

# Antitrust Law



# Antitrust Law

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## Policy and Practice

FIFTH EDITION

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For Julie—C.P.R.



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# Preface to the Fifth Edition

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Antitrust Law continues to play a major role in the life and vibrancy of our free market system. As our markets evolve through the internet, smart phones, apps, and even social media outlets, a healthy debate has ensued about the appropriate role and adaptability of antitrust law in our high-tech age. But antitrust law enforcement remains robust in any event, both privately through class action law suits and through government enforcement. Large law firms and corporations are hiring more, not fewer, antitrust lawyers and so the study of antitrust law in law school remains ever important both for burgeoning commercial litigators and transaction lawyers.

This fifth (and overdue) edition attempts to cover the recent developments in Antitrust Law while still providing the historical foundation and development of the law which we believe is necessary for its contemporary understanding. This edition is a thorough revision and while we added substantial new material, we also focused on shortening what was a too long book by cutting material no longer essential to understanding modern antitrust doctrine. In doing so, even with substantial new material, we did manage to trim more than 200 pages overall so that if an instructor is fortunate enough to teach a four-hour, rather than a three-hour, antitrust course, she could at least come within shouting distance of covering the entire book.

We also reorganized the book to some extent, dividing some chapters and striving to make them more reasonable in length. In addition, we also reedited existing cases, again striving to prune nonessential language, and reduced some to notes. We continue to believe that the problems interspersed throughout the materials are a great learning tool and good exposure to students wondering what an antitrust exam question might look like.

We owe a debt of gratitude to several SMU Dedman School of Law students for their excellent help on this project, including Chris Knight ('15), Alexa Naumovich ('18), Dominic Cruciani ('19), Nicolas Lee ('19), and Elizabeth Pittman ('19). All were simply first rate and are now well on their way to outstanding legal careers.

C. PAUL ROGERS III  
January 2020



# Preface to the Fourth Edition

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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

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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

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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

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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 specialties-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.

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