Antitrust Law and Policy
John A. Francis, Esq., Adjunct
Spring 2005
Tuesday and Thursday Evenings from 6:00 to 7:15 p.m.

Course Description:
This course is an introduction to basic American antitrust law and policy. In particular, the course examines the roles played by the Sherman and Clayton Acts in regulating our economy and protecting consumers from anticompetitive practices and unfair competition. Because the relevant statutes are around a century old, much of antitrust law stems from judge-made case law and policy positions adopted by the relevant enforcement agencies (the Antitrust Division of the Department of Justice and the Federal Trade Commission).

Class Times and Professor Contact Information:
The class meets Tuesday and Thursday evenings from 6:00–7:15 p.m. As an adjunct, I do not have an office at the law school, but, schedule permitting, I will generally be happy to stay after class as long as necessary to answer questions. You also should feel free to call or e-mail me any time at my downtown Denver law office. My number is 303-892-7338, and my e-mail is john.francis@dgslaw.com.

Grades, Class Participation, and Attendance:
Grades for the course will be based on the final exam and class participation and attendance. Students’ performance on the final exam will constitute 85% of their final grade, while class participation and attendance will constitute the remaining 15%. Obviously, class attendance is mandatory and expected for all class sessions, although illnesses and unavoidable emergencies do occur. Nevertheless, any student who misses more than seven of the 28 class sessions (more than 25% of all classes) will not be eligible to take the final exam.

Class participation and preparedness are an important part of this course. Accordingly, each student will sign up to be “on call” during three different weeks of the semester. During each week, the “on call” students (approximately three or four students per week depending on final class size) will be called upon frequently and will be expected to be prepared to discuss that week’s reading assignments. If necessary, other students may also be called on at random during any given class. This possibility is meant to be a policy of last resort to maintain discussion of and clarify topics that are not well understood. Hopefully, students who are not "on call" will ask enough questions to make such random selections unnecessary.

Course Materials:
The course is taught from a casebook (“CB”) by Robert Pitofsky, Harvey Goldschmid, and Diane Wood entitled TRADE REGULATION: CASES AND MATERIALS (5th ed. 2003), including the 2004 Supplement (“CBSupp.”), and from several supplemental handouts that will be made available during the semester. The syllabus that follows lists the required readings for each class session. In addition, students feeling particularly challenged by antitrust law and/or economic principles may wish to pick up Gellhorn & Kovacic's Antitrust Law and Economics in a Nutshell (5th ed. 2004), although that is entirely optional.

Week 1: Overview of Antitrust
A. **Required Reading**
   Tuesday, January 11: Objectives, Origins and History of Antitrust (CB 1-15) and Economics of Antitrust (CB 169-72).

B. **Concepts**
   1. Unilateral v. Coordinated Effects
   2. Cartel Behavior—e.g., price fixing agreements
   3. Oligopoly Pricing—tacit collusion
   4. Monopoly Pricing—deadweight loss; consumer welfare loss; monopoly rents
   5. Public versus Private Enforcement of antitrust laws

**Week 2:** The Sherman Act Section 1 – *Prohibiting Agreements in Restraint of Trade*

A. **Required Reading**
   Tuesday, January 18: Section 1 of the Sherman Act (CB 35-67).
   Thurs., January 20: Horizontal Agreements and the *Per Se* Rule on Price Fixing (CB 207-227) (Chicago Board of Trade; Socony Vacuum)

B. **Concepts**
   1. Conspiratorial or Concerted Conduct
   2. Price-Fixing
   3. The *Per Se* Rule

**Week 3:** Horizontal Agreements and the Rule of Reason

A. **Required Reading**
   Thurs., January 27: A Structured Rule of Reason: The Stepwise Approach (CB 265-303) (Brown University; Cal Dental)

B. **Concepts**
   1. The Rule of Reason
   2. Market Definition
   3. Anticompetitive Effects and Pro-competitive Benefits
   4. Ancillary Restraints Doctrine (Addyston Pipe)

**Week 4:** Coordination Among Competitors

A. **Required Reading**
   Tuesday, February 1: Oligopoly Coordination and Inferring Agreements Among Competitors (CB 490-522).
B. **Concepts:**
   1. Conscious Parallelism
   2. Section 1 “proof of agreement” requirement

**Week 5: Joint Ventures and Standard-Setting**

A. **Required Reading**
   Tuesday, February 8: Joint Ventures (CB 354-361; 370-372; 378-402; and CBSupp. 18) (Northwestern Wholesale Stationers; Rothery; AP; Visa)

B. **Concepts**
   1. Free Riding
   2. Integrative Efficiencies

**Week 6: Vertical Agreements**

A. **Required Reading**
   Tues., February 15: Vertical Price Fixing (CB 620-645) and Vertical Restraints on Customers and Territories (CB 648-663(top)).
   Thurs., February 17: Vertical Refusals to Deal and Other Vertical Restraints (CB 679-694; CB 696-712).

B. **Concepts**
   1. Resale Price Maintenance
   2. Vertical Non-price Restraints
   3. Exclusive Territories

**Week 7: Section 2 of the Sherman Act – Prohibiting Unlawful Monopolization**

A. **Required Reading**
   Tues., February 22: Sherman Act Section 2 and Introduction to Monopolization (CB 128-43 (top); 147-68) (Alcoa, DuPont).
   Thurs., February 24: Monopolization and Attempted Monopolization (CB 172-191; CB 736-50 (top); CB 832-37) (Grinnell, Aspen Skiing, Lorain Journal).

B. **Concepts**
   1. Single Firm Conduct
   2. Relevant Market
   3. Monopoly Power
   4. Market Share
   5. Limits on Single Firm Conduct

**Week 8: Defining the Relevant Market**

A. **Required Reading**
Tuesday, March 1: Market Definition Analysis (CB 1140-1145; 1026-1045).
Thursday, March 3: Substitutability (CB 172-83; 729-31) and Potential Entry (CB 199-203; 1051-62).

B. Concepts
1. Market Definition
2. Substitutability
3. Interchangeability
4. Cross Elasticity of Demand
5. Potential Entry and Potential Competition

Week 9: Microsoft, Tying and Exclusive Dealing

A. Required Reading
Tuesday, March 8: Tying Law (CB 886-903) (Jefferson Parish); Exclusive Dealing Law (CB 939-48; 953-60)
Thursday, March 10: Microsoft (CB 765-791 (top); 798-807 (top)).

B. Concepts
1. Section 1 Tying v. Section 2 Tying
2. Tied Product and Tying Product
3. Technological Tying
4. Section 2 Exclusive Dealing Analysis
5. Types of Anticompetitive Conduct

Week 10: Predatory Pricing, Airlines, Cigarettes, and Rock Concerts

A. Required Reading
Tuesday, March 15: Predatory Pricing (CB 847-864 and CBSupp. 33-47) (Brooke Group, American Airlines).

B. Concepts
1. Below Cost Pricing
2. Definition of Cost/Marginal Cost
3. Recoupment
4. Price Discrimination
5. Robinson-Patman Act
6. Monopoly Leveraging

Week 11: Essential Facilities, Network Industries, and the Relationship of Antitrust to Regulation

A. Required Reading
Tuesday, March 29: Essential Facilities—(CB 735-36) (Otter Tail); (CB 758-65) (Note on Essential Facilities); (CBSupp. 19-32) (Trinko).

Thursday, March 31: Networks and Antitrust. 
Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370 (7th Cir.1986) (Posner, J.) (Supp.)
Carl Shapiro, Antitrust in Network Industries (speech before the ALI and ABA, 1/25/96) (Supp.)

B. Concepts:
1. Network
   (a) interoperability/compatibility
   (b) installed base
   (c) “network effects/externalities”
   (d) interconnection
2. Bottleneck
   (a) essential facility
   (b) standard (open v. closed)
   (c) switching costs/lock-in
3. No duty to provide competitor with a helping hand
4. Terminal Railroad
5. State Action, Primary Jurisdiction, and Filed Rate Defenses.

Week 12: Clayton Act Section 7 – Prohibiting Unlawful Mergers

A. Required Reading
Tuesday, April 5: Clayton Act Section 7 and motivations for mergers (CB 964-978); the antitrust analysis of mergers (CB 978-994); measuring concentration (CB 1040-45).
Thursday, April 7: Coordinated effects (CB 1015-24; 1046-49); unilateral effects analysis (CB 1049-52 (top)).

B. Concepts
1. Mergers that Substantially Lessen Competition
2. Market Concentration
3. Herfindal-Hirschman Index (“HHI”)
4. Hart-Scott-Rodino Act

Week 13: Vertical Mergers, Merger Defenses, and Merger Remedies

A. Required Reading
Tuesday, April 12: Vertical Mergers (CB 1127-1140 (top); CB 1148-61).
Thursday, April 14: Efficiencies as a Defense (CB 1055-62 (top)); Failing Company Defense (CB 1011-15 (top)).
FTC Divestiture Study (1999)
(www.ftc.gov/speeches/pitofsky/restruct.htm) (Supp.)

B. Concepts
1. Vertical Integration
2. Efficiencies
3. Failing Company Defense
4. Newspaper Preservation Act and Joint Operating Agreements (“JOAs”)
5. Divestiture and Remedies

Week 14: Aftermarkets, Intellectual Property, and the Scope of Antitrust

A. Required Reading
Tuesday, April 19: Kodak (CB 903-920); Image Technical Services, Inc. v. Eastman Kodak Co. (CB 813-831).
Thursday, April 21: In re Intel Corporation. (CB 146-47).
Intergraph Corp. v. Intel Corp., 195 F.3d 346 (Fed. Cir. 1999) (Supp.).
Richard A. Posner, Antitrust in the New Economy (September 14, 2000) (Supp.)
Final exam discussion and preparation; miscellaneous clean-up.

B. Concepts
1. Aftermarket Products
2. Interplay Between Intellectual Property and Antitrust
3. Limits on Antitrust
4. Antitrust in the New Economy