THE LAW OF ANTITRUST

AN INTEGRATED HANDBOOK

Third Edition

Lawrence A. Sullivan
Warren S. Grimes
Christopher L. Sagers

Hornbook Series

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Third Edition

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To all of those who believe in and work to implement the Sherman Act Idea,

and to J the Principled, Joodge, Poopy, and their Mom

Foreword to the First Edition

The Hornbook on the Law of Antitrust by one of the authors was published by West in 1977 to meet the needs of students and practitioners for adequate treatment of major antitrust areas. Although the purposes of this volume are essentially the same and its title similar, this is not a revision of that work but a new book that is responsive to changes in the economy (e.g., increasing dynamism and globalization), in economic theory (e.g., analysis of network efficiencies), in prevailing attitudes about how theory should be applied (e.g., post-Chicago analysis), in related policy areas (e.g., deregulation) and, reflexively, in antitrust itself. The book addresses new areas, treats a number of areas more fully, and thoroughly reassesses core concepts like monopolization and horizontal and vertical restraints.

We think of antitrust as law, not free form policy. Antitrust, at any stage, is shaped by the interplay of the legal rules previously laid down (however broad or general these may be) with current political, economic and theoretical forces. Our effort has been to describe this process and to distill from it what we view as antitrust law today. Because antitrust law is constantly evolving, we have sought to describe the law's central principles in their developmental contexts. While we have often disclosed our own (usually consistent) views on significant policy issues, we have tried fairly to summarize alternative positions and contentions. Because we are convinced that each of antitrust's developmental stages is related to an existing or emerging consensus about the needs and opportunities of the economy, we view current policy debates less as efforts to stake out solid, normative base lines than as parts of the ongoing developmental process.

Our debts are many. Few can be specifically recognized, none adequately. We are especially grateful to Southwestern University School of Law for encouragement and support in the form of released time, summer stipends and funding for research assistants. We must also stress our gratitude to Ms. Antoinette Shilkevich, librarian of the law firm of Blecher and Collins in Los Angeles, who took time from busy professional involvements to proof read and correct the book.

LAWRENCE A. SULLIVAN
WARREN S. GRIMES

February 2000

Foreword to the Third Edition

The ten years since the last edition have seen potentially momentous changes in federal antitrust law. Their consequences are only beginning to be understood.

An active and activist Supreme Court has taken a large number of antitrust cases and, through them, worked many changes. The Court capped a three decade-long exercise in loosened vertical restraints rules, finally ending the century-old *per se* rule against vertical price fixing and rendering all non-tying vertical restraints subject to full rule of reason (and loosening its tying rules a bit as well). It effectively ended the cause of action against "price-squeezes" by vertically integrated monopolists, a venerable interpretation initially recognized by Learned Hand, applied by lower courts for sixty years, and adopted in the competition law of the European Union. It announced reverence for a monopolist's freedom of action, even when that course invites strategic conduct potentially harmful to new entrants, small business, innovation, and consumers. And it set up what some foresee as a potent new exemption for federally regulated actors, at least within the financial sector. Perhaps even more consequential were the Court's many procedural rulings, beginning with tough, controversial new pleading rules, followed by demanding rules for class certification, expert testimony, and mandatory arbitration. For its upcoming Term the Court has granted certiorari in a closely watched case in which it may require proof that all class members are injured prior to certification. That result could severely restrain private antitrust enforcement.

There is some reason to believe these changes have taken a practical toll. New private antitrust filings began a downward trend in about 2009 that, with one brief exception during 2012, has not abated. The number of new case filings is roughly half of what it was before the Court began the recent wave of restrictive rulings. This reduction in private enforcement comes at the same time that government enforcers have experienced substantial cuts in budget and staffing.

The news was not unequivocally dark for enforcement. Breaking a streak of nearly twenty years of plaintiff losses, the Court in two decisions resoundingly reaffirmed the broad *scope* of antitrust in cases involving antitrust immunities and in another unanimous decision tightened its rule for "single entity" treatment under Sherman Act Section 1. And in its first ruling for a plaintiff going to the actual merits in more than twenty years, the Court in 2013 adopted a pro-competitive (albeit perhaps difficult-to-enforce) rule to resolve the long running drama of "pay-for-delay" pharmaceutical settlements.

Some lower court developments have been significant as well, including important new decisions on monopolization through exclusive contracting and bundled discounting, major government successes in blockbuster price-fixing cases against Apple and other marquee companies, and a trial court result that potentially could force fundamental change in college athletics. The period also saw a series of spectacular merger challenges and the first new set of *Horizontal*

Merger Guidelines in nearly 20 years. The merger cases had mixed results, though, including attempts thwarted by government and negotiated consent orders that may inadequately protect market structures.

The passage of years and the variety and gravity of change called for significant revision. Entirely rewritten chapters now cover merger law and the Hart-Scott-Rodino process, the law of joint ventures, and the scope of antitrust. Other chapters have been substantially revised as well, including horizontal restraints and the law of distribution. In all, nearly half the book is new or significantly revised.

This edition welcomes a new co-author. We could no longer benefit from the advice and counsel of Lawrence Sullivan, yet his hand remains indelibly present. The original Sullivan treatise, published in 1977, sought to set forth the law, with honest description of varied positions where they exist. Building upon that platform, Sullivan treatises did not hesitate to follow up with analysis and criticism. This edition follows that tradition.

WARREN S. GRIMES
CHRISTOPHER L. SAGERS

July 2015

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