

UNDERSTANDING
ANTITRUST AND ITS
ECONOMIC IMPLICATIONS

SIXTH EDITION

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UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS

Sixth Edition

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MATTHEW  BENDER

DEDICATION

For Leslie and Sarah.

PREFACE TO THE SIXTH EDITION

This is the Sixth Edition of *Understanding Antitrust and its Economic Implications* and thirty years since the initial edition appeared. The changes in this thirty year period have been vast and marked by a level of judicial activism that is probably unmatched by any other area of law. The impact of this procedural and substantive activism has been mostly to disadvantage private plaintiffs as well as public enforcement agencies. Whether this is or is not beneficial to the public generally is up to the reader.

Each edition of this book has been an effort to track this development and to offer an accurate and balanced description of critical decisions and the implications of those decisions. In addition, each has been designed to provide a historical perspective in order for the reader to understand how and to what extent this area of law has been reshaped, sometimes in manners that may seem to be inconsistent with legislative history.

This edition carries forth this effort. Since the last edition, the implications of the Supreme Court's decisions with respect to summary judgment have taken hold. Cases that would have gone forward ten years ago are now often dismissed at an early stage. On the substantive side, the Supreme Court has been decisive in rejecting the so called "leverage" theory of monopolization. The Court was far less decisive, however, in the case of reverse payments – instances in which competitor pays a potential competitor to delay its entry into the market. The importance of the Robison-Patman Act has continued its decline. Further, the Court has addressed the broad pressing issue of whether the goal of the antitrust laws is to increase efficiency or consumer welfare — two goals that are not always consistent. Finally, once again the Merger Guidelines issued by the Justice Department and Federal Trade Commission have been adjusted and refined.

As with prior editions, this represents a joint and equal effort. The authors express their appreciation to each other and to commentators who have taken the time to offer suggestions on improving the book.

August 2013

E. THOMAS SULLIVAN
Burlington, Vermont

JEFFREY L. HARRISON
Gainesville, Florida

PREFACE TO THE FIFTH EDITION

It has been twenty-one years since *Understanding Antitrust and Its Economic Implications* first appeared and six years since the last edition. When the first edition was written, the United States Supreme Court was in the midst of reshaping antitrust law to reflect its philosophy that it should adhere to the teachings of economics. During the last six years, this process continued as the Court sought to achieve greater consistency. For example, the Court removed resale price maintenance (RPM) from the list of *per se* unlawful activities. To many, this change was a necessary, albeit belated, response to the Court's *Sylvania* decision over 30 years ago. The Court has also made it clear that it would treat secondary line price discrimination — perhaps the last remaining element of the populous antitrust philosophy of the 1960s — in a manner consistent with its emphasis on efficiency. In addition, the Court made one of its first forays into the theory of monopsony and addressed the question of how antitrust law applies to market power on the buying side of the market.

The process of rationalizing antitrust law is far from complete. For example, the Court's newly announced position on RPM raises a number of issues. Specifically, many past decisions by the Supreme Court and lower courts reflect either approval or disapproval of the *per se* status of RPM. Now that the rule has been changed, the relevance of that law is in question. In addition, a truly consistent antitrust policy requires close attention to various exemptions. Exemptions based on non economic considerations are hard to reconcile with the path the Court has chosen. Finally, in a global economy, matters of market power and the competitive impact of various agreements must be viewed from an international perspective.

This edition of *Understanding Antitrust and Its Economic Implications* examines all these matters. Like all books on law, however, it only captures the moment in an ever changing, challenging, and fascinating area of law. As noted in every previous edition, this effort is a shared one, with each author contributing equal amounts of effort and each author responsible for any omissions or errors. The authors thank those who have communicated their suggestions for improvements. Professor Harrison would like to thank Sarah Harrison for her editorial assistance. Professor Sullivan would like to thank Calvin Hoffman, Charles Dickinson, Mark Creer, and Sarah Gillstom.

November 2008

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PREFACE TO THE FOURTH EDITION

Fifteen years ago the first edition of this book appeared. At that time, lower courts were still in the process of recognizing the importance of two important shifts in antitrust law. The first was an increased emphasis on economic analysis as signaled by *Continental T.V. Inc. v. Sylvania*. The second was the application of the doctrines of antitrust standing and antitrust injury to narrow the scope of potential antitrust plaintiffs.

Subsequent editions of this book have treated further refinements with respect to these two crucial antitrust concerns. In addition, the intervening years witnessed progress toward a predictable standard for predatory prices, an effort by the Supreme Court to describe what a “quick look” analysis means, and much greater sophistication with respect to the analysis of market power. This fourth edition tracks further developments with respect to all of these traditional areas of analysis.

As with most areas of law, there always are new challenges as the world changes. In the case of antitrust, the new challenges stem from continued economic globalization and technological advances. Globalization requires consideration of the international reach of the United States’ antitrust law. Technological change requires one to consider the intersection of antitrust law and intellectual property. This fourth edition includes greatly expanded treatment of these two important areas of analysis.

Since the last edition, clearly the most public display of antitrust came in the *Microsoft* case. The long-run impact of that case on antitrust law may not be felt for some time. In this volume we examine the possible implications of *Microsoft* for a variety of areas including monopolization, market power analysis, and tying doctrine.

As always this has been a joint undertaking. We have enjoyed our collaboration in producing what we hope will be a useful hornbook to students, practitioners and judges. Professor Harrison would like to thank

Margie Tyler for her help in preparing the manuscript. Professor Sullivan would like to thank David James and Matt Scheidt. Both of us greatly appreciate the work of Ally VonHockman whose diligence at LexisNexis made our work easier.

February 2003

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PREFACE TO THE THIRD EDITION

Ten years have now passed since the first edition of this book. It has been a period during which antitrust law continues to be shaped by the judicial philosophy found in *Continental T.V. v. GTE Sylvania*. This perspective was played out most recently in *State Oil v. Khan*, in which the Supreme Court (finally, some would say) overruled *Albrecht v. Herald Co.*

More noteworthy, perhaps, has been lower court reaction to two Supreme Court decisions made just prior to the publication of our second edition. Thus, over the past five years, courts have begun applying the teachings of both *Eastman Kodak Co. v. Image Technical Services* and *Brooke Group Ltd. v. Brown & Williamson Tobacco Co.* This volume addresses *Khan* as well as judicial reaction to *Image Tech.* and *Brown & Williamson* and other antitrust “events” like the 1997 Merger Guidelines.

At the heart of the book, however, is a more expansive treatment of traditional antitrust matters. The theory of market power is considered in a more focused manner as is the continuing efforts by courts to make sense of the complexities of market power analysis. In addition, substantial new treatment of antitrust standing, of domestic and international “commerce” issues, and of conspiracy and its multiple permutations has been added.

In preparing this edition, the authors once again thank each other and report that the book is the result of a joint effort. Dean Sullivan would also like to thank Deidre McGrath and David Schlutz for their research assistance. Professor Harrison would like to thank Danny Payne for his secretarial efforts and Bill Shilling for his research assistance. Finally, the authors thank Kent Hanson, their editor at Matthew Bender, whose tireless work on the manuscript was of inestimable value.

May 1998

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PREFACE TO THE SECOND EDITION

Six years have passed since the publication of the first edition of this book. The Sherman Act has closed its first 100 years and began its second. It would be misleading to suggest that the 100th anniversary was marked by landmark decisions or even by a significant change in emphasis. It is clear that the economic approach to antitrust announced in *Continental T.V., Inc. v. GTE Sylvania* and the judicial philosophy compatible with that approach remain dominant.

When the first edition was published, the teachings of *Sylvania* had already influenced the law of both vertical and horizontal restraints. In the past six years, those teachings have been applied even further afield. In its latest term, the Supreme Court announced tough standards for plaintiffs relying on a theory of predatory pricing. Additional hurdles have been erected for private parties attempting to enforce the Robinson-Patman Act. Recent decisions concerning such threshold issues of summary judgment, antitrust standing, and antitrust injury are also generally consistent with the view that antitrust should play a smaller role in modern society.

Antitrust law is, however, nothing if not complex. While its influence may be withering, there continue to be decisions that cannot be easily reconciled with a reduced role. In the past six years, the Supreme Court has indicated that there is a lasting and important role for *per se* rules in appropriate cases. It has given new hope to plaintiffs in tying cases. It has narrowed, or at least refined, the antitrust exemption for “the business of insurance.” More importantly, the Court has, on more than one occasion, been critical of the use of economic theory in the absence of supporting empirical data. It is this complexity that makes antitrust an exciting and challenging field.

In preparing this edition, the authors would once again like to thank each other and report that this book is the result of a joint effort throughout. In addition to those acknowledged in the first edition, Dean Sullivan would like to thank Craig Marquiz for his able research assistance. Professor Harrison would like to thank Danny Payne and Gwen Reynolds.

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PREFACE TO THE FIRST EDITION

This volume on federal antitrust laws is both timely and overdue. It is merely because we are on the eve of celebrating the 100th anniversary of the Sherman Act and the 75th anniversary of the Clayton Act and Federal Trade Commission Act. Accordingly, it is an appropriate time to reflect on the state of antitrust law and to consider its future. These two objectives informed the direction and content of this text. The effort is overdue, as we believe this is the most comprehensive and balanced treatment of antitrust law in a single volume since the United States Court's 1977 landmark decision in *Continental T.V., Inc. v. GTE Sylvania*, which signaled a new era of antitrust law.

As every antitrust practitioner and scholar knows, the changes in the wake of *Sylvania* have made antitrust one of the most challenging and exciting fields of contemporary law. At times, it is also bewildering. Business activities that were once subject to "bright line" tests of legality are increasingly judged under the elusive "rule of reason" standard. For example, it can no longer be stated with confidence that pricing agreements among competitors are *per se* violations of § 1 of the Sherman Act. Similarly, mergers that were readily condemned 15 years ago are now commonplace. Pervading these changes is an increased reliance by the courts and by public enforcement agencies on the sophisticated economic analysis.

We approached our task with several goals in mind. First, we have attempted to highlight and restate those areas of antitrust law where the law is relatively clear. At the same time, where the issues are especially difficult and the law remains unclear, we have endeavored to provide the reader with an appropriate analytical approach. Second, we have discussed fully the latest cases as well as their landmark forerunners. Third, we have identified what appear to be the trends and competing points of view which are likely to dictate the direction of antitrust law in the years to come. This treatise is specifically designed not to become obsolete with the release of the latest Supreme Court decision. Fourth, the book offers full coverage, including horizontal and vertical conduct, monopolies, mergers, price discrimination, private and public enforcement issues, and antitrust economics.

Finally, our intent is to present a balanced presentation which does not put forth the "Chicago School" approach or any doctrine as providing the "right" answers to the complex economic, political, and social issues that are woven throughout this area of law. We have made an effort to present a wide spectrum of ideas and opinions regarding the goals and economic underpinnings of antitrust law.

A number of individuals assisted in this project and deserve recognition. Professor Sullivan would like to acknowledge the able research assistance of Winston Smart, Gail Israelievitch, Tom Glassberg, and Gerald Bassett. He also would like to give special recognition to Jane Bettlach for her indispensable secretarial skills. Professor Harrison would like to thank Warren Braums, Charles Carlson, Laurel Judd, and Tony Smith. In addition, we would like to thank each other and report that the book is, in every sense, a joint effort and the product of a rewarding collaboration.

We offer this treatise as a restatement and critical assessment of antitrust law in

PREFACE TO THE FIRST EDITION

anticipation of the first of many anniversaries celebrating the antitrust laws. We hope it will stimulate discussion about the role antitrust has played in the twentieth century and, as we approach the twenty-first century, the role it should play in our society and economy in the next century.

January 1988

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