

ANTITRUST LAW, POLICY,
AND PROCEDURE: CASES,
MATERIALS, PROBLEMS
SEVENTH EDITION

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ANTITRUST LAW, POLICY, AND PROCEDURE

Cases, Materials, Problems

Seventh Edition

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MATTHEW  BENDER

Preface to the Seventh Edition

This Seventh Edition of *Antitrust Law, Policy, and Procedure* comes out as this casebook has entered its thirtieth year of continuous publication. This year we welcome a fourth author, Professor Christopher R. Leslie of the University of California, Irvine, a prolific and nationally known antitrust scholar with particular experience in the law of collusion and intellectual property rights.

The Seventh Edition is completely updated through 2013. As previously, we have attempted to select and edit cases so as to give balanced coverage of antitrust's various ideologies as well as its economics. All chapters have been completely revised.

Out of concern for publication costs and as a concession to classroom realities, we have moved the Chapter on secondary-line enforcement of the Robinson-Patman Act to SSRN's digital site. Few antitrust teachers continue to cover the materials in that chapter in a basic antitrust course, although it continues to be taught in some advanced or specialty classes or seminars. It can be found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2319067. We will continue to keep that chapter up to date, and anyone who wishes may use it at no charge, including the printing of multiple copies for classroom use. We ask only that you preserve attribution of authorship.

E. Thomas Sullivan,
Burlington, Vermont
Herbert Hovenkamp,
Iowa City, Iowa
Howard A. Shelanski,
Washington, D.C.
Christopher R. Leslie,
Irvine, California
October, 2013

Preface to the Sixth Edition

This Sixth Edition is a substantial revision from the previous edition, with updating of all case law materials, including the recent decisions of the Roberts Supreme Court, and numerous lower court decisions. In particular we have expanded sections on pricing behavior, intellectual property, merger policy, regulatory policy, and added a great deal of comparative material focusing mainly on the competition law of the European Union.

Beginning with this edition we welcome Professor Howard A. Shelanski as a co-author. Professor Shelanski has been teaching and writing in antitrust and related fields for many years. He has particular expertise in the areas of regulated industries, telecommunications law, and mergers. His knowledge of antitrust policy in high technology industries is particularly welcome.

E. Thomas Sullivan,
Minneapolis, Minnesota
Herbert Hovenkamp,
Iowa City, Iowa
Howard A. Shelanski,
Washington, D.C.
June, 2009

Preface to the Fifth Edition

The structure and approach of the Fifth Edition of Antitrust Law, Policy and Procedure remain the same as we used in previous editions. The text has been updated fully with all the Supreme Court decisions and the most important appellate decisions issued since the Fourth Edition was published. In addition, we have updated and expanded notes on economics, international issues, and expert testimony, and we have greatly enlarged the treatment of intellectual property issues. We also include several new problems.

E. Thomas Sullivan,
Minneapolis, Minnesota
Herbert Hovenkamp,
Iowa City, Iowa
August, 2003

Preface to the Fourth Edition

This Fourth Edition of Antitrust Law, Policy and Procedure continues the basic approach of preceding editions. The central focus is on judicial decisions, supplemented by analytic, historical, and economic notes and questions. Principal decisions and note cases have been updated in all areas, as well as references to secondary sources, and we have added new problems. The edition also adjusts the coverage to include somewhat less in relatively quiet areas, such as vertical and conglomerate mergers, and more in areas of greater activity, such as technology and intellectual property. A few older decisions have been pruned, but we have tried not to change the book's general pitch any more than necessary to reflect new developments.

E. Thomas Sullivan,
Minneapolis, Minnesota
Herbert Hovenkamp,
Iowa City, Iowa
March, 1999

Preface to the Third Edition

This edition continues the same approach followed in earlier editions of heavy focus on the case law, together with simple economic analysis and notes representing a variety of ideological viewpoints. In the matter of antitrust ideology, the Supreme Court is as divided and undirected as it has ever been — witness the chasm between the 1992 Kodak decision and the 1993 Spectrum Sports and Brooke decisions.

The increase in the volume of Supreme Court opinions over the last five years has necessitated some pruning and editing of earlier opinions, but we have tried to leave all important concurrences and dissents as intact as possible. This edition also adds several new problems, expanded bibliographies, and all Supreme Court decisions through the October, 1992 term.

We thank Professor Richard D. Friedman of the University of Michigan Law School for numerous invaluable comments. We are also grateful to our research assistants Craig Marquiz, Hrayr A. Sayadian, and Ellen Szarleta for a variety of significant contributions.

E. Thomas Sullivan,
Tucson, Arizona
Herbert Hovenkamp,
Iowa City, Iowa
September, 1993

Preface to the Second Edition

We continue to believe that the best approach toward antitrust in the law school curriculum is through the cases. For that reason, this casebook emphasizes judicial opinions and contains relatively more of each one, including dissents, than other books in the field.

We also believe that antitrust should be taught with the “best” legal precedents available, and that sometimes a recent circuit court opinion is better than an outdated Supreme Court opinion. For this reason, some antitrust decisions that were important in the 1960s and earlier have been given very brief treatment or omitted as principal cases in this edition.

Finally, we believe that a casebook designed for a student’s first or second antitrust course should not overwhelm the student with one particular ideology. Antitrust ideologies have come and gone, and they will continue to do so. The notes in this book are designed to take seriously the competing ideologies of left, right, and center, to confront their defects, and to present their strengths. Professors who are strongly committed to a particular ideology should find plenty of material to criticize or, alternatively, to illustrate their views.

This edition encompasses antitrust developments through the summer of 1988 and includes all Supreme Court decisions of the October, 1987 Term.

As a new feature in this edition, we offer a series of problems for class discussion or individual assignment. The problems are analyzed in detail in a Teacher’s Problem Manual to be published as a companion to this volume.

E. Thomas Sullivan,
St. Louis, Missouri
Herbert Hovenkamp,
Iowa City, Iowa
January, 1989

Preface to the First Edition

We believe this book on federal antitrust law is a unique and valuable contribution to its genre. Although it covers the same general law as its peers, its perspective is different in several ways that make it particularly useful for teachers hoping to offer a sophisticated but litigation-oriented antitrust course.

First, this book is shorter than most others in the field. Many antitrust books have grown fat with overruled Supreme Court opinions, with opinions whose historical value far exceeds their usefulness as credible statements of current law, and long footnotes of string citations that do little for students facing their first experience in antitrust analysis and problem solving.

To be sure, brevity imposes certain costs. This book contains no separate sections on antitrust and the patent system, and no detailed discussion of the extraterritorial applications of antitrust law. It has only brief sections on antitrust in the regulated and so-called “exempt” industries. Although all these things are useful and can be profitably taught, it is our experience that few instructors emphasize them in the basic three-unit or four-unit antitrust class.

At the same time, this book offers a broader coverage than most on procedural issues, particularly on the law of private enforcement. Because more than ninety percent of all federal antitrust cases are now brought by private plaintiffs, the law of private enforcement has developed a rich and complex “substance” all its own. That law is more appropriate to a basic antitrust course than is the extensive discussion of patents or extraterritorial application.

Likewise this book focuses more than most on the process of antitrust litigation — on evidentiary standards, burden of proof requirements, and standards for judgment. These emphases seem appropriate because concepts such as “market power,” “agreement,” or “intent” are not merely abstractions of the substantive law: They are facts that must be established in court.

An additional, important difference between this book and many others in the field is ideological. This book attempts to strike a balanced, diversified approach in presenting a wide spectrum of ideas regarding the goals and economic underpinnings of antitrust law. The authors of this book disagree with each other about many questions that are central to antitrust policy making today, such as whether increased allocative efficiency should be the exclusive or only one of many antitrust enforcement goals. As a result this book both entertains and takes seriously alternative viewpoints and permits the students (or the teacher) a larger perspective for individual choice.

Ideological narrowness is nowhere more evident than in the editing of opinions. Antitrust casebooks have become notorious for “ideological editing” that either supports the view of the editor or else makes the court’s position appear far less rational than it really was. Antitrust opinions are particularly conducive to such editing because they are so long — in many cases a fifty-page opinion must be reduced to five or six.

Neither of the authors has permitted an editorial atrocity that reflects too favorably on the ideology of the other. Although nonideological editing does not exist, nothing succeeds like competition in bringing differences of ideology into the light of day. The

Preface to the First Edition

result in most instances is that the edited opinions contained here are longer than those in other antitrust casebooks. Furthermore, this book prints excerpts from many more concurring and dissenting opinions, particularly when the secondary opinion foreshadowed a position later taken by the Supreme Court.

The book also employs the positive use of economic theories as an analytical device. As to the level of economic sophistication and difficulty, this book must be classified as “medium.” Today no one can ask whether an antitrust casebook should develop price theory and industrial organization; the only question is how much. This book is addressed to students, however, who are assumed to have no prior experience in economics. Its approach centers on the fundamentals.

It offers an introductory chapter and then builds in succeeding chapters on the models created. Unlike casebooks in which economic analysis can be found only in an opening chapter or appendix, the economic analysis in this book is integrated into the notes and discussions following each case selection. Economics in antitrust is valuable only to the extent that it enhances our ability to analyze disputes and make useful policy judgments. For that, a few comments about price theory hidden in an appendix are simply inadequate. Famous and influential opinions such as *Alcoa*, *du Pont*, and *Brown Shoe* have an imposing if dubious economics content, but most students will not discern that content unless they are given at least minimal guidance. We attempt to do that.

In sum, this offering attempts to integrate into the traditional antitrust casebook an appreciation for the rich historical, socio-political, and economic development of the antitrust laws and policies. How the law has evolved and the implications for future development are central to this book’s format. In addition to the doctrinal development, this book attempts to focus the attention of students on the evidentiary and procedural context within which the “substantive” material may be utilized. We hope these objectives will be successful.

E. Thomas Sullivan,
Columbia, Missouri
Herbert Hovenkamp,
San Francisco, California
February, 1984

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