

Antitrust, Bankruptcy & Consumer Law
University of North Dakota School of Law
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Eric E. Johnson
Associate Professor of Law

SYLLABUS

GOALS: I intend for this class to give you an introduction to the law of antitrust law, bankruptcy law, and selected aspects of consumer law. By the end of the course you should be able to spot key antitrust, bankruptcy, and consumer law issues that may come up in a general practice of advising business clients. You should also have a grasp of how our system of law has regulated the ability of businesses to form working agreements and binding contracts which tend to disadvantage consumers and restrict competition in the free market. Our focus throughout will be the consumer, and thus in bankruptcy we will concentrate on consumer bankruptcies, giving abbreviated attention to business bankruptcies.

CLASS WEBSITE: Various materials and links are or will be posted on the class website at: http://www.eejlaw.com/courses/abc_2010/

MATERIALS: The required book for this course is a custom casebook:

Antitrust, Bankruptcy & Consumer Law
Published by Aspen, 2010. ISBN: 978-1-4548-0125-2

To the extent that additional materials are made part of the required reading, those materials will be available for free download from the course website in a section titled "Johnson's ABC Compendium for 2010" or will be listed on the course website in a section titled "Johnson's ABC Referenced Works for 2010." Materials under Referenced Works may be available online via links or may be placed on reserve in the library, including, possibly, audio, visual, and audiovisual works.

Study Aids: Beyond the required materials, you are encouraged to use any other materials you find helpful or interesting, including, for instance, commercial outlines. The more you learn about the subject matter, the better. Commercial outlines and condensed treatises are a great way of gaining a basic understanding of the blackletter law in a subject. That being said, the best time to read such a 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. On the other hand, reading a commercial outline as exam preparation for this class could be a waste of your time and mental energy. But it's up to you, of course, to judge for yourself. If you do use study aids, I would appreciate your letting me know your experience with them – whether good or bad.

ASSIGNED READING: In each class I will announce the reading assignment for the next class meeting.

I take care to craft reading assignments so that they are not unduly burdensome. Because of this, I expect all students to actually do the reading and to be ready to discuss it, as doing so will ensure healthy classroom dialog.

How should you tackle the reading? 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. If you do not have time to engage in your usual ritual of making the most of reading material, at least make sure that you read it 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?!?!?”

One way to approach the reading, suggested by Professor Scott Brewer of Harvard Law School, is to be aware of “the literary drama of the law,” that is, “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.

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

COURSEWORK: The work we do in this class will be subject to more variation than you may be used to in other law-school classes. We will, of course, have assigned readings that we then discuss in class. But we will proceed in other ways as well. This course will involve some homework assignments. You may be required to present your results sometimes in writing, or sometimes orally. You may be asked to work in groups, or by yourself. I will tailor assignments to the evolving class dynamic. So be flexible and reasonable. In return, I’ll be flexible and reasonable as well. Just as you might need to miss a class, I will understand if there is some exercise you cannot do because of some outside contingency. Just talk to me (or e-mail me) about it. It will not ruin your grade.

GRADING: Your grade will primarily be based on your exam performance. The exam is discussed below. Each exam will be “blind graded,” so that I will not know the identity of the student as I am grading his or her exam.

Class participation will also count in calculating your grade. I may do this in one of a couple of ways. I may add or subtract from students’ exam grades on a non-blind, discretionary basis, with the result forming your grade for the course. Alternatively, I may create a class-participation grading component on a non-blind discretionary basis, and then have that component form a small portion, not exceeding approximately 10 percent, of the total grade for the course. Regardless of the method I use for factoring in class participation, I anticipate that some students’ grades will be increased upward, some students’ grades will remain unchanged, and others’ may end up being adjusted downward.

Reasons for a negative effect of class participation on the overall course grade will include exhibiting poor performance in the classroom, excessive absence, tardiness, and being unprepared for class.

Please keep in mind that, despite the fact that class participation is graded, 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 and 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.

COMMUNICATIONS: My e-mail address is ejohnson@law.und.edu. Please note that I do not answer or discuss substantive questions through e-mail. Moreover, perhaps unlike many students, I do not read e-mail on an hour-by-hour or even day-by-day basis. I may not respond at all to certain e-mailed questions, including those which

are clearly answered in this syllabus. If you miss class, please ask other students for information you may have missed, such as reading assignments. Any e-mail communications you do have with me should be prepared in a professional manner, including the use of a meaningful subject line.

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.

My office is No. 304. Open office hours are posted on eejlaw.com. If you would like to speak with me and you cannot come by office hours, I am very happy to arrange for another time to talk with you. Please make an appointment by sending me an e-mail with some suggested times.

IN THE CLASSROOM: Do not eat in class. Do not chew gum audibly or with your mouth open. Do nothing that might disrupt class or distract your fellow students.

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. Your classroom participation should be appropriate – not too little, not too much. Everybody knows there are students who raise their hand too often and take up too much of the class’s time. All of us also know that there are people who sit passively and rarely, if ever, contribute to classroom discussion. Take care that you do not fall into either extreme.

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 will not adversely affect your grade.

Be aware that I plan to make an audio recording of each class meeting. These recordings are for my use, and, unfortunately, I will not be making them available during the semester for absent students. No one is permitted to make an audio or video recording of class without my express, written permission.

ABSENCES AND TARDINESS: I view attendance in class as an essential component of the educational experience, and, therefore, superior performance on an examination cannot make up for insufficient attendance. Deficient attendance may result in a lower class-participation grade. Further, I reserve the right to not award a passing grade for a student with a seriously deficient record of timely attendance.

That being said, an occasional absence or late arrival will not adversely affect your grade at all. But I do appreciate it if you e-mail me beforehand. If you will be late or absent, please let me know by e-mailing me before class, and please make sure you use this special e-mail address: attendance@eejlaw.com. Please make sure the subject line of your e-mail is “ABC.” Note that I likely will not read any such attendance e-mails until after all classes conclude. My practice is to review attendance e-mails at the end of the semester when reviewing attendance records and calculating class-participation grades. Please note that there is no need to tell me why you will be absent or late.

Also, if you are late, make sure you come up to me after class so that I can note your attendance. Otherwise, you may be counted as absent.

If you are concerned about your attendance record, please talk to me. Of course, none of the foregoing supercedes the School of Law’s or the University’s policies.

WYPADKI: The traditional method of exam preparation for law students involves making an outline of the course. Because traditional legal pedagogy eschews

using a textbook in lieu of a casebook, the outline fulfills the place of a textbook – providing a written explanation of the subject matter.

With the goal of saving time by reducing duplicative labor, I am providing the class with a chance to create an outline as a community – which we’ll call a “wypadki.” The wypadki will be enabled with a wiki, the same web application that is behind Wikipedia, the online encyclopedia that is authored and edited by its readership. Only members of the class will be able to contribute to the wypadki, and each addition, edit, and deletion will be tagged with the name of the contributing class member. I intend to allow students broad latitude in creating the wypadki, though I will step in and provide guidance and restrictions if necessary. On or after a certain announced date at the end of the semester, before the exam, I will lock the wypadki. I will then have a chance to review and alter it before leaving it in a final version. Please note that I reserve the right to make any changes, deletions, and additions I deem appropriate, in my sole discretion, before or after locking the wypadki. The final version will be made available for download sometime before the exam, and copies will be printed and distributed to all students during the exam, discussed below, for use as a reference in drafting an examination answer.

Contributions to the wypadki are voluntary. To the extent you do contribute, please note that contributions to the wypadki must respect intellectual-property law. Do not add copyrighted material (regardless of licensing); limit your contributions to your own originally authored material and material in the public domain, which includes court-issued opinions. In addition, you may add into the wypadki the mindmaps that I create for class and any other class materials that I author and post under the heading “Classroom Notes and Presentations,” unless otherwise noted. In making a contribution to the wypadki, you are certifying that the material you add is original and does not include the copyrighted content of others. Also, by contributing, you are agreeing that the wypadki and/or any of your contributions to it may be used, copied, and/or changed by your fellow students for this course and by others for any education- or learning-related endeavor approved by me or my designee.

The wypadki may be accessed from a link on the course website. In order to contribute to the wypadki, you must register. Registration instructions will be posted on wypadki website. In the past, some users have had technical problems with getting registered and logging on. Make sure you work out any problems early in the semester. If you wait until too late in the semester to try logging on, you may find yourself in a situation where you cannot make any contributions. For technical problems, please contact Mark Conway of the law school’s information technology staff.

EXAMINATION: I will give a final exam requiring written answers. You will be allowed to bring with you, into the exam, and to reference during the exam, a “reference sheet,” consisting of a single 8.5-inch-by-11-inch sheet of paper, upon which you may write or print any information you wish. If you have concerns about receiving a disability accommodation with regard to the reference sheet, please contact the Dean of Students office. In addition to the reference sheet, you will be given a paper printout of the ABC Wypadki to reference during the exam. You may bring in adhesive flags or tabs with writing on them to use as index tabs for the exam copy of the wypadki. Other than the wypadki and the reference sheet, no other informational or reference materials will be permitted, except as otherwise permitted by the Dean of Students office as an accommodation.

The exam will consist of one or more open-ended questions calling for written essay responses to one or more hypothetical fact patterns. In addition, the exam may include directed response or “short answer” questions. You may also be asked to answer

a “theme” or “theoretical” style question, in which you will critique the law. Be assured that I will not use any essay questions that have been used on any other prior exam. As noted above, I will not discuss the exam on an *ex parte* basis; any questions about the exam must be asked in open class. I may provide a more specific description of the examination at a later time. My old exams may be useful to you in having an idea of what to expect, although I have not written any specifically for antitrust, bankruptcy, consumer law, or the current survey course. My old exams can be found in the exam archive at eejlaw.com.

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.

SUBJECT MATTER TO BE COVERED: Topics and readings are listed below. Topics areas are in **bold**. Readings are in *italics*. Section references refer to sections in the custom casebook, and page numbers refer to pages in the original texts. “EEJ online” refers to the online compendium. This list is subject to adjustment.

PRELIMINARIES

**Overview of ABC
Microeconomics**

ANTITRUST

Antitrust Overview

Horizontal Restraints, Collaborating Competitors - Sherman Act 1

Developments and Modern Applications

Chicago Board of Trade - §I: 126-129

BMI v. CBS - §I: 149-158

California Dental - §I: 181-196

Existence of Agreements

Copperweld - §I: 233-240

Concerted Refusals to Deal

Fashion Originators Guild - §I: 275-278

Monopoly - Sherman Act 2

Monopolization

Standard Oil and American Tobacco - §I: 368-370

United Shoe - §I: 386-393

U.S. v. Microsoft - §I: 398-415

Otter Tail Power, Berkey Photo, Aspen Skiing, AT&T - §I: 425-437

Monopoly Power

narrative - §I: 483-503

U.S. v. Microsoft - §I: 518-525

Intellectual Property & Antitrust

IP Licensing and Settlements

various - §I: 340-366

Patent Accumulation

various - §I: 479-483

Vertical Restraints

Restricted Distribution

Leegin Creative Leather v. PSKS - EEJ online

Tying Arrangements

U.S. v. Microsoft - §I: 632-637

Discrimination - Robinson-Patman Act

Great A&P Tea Co. v. FTC - §I: 835-838

Mergers

narrative - §I: 669-687

DOJ & FTC Horizontal Merger Guidelines - §I: 710-717

Staples - §I: 718-736

BANKRUPTCY

Bankruptcy Overview

narrative - §II: 1-13

Consumer Bankruptcy

various - §III: 99-357

Business Bankruptcy

Chapter 7 Liquidation - §III: 361-366

Chapter 11 Reorganization - §III: 387-406

CONSUMER LAW

Unfair and Deceptive Sales

unordered merchandise, FTC - §IV: 60-70

telemarketing, spam, door-to-door sales - §IV: 116-126

Warranties

state warranty law, Magnuson-Moss - §IV: 203-232

Loans, Credit Cards, Billing Disputes

loans - §IV: 277-286

credit cards, billing disputes - §IV: 294-324

Credit reports

credit reports - §IV: 355-358 & 367-402

Cyberspace

consumers in cyberspace - §IV: 739-759