

ANTITRUST LAW
INTERPRETATION AND
IMPLEMENTATION

FOURTH EDITION

CHARLES J. GOETZ
FRED S. MCCHESENEY

FOUNDATION PRESS

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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.

PREFACE

PREFACE TO THE FOURTH EDITION

As we prepared the manuscript for the previous edition of this text some three years ago, few observers (certainly not the two of us) could have predicted the changes in antitrust jurisprudence then about to occur. But perhaps we should have been ready. The Supreme Court has in the past treated antitrust fitfully: periods of general lack of interest alternate with paroxysms of important clarifications in the law, even the creation of new law. The 1977 cases concerning the law of vertical restraints and antitrust standing now stand out as watersheds in the development of modern antitrust. So, we believe, will the cases in 2006-07 in a variety of areas come to be seen as exceptionally important changes in antitrust law.

Perhaps most notable has been the change in the law of vertical price restraints, reflected in our completely revamped Ch. 5 for this edition. But other changes or clarifications that have distinguished the years just past—such as clarifications of the law of tying and the requirements for showing concerted rather than unilateral behavior—are also presented here. And, because the Court will soon consider the law of vertical “prize squeezes,” so has material related to possible future developments in that area of the law also been included.

Evolution in the law necessitates changes in casebooks, it is true. Nonetheless, this latest edition re-emphasizes the features explaining 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 below.) 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.

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.

Student contribution to this fourth edition from Anatoly Smolkin, 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, 2008

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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 roadmap 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 citations 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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TABLE OF CASES

Principal and summary cases appear in boldface.
References are to page number.

- 324 *Liquor Corp. v. Duffy*, 837, 839
A.D. Bedell Wholesale Co. v. Philip Morris, Inc., 201
Aamco Automatic Transmissions, Inc. v. Tayloe, 616
Abcor Corp. v. AM International, Inc., 414
Addyston Pipe & Steel Co., United States v., 47, 96, **101**, 117, 136, 215, 230, 716, 792
Advo, Inc. v. Philadelphia Newspapers, Inc., 445
Albrecht v. Herald Co., 536
Alexander v. National Farmers Organization, 289, 290
Allied Tube & Conduit Corp. v. Indian Head, Inc., 196, 856, 860, 862
Alpha Delta Psi, Inc. v. Hamilton College, 506
Aluminum Co. of America, United States v., 18, 252, **357**, 407, 429, 458, 476, 483
Amalgamated Meat Cutters Local 189 v. Jewel Tea Co., 247
Amer. Tobacco Co. v. United States, 289
Amerel v. Connell, 38
American Ad Mgmt. v. GTE Corp., 208
American Banana Co. v. United Fruit Co., 880
American Column & Lumber v. United States, 292, 305
American Key Corp. v. Cole National Corp., 389
American Linseed Oil Co., United States v., 305
American Soc. of Mech. Engineers v. Hydrolevel Corp., 152, 236, 237, 284
American Tobacco Co., United States v., 110
Anron v. Morgan Stanley Inv. Advisors Inc., 72
Anderson v. Liberty Lobby, Inc., 418
Antitrust Litigation, In re, 72, 182
Apex Hosiery Co. v. Leader, 230, 236
Appalachian Coals, Inc. v. United States, **104**
Arista Records LLC v. Lime Group LLC, 68
Arizona v. Maricopa County Medical Soc., 42, **192**, 222, 783, 818, 843
Arnold Pontiac-GMC v. General Motors, 265
Arnold, Schwinn & Co., United States v., 26
Aro Manufacturing Co. v. Convertible Top Replacement Co., 274
Aspen Skiing Co. v. Aspen Highlands Skiing Corp., **13**, 451, 455, 462
Assn. of Cleveland Fire Fighters v. City of Cleveland, 182
Associated Gen. Contractors v. Cal. State Council of Carpenters, 73, 809
Associated Press v. United States, 42, 456, 458
AT & T Corp. v. Iowa Utilities Bd., 177, 464
Atlantic Richfield Co. v. USA Petroleum Co., 73, 74, 435, 575, **815**
Audio Car Stereo v. Little Guys, 356
Baby Foods Antitrust Litig., In re, 323
Baker Hughes, Inc., United States v., 746
Barry Wright Corp. v. ITT Grinnell Corp., 257, 425, 427, 431, 471, 490
Bates v. State Bar of Ariz., 208, 225
Beachner Construction Co., United States v., 267
Beef Industry Antitrust Litigation, In re, 323
Bell Atlantic Corp. v. Twombly, 72, 78, 177, 187
Berkey Photo, Inc. v. Eastman Kodak Co., 458
Bernstein v. Universal Pictures, Inc., 163
Berry v. City of Detroit, 337
Bhan v. NME Hosps., Inc., 204
Bill Beasley Farms, Inc. v. Hubbard Farms, 290
Blackwelder Furniture Co. v. Seilig Mfg. Co., 598
Blue Cross & Blue Shield Of Wisconsin v. Marshfield Clinic, 379
Blue Shield of Virginia v. McCready, 808
Bogan v. Hodgkins, 788
Bolt v. Halifax Hosp. Medical Center, 175, 328
Brand Name Prescription Drugs Antitrust Litig., In re, 56
Brand Name Prescription Drugs Antitrust Litig., In re, 265
Broadcast Music v. CBS, 49, **140**, 152, 215, 225, 313, 385, 440, 792, 794
Broadway Delivery Corp. v. United Parcel Service, 387

- Brooke Group v. Brown & Williamson Tobacco Corp.**, 324, 329, 384, 431, 466, 482, 489, 786
- Brown Shoe Co. v. United States**, 11, 419, 436, 600, 716, 735, 811, 877
- Brown University, United States v.**, 233
- Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.**, 73, 252, 426, 488, 808, 810, 825
- Bulk Oil (ZUG) A.G. v. Sun Co.**, 882
- Business Elecs. Corp. v. Sharp Elecs. Corp.**, 542, 791, 792
- California Computer Products v. IBM Corp.**, 448, 520
- California Dental Ass'n v. FTC**, 201, 223, 225, 783
- California Motor Transport Co. v. Trucking Unlimited**, 856, 860, 861, 868
- California Retail Liquor Dealers v. Midcal Aluminum**, 837, 838
- California v. ARC America Corp.**, 806
- Cargill, Inc. v. Monfort of Colorado**, 426, 435, 437, 489, 807
- Catalano, Inc. v. Target Sales, Inc.**, 226, 237, 343, 794
- CBS v. ASCAP**, 204
- CBT Flint Partners v. Goodmail Systems**, 183
- Celotex Corp. v. Catrett**, 451
- Cement Mfrs. Protective Assn. v. United States**, 96, 305, 344
- Chawla v. Shell Oil Co.**, 650
- Chicago Board of Trade v. United States**, 27, 31, 128, 137, 664
- Chicago Prof'l Sports Ltd Partnership v. NBA**, 238
- Citizens & Southern Nat. Bank, United States v.**, 464
- City of Anaheim v. Southern. Calif. Edison Co.**, 482, 483
- City of Columbia v. Omni Outdoor Advertising, Inc.**, 840, 850, 862, 865
- City of Lafayette v. Louisiana Power & Light Co.**, 840
- City of Tuscaloosa v. Harcros Chemicals, Inc.** (11th C. 1998), 336
- City of Tuscaloosa v. Harcros Chemicals, Inc. (1995)**, 323
- Clarke v. Baptist Mem'l Healthcare Corp.**, 313
- Coastal Fuels Inc. v. Caribbean Petroleum Corp.**, 57
- Coleman Motor Co. v. Chrysler Corp.**, 30
- Colgate & Co., United States v.**, 18, 462, 498, 535, 539, 674
- Columbia Steel Co., United States v.**, 716
- Community Communications Co. v. City of Boulder**, 841, 851
- Conley v. Gibson**, 182
- Consolidated Laundries Corp., United States v.**, 290
- Consolidated Metal Prods. v. American Petroleum Inst.**, 309
- Consolidated Packaging Corp., United States v.**, 269
- Container Corp. of America, United States v.**, 291, 297, 304, 311, 317
- Continental Cablevision of Ohio, Inc. v. American Electric Power Co.**, 323
- Continental Can Co., United States v.**, 694
- Continental T.V., Inc. v. GTE Sylvania, Inc.**, 26, 46, 152, 216, 539, 557, 580, 600, 656, 791, 794
- Continental T.V., Inc. v. GTE Sylvania, Inc. (remand to 9th C.)**, 566
- Conwood Co., L.P. v. U.S. Tobacco Co.**, 697
- Copper Antitrust Litig., In re**, 322
- Copperweld Corp. v. Independence Tube Corp.**, 36, 40, 41, 214, 675, 787, 791
- Cornwell Quality Tools Co. v. C.T.S. Co.**, 28
- Cost Mgmt. Servs. v. Washington Natural Gas Co.**, 57
- Covad Communications Co. v. Bell Atlantic Corp.**, 481, 485
- Credit Suisse Securities v. Billing**, 184, 187
- Cuvillier v. Taylor**, 182
- D.E.L.T.A. Rescue v. The Humane Soc. of the U.S., Inc.**, 229
- Dagher v. Saudi Refining Inc.**, 780
- Danik, Inc. v. Hartmarx Corp.**, 314
- Data General Corp. v. Grumman Systems Support Corp.**, 24
- Datagate, Inc. v. Hewlett-Packard Co.**, 628
- Day v. Taylor**, 553
- de Atucha v. Commodity Exchange**, 915
- DeLong Equipment Co. v. Washington Mills Electro Minerals Corp.**, 546
- Dial A Car, Inc. v. Transportation, Inc.**, 445
- Dimmit Agri Industries v. CPC International, Inc.**, 386
- Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc.**, 290
- Dr. Miles Medical Co. v. John D. Park & Sons**, 539
- Duplan Corp. v. Deering Milliken Inc.**, 284
- E.C. Knight Co., United States v.**, 99, 184, 833
- E.I. Du Pont de Nemours & Co. (Cellophane), United States v.**, 56, 452, 739
- E.I. Du Pont de Nemours & Co. v. FTC. ["Ethyl Case"]**, 328, 491
- Eastern RR. Presidents Conf. v. Noerr Motor Freight Co.**, 195, 845
- Eastern States Retail Lumber Dealers' Assoc. v. United States**, 117, 118, 536
- Eastman Kodak Co. v. Image Technical Services**, 57, 438, 642
- Eichler v. Berner**, 163
- Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.**, 891
- Ervin v. Johnson & Johnson, Inc.**, 338
- Exxon Corp. v. Governor of Maryland.**, 833
- Falstaff Brewing, United States v.**, 62, 730
- Fashion Originators' Guild of America v. FTC**, 42, 115, 411
- Fatico, United States v.**, 67
- Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs**, 249

- Filetech S.A.R.L. v. France Telecom** (S.D.N.Y. 1997), 904
- Filetech S.A.R.L. v. France Telecom** (S.D.N.Y. 2001), 892
- Finnegan v. Campeau Corp.*, 188
- Fishman v. Estate of Wirtz*, 453, 473
- Flood v. Kuhn*, 249
- Florida Fuels, Inc. v. Krueder Oil Co.**, 449
- FMC Corp., United States v.*, 303
- Ford Motor Co. v. United States*, 709
- Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 448
- Freeman v. San Diego Ass'n of Realtors*, 787
- FTC v. Brown Shoe Co.*, 497
- FTC v. Cement Institute*, 341
- FTC v. Consolidated Foods Corp.*, 738
- FTC v. Indiana Federation of Dentists**, 171, 204, 235, 238, 243, 351, 353, 683
- FTC v. PPG Industries, Inc.*, 746
- FTC v. Procter & Gamble Co.**, 62, 720, 729
- FTC v. Staples, Inc.*, 745
- FTC v. Superior Ct. Trial Lawyers Assn.**, 56, 194, 244, 656, 862, 877
- Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 453, 456
- General Atomic Co. v. Exxon Nuclear Corp.**, 86
- General Dynamics Corp., United States v.**, 733
- General Electric Co., United States v.*, 547, 555
- General Industries Corp. v. Hartz Mountain Corp.*, 417
- General Leaseways, Inc. v. National Truck Leasing Assn.*, 163, 198, 578
- General Motors Corp., United States v.*, 265
- Gibbons v. Ogden*, 230
- Goldfarb v. Va. State Bar*, 135, 152, 236, 239, 244, 688, 878
- Graphic Products Distributors, Inc. v. Itek Corp.**, 24, 76
- Great Atlantic & Pacific Tea Co. v. FTC*, 434
- Greene v. General Foods Corp.*, 555
- Griffith, United States v.*, 204, 406
- Grinnell Corp., United States v.*, 374
- Group Life & Health Insurance Co. v. Royal Drug Co.*, 248
- H & B Equipment Co. v. International Harvester Co.*, 29
- Hack v. Yale College*, 650
- Hallie v. Eau Claire*, 851
- Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College*, 650
- Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 796
- Hardwick v. Nu-Way Oil Co.*, 556
- Hartford Fire Insurance Co. v. California*, 891, 902, 906
- Hawaii v. Standard Oil Co. of Cal.*, 194, 799, 803, 805
- Hertz Corp. v. City of New York**, 838
- Hoffmann-La Roche, Ltd. v. Empagran S.A.**, 884
- Horsley v. Feldt*, 554
- Horst v. Laidlaw Waste Systems, Inc.*, 746
- Hospital Bldg. Co. v. Rex Hospital Trustees*, 872
- Hospital Corp. of America v. FTC**, 352, 384, 748
- Illinois Brick Co. v. Illinois**, 81, 194, 796
- Illinois Tool Works v. Independent Ink**, 653, 656
- Indian Coffee Corp. v. Procter & Gamble Co.*, 445
- International Assn. of Machinists v. OPEC*, 883
- International Business Machines Corp. v. United States*, 608
- International Salt Co. v. United States**, 605, 656, 660
- International Shoe Co. v. FTC*, 736
- Internatl. Distrib. Ctrs., Inc. v. Walsh Trucking*, 57
- Interstate Circuit, Inc. v. United States*, 351
- Iqbal v. Hasty*, 72
- Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 445
- Jack Winter, Inc. v. Koratron Co., Inc.*, 303
- Jacob Blinder & Sons, Inc. v. Gerber Prods. Co.*, 323
- Jefferson Parish Hosp. Dist. No. 2 v. Hyde**, 217, 238, 429, 471, 600, 616, 648, 656, 675, 694
- Joint Traffic Association, United States v.*, 101, 109
- K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 56
- Kansas and Missouri v. Utilicorp United, Inc.*, 805
- Kartell v. Blue Shield of Massachusetts*, 194
- Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 30
- Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 42, 168, 176, 222, 874
- L.C. Williams Oil Co. v. Exxon Corp.*, 601
- L.C.L. Theatres, Inc. v. Columbia Pictures Industries, Inc.*, 303
- Lafayette v. Louisiana Power & Light Co.*, 851
- Laker Airways v. Sabena, Belgian World Airlines*, 882
- Law v. NCAA*, 227
- Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 189, 656
- Local Beauty Supply, Inc. v. Lamaur, Inc.*, 531, 825, 828
- Lorain Journal Co. v. United States*, 17, 421, 456

- M&M Medical Supplies and Serv., Inc v. Pleasant Valley Hosp., Inc.*, 339
- Maiz v. Virani*, 337
- Mannington Mills, Inc. v. Congoleum Corp.*, 882
- Maple Flooring Mfrs. Assn. v. United States*, 295, 297, 310
- Marine Bancorporation, United States v.*, 731
- Maryland & Virginia Milk Producers Association v. United States*, 248
- Massachusetts Board of Registration in Optometry, In re*, 203, 219, 221
- Matsushita Elec. Indus. Co. v. Zenith Radio Corp.***, 74, 80, **249**, 316, 451, 465, 782, 812, 878
- Maxwell Communication Corp., In re*, 904, 908
- MCI Communications Corp. v. AT&T Corp.*, 458
- McLain v. Real Estate Bd. of New Orleans, Inc.*, 291, 873, 875
- Medical Arts Pharmacy of Stamford v. Blue Cross & Blue Shield of Conn.*, 194
- Menasha Corp. v. News America Marketing In-Store***, **692**
- Mercantile Texas Corp. v. Bd. of Govs. of the Fed. Reserve System*, 732
- Merit Motors, Inc. v. Chrysler Corp.*, 339
- Microbyte Corp. v. N.J. State Golf Ass'n*, 616
- Microsoft Corp. Antitrust Litig., In re*, 806
- Microsoft Corp., United States v.* (1995), 510
- Microsoft Corp., United States v.* (1998), 510
- Microsoft Corp., United States v.* (D.C. Cir. 2001), 223, 465, 519, 656
- Microsoft Corp., United States v.* (D.D.C. 1999), 510
- Microsoft Corp., United States v.* (D.D.C. 2000), 510
- Microsoft v. United States* (2000), 679
- Microsoft, U.S. v.***, **652**
- Mid-State Fertilizer Co. v. Exchange National Bank of Chicago*, 339
- Mid-Texas Communications Sys., Inc. v. AT&T*, 520
- Military Services Realty, Inc. v. Realty Consultants of Virginia, Ltd.*, 418
- Mitchel v. Reynold*, 136
- Monsanto Co. v. Spray-Rite Service Corp.***, 80, 254, 259, 265, 351, 451, **538**, 674, 782
- Monument Builders of Greater Kansas City, Inc. v. American Cemetery Ass'n*, 290
- Morrison v. Murray Biscuit Co.*, 548
- Mozart Co. v. Mercedes-Benz of North America, Inc.*, 608
- Murrow Furniture v. Thomasville Furniture Industries***, **596**
- NAACP v. Claiborne Hardware Co.*, 196, 862
- National Assn. of Real Estate Boards, United States v.*, 291
- National Bancard Corp. v. VISA U.S.A., Inc.*, 387
- National Bank of Canada v. Interbank Card Association*, 880
- National Society of Professional Engineers v. United States***, **134**, 222, 235, 344, 577
- Natl. Assn. of Securities Dealers, Inc., United States v.*, 461
- NCAA v. Board of Regents of the Univ. of Okla.***, **42**, **49**, **56**, **148**, **191**, **204**, **215**, **217**, **222**, **236**, **242**, **313**, **385**, **440**, **656**
- Newberry v. Washington Post Co.*, 538
- No. Jackson Pharm., Inc. v. Caremarket RX, Inc.*, 218
- North Texas Specialty Physicians v. FTC*, 228
- Northern Pacific Ry. Co. v. United States*, 42, 122, 471, 609, 656
- Northern Securities Co. v. United States*, 603, 716
- Northwest Publications, Inc. v. Crumb*, 538, 574
- Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.***, **43**, **49**, **51**, **165**, **350**
- NYNEX Corp. v. Discon, Inc.*, 175, 288, 352
- O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 895, 905
- Oahu Gas Serv., Inc. v. Pacific Resources Inc.*, 448
- Ohio v. Louis Trauth Dairy*, 337
- Olsen v. Progressive Music Supply, Inc.*, 290
- Oltz v. St. Peter's Community Hospital*, 174
- Olympia Equipment Leasing v. Western Union Telegraph*, 452
- Omni Outdoor Advertising v. Columbia Outdoor Advertising*, 213
- Oracle Corp., United States v.*, 758
- Orson, Inc. v. Miramax Film Corp.*, 174
- Otter Tail Power Co. v. United States*, 456, 458, 463, 470, 861, 868
- Ozee v. American Council on Gift Annuities*, 233
- Pacific Bell Tel. Co. v. linkLine Communications, Inc.***, **481**
- Palmer v. BRG of Georgia, Inc.***, **197**, **385**, **794**
- Palmer, United States v.*, 290
- Paoli Railroad Yard PCB Litigation, In re*, 338
- Paramount Pictures, Inc., United States v.*, 284
- Parke, Davis & Co., United States v.*, 536, 537
- Parker v. Brown***, **830**
- Paycom Billing Servs. v. Mastercard Int'l, Inc.*, 72
- Pennsylvania Avenue Funds v. Borey***, **186**
- Perma Life Mufflers, Inc. v. International Parts Corp.*, 36, 162
- Petroleum Prod. Antitrust Litig., In re Coordinated Pretrial Proceedings in*, 312
- Petroleum Products Antitrust Litigation, In Re***, **314**
- Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 337
- Philadelphia Nat. Bank, United States v.*, 377, 393

- Philadelphia Natl. Bank, United States v.*, 59, 61, 719, 735
 Plywood Antitrust Litigation, In re, 341
Polk Brothers v. Forest City Enterprises, 214, 226
Polygram Holding, Inc. v. FTC (DC. C. 2005), 220
PolyGram Holding, Inc., In re (FTC 2003), 219
Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 73
Power East Ltd. v. Transamerica Delaval Inc., 882
Professional Real Estate Investors v. Columbia Pictures, 858
Queen City Pizza, Inc. v. Domino's Pizza, Inc., 57, 650
Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 168, 346
Rebel Oil Co., Inc. v. Atlantic Richfield Co., 191, 339, 746
Reiter v. Sonotone Corp., 154
Republic of Argentina v. Weltover, Inc., 895, 896
Republic Tobacco Co. v. North Atlantic Trading Co., 356
Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 328
Richter Concrete Corp., United States v., 303
Ridge at Red Hawk, LLC v. Schneider, 182
Rockford Memorial Corp., U.S. v., 692
Roland Machinery Co. v. Dresser Industries, Inc., 669, 680
Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 11, 38, 39, 470, 792
Russell Stover Candies, Inc. v. FTC, 538, 674
Ryko Manufacturing Co. v. Eden Services, 387
Santa Cruz Medical v. Dominican Santa Cruz Hosp., 692, 768
Sargent, United States v., 270
Schooner Exchange v. McFaddon, 883
Schreiber v. Burlington Northern, Inc., 188
Schwegmann Brothers v. Calvert Distillers Corp., 855, 869
Sealy, Inc., United States v., 42, 123
Siegel v. Chicken Delight, Inc., 609
Silver v. New York Stock Exchange, 166
Simpson v. Union Oil Co., 547, 554, 555
Smithkline Beecham Corp. v. Eastern Applicators, Inc., 273
Society of Professional Engineers, 173
Socony-Vacuum Oil Co., United States v., 106, 144, 222, 291, 297, 298, 308, 353, 572
Spectrum Sports, Inc. v. McQuillan, 289, 869
Standard Manufacturing Co. v. United States, 104
Standard Oil Co. of Cal. v. United States, 683
Standard Oil Co. v. FTC, 241, 434
Standard Oil Co. v. United States, 110, 137, 497, 519, 604, 611, 614, 641, 659, 667, 668, 674
State Oil Co. v. Khan, 128, 574, 588, 656, 790
Steel Co. v. Citizens for Better Environment, 466
Sugar Institute v. United States, 310, 343
Summit Health, Ltd. v. Pinhas, 871
Swift & Co. v. United States, 230
Syufy Enterprises v. American Multicinema, Inc., 775
Syufy Enterprises, United States v., 65, 746
Tampa Electric Co. v. Nashville Coal Co., 218, 393, 601, 666, 683
Tenneco, Inc. v. FTC, 732
Terminal Railroad Assn. of St. Louis, United States v., 16, 452, 463
Texaco Inc. v. Dagher, 189
Texas Industries, Inc. v. Radcliff Material, Inc., 274
Texas Trading v. Federal Republic of Nigeria, 900
The Five Smiths, Inc. v. N.F.L. Players Association, 306
Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 179, 499
Timberlane Lumber Co. v. Bank of America, 881, 905
Times-Picayune Pub. Co. v. United States, 204, 415, 429, 669
Todorov v. DCH Healthcare Authority, 338, 820, 833
Topco Assocs., Inc., United States v., 42, 48, 119, 199, 466, 793
Town of Concord v. Boston Edison Co., 8, 464, 467
Town of Hallie v. City of Eau Claire, 834, 835, 836
Toys "R" Us, Inc. v. FTC, 347
Trans-Missouri Freight Assn., United States v., 99, 117, 136, 536
Transnor (Bermuda) Ltd. v. BP North American Petroleum, 915
Trenton Potteries Co., United States v., 103, 110, 112, 113, 124, 572
Union Labor Life Insurance Co. v. Pireno, 248
Union Pacific R. Co. v. United States, 852, 853
United Air Lines, Inc. v. Austin Travel Corp., 387
United Mine Workers v. Pennington, 247, 447, 855
United Phosphorus, Ltd. v. Angus Chemical Co., 915
United Shoe Machinery Corp. v. United States, 407
United Shoe Machinery Corp., United States v., 396, 520

- United States Football League v. National Football League*, 313
- United States Gypsum Co., United States v.***, 303, 307
- United States Steel Corp., United States v.*, 716
- Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 449
- Uranium Antitrust Litigation, In re*, 882
- Utah Pie Co. v. Continental Baking Co.*, 430, 435
- Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 387
- Vendo Co. v. Lektro-Vend Corp.*, 862
- Ventimiglia v. United States*, 291
- Verizon Communications, Inc. v. Trinko***, 79, 178, 459, 481
- Viacom International v. Tele-Communications, Inc.*, 448
- Virginia Vermiculite Ltd. v. W.R. Grace & Co.* (1997), 505
- Virginia Vermiculite Ltd. v. W.R. Grace & Co.* (4th C., 1998), 284
- Virginia Vermiculite Ltd. v. W.R. Grace & Co.*** (W.D.Va. 2000), 288
- Visa U.S.A., Inc., United States v.***, 567, 793
- Von's Grocery Co., United States v.***, 65, 710, 734
- Wabash, St. Louis & Pacific Railway v. Illinois*, 833
- Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 72
- Waste Management, Inc., United States v.***, 58
- Western Res., Inc. v. Surface Transp. Bd.*, 488
- Wickard v. Filburn*, 833
- Wilk v. American Medical Association*, 174
- William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 428, 431
- Winship, In re*, 67
- Woman's Clinic, Inc. v. St. John's Health Sys.*, 218
- Yamaha Motor Co. v. FTC*, 732
- Yellow Cab Co., United States v.*, 289, 290
- Yentsch v. Texaco, Inc.*, 674
- Zenith Radio Corp. v. Hazeltine Research, Inc.*, 274
- Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 881

SUMMARY OF CONTENTS

PREFACE	V
SUMMARY OF CONTENTS	ix
TABLE OF CONTENTS	xv
TABLE OF CASES	xxvii

CHAPTER 1: INTRODUCTION AND OVERVIEW 1

Sec.	Page
A. The Law And Economics Of Antitrust	1
1. The Sale of Mineral Water in Cournotia	2
2. Some Analytic Extensions and Formalizations.....	4
a. Translation into Graphical Models	4
b. The Dilemma of Rivalistic Behavior	6
3. Assumptions and Premises: Economic Modeling and Legal Reasoning	7
a. Assumptions in Social Science.....	8
b. Economic Efficiency: The Core Premise of Antitrust?	10
B. An Overview Of Antitrust In The Courts	12
1. Monopolization	12
2. Vertical Restraints	24
3. Conspiracy to Restrain Trade.....	39
4. Injury to Competition Through Mergers	57
5. Special Requirements for Private Recovery	68

CHAPTER 2: CONSPIRACIES IN RESTRAINT OF TRADE 83

Sec.	Page
A. The Mechanics Of Price-Fixing Arrangements.....	83
1. How Price-Fixing Works: The Uranium Cartel	83
a. Business Background and Politico-Legal History	83

b. Official Rules of the Uranium Cartel	88
c. Discussion Problem: McGinty's Gasoline Cartel	92
2. The Normative Pros and Cons of Cartels (and Antitrust Enforcement)	94
a. "Ruinous Competition"	94
b. Self-Help Remedies in Contract	96
c. Lower Prices Through Collusion	97
d. Property Rights and Establishment of Efficient Prices	98
e. Enforcement of Rules Against Price-fixing	98
B. Classic Early Cases	99
Notes and Questions	106
C. Doctrinal Foundations Of §1	106
1. <i>Per Se</i> Violations	106
2. Rule of Reason	128
Note: The Rule of Reason and Definition of Relevant Markets	133
D. Doctrinal Reformulations	140
1. Loosening of <i>Per Se</i> Rules	140
a. Price-fixing	140
b. Concerted Refusals to Deal	165
2. The "Early Exit" Route in Antitrust Cases	177
a. Factual Sufficiency Post- <i>Twombly</i>	177
b. Preclusion	184
c. Reviewing a Securities Case Dismissal	186
3. Reaffirmations of <i>Per Se</i> Rules	192
E. An Emerging Non-Dichotomous Presumption-Based Analysis (?)	198
1. The "Quick Look" as a Presumption-determining Tool	199
2. Ancillarity as a Pigeonholing Principle	213
3. FTC Standards for Evaluating Horizontal Agreements	218
CHAPTER 3: FURTHER ISSUES CONCERNING COLLUSION	229
Sec.	Page
A. Applicability Of The Sherman Act	229
1. Commercial vs. Non-Commercial Activities	229