

ANTITRUST LAW: POLICY AND PRACTICE

Fourth Edition



LexisNexis Law School Publishing Advisory Board

Charles B. Craver

Freda H. Alverson Professor of Law
The George Washington University Law School

Richard D. Freer

Robert Howell Hall Professor of Law
Emory University School of Law

Craig Joyce

*Andrews Kurth Professor of Law &
Co-Director, Institute for Intellectual Property and Information Law*
University of Houston Law Center

Ellen S. Podgor

*Professor of Law &
Associate Dean of Faculty Development and Distance Education*
Stetson University College of Law

Paul F. Rothstein

Professor of Law
Georgetown University Law Center

Robin Wellford Slocum

Professor of Law & Director, Legal Research and Writing Program
Chapman University School of Law

Charles J. Tabb

Alice Curtis Campbell Professor of Law
University of Illinois College of Law

Judith Welch Wegner

Professor of Law
University of North Carolina School of Law

ANTITRUST LAW: POLICY AND PRACTICE

Fourth Edition

C. Paul Rogers III

*Professor of Law and Former Dean
Dedman School of Law
Southern Methodist University*

Stephen Calkins

*Professor of Law and Director of Graduate Studies
Wayne State University Law School*

Mark R. Patterson

*Professor of Law
Fordham University*

William R. Andersen

*Judson Falknor Professor of Law Emeritus
University of Washington, Seattle*



ISBN: 9780820570365

LCCCN#: 2007939927

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are trademarks of Reed Elsevier Properties Inc, used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.

Copyright © 2008 Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All Rights Reserved.

No copyright is claimed in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material exceeding fair use, 17 U.S.C. § 107, may be licensed for a fee of 10¢ per page per copy from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

NOTE TO USERS

To ensure that you are using the latest materials available in this area, please be sure to periodically check the LexisNexis Law School web site for downloadable updates and supplements at www.lexisnexis.com/lawschool

Editorial Offices

744 Broad Street, Newark, NJ 07102 (973) 820-2000
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
701 East Water Street, Charlottesville, VA 22902-7587 (434) 972-7600
www.lexis.com

(Pub.00598)

DEDICATIONS

For Julie — C.P.R.

For my parents — S.C.

For Ruth, Lily, and Celia — M.R.P.

PREFACE TO THE FOURTH EDITION

What a great time to study antitrust law! After more than a decade largely missing in action, the Supreme Court under Chief Justice Roberts has leapt into the fray to address fundamentally important issues on proof of agreement, resale price maintenance, dominant firm conduct, price discrimination, tying, and more. The Justice Department consistently gives its highest priority to cartel enforcement, but both the DOJ and the FTC have wrestled with important dominant firm and intellectual property issues while continuing to stumble when challenging mergers in court. The FTC is even attacking mergers through administrative adjudication and talking anew about a special role for its statute. Meanwhile, competition law continues its steady march across the globe, with several foreign competition authorities claiming their places in the sun.

In spite of all this excitement, Bill Andersen decided to stick with his plans to retire. Although Bill did not participate in this edition, his influence still is felt throughout the book. Two new co-authors were recruited, and each of the three of us took primary responsibility for updating separate chapters. All of the best of the earlier editions was retained, as was the basic format and approach. The key cases are all here, lightly edited and supplemented by notes and comments. As was said in the preface to the third edition, we continue to believe that the best avenue to a usable grasp of antitrust law is a solid grounding in substantive antitrust principles through critical study of the foundational cases, coupled with a healthy dose of practice issues raised in problem discussions.

In our editing of cases, omissions of citations are not marked. Omissions of words are indicated by an ellipses, and omissions of paragraphs by ellipses followed by periods. Footnotes from the cases retain their original footnote numbers.

Dean Rogers would like to thank Brett Hiser for research assistance. Professor Calkins would like to thank Kristin Pell for research assistance. All of us would like to thank our past antitrust students for their considerable contributions to this book.

C. PAUL ROGERS III
STEPHEN CALKINS
MARK R. PATTERSON
WILLIAM R. ANDERSEN
November 2007

PREFACE TO THE THIRD EDITION

Change remains the norm in antitrust law, although sometimes in seemingly contrary directions. Government enforcement during the Clinton years has been aggressive and often high profile. Hard-core antitrust offenses such as price fixing and bid rigging now bring multimillion dollar fines and prison terms far beyond what was imaginable when the last edition of this casebook was published in 1992.

In contrast, the federal judiciary appears to be becoming more focused on narrowly defined competitive injury as antitrust's sole concern. The rule of reason continues to expand, while the per se categories contract. Some offenses which the courts continue to label per se offenses (such as tying) are hard to distinguish from conventional rule of reason cases. The courts are increasingly using the "quick look" rule of reason to see if a full-blown rule of reason inquiry is even necessary. Vertical cases are difficult for plaintiffs to win unless the defendant's market share reaches a level that would warrant an independent Section 2 case.

Nonetheless, the influence of U.S. antitrust law continues to expand as markets become more global. Private class action suits are on the upswing, just as the total number of private suits appears to be in decline. With the merger wave of the late 1990s, the government reviewed an unprecedented number of mergers, successfully challenged several, and was criticized for not challenging more. The Federal Trade Commission even became embroiled in a squabble with the European Commission over the acquisition of McDonnell Douglas by Boeing.

We hope that this third edition reflects and makes apparent these countervailing antitrust winds. We have included additional notes on European Competition Law to reflect its growing role, although the book remains a U.S. antitrust book. We continue to believe that the best avenue to a usable grasp of antitrust law is a solid grounding in substantive antitrust principles through critical study of the foundational cases, coupled with a healthy dose of practice issues raised in problem discussions.

Dean Rogers would like to acknowledge the able research assistance of Daryl Reid ('98) and Brian Corrigan ('99) during the bulk of the project, and the help of Derek Rollins ('00) and Catherine Bright ('01) during the latter stages. Professor Andersen would like to thank Jay Terry ('98) for valuable research help.

WILLIAM R. ANDERSEN
C. PAUL ROGERS III
July 1999

PREFACE TO THE SECOND EDITION

For the second edition, we have stayed the course with our attempts to integrate theory and policy issues with doctrine and practice, so that students of antitrust will emerge with a fundamental grasp of antitrust doctrine, at least an introduction to the vagaries of antitrust practice, and a sensitivity to policy issues undergirding the application and enforcement of our antitrust laws. We have attempted to achieve a balance between the varying “schools” of antitrust, so that our students understand that very bright people think quite differently about how and what antitrust should strive to accomplish.

Pedagogically, we continue to believe that problems, integrated with cases and rather thorough textual notes, provide both the necessary adaptability for different teaching approaches and objectives and a sound basis for learning the subject. With respect to organization, we have moved the material on the private enforcement of antitrust, which previously made up the bulk of Chapter 2, to follow the chapter on vertical restraints. We hope that the complex material on private enforcement (standing, antitrust injury and the like) will be easier to understand after coverage of the basic substantive areas of antitrust.

The authors continue to owe old debts and have acquired some new ones in preparation of the second edition. First and foremost, the authors continue to be indebted to their respective families. Completion of these types of projects almost invariably come at the expense of family time; evenings and weekends at the office become the rule rather than the exception.

Beyond general thanks to colleagues and students too numerous to list, Professor Andersen would like to thank his secretary, Mrs. Mary Jane Young, who tended to the details of large-scale manuscript production with unfailing cheerfulness and impressive technological wizardry.

In addition, Dean Rogers has had a succession of talented and dependable research assistants who kept the project on track when “the Dean” was otherwise occupied. They are Holly Jameson Roman (class of 85 and a survivor of the first edition), Lea Elizabeth Michaels (class of 91), Kyle Brackin (class of 92), Denise Urzendowski Scofield (class of 92) and Albert Nicholson (class of 93). He is also indebted to Professor Alan R. Bromberg, who has been unfailing in his support of the book since its inception in about 1982, and to Sherrie Devlin, who actually enjoyed the many challenges of preparing the manuscript.

WILLIAM R. ANDERSEN
C. PAUL ROGERS III
May 1992

PREFACE TO THE FIRST EDITION

While antitrust is seen today as relating principally to questions of economic policy, the subject has historically played a much larger part in American public policy. Antitrust has been debated in presidential campaigns, within administrations and in Congress, and has played a significant part in heated discussions about the nature of the American system and the fabric of our social institutions.

The arguments are not trivial. They are about “the value of competition, about the political and social significance of economic concentration, about the extent to which the government ought to be permitted to constrain the free enterprise system and about the continued viability of such quintessentially American values as entrepreneurialism, individualism, and economic self reliance.” R. A. Katzmann, *The Attenuation of Antitrust*, The Brookings Review, Summer 1984, at 23.

That antitrust should be part of that larger discussion is not surprising. The way we perceive and regulate business enterprise will necessarily affect non-economic components of our society. And it is especially true for antitrust, since the founders of the American antitrust system had many goals in mind, some of them economic, some much broader. The laws were written in a manner that permitted their enforcement to respond to felt needs for the diffusion of power, the expansion of opportunity and standards of competitive conduct. Cases, doctrine, theory and practice still resonate with such matters.

This book, of course, has a narrower focus. The reader of this work seeks professional skills development, not merely broad ranging policy analysis. Hence, the book explores in detail those legal issues which arise in counselling, planning and litigating under the antitrust laws. Still, it is worth reminding the reader at the outset that he or she will never be far from the deeper social issues antitrust has historically touched. John Dewey once observed that the legal order is like the banks of a river, which in the short run control and direct the course of the stream, but which in the long run themselves are shaped by the very forces they seek to contain. For pedagogic reasons, we focus primarily on the legal order on the banks of the river. But we must always remain sensitive to the underlying currents that account for the general shape of those banks today and which will just as certainly control their larger contours tomorrow.

This book is intended for use in an upper-level law school course in the law of antitrust. Because of the widespread availability of public and private antitrust remedies at the state, federal and, increasingly, international levels, antitrust is a subject of constant concern (in a surprisingly wide range of contexts) to those who counsel business clients.

The student will find here a treatment of all the main problems and the basic (and most recent) principal cases. But the work is, in our view, different from most other available books with a similar purpose. A word about the

special emphasis might be appropriate. There are several areas in which the book varies from the prevailing pattern.

1. *Business context.* We have written text, edited cases and collected materials with an eye to keeping the business context of the problems in the forefront. This is not to deemphasize legal theory, but rather to give theory and doctrine a more solid footing in practical affairs. We believe theory is learned better and longer retained that way.

2. *Counselling/compliance.* For the same reasons, we have emphasized the lawyer's role as counsellor and planner throughout. Questions are posed at relevant points about how a client might be usefully advised, how a firm's objectives might be better planned to reduce antitrust risk. Our students respond with enthusiasm to such queries, and we believe such an approach to be conducive to learning. Beyond understanding and retaining the material, considering it through such roles can develop a better feel for the lawyer's function—including its difficulties, paradoxes and conflicts—all useful parts of professionalization. Further, we believe that focus on counselling is particularly appropriate in the antitrust field, where lawyers are heavily engaged in "antitrust avoidance"; that is, advising clients how to comply with antitrust issues and avoid antitrust litigation.

Incidentally, we treat antitrust compliance here not for the reasons sometimes suggested in the literature—that it is a form of behavior in which clients should be encouraged because it has "payoffs" of various sorts. Compliance with any set of laws is the understood norm and clients should be expected to comply with the letter and spirit of known legal standards, not to reap special benefits (or to avoid special costs), but because that is the way civilized people behave. Even for the client who fully understands that, however, some attention to the mechanics of compliance is useful in aid of comprehensiveness and economy.

3. *Enforcement and procedure.* The business-context emphasis is paralleled by (another) practical emphasis on enforcement and procedure. Such matters are treated throughout as important aspects of counselling. In addition, there is a rather full chapter on antitrust procedure (both criminal and civil) and enforcement (both public and private). Cases and materials have been included on such matters as standing, class actions and the proof and measurement of damages. It is our experience that these issues are often overlooked in antitrust courses, although they are of crucial importance to the antitrust practitioner and counsellor.

4. *Ethical sensitivity.* Notes, questions and problems here and there touch important ethical issues, and we have not been reluctant to point this out. We have not explored many of these issues in great depth due to space considerations, but we have tried to include frequent enough references to remind students that ethical matters are pervasive in law practice and to suggest some of the special areas of difficulty presented by the antitrust setting.

5. *Problem method.* Both the authors are enthusiastic about the use of problems in advanced law school courses such as antitrust. But the “problem method” has as many meanings as it has enthusiasts. We have included a wide variety of problems. Some are short, meant to be dealt with in passing or by brief discussion. Some are longer, intended to occupy a full class hour or more. Some are in serial form, with the reader getting additional data as more doctrine is assimilated. And some are review problems that students may find useful to discuss among themselves. In short, we think the “problem method” appears here in enough variety to satisfy a wide range of teaching objectives and styles, and a wide range of student interests.

Similarly, the notes and questions which follow most cases can be put to different uses in different teaching approaches. At a minimum, however, students should recognize that these materials are aids to deeper analysis of the issues. Some time spent working with these questions before class, and some time puzzling over them in light of class discussion, will repay effort in substantial measure.

6. *Patent coverage.* The treatment of patent in the basic antitrust course has always been something of a problem. In some casebooks, patent materials are integrated throughout, though most devote a separate chapter to the subject. In either case, it has been our experience that the material is usually omitted under the pressure for more basic coverage. In a few schools, there will be an advanced course in the antitrust implications of patents, but it seems safe to say that most antitrust students miss the subject altogether.

We believe this unfortunate. Patents are not only of growing importance in antitrust counselling, but the patent/antitrust overlap is itself an instructive example of the accommodation of conflicting social policies. We have included a brief but, we think, teachable, chapter on the subject, and we hope every user of the book will be able to spend at least a few hours on those introductory materials.

We have also included separate chapters on antitrust exemptions and immunities and on the extraterritorial application of the antitrust laws, both burgeoning, topical areas of antitrust. Some exposure to both areas seems to us necessary in a survey of current antitrust issues.

A word about the economic content of the book. As will appear below, there are numerous economic issues underlying the legal policies that antitrust law addresses. Both the authors have studied economics, though neither is credentialed in the field. We have sought balance in our treatment of economic matters, and hope that we have fairly portrayed the current range of different economic perspectives. As to technical economics, we have sought to address such matters as well-informed lawyers usually treat technical specialities—in enough depth to be useful, but without that additional complexity sometimes used for the benefit of other technicians.

We have retained the original numbering of footnotes from judicial opinions. Author's footnotes, which we have attempted to keep to a minimum, are indicated by letter.

Some essential acknowledgements: First to our students. They have taught us much over the years, both of antitrust and of pedagogy. In particular, their reactions to earlier mimeographed versions of this work have improved it immeasurably. Second, to Holly Jameson, Mark Steiner and Tom Shaw (at SMU) and John Badger Smith (at Washington) for critical and professional research assistance. Third, to Jill Dickson (at SMU) and Katherine Berrigan Fuller (at Washington), who, with patience and good humor, saw the manuscript through its many stages into completion.

The authors both owe much to their families' exhibited selflessness, support and understanding throughout this long project. In particular, Professor Rogers would like to acknowledge his daughters Heather, Jillian and Ruthie, none of whom helped write this book, but all of whom helped keep their Dad otherwise in line.

WILLIAM R. ANDERSEN
C. PAUL ROGERS III
April 1985

SUMMARY TABLE OF CONTENTS

	Page
Chapter 1. Introduction	1
Chapter 2. Monopoly	57
Chapter 3. Horizontal Restraints of Trade	225
Chapter 4. Mergers With Horizontal Effects	501
Chapter 5. Vertical Restraints	647
Chapter 6. Private Enforcement of the Antitrust Laws	833
Chapter 7. Antitrust Exemptions and Immunities	933
Chapter 8. Extraterritorial Jurisdiction and Enforcement	1055
Chapter 9. Antitrust Analysis in the Presence of Conflicting Social Policy: Some Aspects of the Patent-Antitrust Relationship	1109
Chapter 10. Price Discrimination Under the Robinson-Patman Act	1177
Appendix A. Selected Statutes	A-1
Appendix B. Some Introductory Observations on Economics and Antitrust	B-1
Appendix C. Department of Justice and Federal Trade Commission Antitrust Guidelines	C-1

	Page
Table of Cases	TC-1
Index	I-1

TABLE OF CONTENTS

	Page
Dedication	v
Preface to the Fourth Edition	vii
Preface to the Third Edition	ix
Preface to the Second Edition	xi
Preface to the First Edition	xiii
 CHAPTER 1 INTRODUCTION	 1
§ 1.01 Prologue	1
Problem A	1
A Word on Economics and Economists	4
§ 1.02 The Origin of Antitrust Policy	5
Hans B. Thorelli, <i>The Federal Antitrust Policy: Origination of an American Tradition</i> (1955)	5
James May, <i>Antitrust in the Formative Era: Political And Economic Theory in Constitutional and Antitrust Analysis</i> (1989)	8
A Note on <i>Standard Oil Co. v. United States</i> (1911)	13
Earl W. Kintner & Joseph P. Bauer, <i>Federal Antitrust Law</i> (1983)	21
§ 1.03 The Goals Of Antitrust: Economics as Ends or Means	24
Note on Robert H. Bork's <i>The Antitrust Paradox: A Policy at War with Itself</i> (1978)	26
Walter E. Adams & James W. Brock, <i>The Antitrust Vision and Its Revisionist Critics</i> (1990)	28
Louis B. Schwartz, <i>On the Uses of Economics: A Review of the Antitrust Treatises</i> (1979)	32
Phillip E. Areeda, <i>Introduction to Antitrust Economics</i> (1984)	33
§ 1.04 Public Enforcement of the Antitrust Laws	36
[A] Government Enforcement Overview	36
[B] The Federal Trade Commission	38

	Page
[C] The Antitrust Division of the Department of Justice	39
[D] Criminal Prosecutions and Sentencing	40
[E] Consent Decrees	42
[F] Government Enforcement Coordination	42
[G] Government Civil Injunctive Remedies	44
[H] The Interstate Commerce Requirement	46
Problem B	51
[I] Antitrust Compliance Programs	52
[J] Ethical Problems of Multiple Client Representation in Antitrust Enforcement Actions	54
 CHAPTER 2 MONOPOLY	 57
§ 2.01 Introduction	57
Problem A	57
Notes and Questions	58
§ 2.02 Power	59
<i>United States v. Aluminum Co. of America</i> (1945)	59
Notes and Questions	68
<i>United States v. E. I. du Pont de Nemours & Co.</i> (1956)	71
Notes and Questions	78
<i>United States v. Grinnell Corp.</i> (1966)	84
Notes and Questions	91
§ 2.03 Conduct	94
Problem B	95
<i>United States v. United Shoe Machinery Corp.</i> (1953)	96
Notes and Questions	106
<i>Lorain Journal Co. v. United States</i> (1951)	108
<i>Otter Tail Power Co. v. United States</i> (1973)	112
Notes and Questions	114
<i>Aspen Skiing Company v. Aspen Highlands, Inc.</i> (1985)	114

	Page
Notes and Questions	124
Note on <i>Olympia Equipment Leasing Co. v. Western Union</i> (1986)	126
<i>Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP</i> (2004)	128
Notes and Questions	137
Notes on Miscellaneous Conduct Issues	139
<i>United States v. Microsoft Corp.</i> (2001)	142
Notes and Questions	174
<i>Brooke Group v. Brown & Williamson</i> (1993)	178
Notes and Questions	197
<i>Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.</i> (2007)	199
Notes and Questions	206
A Concluding Note on the Conduct Requirement	207
§ 2.04 Attempts to Monopolize	209
<i>Spectrum Sports v. McQuillan</i> (1993)	211
Notes and Questions	216
<i>United States v. Microsoft Corp.</i> (2001)	217
Notes and Questions	220
 CHAPTER 3 HORIZONTAL RESTRAINTS OF TRADE	 225
§ 3.01 Introduction	225
§ 3.02 Price Fixing	226
[A] Early Developments	226
<i>United States v. Trans-Missouri Freight Ass'n</i> (1897)	226
Note on <i>Joint Traffic</i> (1898)	230
<i>United States v. Addyston Pipe & Steel Co.</i> (1899)	231
Notes and Questions	236
A Modern Price Fixing Tale	238
Note on Cartels	239
Problem A	241
<i>Chicago Board of Trade v. United States</i> (1918)	242
Notes and Questions	245

	Page
Note on <i>Appalachian Coals, Inc. v. United States</i> (1933)	246
<i>Texaco Inc. v. Dagher</i> (2006)	250
Notes and Questions	253
Problem B	254
<i>United States v. Socony-Vacuum Oil Co.</i> (1940)	255
Notes and Questions	264
[B] Characterization Problems	265
<i>National Society of Professional Engineers v. United States</i> (1978)	265
Notes and Questions	273
<i>Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.</i> (1979)	276
Notes and Questions	283
<i>Arizona v. Maricopa County Medical Society</i> (1982)	285
Notes and Questions	295
Problem C	296
<i>National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma</i> (1984)	297
Notes and Questions	311
<i>California Dental Association, Petitioner v. Federal Trade Commission</i> (1999)	315
Notes and Questions	332
Note on Basic Sherman Act Analysis	334
§ 3.03 Price Dissemination	338
<i>United States v. Container Corporation of America</i> (1969)	343
Notes and Questions	349
Problem D	350
<i>United States v. United States Gypsum Co.</i> (1978)	351
Notes and Questions	359
§ 3.04 The Conspiracy Requirement	362
<i>Interstate Circuit, Inc. v. United States</i> (1939)	363
Notes and Questions	367
<i>Theatre Enterprises v. Paramount Film Distributing Corp.</i> (1954)	368
Notes and Questions	370

	Page
Problem E	372
Note on Inferential Conspiracies in a Procedural Context	373
<i>Bell Atlantic Corp. v. Twombly</i> (2007)	377
Notes and Questions	394
Problem F	394
Note on Oligopoly Pricing and Conscious Parallelism . . .	395
Note on Product Differentiation	398
Note on Delivered Pricing, Base Point Pricing, and Inferential Conspiracies	400
<i>E.I. du Pont de Nemours & Co. v. Federal Trade Commission</i> (1984)	403
Notes and Questions	411
Note on Intra-Enterprise Conspiracies	413
§ 3.05 Market and Customer Allocations	420
Note on <i>Timken Roller Bearing Co. v. United States</i> (1951)	421
Note on Output Controls — Wages and Hours	421
<i>United States v. Sealy, Inc.</i> (1967)	422
Notes	425
<i>United States v. Topco Associates, Inc.</i> (1972)	425
Notes and Questions	435
<i>Palmer v. BRG of Georgia, Inc.</i> (1990)	438
Notes and Questions	440
Problem G	440
§ 3.06 Group Boycotts and Concerted Refusals to Deal	441
<i>Eastern States Retail Lumber Dealers' Association v.</i> <i>United States</i> (1914)	442
Notes and Questions	445
<i>Fashion Originators' Guild of America v. Federal Trade Commission</i> (1941)	446
Notes and Questions	449
<i>Associated Press v. United States</i> (1945)	450
Notes and Questions	453
<i>Klor's, Inc. v. Broadway-Hale Stores, Inc.</i> (1959)	455
Notes and Questions	457
<i>NYNEX Corp. v. Discon, Inc.</i> (1998)	459
Notes and Questions	464

	Page
Problem H	465
The Purpose and Effect of Boycotts	466
<i>Paramount Famous Lasky Corp. v. United States</i> (1930)	466
Notes and Questions	468
<i>Radiant Burners, Inc. v. Peoples Gas & Coke Co.</i> (1961)	471
Notes and Questions	472
Problem I	475
<i>Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.</i> (1985)	476
Notes and Questions	482
<i>Federal Trade Commission v. Indiana Federation of Dentists</i> (1986)	484
Notes and Questions	489
Note on Non-Commercial Group Boycotts	490
<i>Federal Trade Commission v. Superior Court Trial Lawyers Association</i> (1990)	493
Notes and Questions	497
Review Problem	498
 CHAPTER 4 MERGERS WITH HORIZONTAL EFFECTS	 501
§ 4.01 Mergers Among Actual Competitors	501
[A] Introduction	501
[B] Historical Perspective	502
[C] The Celler-Kefauver Amendment	508
<i>Brown Shoe Co. v. United States</i> (1962)	509
Notes and Questions	522
<i>United States v. Philadelphia National Bank</i> (1963)	524
Notes and Questions	531
[D] Bank Mergers	532
[E] Other Supreme Court Merger Decisions	535
<i>United States v. General Dynamics Corp.</i> (1974)	540
Notes and Questions	551
[F] <i>General Dynamics</i> and Failing Company Defenses	553

	Page
[G] The Department of Justice and Federal Trade Commission Horizontal Merger Guidelines	558
Notes and Questions	560
<i>Federal Trade Commission v. Staples, Inc.</i> (1997)	563
Notes and Questions	580
<i>Federal Trade Commission v. H.J. Heinz Co.</i> (2001)	583
Notes and Questions	594
Notes on Unilateral Effects	595
Note on Hospital Mergers	598
Problem A	599
Note on European Community Merger Law	600
§ 4.02 Other Mergers With Horizontal Effects	604
[A] Introduction	604
<i>United States v. El Paso Natural Gas Co.</i> (1964)	604
Notes and Questions	608
[B] Entrenchment and Potential Competition	609
<i>Federal Trade Commission v. Procter & Gamble Co.</i> (1967)	609
Notes and Questions	618
Note on <i>Ford Motor Co. v. United States</i> (1972)	620
<i>United States v. Falstaff Brewing Co.</i> (1973)	621
Notes and Questions	624
Note on <i>Marine Bancorporation</i> (1974) and <i>Connecticut National Bank</i> (1974)	624
<i>Boc International, Ltd. v. Federal Trade Commission</i> (1977)	627
Notes and Questions	630
[C] Section 7 and Reciprocity	634
[D] Section 7 and Joint Ventures	636
Note on <i>United States v. Penn-Olin Chemical Co.</i> (1964)	636
Note on the National Cooperative Research Act of 1984	639
[E] Conglomerate Mergers Today	640
[F] Merger Guidelines—Horizontal Effects From Non-Horizontal Mergers	642

	Page
Notes and Questions	642
Problem B	643
[G] The Reach of Section 7: Partial Asset Acquisitions and Solely for Investment Stock Purchases	643
[H] Premerger Notification	644
[I] Section 8 of the Clayton Act	645
 CHAPTER 5 VERTICAL RESTRAINTS	 647
§ 5.01 Introduction	647
§ 5.02 Resale Price Maintenance, or Vertical Price-Fixing	653
Problem: The Goodwear Tire Company	653
<i>Dr. Miles Medical Co. v. Park & Sons</i> (1911)	654
Notes and Questions	658
§ 5.03 The Agreement Requirement of Section One of the Sherman Act in the Vertical Context	659
<i>United States v. Colgate & Company</i> (1919)	660
Note on the Hazards of Giving <i>Colgate</i> Advice	662
Note on Proving the Vertical Agreement	666
<i>Monsanto Co. v. Spray-Rite Service Corp.</i> (1984)	667
Notes and Questions	673
Note on Identifying the Parties to the “Agreement”	675
§ 5.04 Assessing the Reasonableness of Vertical Restraints	676
<i>Continental T.V., Inc. v. GTE Sylvania, Inc.</i> (1977)	676
Notes and Questions	691
<i>Graphic Products Distributors, Inc. v. Itek Corp.</i> (1983)	694
Notes and Questions	702
Note on <i>Business Electronics Corp. v. Sharp Electronics</i> <i>Corp.</i> (1988)	704
<i>State Oil Co. v. Khan</i> (1997)	705
Notes and Questions	710
<i>Leegin Creative Leather Products, Inc. v. PSKS, Inc.</i> (2007)	712
Notes and Questions	728
§ 5.05 Agency and Consignment Arrangements	729
§ 5.06 Restrictions Affecting Competitors of the Manufacturer (Herein of Tying and Exclusive Dealing)	732

	Page
The Goodwear Problem (continued)	732
Notes and Questions	734
F. M. Scherer & David Ross, <i>Industrial Market Structure and Economic Performance</i> (1990)	734
<i>International Salt Co. v. United States</i> (1947)	735
Notes and Questions	737
Note on the Power Requirement Between <i>International Salt</i> and <i>Fortner</i>	740
<i>United States Steel Corp. v. Fortner Enterprises</i> (1977)	741
Notes and Questions	746
<i>Jefferson Parish Hospital District No. 2 v. Hyde</i> (1984)	747
Notes and Questions	760
<i>Eastman Kodak Company v. Image Technical Services, Inc.</i> (1992)	765
Notes and Questions	779
<i>Queen City Pizza v. Domino's Pizza</i> (1997)	781
Notes and Questions	789
Note on Reciprocal Dealing	792
<i>Illinois Tool Works Inc. v. Independent Ink, Inc.</i> (2006)	793
Notes and Questions	798
The Goodwear Problem (continued)	799
<i>Standard Oil Co. v. United States</i> (1949)	800
Notes and Questions	806
<i>Tampa Electric Co. v. Nashville Coal Co.</i> (1961)	809
Notes and Questions	814
§ 5.07 Vertical Restraints as Part of More Formal Integrations	818
The Goodwear Problem (continued)	818
Notes and Questions	819
<i>Brown Shoe v. United States</i> (1962)	820
Notes and Questions	824
U.S. Department of Justice Merger Guidelines (1984) . . .	826

	Page
CHAPTER 6 PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS	833
§ 6.01 Introduction	833
§ 6.02 Prerequisites and Limitations	836
[A] Who Is a “Person”	836
[B] Injury to “Business or Property”	837
Note on <i>Parens Patriae</i>	839
§ 6.03 Antitrust Standing, Antitrust Injury, and Related Issues	840
[A] Antitrust Injury	841
<i>Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.</i> (1977)	841
Notes and Questions	846
<i>Atlantic Richfield Co. v. USA Petroleum Co.</i> (1990)	849
Notes and Questions	853
[B] The Indirect Purchaser Doctrine	854
<i>Illinois Brick Co. v. Illinois</i> (1977)	854
Notes and Questions	863
[C] Standing	867
<i>Blue Shield of Virginia v. McCready</i> (1982)	868
Notes and Questions	877
Note on <i>Associated General Contractors of California, Inc. v. California State Council of Carpenters</i> (1983)	878
Notes and Questions	880
§ 6.04 Class Actions	881
§ 6.05 The Relationship of Government Suits and Private Plaintiffs	884
§ 6.06 Statute of Limitations	885
§ 6.07 The <i>In Pari Delicto</i> Defense	888
§ 6.08 Proof and Measurement of Damages	889
<i>Bigelow v. RKO Radio Pictures, Inc.</i> (1946)	891
Notes and Questions	896
Problem	899

	Page
§ 6.09 Contribution Among Antitrust Co-Defendants	900
Note on <i>Texas Industries, Inc. v. Radcliff Materials, Inc.</i> (1981)	900
Notes and Questions	902
§ 6.10 Injunctive Relief Under Section 16 of the Clayton Act . . .	903
<i>Cargill, Inc. v. Monfort of Colorado, Inc.</i> (1986)	903
Notes and Questions	910
<i>California v. American Stores Co.</i> (1990)	913
Notes and Questions	919
§ 6.11 Reasonable Attorney's Fees	919
§ 6.12 Arbitration	923
<i>JLM Industries, Inc. v. Stolt-Nielsen SA.</i> (2004)	923
Notes and Questions	930
 CHAPTER 7 ANTITRUST EXEMPTIONS AND IMMUNITIES	 933
§ 7.01 Introduction	933
§ 7.02 Private Attempts to Influence Government Decisionmaking	934
<i>Eastern Railroad Presidents Conference v. Noerr Motor Freight Company</i> (1961)	934
Notes and Questions	940
<i>Allied Tube & Conduit Corp. v. Indian Head, Inc.</i> (1988)	942
Notes and Questions	949
Problem A	951
<i>California Motor Transport Co. v. Trucking Unlimited</i> (1972)	952
Notes and Questions	956
<i>City of Columbia v. Omni Outdoor Advertising, Inc.</i> (1991)	956
Notes and Questions	960
<i>Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.</i> (1993)	961
Notes and Questions	969
Problem B	973
§ 7.03 State Regulatory Action	973
<i>Parker v. Brown</i> (1943)	974

	Page
Notes and Questions	977
Subsequent History of the <i>Parker Doctrine</i>	979
Problem C	981
<i>California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.</i> (1980)	983
Notes and Questions	986
<i>Southern Motor Carriers Rate Conference, Inc. v. United States</i> (1985)	987
Notes and Questions	993
Note on Antitrust and Municipalities	997
<i>Town of Hallie v. City of Eau Claire</i> (1985)	1000
Notes and Questions	1005
<i>Federal Trade Commission v. Ticor Title Insurance Company</i> (1992)	1007
Notes and Questions	1017
<i>City of Columbia v. Omni Outdoor Advertising, Inc.</i> (1991)	1018
Notes and Questions	1024
Problem D	1024
Note on Preemption	1025
<i>Fisher v. City of Berkeley</i> (1986)	1026
Notes and Questions	1031
Problem E	1032
§ 7.04 The Labor Exemptions	1033
§ 7.05 The Insurance Exemption	1038
[A] Business of Insurance	1038
[B] Regulation by State Law	1041
[C] Boycott, Coercion, or Intimidation	1041
§ 7.06 Selected Additional Exemptions	1043
[A] Agricultural Cooperatives	1043
[B] Fishery Associations	1044
[C] Newspapers	1044
[D] Soft Drink Industry	1045
[E] Small Businesses	1045
[F] National Defense	1045
[G] Joint Exporting Companies	1045
Questions	1046

	Page
§ 7.07 Professional and Intercollegiate Sports	1046
§ 7.08 Antitrust and Regulated Industries	1048
Note on Primary Jurisdiction and Related Concepts	1050
 CHAPTER 8 EXTRATERRITORIAL JURISDICTION AND ENFORCEMENT	 1055
§ 8.01 Subject Matter Jurisdiction	1055
[A] Historical Perspective	1055
[B] Comity	1057
[C] The Foreign Trade Antitrust Improvements Act of 1982 and the Supreme Court	1058
<i>Hartford Fire Insurance Co. v. California</i> (1993) . . .	1060
Notes and Questions	1070
<i>F. Hoffman-La Roche Ltd. v. Empagran S.A.</i> (2004)	1073
Notes and Questions	1083
Problem A	1084
Note on Foreign Criticism of U.S. Antitrust Enforcement Abroad	1085
§ 8.02 Defenses to Subject Matter Jurisdiction	1091
<i>W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.</i> (1990)	1092
Notes and Questions	1095
<i>International Association of Machinists and Aerospace Workers v. The Organization of Petroleum Exporting Countries (OPEC)</i> (1982)	1098
Notes and Questions	1103
§ 8.03 Personal or In Rem Jurisdiction	1105
§ 8.04 Supplemental U.S. Statutes—Antidumping Legislation and the Export Trading Company Act of 1982	1106
Problem B	1107
 CHAPTER 9 ANTITRUST ANALYSIS IN THE PRESENCE OF CONFLICTING SOCIAL POLICY: Some Aspects of the Patent-Antitrust Relationship	 1109
§ 9.01 Introduction	1109
Problem A	1109

	Page
A Historical Note	1111
The Mechanics of the Patent Process	1112
A Note on Antitrust Remedies in the Patent Setting . . .	1113
§ 9.02 The Relationship Between the Patent Owner and the Licensee	1114
[A] Tying Arrangements	1114
Problem B	1114
<i>Morton Salt Co. v. G.S. Suppiger Co.</i> (1942)	1114
Notes and Questions	1117
[B] Other Relationships Between the Patent Owner and the Licensee	1119
Problem C	1119
A Note on Patent Licensing	1120
A Note on the 1995 Department of Justice and Federal Trade Commission Guidelines for the Licensing of Intellectual Property	1121
Richard J. Gilbert, <i>Defining the Crossroads of Intellectual Property and the Antitrust Laws: The 1995 Antitrust Guidelines for the Licensing of Intellectual Property</i> (1995)	1121
<i>United States v. General Electric Co.</i> (1926)	1125
Notes and Questions	1127
<i>Mallinckrodt, Inc. v. Medipart, Inc.</i> (1992)	1130
Notes and Questions	1137
§ 9.03 Relationships Among Patent Owners and Other Horizontal Competitors	1138
Problem D	1138
<i>Standard Oil Co. (Indiana) v. United States</i> (1931)	1139
Notes and Questions	1144
Business Review Letter from Joel I. Klein, Assistant Attorney General, Antitrust Division, Department of Justice, to Gerrard R. Beeney, Esq. (June 26, 1997)	1144
Notes and Questions	1153
<i>Schering-Plough Corporation v. Federal Trade Commission</i> (2005)	1155
Notes and Questions	1166
§ 9.04 Unilateral Refusals to License	1167
<i>In re Independent Service Organizations Antitrust Litigation (CSU, L.L.C. v. Xerox Corp.)</i> (2000)	1167

	Page
Notes and Questions	1171
 CHAPTER 10 PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT	 1177
§ 10.01 Introduction	1177
§ 10.02 Historical Perspective	1179
§ 10.03 Section 2(a) of the Robinson-Patman Act	1180
[A] Jurisdictional Requirements of Section 2(a)	1181
[1] Commerce	1181
[2] Discrimination in Price	1183
[3] Two or More “Purchases”	1184
[a] Completed Sales	1184
[b] The “Indirect Purchaser” Doctrine	1185
[c] Parent Company Sales to Subsidiaries	1185
[d] Government Agencies and Non-Profit Institutions as Purchasers	1186
[4] The “Commodities” Requirement	1186
[5] The “Like Grade and Quality” Requirement	1187
[B] The Requirement of Injury to Competition	1187
[1] Primary-Line Injury	1188
<i>Utah Pie Co. v. Continental Baking Co.</i> (1967)	1188
<i>Anheuser-Busch, Inc. v. Federal Trade</i> <i>Commission</i> (1961)	1194
Notes and Questions	1197
<i>Brooke Group Ltd. v. Brown & Williamson</i> <i>Corp.</i> (1993)	1198
Notes and Questions	1198
Problem A	1200
[2] Secondary-Line Injury	1201
<i>Federal Trade Commission v. Morton Salt Co.</i> (1948)	1201
Notes and Questions	1205
<i>Volvo Trucks North America, Inc., Petitioner v.</i> <i>Reeder-Simco GMC, Inc.</i> (2006)	1210

	Page
Notes and Questions	1217
[C] Functional Discounts and Dual Distribution	1217
<i>Texaco, Inc. v. Hasbrouck</i> (1990)	1221
Notes and Questions	1231
[D] The Cost Justification Defense	1231
<i>United States v. Borden Co.</i> (1962)	1232
Notes and Questions	1236
[E] The Meeting Competition Defense	1238
<i>Standard Oil Co. v. Federal Trade Commission</i> (1951)	1239
Notes and Questions	1243
<i>Falls City Industries, Inc. v. Vanco Beverage, Inc.</i> (1983)	1247
Notes and Questions	1256
<i>United States v. United States Gypsum Co.</i> (1978)	1257
Notes and Questions	1257
<i>Federal Trade Commission v. Sun Oil Co.</i> (1963)	1257
Notes and Questions	1261
§ 10.04 Buyer Liability Under Section 2(f)	1262
<i>Automatic Canteen Co. v. Federal Trade Commission</i> (1953)	1263
Notes and Questions	1270
<i>Great Atlantic & Pacific Tea Co. v. Federal Trade</i> <i>Commission</i> (1979)	1272
Notes and Questions	1276
Problem B	1277
§ 10.05 Proof of Damages	1278
<i>J. Truett Payne Co. v. Chrysler Motors Corp.</i> (1981)	1278
Notes and Questions	1282
§ 10.06 Discriminatory Allowances or Services Under Sections 2(d) and 2(e)	1283
§ 10.07 Brokerage Payments Under Section 2(c)	1285
§ 10.08 Criminal Sanctions Under Section 3 of the Robinson- Patman Act	1288

APPENDIX A SELECTED STATUTES	A-1
--	-----

	Page
Sherman Act (1890)	A-1
Clayton Act (1914)	A-2
Federal Trade Commission Act (1914)	A-15
 APPENDIX B SOME INTRODUCTORY OBSERVATIONS ON ECONOMICS AND ANTITRUST	 B-1
 APPENDIX C DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION ANTITRUST GUIDELINES	 C-1
Horizontal Merger Guidelines (1992)	C-1
Antitrust Enforcement Guidelines for International Operations (1995)	C-29
Antitrust Guidelines for the Licensing of Intellectual Property (1995)	C-61
TABLE OF CASES	TC-1
INDEX	I-1

