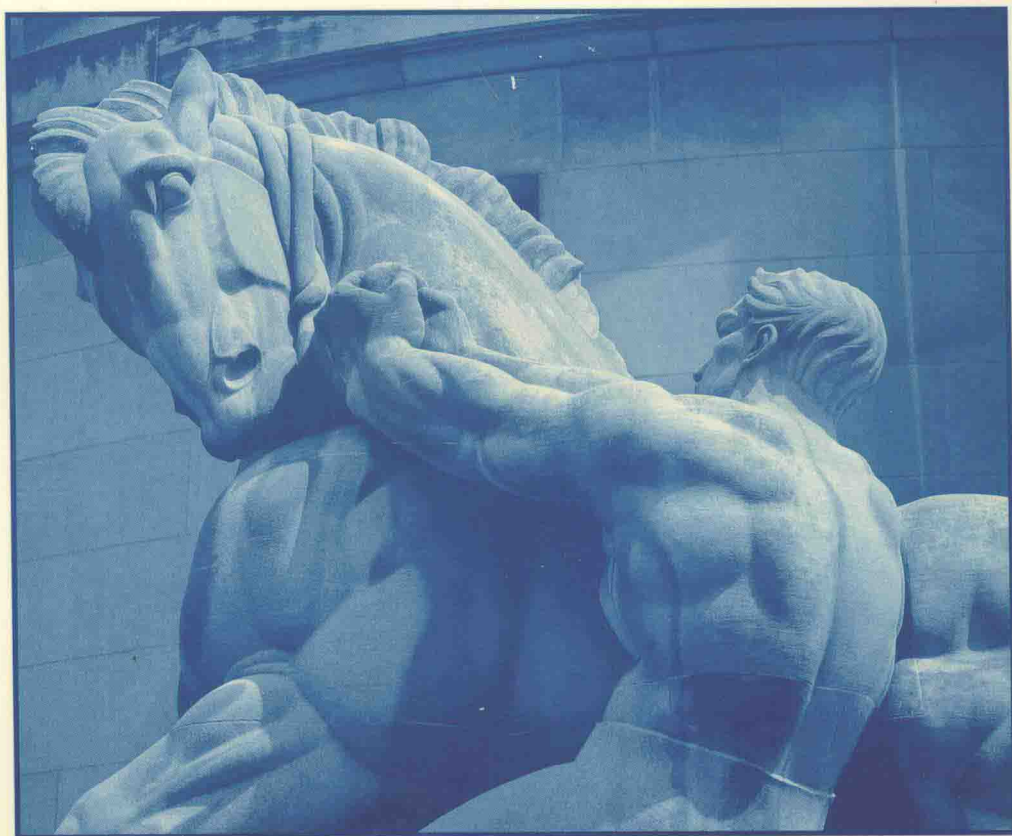


Antitrust

Christopher L. Sagers



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EXAMPLES & EXPLANATIONS

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Christopher L. Sagers

Cleveland-Marshall College of Law
Cleveland State University



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*This book is for Jub Jub (that is, Jonah Balogna
Arizona Barcelona Pamplona Mascarpone), because he
waited a long time for Daddy to come and play.*

Preface

The conviction driving this book is that two challenges usually cause anti-trust students the most difficulty but that neither actually has to be that challenging at all. They are (1) the learning of economic theory and (2) the interrelatedness of antitrust issues. This book approaches both problems strategically, and it combines its strategy with the tried and proven question-and-answer pedagogy of the Examples and Explanations series. Additionally, the book is supplemented with current updates and other materials at www.aspenlawschool.com/antitrustEE.

As for economics, the good news is that the bare minimum economic theory one needs to understand the antitrust case law is not really that hard at all, even for students without prior economics training. There may be plenty more to say about the economics of antitrust issues in policy debates and academic seminars, and antitrust practitioners tend to be economically sophisticated. But none of that advanced material is needed to learn the basic law as the courts apply it. This book approaches the teaching of the minimum core of economics with a two-part strategy, set out in Chapters 2 and 3. First, §2.2 introduces all the economic theory a student really needs to understand the cases and presents it in a purely intuitive way, without any mathematics. (Section 2.3 supplements this introduction by re-explaining the same material in the more traditional, quantitative manner, though in a way still accessible to any student who wants to learn it.) Second, Chapter 3 takes the economic basics a step further by introducing a set of economic generalizations that run throughout antitrust and help explain much of the law as it now stands. The book also includes more economic material for students who want it and for students whose teachers take a more in-depth approach.

As for interrelatedness, the problem is that, in antitrust, everything seems to relate to everything else, and so it can be hard to know where to start. Especially early in the semester of an antitrust course, it can be difficult for an instructor to explain anything because learning any one thing seems to call for an understanding of so many other things. Often this leaves the student at sea for much of the semester. But this doesn't have to be the case, because there are some very general concepts in antitrust that can be explained first, without reference to anything else, and so it is possible to teach antitrust concepts by moving from the most general to the more specific.

Preface

We can begin with a basic generalization about what antitrust is. To borrow from Chapter 1:

Under federal antitrust law, it is the policy of the United States that private persons may not take actions to interfere improperly in the functioning of competitive markets.

Furthermore, almost all of the law that now gives life to this most general policy can be boiled down to the law surrounding three causes of action—challenges to conspiracies under §1 of the Sherman Act, challenges to monopolies under §2 of the Sherman Act, and challenges to mergers and acquisitions under §7 of the Clayton Act. What's more, these three causes of action turn out to have a great deal in common. Because they share so much, we can identify what is most general about them and move from that most general basis to the more specific details. What they share most generally is that each of them is meant to prohibit only those interferences with competition that are *unreasonable*. Antitrust has come to define unreasonable interference as private conduct that causes more harm to a market than benefit for it. And as it now exists, antitrust looks for both harm and benefit by using the tools of economic theory. In other words, the single most basic idea in current antitrust law is the simple economic theory that will be laid out using the two-part strategy in Chapters 2 and 3.

Next, a basic insight of this economic theory is that private interferences in markets are likely to be net harmful—that is, they should be unreasonable—only where some feature or weakness in the market prevents that market from correcting itself. Most economists believe that when a firm tries to raise its prices or otherwise abuse consumers, the market will usually self-correct by causing that firm to lose sales. But sometimes markets do not do that, and where a market's self-corrective power is hindered, a firm within it might have some power to raise prices or otherwise misbehave. Such a firm is said to have *market power*, and the concept of market power has come to have truly fundamental significance in antitrust. Each of the three causes of action that make up antitrust will in most cases require a plaintiff to prove that a defendant holds market power, because without it, a defendant that tries to engage in abuses of a market should just suffer lost sales. Because plaintiffs must prove market power according to the same doctrinal test no matter what cause of action at issue, proof of market power is the next most general concept in antitrust law. It is explained in Chapter 4.

With economic theory and market power under our belt, we can move on to more specific details of the three major causes of action, and that study will take up the next several chapters of the book. Finally, the remaining chapters cover more peripheral matters, such as the intersection of antitrust and intellectual property (Chapter 15), the problem of price discrimination (Chapter 16), antitrust procedural issues (Chapter 19), and the scope of antitrust (Chapters 20-23).

Preface

I thank Lynn Churchill of Wolters Kluwer for the opportunity to write this book. She was an awfully nice person to work with. As for Peter Skagestad, the editor who shepherded the book and who manages the entire Examples and Explanations series, what can one say? As if it were not enough to oversee a series that set a standard in legal education (in a second language no less), he is a polyglot philosopher economist who has interesting things to say about matters from regulatory policy to Charles Sanders Peirce. More important to me, in any event, were his patience and forbearance. I am thankful for feedback from Peter Carstensen and from several anonymous reviewers, who undertook a large and thankless task and gave very effective advice. This book also benefited from the financial support of the Cleveland-Marshall summer scholarship fund and my sabbatical leave from the Cleveland-Marshall College of Law.

The four-year-old boy to whom this book is dedicated wrote the heck out of a book of his own while I was writing this one, and it was darn nice for a dad to have him as a working companion. His book, he tells me, is written entirely in Ant-Chinese, a language that only ants understand, and is called *My Son Is a Peanut*. He is a good egg. My wife, Annie, is beyond the reach of my thanks for her support and the sacrifices she has made for me.

May 2011
Christopher L. Sagers

Antitrust

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