or more open-ended questions calling for a written essay response to a hypothetical fact pattern. The open-book/open-note allowance may be limited to things on physical paper.

The exam will also have some way of testing pure economics knowledge.

I will provide more detail about the exam at a later time.

10-5. Toward the end of the semester, I anticipate releasing a document called the "Exam Prospectus," posted to the class website, providing more detailed information about the exam and how I recommend preparing.

10-6. Regardless of what format we end up using for the exam this semester, materials set aside in my Exam Archive should be quite useful to you in studying for your exam. The Exam Archive 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 talk to me during office hours or by appointment early in the semester, and at the very latest by the fourth week of classes. So, for instance, if you are not a native English speaker and you might need an English-to-foreign-language dictionary

on a closed-book portion of the exam, you should pursue a language accommodation. 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 (might be available only during regular office hours) 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). Note that the University of Oklahoma also has a 24-hour Reporting Hotline, which can be reached by calling 844-428-6531 or going online to www.ou.ethicspoint.com. The hotline is offered as added protection for OU students for handling reports of bias, discrimination, physical or mental harassment or misconduct by OU community members. 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. 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 pregnancy-related or childbirth-related issues, please contact the Disability Resource Center at 405-325-3852 as soon as possible. Also, for answers to commonly asked questions, see <http://www.ou.edu/eoo/faqs/pregnancy-faqs.html>.

Mental Health Support Services: If you are experiencing any mental health issues that are impacting your academic performance, counseling is available at the University Counseling Center (UCC). The Center is located on the second floor of the Goddard Health Center, at 620 Elm Avenue, room 201, Norman, Oklahoma 73019. Counselors are also available by appointment at the College of Law. To schedule an appointment call 405-325-2911. For more information please visit <http://www.ou.edu/ucc>.

Wearing a Mask: Comply with university masking policy. Information is here: <https://www.ou.edu/coronavirus/masking-policy>. I hope everyone understands how incredibly important wearing a mask is for the purpose of trying to stem the appalling death toll in our state, country, and world.

12. REVISIONS AND ADDITIONS TO THIS SYLLABUS: This syllabus may be amended or revised, and if it is, the most recent syllabus and any amendments or addenda thereto will be posted to the class website.

13. WAIVERS OF STUDENT OBLIGATIONS – NO ORAL WAIVERS: 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, *supra*, regarding attendance.)

14. 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. 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.

PART I: Preliminaries

0. About this Course
1. Antitrust Law Overview

PART II: Economics for Antitrust

2. Supply and Demand Basics
3. Incentives, Markets, Prices, and Efficiency
4. Production, Costs, and Industry Structure
5. Models of Competition
6. Economics Synthesis and Review

PART III: Horizontal Restraints

7. Non-Compete Agreements Under State Law
8. Structure of Federal Legal Actions Against Horizontal Restraints
9. Horizontal Price Fixing
10. Horizontal Output Restrictions
11. Horizontal Market Divisions
12. Group Boycotts / Concerted Refusals to Deal
13. Other Horizontal Restraints, Rule of Reason Analysis, and Quick Look
14. Horizontal Restraints and Intellectual Property Justifications
15. Review of Horizontal Restraints

PART IV: Monopoly

16. Structure of Federal Legal Actions Against Monopolization

17. Monopoly Power
18. Anticompetitive Conduct Generally
19. Predatory Pricing
20. Refusals to Deal
21. Attempted Monopolization
22. Review of Monopoly

PART V: Vertical Restraints

23. Structure of Federal Legal Actions Against Vertical Restraints
24. Exclusive Dealing
25. Tying
26. Loyalty and Bundled Discounts
27. Restraints on Downstream Distribution
28. Review of Vertical Restraints

INTERLUDE: Review

Special Review Topic: Analysis Synthesis

PART VI: Other Essential Aspects of Federal Antitrust Litigation

29. Proof of Concerted Action or Agreement
30. Jurisdiction, Remedies, Injury, Standing, Limitations on Actions
31. Exemptions and Immunities
32. Effect on Commerce

PART VII: Challenging Bigness[◇]

33. Merger Review[◇]
34. The Current Antitrust Debate[◇]

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

15. 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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