ANTITRUST ANALYSIS

Problems, Text, Cases

Third Edition

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LITTLE, BROWN AND COMPANY
Boston Toronto

Library of Congress Catalog Card No. 80-84032

Third Edition

Third Printing

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Published simultaneously in Canada
by Little, Brown and Company (Canada) Limited
Printed in the United States of America

Preface to the Third Edition

The editorial format and basic features of the previous edition are retained in this third edition, which further refines the book and brings it up to date. Several new cases are reproduced and relevant decisions through mid-1980, especially Supreme Court decisions, are noted or discussed. The footnote references throughout the book have been updated and enriched in depth and by the addition of capsule descriptions.

Revisions by chapters can be briefly highlighted. The Chapter 1 text has been significantly revised, especially on consent decrees, FTC rulemaking, treble damages and standing, collateral estoppel, regulated industries, state law, the commerce requirement, sovereign immunity, and the "act of state" doctrine. Chapter 2 now has several new cases, new text on predatory pricing and vertical integration, more problems, reordered and expanded text on oligopoly, and a few revisions on attempted monopolization. In addition to new cases and problems, Chapter 3 has new or expanded text on per se rules generally, pervasive conspiracy issues, parallel behavior, intra-enterprise conspiracy, and concerted refusals to deal. Chapter 5 substitutes some new cases for obsolete ones, reorders and expands the problems, and has new or expanded text about price and nonprice restraints, tying, and voluntary ties. In Chapter 6, there is some reordering, new text on a variety of matters, including the "toehold" doctrine, and new cases. Chapter 7 has expanded its initial text on the general requirements of Robinson-Patman Act coverage and has several new cases. There is a new appendix reproducing the government guides on international operations to illuminate the application of antitrust law to international transactions and to give the Justice Department's thinking about various domestic restraints. Finally, I note that a number of previously reproduced cases have been edited into more concise form.

Since publication of the previous edition, I have co-authored a still-unfinished prescriptive treatise on this subject. See P. Areeda and D. Turner, Antitrust Law (vols. I-III 1978; vols. IV-V 1980). But the present work makes no greater effort than the previous editions to state my own views on the various matters considered here.

(As one minor point of citation style, please note that "Inc." has been dropped from case names.)

I would like to acknowledge the assistance of Howell Jackson, Mark Levinstein, Stuart Panish, Peter Wallace, and also Deborah Nichols in preparing the manuscript.

P.A.

Cambridge
September, 1980

Preface to the Second Edition

The second edition retains both the editorial format and all the basic features of the first. Updating supplies the occasion for a new edition. All major developments since publication of the first edition in 1967 are reflected in newly reproduced cases, new text, new or elaborated problems, or more comprehensive footnotes. The new material makes the book a much richer research source for the student and even for the practitioner.

Teachers, students, and other users may appreciate the broadened and deepened textual treatment of many legal and economic topics. The text on procedural matters has been expanded significantly in detail but without loss of readability. Also expanded is the introductory text relating the federal antitrust laws to state law and to federal regulatory regimes. The presentations on the patent system, patent licensing restrictions and their possible justifications, tying, package licensing, and mergers also benefit from new text. There is also new material—including cases, text, and problems—devoted to private dealings with government, internal vertical integration, pricing decisions by a single firm, and refusals to deal.

The presentation of economic material has been expanded throughout the book. As with the first edition, the reader without training in economics will find the economics materials intelligible although concise, and neither intimidating nor obscure. The introductory chapter now attempts to present the reader with a primer on the microeconomic concepts, theory, and empirical data most relevant to understanding antitrust law. The concept of oligopoly, or "shared monopoly," is now given a subchapter of its own and presented in greater depth than before. Also much elaborated are the textual discussions of the economics relating to tying arrangements and to mergers.

Again, my primary debt is to my students whose questions, troubles, and enthusiasms have often pointed the way toward improvements. In particular, valuable assistance was provided by John Kirkwood, Jon Meyer, and Barbara Stergis. And Martha Williams's typing, proofreading, and general attention to the manuscript were heroic.

P.A.

Cambridge
January, 1974

Preface

Although this book may have some usefulness elsewhere, it was prepared to meet the threefold needs of my antitrust classes for problems, text, and cases. The cases have, I hope, been edited and organized for maximum ease of comprehension. But an improved casebook was not my primary object. The distinguishing features of this book will be found in its text and in the extensive questions and problems.

Text. I am convinced that a contemporary antitrust course requires a judicious use of text to meet several clear needs. The relevance of economics to antitrust law is unquestioned. Although students need study economic theory and behavior only as useful to the law, they must know about market power, justifications for cartelization, price behavior in markets with few firms, basing-point pricing, the economic rationale of the patent system, manufacturer interests in resale prices, the objects of exclusive dealing arrangements, the competitive significance of large firms and of mergers, and various aspects of price discrimination. These are all subjects of textual discussion in this book, and in addition there is a summary exposition of the competitive system in Chapter 1A. The utility of such material is quite clear. As one example, consider the economics of vertical integration discussed in Chapter 6A. The cases are hardly illuminating, and, in prior years, neither lecture nor class discussion produced anything beyond confusion for most students. By contrast, my class has understood the essentials stated in the textual note. The greater efficiency and effectiveness of economics text is manifest in two respects. First, limited class time is not used for conveying information that is more easily grasped when read and studied. Second, discussion may give the appearance that some members of the class comprehend the economics at hand, but the instructor may be quite uncertain as to how many of the class have mastered the economic argument. To reap these advantages fully, the text is sometimes made more elaborate than would on first consideration seem necessary for law students, in order to meet complications or confusions which in fact have developed in the classroom when a simpler treatment has been used.

A second variety of text is more "legal." Chapter 1 is entirely textual. In addition to the economics material already mentioned, and the historical background of Chapter 1B, there is exposition of two matters that cannot receive full treatment in an antitrust course of usual length. Chapter 1C discusses procedures for enforcing the antitrust laws, and Chapter 1D notes the statutes' "jurisdiction" over interstate and foreign commerce and the major exemptions from the antitrust laws. These sec-

tions attempt to steer a delicate course between undue generality and excessive detail. Text in other chapters has varying objectives. There is the brief exposition of noteworthy issues that can be efficiently developed in text and which do not warrant class time (as in ¶334, intra-enterprise conspiracy, or in ¶507, "fair trade" laws); the compact presentation of an issue analogous to one analyzed in detail through questions and problems (as in ¶521, customer limitations), especially where the related issue lends itself to great compression (as in ¶424, price-fixing in multiple patent licenses); and a presentation of necessary technical details (as in ¶701, jurisdictional requirements of the Robinson-Patman Act).

Third, there are occasional brief paragraphs of introduction, connection, or comment scattered through the book. Finally, there is material that is midway between text and question: questions are put in a way that tends to suggest at least one possible line of answers (as in Chapters 2D and 4E). This device is used where authority is scant, issues are important but difficult, and where conventional text might seem prematurely definitive.

Let me add that I fully appreciate the difficulties in preparing text that is clear, concise, accurate, and yet free of unnecessary detail. This book is, I hope, a useful step in that direction.

Questions and problems. The several hundred questions and problems —categories that I do not distinguish sharply—are the heart of this effort for my own classroom. They try to achieve the advantages and to avoid the disadvantages of both case and problem approaches. Problems force students to manipulate and apply antitrust ideas to difficult issues extracted from complex facts with uncertain economic and legal implications. That process tests the usefulness of doctrine, often demonstrates its inadequacies, and helps students focus both on private planning and on "legislative" considerations.

Adequate problems, however, are sometimes overly complex for effective classroom use. The difficulties are several. Problem analysis and solution often demand prior mastery of numerous cases and concepts, but few students can or will attain that command of a topic at the outset of its consideration. When analysis and solution require so much preparation, many students will do little more than read the cases. More manageable questions will be more adequately prepared.

To discuss a complex problem, moreover, is necessarily to discuss the meaning and reasoning of the relevant cases. The appropriate questions can, of course, be posed orally in class, but I find several overwhelming advantages in providing questions in the coursebook. First, students can and do think about them before class. Second, printed questions eliminate some of the delay, confusion, or misunderstanding inevitable with oral questions. Third, the greater precision of a written question invites more precise responses. Fourth, the structure of questions approximates an outline of the class discussion and thus enhances student understand-

ing and sometimes lessens the compulsion to take notes. The result is greater confidence and a more relaxed classroom attitude.

There is, of course, no single best way to treat an antitrust topic. The teacher must often choose among several historical and analytical avenues. And student confusion may result from opaque opinions, complex facts, elusive business context, and obscure economic implications. In striving for orderly development and maximum clarity, I have endeavored to present questions and problems that are highly structured. The questions and problems are designed to expose easier or basic ideas before complex ones. Where experience has shown that a complicating issue unduly obstructs progress toward "answering" a problem, the complicating factor has either been excluded from the problem or made the subject of a prior question that clears the way for a later inquiry. Although it is neither possible nor desirable to narrow questions and problems too finely, a conscious effort has been made to build from basic ideas to more elusive ones. Indeed, for this purpose, occasional elementary questions with clear-cut answers are scattered through the materials to emphasize fundamental points and to remind students that some "answers" do exist. Other questions and problems vary in specificity, breadth, object, and student role. The statement of facts or of issues or both may be complete or require the student to supplement them. There may be subordinate questions to aid the analysis, or a complete fact statement may pose a variety of issues without further written guidance. The problem may call upon the student to take the viewpoint of businessman, counselor, advocate, judge, or legislator. He may be called upon to identify the legal issues, to use and distinguish cases after careful exegesis, to consider what data are available and how they can be used by either party or the judge, to understand the strengths and limits of the institutions that must decide, to explore the private and social interests at issue, and to resolve the issue as best he can within the limits imposed by the relevant institutions, doctrines, and interests.

Antitrust cases offer a particular challenge to orderly development. Some difficulties have already been noted. In addition, litigants have not arranged their affairs nor have judges written with the needs of the classroom in mind. Yet, in an institutional system in which judges and commissioners have such vital roles in developing and applying antitrust policy, cases provide an object of analysis and discussion, show the tribunals struggling with our problems and creating antitrust law, and, it is hoped, illuminate the subject and the process. Before preparing these materials, I sometimes asked students to read all the reproduced cases on, say, boycotts or tying arrangements and then attempted to discuss the subject as a unit. The results were far less successful than when students read one case, pondered a few questions about it, read another case, then considered questions about both cases, and so on. That is often the pattern of these materials. The questions immediately after a

case will not necessarily exhaust its implications. It sometimes happens that the case that opens a section may not be fully explored until the end of that section, or even later. The effort is to open a theme and then, in orderly stages, to elaborate it with the richness and variations of reality.

Spontaneity and flexibility. The virtues—if such they be—of this structured approach raise two questions. First, will the orderly development and detailed questions reduce classroom spontaneity or give too much away? Experience has provided satisfactory answers. Detailed questions have not reduced classroom spontaneity. The channeling of energies has increased the relevance of student observations or challenges without diminishing their originality, variety, or intensity. Nor was too much given away by the questions, which, for all their detail, often remain quite difficult. The questions seemed to aid all students to grasp the subject and yet tax many to dig deeper. In my own classes there has been a more rapid and more subtle response from more of my students since I began to use these materials.

The other question about structured materials is this: Will other teachers find the structure congenial? The tested sequence of cases, questions, and problems will be useful to those teachers who have not had occasion to develop a different approach to antitrust pedagogy. Other teachers will, I hope, find at least some of the structure suitable for their tastes. But few teachers will use all these materials in the printed sequence. At least on occasion, other teachers will use cases and text without using the questions or will use the questions or problems in a different order. A teacher who wishes to vary the order of topics or their development will find that the book's system of numbered paragraphs will greatly facilitate the task of making up his own syllabus or assignment list.

The questions and problems need not, of course, be used in their entirety. Teachers who prefer to concentrate on problems in class may wish to urge students to answer the nonproblem questions for themselves. Teachers who emphasize case-analysis questions may wish to encourage their students to solve the problems for themselves as an aid to study and review. Indeed, no course of conventional length will have time to consider all the questions, problems, or topics in class. Some selection is therefore inevitable in the use of these materials, which are more extensive than I can cover in a full-year course of two hours per week.[1]

The organization of topics is by no means inevitable. To emphasize the unity of subject matter, I have used only seven chapter divisions. They need not be treated in the order printed.[2] The content and devel-

1. Those who are interested may obtain from the publisher a mimeographed suggestion of useful minimum assignments for shorter courses; also indicated there are omissions in my own course, problems assigned but not discussed in class, and problems recommended for student review without class discussion.

2. I assign portions of Chapter 1 at various points in the course. Chapter 2 (monopoly) could be treated after Chapter 3 (horizontal restraints). Chapter 2D

opment of each chapter is not, in the main, dependent on the order of topics. There are, of course, the usual progressions. Horizontal restraints and monopoly should precede patents. Monopoly, horizontal restraints, tying, and exclusive dealing should precede mergers.[3] Price-fixing must precede most of the other horizontal issues. But most topics need not be pursued in any particular order. The answers to be expected and the development of the discussion will, of course, vary according to what has gone before, but most questions can be usefully discussed regardless of the order of topics.

The questions within each topic need not always be treated in the order in which they are printed, and substantial omissions can usually be made. A topic may include several distinct subtopics. But even where the questions are cumulative, a different progression is usually possible. At only a few points is the solution of a question totally dependent on what has directly preceded it. Most questions can be discussed out of the printed order when the instructor considers some other sequence preferable.

Editorial matters. All Paragraphs other than statutes or principal cases are numbered to facilitate assignment, cross-reference, and general use of the book. Paragraphs of text or case abstracts are identified by boldfaced headings. Paragraphs without headings are questions or problems. Problems should be regarded as entirely hypothetical, although they are sometimes based on the case, if any, cited to the problem. A citation to a problem may simply identify a fact situation or it may identify a discussion of some aspect of the problem. Occasionally, more elaborate footnotes to a question or problem will provide considerable information about the relevant cases.

Some of the principal cases have been edited severely, but omissions are indicated in the conventional way with these exceptions: omitted without further notation are repetitive statutory or code citations to the

(attempts to monopolize) could be treated after Chapter 5A (distribution) or at many other points. Chapter 4 (patents) could be treated anytime after Chapters 2 and 3, although I think that it would not be desirable to interrupt the flow from Chapter 5 (vertical restraints) to Chapter 6 (mergers). Chapter 7 (price discrimination) is rather self-contained and could be treated at any time.

3. A particular word about the unconventional organization of the merger chapter may be in order. Although the last three sections of Chapter 6 do separate vertical, horizontal, and conglomerate mergers, the economic analysis and historical background do not readily divide in that way. Chapter 6A may seem more intricate than is necessary to treat conventional horizontal and vertical mergers, but it does provide an essential underpinning for the subtle and complicating factors that students invariably introduce into the discussion of "simple" horizontal and vertical mergers. Students are then invited to use some of these complex ideas in ¶629, which is, moreover, a difficult but efficient bridge from Chapter 5. Students may not fully absorb Chapter 6A on the first reading, but they will have occasions to refer back to particular paragraphs at numerous points in the development and discussion of Chapter 6.

antitrust laws, repetitive reporter references within an opinion, cross-references within an opinion, citations for a court's references to a lower court decision in the same case, and excessive citations by a court to a case already cited. Footnotes are frequently omitted from quoted material; reproduced footnotes retain their original numbers. Footnotes within a case are always those of the court unless my initials or the context unmistakably indicates otherwise. Finally, it should be noted that very occasional liberties have been taken with punctuation, capitalization, and paragraphing in the course of editing.

Acknowledgments. I wish to acknowledge my debt to my students. Their questions and their responses to my questions have greatly influenced the shape and content of this book. In particular, valuable assistance was provided from time to time by David Bonderman, Louis Cohen, John Cramer, Keith Jones, Peter Lockwood, and Robert Winter. I am grateful to them all.

P.A.

Cambridge
January, 1967

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