



Enforcement Aspects of American Antitrust Law

An 8 hour CPD course
taught by Professor Joseph P. Bauer
February - March 2013

ENFORCEMENT ASPECTS OF AMERICAN ANTITRUST LAW

Course tutor

Joseph Bauer has taught and written about antitrust law for the past forty years. He is a graduate of the University of Pennsylvania (A.B. 1966) and the Harvard Law School J.D. 1969). After graduation from law school, he worked as an associate in the antitrust/litigation department of a major New York City law firm for three years, and then served as a Teaching Fellow at the University of Michigan Law School.

Prof. Bauer has been a member of the faculty at Notre Dame Law School since 1973. In that period, he has taught an antitrust course approximately 45 times. At Notre Dame, Prof. Bauer also teaches courses in and writes about civil procedure, conflict of laws, and intellectual property. He has also taught antitrust as a visitor at the University of North Carolina, Emory University and the University of Hong Kong.

Prof. Bauer is also a significant scholar in the area of antitrust law. He has written more than a dozen lengthy articles in major American law journals, and is one of the co-authors of one of the leading multi-volume treatises in the field – KINTNER & BAUER, FEDERAL ANTITRUST LAW. He has been invited to speak as a lecturer at conferences and meetings around the world. He maintains his interest in the practical issues in the antitrust area by working as a consultant in antitrust litigation to practitioners and law firms.



BACKGROUND

The American antitrust laws have been in force since 1890. They have proved to be a valuable force for the promotion of consumer welfare, by regulating various forms of conduct and structural phenomena which inhibit competition. The antitrust laws achieve these goals by prohibiting various forms of collusive behavior between competitors or would-be competitors, by limiting certain restraints imposed by sellers on their customers, by prohibiting monopolization and certain abuses of market power, and by restraining certain mergers and acquisitions which might abridge competition.

The American antitrust laws are enforced in a variety of different ways, and frequently in ways that differ significantly from the enforcement mechanisms under the antitrust and competition law regimes of any other country. This mini-course will look at the enforcement aspects of the American law, in an attempt to understand both the specifics of that enforcement, and the policy choices that these details embody. This examination and analysis should be of benefit and value to a variety of persons, including those practicing with law firms that either represent American firms in Europe or European entities that do business in the United States. It should also be of value to students and academics of antitrust and competition law, who would benefit from a comparative perspective of the American experiences.

The antitrust laws are enforced in a surprising variety of ways – civilly and criminally, by numerous governmental and private actors, and at the federal and state level. Two federal agencies may bring actions for violations of the antitrust laws – the Antitrust Division of the Department of Justice and the Federal Trade Commission. The DOJ can initiate criminal proceedings, which can result in fines or imprisonment of violators, as well as seeking a variety of civil relief. The FTC can initiate administrative agency proceedings as well as judicial actions. Antitrust claims can also be initiated by the attorneys general of any of the 50 states.

Governmental enforcement can be both regulatory and judicial. It may consist of approval prior to a particular transaction, but more frequently it takes the form of judicial actions to challenge alleged violations. The FTC may also proceed by issuing rules and regulations, to specify allegedly unlawful behavior. And, both agencies promulgate guidelines, most importantly with respect to their merger enforcement standards.

Civil actions by private parties reflect an equal diversity. The antitrust laws permit any person who is injured by reason of the antitrust violation of another person to seek both legal and equitable (principally injunctive) relief. These plaintiffs usually will be either a competitor with, or a customer from, the defendants. The statutory provision for damages indicates that a successful plaintiff will receive automatic trebling of the amount of damages proven, as well as the plaintiffs attorneys fees.

WHO IS THE COURSE FOR?

The course has a strong focus on the needs of practitioners who are in the early stages of a career. We have assumed that most people attending it will be **qualified English solicitors and barristers, with between one and five years post-qualification experience.**

There are no formal entry requirements for the course, but it is designed for competition law practitioners as

described above. Applicants will be asked to provide **a short personal statement** that indicates what they hope to achieve from attending the course. We reserve the right to reject any application.

The course is accredited with 16 CPD hours by the Solicitors Regulation Authority and the Bar Standards Board (pending).

HOW IS THE COURSE STRUCTURED?

This mini-course will run over four 2-hour sessions during February and March 2013. It will consider the variety of issues raised by the availability of civil damages for successful plaintiffs, including the various methodologies for the calculation of base amounts; potential limitations on the amount of damages; and contribution for damages among co-defendants.

This mini-course will initially examine this structural landscape. Particular attention will be given to the civil side, in which plaintiffs seek monetary relief. Caselaw under the antitrust laws has imposed numerous procedural barriers to bringing a successful action. The plaintiff must have standing to bring the lawsuit, and it must show that it suffered an “antitrust injury.” One particularly important facet of these requirements is the so-called Illinois Brick rule, which provides that only a “direct purchaser” from the defendant may maintain an action for damages.

As is widely known, American rules of procedure permit antitrust claims to be brought as class actions, in behalf of potentially millions of aggrieved consumers. Class actions can introduce significantly enhanced costs on the parties and the courts, and may make the litigation significantly more complicated. The Federal Rules of Civil Procedure impose important requirements, to determine whether class action treatment is appropriate for the plaintiffs’ claims. The course will examine the implications of this important tool for potential defendants, as well as for enhanced enforcement.

Other procedural and evidentiary aspects of American law play important roles in antitrust enforcement. The United States still retains jury trials for any civil action seeking monetary relief, including antitrust lawsuits. The importance of expert testimony has grown significantly in recent years, along with judicial control of who may testify and the scope of their testimony. The full range of federal constitutional rights applies to antitrust actions, including due process protection and first amendments rights. But, the overwhelming percentage of lawsuits are resolved by settlement rather than actual litigation.

American procedural rules allow far more extensive pre-trial discovery – both in terms of who can be required to produce information and the scope of what must be produced – than in any other country. While this vehicle of the gathering of evidence is designed to make the eventual litigation one more likely to be decided on the merits, it also significantly increases the cost and duration of litigation, and may raise questions of fairness. These rules have particular importance to antitrust, because antitrust litigation tends to be highly fact-specific and complicated. The discovery rules can also have important spill-over effects outside the U.S., as parties to non-American litigation seek resort to American courts for assistance with their litigation.

There are a number of important limitations on the ability to maintain a civil action. These exceptions are the product both of statutory provisions and caselaw. They carve out varying exceptions for certain industries (agriculture, banks, utilities), for certain sectors (labor unions), and for certain behavior, including in particular petitioning various branches of the government for legislative or judicial relief. There is also an important exception from antitrust liability for behavior either of governmental bodies, or by private entities which are either required or permitted to engage in certain behavior by governmental bodies.

Another important aspect of this course will consider the effect on enforcement issues of the continually growing global nature of commerce. Multi-national firms increasingly do business both in the U.S. and in dozens of other countries, with multiple antitrust enforcement agencies. While there are moves towards harmonization of the laws, and cooperation among the agencies, there are still inevitable differences. These companies continue to face the need to comply with varying legal rules and overlapping judicial and regulatory proceedings. The course will consider the implications both of the American antitrust laws, which shield much foreign behavior from the reach of American courts, and changes in the landscape of European competition law, for these firms doing business in multiple jurisdictions.

SUMMARY OF COURSE CONTENT

Wednesday 6 February

- History of American antitrust laws – 1890 to date
- Overview of substantive and enforcement provisions
- Scope of enforcement mechanisms – Governmental and private
 - ◆ Governmental
 - Federal
 - Department of Justice
 - Civil and criminal enforcement
 - Federal Trade Commission
 - State and local government
 - ◆ Private
 - Treble damages
 - Injunctions
 - Class Actions

Wednesday 20 February

- Requirements for bringing civil action
 - ◆ Antitrust injury
 - ◆ Standing
 - ◆ Indirect purchaser rule
- Exemptions from antitrust liability

Wednesday 6 March

- Protected behavior
 - ◆ State action doctrine
 - ◆ Noerr-Pennington doctrine
- Procedural issues
 - ◆ Class actions
 - ◆ Pre-trial discovery
 - ◆ Jury trials
 - ◆ Settlements
 - ◆ Expert testimony
 - ◆ Constitutional protections; due process

Wednesday 20 March

- Continuation of discussion of procedural issues
- Antitrust in international setting
 - ◆ Liability of foreign entities
 - ◆ Liability for foreign behavior
 - ◆ Cooperation between US enforcement agencies and other enforcement authorities

COURSE VENUE



The course venue: UCL Faculty of Laws

The course will be held at the UCL Faculty of Laws' Bloomsbury Campus at

UCL Faculty of Laws
Bentham House
Endsleigh Gardens
London WC1H 0EG

The Faculty is well served by transport links with Euston, King's Cross, and St Pancras International overground train stations within 5 - 10 minute walk away.

Tube stations within easy walking distance of the Faculty are:

Euston

(Victoria / Northern Lines)

Euston Square

(Circle / Metropolitan / Hammersmith & City Lines)

Russell Square

(Piccadilly Line)

FEES AND HOW TO APPLY

The course fee is £450

The course fee covers all course materials and tuition.

Application Process

Applications should be made using the form overleaf or by using the online booking form. Applications should be accompanied by:

- 1 a short personal statement indicating what you hope to achieve by attending the course.

The **application deadline is Friday 25 January 2013**.

Fee payment

Payment of all our fees should be made in full by 1 February 2013. Cheques should be payable to 'UCL'.

Please return your **completed application form**, together with **your short personal statement** as to what you hope to achieve by attending the course, to:

Lisa Penfold
Events & CPD Manager
UCL Faculty of Laws
Bentham House
Endsleigh Gardens
London WC1H 0EG

Queries should be made to:

Lisa Penfold
Telephone: 020 7679 1514
Email: lisa.penfold@ucl.ac.uk

Application can also be made online at:

<http://american-antitrust.eventbrite.co.uk/>

ENFORCEMENT ASPECTS OF AMERICAN ANTITRUST LAW APPLICATION FORM

Surname _____

First name _____

Title _____ Date of birth _____

Nationality _____ Do you require a visa? Yes/No (delete as appropriate)

Business Name _____ Position _____

Address _____

Telephone _____ Mobile Phone _____

Email address _____

Fee payment:

Payment via cheque:

I have attached a cheque for £450 (payable to 'UCL') to this application form.

Payment via Invoice: Please confirm the address/name that you would like your invoice sent to:

please use my details above

please use this name/address for the invoice _____

Data Protection Act 1988: I agree to UCL processing personal data contained on this form or any other data which UCL may obtain from me or other people or organisations while I am applying for admission. I agree to the processing of such data for any purpose connected with my studies or my health and safety while on UCL premises, or for any other legitimate purpose.

To the best of my knowledge, the information on this application is accurate and complete.

Signature _____ Date _____

Have you included with your application form:

personal statement.

Please return this form to:

Lisa Penfold Events & CPD Manager

UCL Faculty of Laws, Bentham House, Endsleigh Gardens, London WC1H 0EG

Queries: lisa.penfold@ucl.ac.uk