

# ANTITRUST LAW

## INTERPRETATION AND IMPLEMENTATION

FIFTH EDITION

CHARLES J. GOETZ

FRED S. MCCHESENEY

THOMAS A. LAMBERT

FOUNDATION PRESS

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UNIVERSITY CASEBOOK SERIES®

# ANTITRUST LAW

## INTERPRETATION AND IMPLEMENTATION

FIFTH EDITION

*by*

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*To J.C.G, my long-time joint-venturer,  
ancillary contractee, and provider of  
supracompetitive benefits*

—C.J.G.

*To my downstream producers:  
Edward, Elizabeth, Madeleine, and William*

—F.S.McC.

*To P.W.K., reliable co-conspirator with  
whom I have usurped a tremendous amount  
of life's surplus*

—T.A.L.

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## PREFACE

### PREFACE TO THE FIFTH EDITION

At the time of the prior (fourth) edition of this text, it was noted that antitrust had, in the years just before, undergone a number of major changes due to new decisions at the Supreme Court. The changes affected both basic procedural aspects of antitrust (e.g., *Bell Atlantic Corp. v. Twombly*) and also its essential substance (e.g., *Leegin Creative Leather Products v. PSKS, Inc.*) Other important issues (e.g., preclusion of the antitrust laws in *Credit Suisse Securities v. Billing*; “price squeezes” in *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*) had likewise been adjudicated.

With the passage of time, it becomes possible to see how these new decisions—which invariably leave some questions unanswered—are being interpreted and implemented by lower courts. That is one objective of this 5<sup>th</sup> edition. Relatedly, confusion left by earlier cases (e.g., *Jefferson Parish*) has motivated new decisions concerning tying-like behavior, such as loyalty and bundled discounts. Updating that and other material (see also Ch. 8’s discussion of antitrust extraterritoriality and the state-action doctrine) is likewise an endeavor of this 5<sup>th</sup> edition.

Evolution in the law necessitates changes in casebooks, it is true. Nonetheless, this latest edition re-emphasizes the distinctive features responsible for the book’s continuing appeal. (These features and our “approach” to antitrust textbook-writing were set out more fully in the original *Preface to the First Edition*, which appears immediately below and is worth reading.) The Overview chapter, one of the important and unique pedagogical features of our text, has been reworked and tweaked, to continue its role of giving the beginning student an initial sense of some of the interesting-but-puzzling problems arising in modern antitrust law. In later chapters, we have updated the material to reflect recent cases and developments, re-edited existing cases, and added new explanatory notes and other material. And, we have done this without adding materially to the book’s length—no mean feat in the ever-expanding world of antitrust jurisprudence. We believe that a textbook’s length should be commensurate with what can reasonably be dealt with, by students and professors alike, within the time and effort constraints of a standard law school course.

As before, we include, both in textual and in note material, more lower court cases and more “real-world” matter than does the typical text. Material here, such as trial-court jury instructions and *certiorari* briefs to the Supreme Court, allows students and practitioners to understand how modern antitrust actually is practiced. As before, we whittle down hoary Supreme Court opinions and re-emphasize lower court “interpretation and implementation” opinions throughout the book. The typical soon-to-be lawyer is likely to overestimate the influence of often-murky (if not outright muddled) Supreme Court cases and to underestimate the willingness of

lower court judges to distinguish and work around “precedent” that is neither clear nor sensible. Students thus should appreciate that antitrust law, whatever its peculiarities and deficiencies, offers constant opportunities to practitioners who understand how it actually works. Those practitioners will have a better sense of the nuances that may sway the lower court judges, the women and men compelled to fill in the often-fuzzy outlines of antitrust law.

Antitrust law continues to evolve as a branch of applied microeconomics, particularly as the Rule of Reason has come to the fore. In this edition, we note that additional modes of analysis have also begun to emerge in the law, but are nonetheless based on economics. The rise of economic thinking in the courtroom often scares students needlessly: the essential features of antitrust economics are neither difficult nor lengthy. So, as before, our text is sparing in its presentation of economic models. But we do not shrink from integrating the really important economics into every part of the text. We show how a few simple models, as well as more general implications of social-science thinking (*e.g.*, Type I *vs.* Type II error) yield, over and over, important insights and also wield much influence in antitrust jurisprudence. As in prior editions, we use clarifying visual-aid “exhibits” to help students better understand complex issues in law as well as economics.

A final, very important change should also be highlighted, the addition of Thomas A. Lambert of the University of Missouri as a third coeditor. Over the years, Thom has distinguished himself as an antitrust practitioner, teacher and scholar. “Greybeards” Goetz and McChesney are delighted to welcome Lambert to this edition, which already reflects his experience, erudition and élan in the field of antitrust.

Student contribution to this 5<sup>th</sup> edition from Ryan Hashmi, in both research and editing, is gratefully acknowledged. We continue to benefit, finally, from the many comments of students who are using the book to discover the delights and unravel the puzzles of modern antitrust law.

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October, 2012

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## PREFACE TO THE FIRST EDITION

The contents of this book reflect the authors’ collective experience of almost 50 years toiling in the antitrust vineyard. That experience includes the teaching and writing on the subject that would be expected of legal textbook writers in academe. But our experience has also entailed considerable work on actual cases, both providing legal advice to other lawyers and serving as expert forensic economists in dozens of antitrust matters.

We are frequently asked to practice what we preach. That fact largely explains this book.

In our opinion, the standard antitrust text is overlarded with Supreme Court cases, many of them outdated and of dubious practical importance today. It may well be important to murmur knowingly about cases like *Appalachian Coals*, *Standard Oil*, and *Columbia Steel* at antitrust section cocktail parties. But, for advising clients or litigating cases, past Supreme Court jurisprudence is often of little help. Thus, the vintage cases are included here, but usually much distilled compared to the space they occupy in other texts.

In much of antitrust practice, fairly recent lower court decisions supply the relevant precedents on which disputes really hinge. The typical text is woefully thin on such material, but lower court practice receives significantly more attention here. Likewise, we think that future lawyers—few of whom will ever argue before the Supreme Court—will benefit from seeing actual cartel agreements, contracts with resale price maintenance clauses, complaints, jury instructions, and other bits and pieces from the typical antitrust practitioner's case files. Especially beyond the first-year level, more room ought to be made in law schools for teaching materials other than appellate cases. We hope to have taken at least a small step toward the more real-worldish "case method" as it is used in leading graduate business schools. Where appropriate, we have changed names or other details, but the excerpts themselves are all based upon real situations.

Just as our focus on law is different, so is our mode of integrating economics into the law. The typical antitrust book segregates most of its economic material into a single introductory chapter or appendix. Such economics sections serve up a bigger helping of industrial organization economics than most law students can fully digest in a single helping. We believe that, pedagogically, *nouvelle cuisine* is both more palatable and nourishing. Thus, we introduce briefer sections of economics in the context of cases where particular economic tools are relevant and, indeed, supply illuminating explanatory keys. Modes of economic thinking are given equal importance with the formal apparatus of economics. For instance, the distinction between Type I and Type II error plays an important thematic role in the entire book, as we believe it also does in the recent development of antitrust jurisprudence.

This is, we believe, the only volume of antitrust teaching materials that specifically addresses the difficulty that most students initially have in seeing how the different statutes, doctrinal developments, and economic issues fit together into some reasonably coherent picture. We do this by providing a set of "overview" materials that provides a useful perspective and road-map about the balance of the course. Other changes from the typical text will, we hope, make the book more user-friendly. We have shortened or omitted many case citations in the cases presented here. Our citation practice is pragmatic rather than stylistically consistent: more elaborate cita-



tions and footnotes are preserved where they serve some useful purpose; otherwise, they are trimmed to the extent possible.

Our goal is not to provide an encyclopedic treatise on antitrust law. Rather, we seek to communicate a sense of how the relevant body of law affects, for better or for worse, both business decisions and lawyerly practice. With respect to legal practice, our audience is as much the would-be commercial law practitioner as it is the potential antitrust litigator. Nobody who reads these pages attentively will doubt that antitrust can be a perilous labyrinth for business decision-makers—and also for the lawyers who claim an expertise both in guiding clients through the legal minefield and in patching up the victims of the minefield's sporadic explosions.

The scope and complexity of modern antitrust law presses authors toward behemoth casebooks, expanded beyond what reasonably can be covered in the typical one-semester course. We have struggled with this problem and have attempted to treat time appropriately, as a scarce resource. While adding fresh topics and materials, we have drastically pruned some traditional subject areas. For instance, the Robinson-Patman provisions—arguably not procompetitive at all—are treated mainly in connection with related Sherman Act issues. Similarly, we sketch only the broad outlines of merger law, on the premise that modern lawyering in this area is a highly specialized expertise similar to public utilities practice, or negotiating zoning variances. Also, the final chapter contains topics which give a time-pressed instructor the opportunity to pick and choose.

Especially because we have attempted some innovative things, even this present published version is a work very much still “in progress.” Doubtless, there are many errors, omissions, and glitches remaining to be rectified. We solicit not only your forbearance but also your advice, criticism, and suggestions for improving eventual revisions.

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January, 1998

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