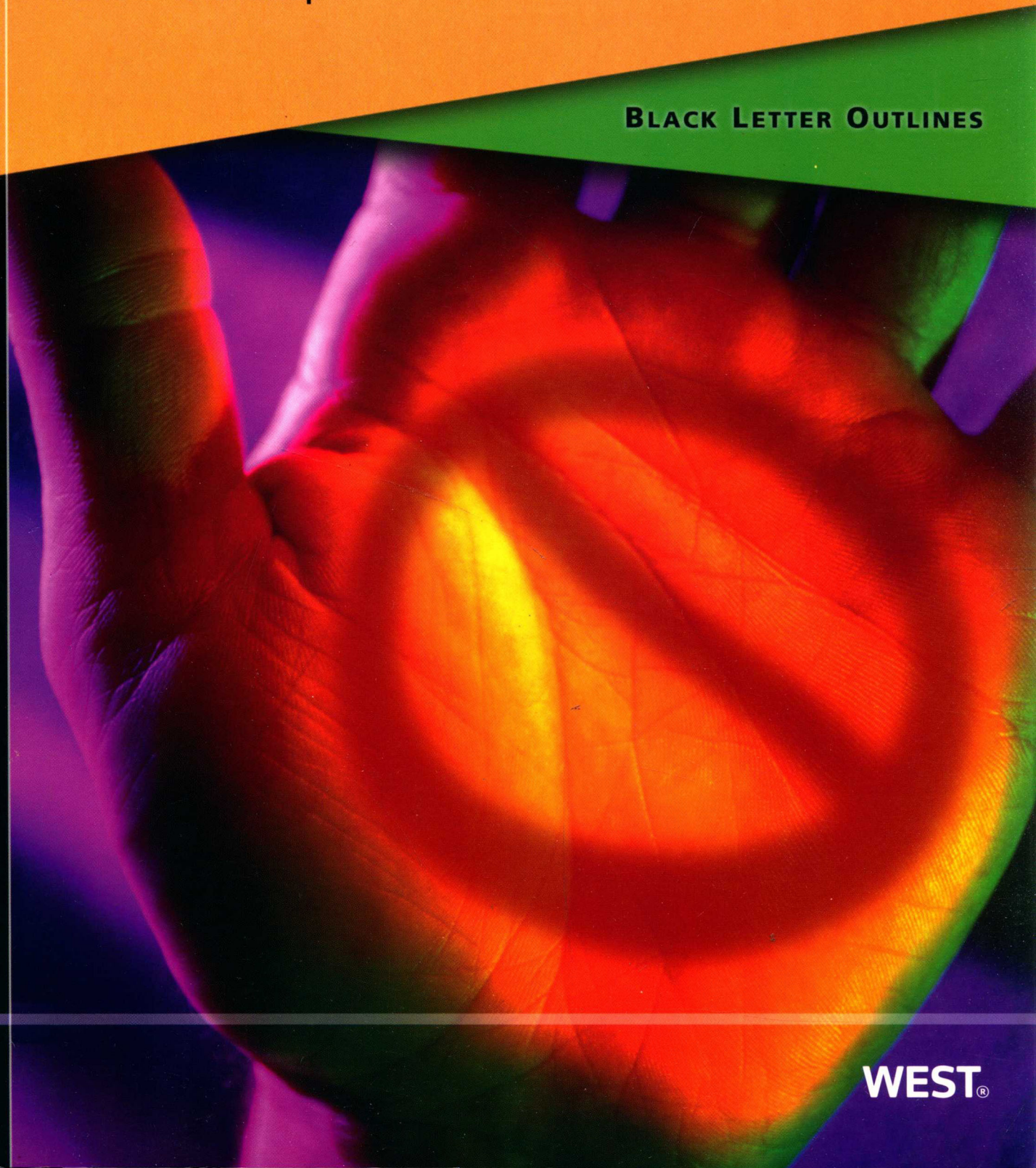


FIFTH EDITION

Antitrust

Herbert Hovenkamp

BLACK LETTER OUTLINES



WEST®

B L A C K L E T T E R O U T L I N E S

Antitrust

by Herbert Hovenkamp

Ben V. & Dorothy Willie Professor
University of Iowa
College of Law

FIFTH EDITION

常州大学图书馆
藏书章

WEST®

A Thomson Reuters business

Thomson Reuters created this publication to provide you with accurate and authoritative information concerning the subject matter covered. However, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. Thomson Reuters does not render legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

Black Letter Series and Black Letter Series design appearing on the front cover are trademarks registered in the U.S. Patent and Trademark Office.

COPYRIGHT © 1986, 1993 WEST PUBLISHING CO.

© West, a Thomson business, 1999, 2005

© 2011 Thomson Reuters

610 Opperman Drive

St. Paul, MN 55123

1-800-313-9378

Printed in the United States of America

ISBN 978-0-314-27448-9

Antitrust

West's Law School Advisory Board

JESSE H. CHOPER

Professor of Law,
University of California, Berkeley

JOSHUA DRESSLER

Professor of Law, Michael E. Moritz College of Law,
The Ohio State University

YALE KAMISAR

Professor of Law, University of San Diego
Professor of Law, University of Michigan

MARY KAY KANE

Professor of Law, Chancellor and Dean Emeritus,
University of California,
Hastings College of the Law

LARRY D. KRAMER

Dean and Professor of Law, Stanford Law School

JONATHAN R. MACEY

Professor of Law, Yale Law School

ARTHUR R. MILLER

University Professor, New York University
Formerly Bruce Bromley Professor of Law, Harvard University

GRANT S. NELSON

Professor of Law, Pepperdine University
Professor of Law Emeritus, University of California, Los Angeles

A. BENJAMIN SPENCER

Professor of Law,
Washington & Lee University School of Law

JAMES J. WHITE

Professor of Law, University of Michigan

Dedication

To Arie, Erik and Mira

HERBERT HOVENKAMP holds the Ben V. and Dorothy Willie Chair at the University of Iowa College of Law. He received his Ph.D. and J.D. at the University of Texas. He is a Fellow of the American Academy of Arts and Sciences and the recipient of the Sherman Award from the United States Department of Justice, Antitrust Division, for his lifelong contributions to antitrust. He has written numerous books and articles, including the 21 Volume Antitrust Law treatise (formerly with the late Phillip E Areeda and the late Donald F. Turner); and *The Antitrust Enterprise: Principle and Execution* (Harvard Univ. Press 2006). He has also published several books for West Publishing Co., including *Federal Antitrust Policy: The Law of Competition and its Practice* (4th Ed. 2011); and *Cases and Materials on American Property Law* (with Sheldon Kurtz); and *The Law of Property, an Introductory Survey* (with Kurtz). In addition to antitrust, Professor Hovenkamp teaches property, torts, and introduction to intellectual property.

Preface

This "Black Letter" is designed to help a law student recognize and understand the basic principles and issues of law covered in a law school course. It can be used both as a study aid when preparing for classes and as a review of the subject matter when studying for an examination.

Each "Black Letter" is written by experienced law school teachers who are recognized national authorities on the subject covered.

The law is succinctly stated by the authors of this "Black Letter." In addition, the exceptions to the rules are stated in the text. The rules and exceptions have purposely been condensed to facilitate quick and easy recollection. For an in-depth study of a point of law, citations to major student texts are given. In addition, a Text Correlation Chart provides a convenient means of relating material contained in the Black Letter to appropriate sections of the casebook the student is using in his or her law school course.

If the subject covered by this text is a code or code-related course, the code section or rule is set forth and discussed wherever applicable.

FORMAT

The format of this "Black Letter" is specially designed for review. (1) **Text.** First, it is recommended that the entire text be studied and, if deemed necessary, supplemented by the student texts cited. (2) **Capsule Summary.** The Capsule Summary is an abbreviated review of the subject matter which can be used both before and after studying the main body of the text. The headings in the Capsule

Summary follow the main text of the "Black Letter." (3) **Table of Contents.** The Table of Contents is in outline form to help you organize the details of the subject and the Summary of Contents gives you a final overview of the materials. (4) **Sample Examination.** The Sample Examinations in Appendix A give you the opportunity to test yourself with the type of questions asked on an exam and compare your answer with a model answer.

In addition, a number of other features are included to help you understand the subject matter and prepare for examinations:

Perspective: In this feature, the authors discuss their approach to the topic, the approach used in preparing the materials, and any tips on studying for and writing examinations.

Analysis: This feature, at the beginning of each section, is designed to give a quick summary of a particular section to help you recall the subject matter and to help you determine which areas need the most extensive review.

Examples: This feature is designed to illustrate, through fact situations, the law just stated. This, we believe, should help you analytically approach a question on the examination.

Glossary: This feature is designed to refamiliarize you with the meaning of a particular legal term. We believe that the recognition of words of art used in an examination helps you to better analyze the question. In addition, when writing an examination you should know the precise definition of a word of art you intend to use.

We believe that the materials in this "Black Letter" will facilitate your study of a law school course and assure success in writing examinations not only for the course but for the bar examination. We wish you success.

THE PUBLISHER

Summary of Contents

Capsule Summary	1
Perspective	73
I. ANTITRUST ECONOMICS: PRICE THEORY AND INDUSTRIAL ORGANIZATION	77
A. An Overview of Basic Price Theory for Antitrust	79
B. Industrial Organization: Economies of Scale and the Dilemma of Antitrust Policy	89
C. The Economic Model and Real World Markets	92
D. Review Questions	93
II. CARTELS, TACIT COLLUSION, JOINT VENTURES AND OTHER COMBINATIONS OF COMPETITORS	95
A. How and When Price Fixing Works	98
B. Express and Tacit Collusion: An Introduction to the Oligopoly Problem	104
C. Joint Ventures and Other Ancillary Restraints Under § 1 of the Sherman Act	114
D. Horizontal Agreements and the Per Se Rule: The Problem of Characterization	122
E. The Death of the Intra-Enterprise Conspiracy Doctrine	126
F. Review Questions	127
III. MONOPOLIZATION, ATTEMPT TO MONOPOLIZE AND PREDATORY PRICING	129
A. Single-Firm Monopolization	132
B. Attempt to Monopolize	157
C. Predatory Pricing as Monopolization or Attempt to Monopolize . . .	160
D. Predatory Pricing Under the Robinson-Patman Act	168
E. Predatory Buying	170
F. Conspiracy to Monopolize	170
G. Review Questions	171
IV. VERTICAL INTEGRATION AND VERTICAL MERGERS	173
A. Introduction: The Nature of Vertical Integration	175
B. Vertical Integration, Efficiency and Antitrust Policy	177
C. Vertical Mergers	185
D. Review Questions	190

V.	TIE-INS, RECIPROCITY, EXCLUSIVE DEALING AND THE FRANCHISE CONTRACT	193
A.	Introduction	195
B.	Judicial Tests for the Illegality of Tie-Ins	195
C.	The Ambiguous Problem of Tie-Ins and Consumer Welfare	195
D.	Tie-Ins, Market Power, and the Per se Rule	196
E.	Why Do Courts Condemn Tie-Ins and Why Do Firms Use Them?	200
F.	Tie-Ins and the Franchise Contract	213
G.	Reciprocity	214
H.	Exclusive Dealing	216
I.	Summary: The Rule of Reason for Exclusive Dealing	221
J.	Review Questions	222
VI.	RESALE PRICE MAINTENANCE AND VERTICAL NONPRICE RESTRAINTS	225
A.	Introduction	227
B.	Why Do Suppliers Use Restrictions on Distribution?	229
C.	Resale Price Maintenance in the Courts	236
D.	Vertical Nonprice Restraints and the Rule of Reason	240
E.	Review Questions	243
VII.	REFUSALS TO DEAL	245
A.	Antitrust Policy and Refusals to Deal	247
B.	Concerted Refusals to Deal	250
C.	Unilateral Refusals to Deal	263
D.	Review Questions	264
VIII.	HORIZONTAL MERGERS	267
A.	Horizontal Mergers and Competition	270
B.	The Basic Tests for Legality in Horizontal Merger Cases	277
C.	Pre-Merger Notification	298
D.	Interlocking Directorates or Officers Under § 8 of the Clayton Act	298
E.	Review Questions	299
IX.	CONGLOMERATE AND POTENTIAL COMPETITION MERGERS	301
A.	Antitrust Policy and the Conglomerate Merger	303
B.	Competition and Conglomerate Merger Policy	306
C.	Review Questions	312
X.	PRICE DISCRIMINATION AND DIFFERENTIAL PRICING UNDER THE ROBINSON-PATMAN ACT	315
A.	The Economics of Price Discrimination	317
B.	The Robinson-Patman Act	323
C.	Review Questions	330

XI.	JURISDICTIONAL, PUBLIC POLICY AND REGULATORY LIMITATIONS ON THE DOMAIN OF ANTITRUST	331
A.	The Jurisdictional Reach of the Antitrust Laws	333
B.	Legislative and Constitutional Limitations on Antitrust Enforcement	337
C.	Antitrust in Federally Regulated Industries and the Doctrine of Primary Jurisdiction	342
D.	Federalism and the “State Action” Doctrine	345
E.	Review Questions	350
XII.	ENFORCEMENT, PROCEDURE AND RELATED MATTERS	353
A.	Public Enforcement	355
B.	Private Enforcement	357
C.	Review Questions	372

APPENDICES

App.

A.	Answers to Review Questions	375
B.	Practice Exam	387
C.	Correlation Table	411
D.	Glossary	413
E.	Table of Cases	427
F.	Index	433

Table of Contents

Capsule Summary	1
Perspective	73
I. ANTITRUST ECONOMICS: PRICE THEORY AND INDUSTRIAL ORGANIZATION	77
A. An Overview of Basic Price Theory for Antitrust	79
1. Supply and Price Under Perfect Competition	79
a. The Value of the Perfect Competition Model	79
b. Supply and Demand in Perfect Competition	79
1) The "Reservation Price"	80
2) The Supply Curve	80
3) Equilibrium	81
4) Consumers' Surplus and Producers' Surplus	82
5) Market Elasticities of Supply and Demand	83
c. The Output Decision of the Individual Firm in Perfect Competition: Marginal Cost	84
1) The Perfect Competitor's Price Decision	84
2) The Perfect Competitor's Output Decision	84
2. Monopoly	85
a. The Monopolist's Price and Output Decisions	86
1) The Marginal Revenue Curve	87
2) The Monopolist's Profit-Maximizing Price	87
b. The <i>De Facto</i> Monopolist in the Real World	88
c. The Social Cost of Monopoly	88
1) The Monopoly Wealth Transfer	89
2) The Deadweight Loss Triangle	89
B. Industrial Organization: Economies of Scale and the Dilemma of Antitrust Policy	89
1. Economies of Scale	90
a. Economies of Scale and Technology	90
b. Minimum Optimal Scale	91
2. Natural Monopoly	91
3. The Dilemma of Antitrust Policy: Coping With Bigness	91
C. The Economic Model and Real World Markets	92
1. Product Differentiation	92
2. Price Discrimination	92
3. Transaction Costs	92

4. Barriers to Entry	92
D. Review Questions	93
II. CARTELS, TACIT COLLUSION, JOINT VENTURES AND OTHER COMBINATIONS OF COMPETITORS	95
A. How and When Price Fixing Works	98
1. The Cartel Market	98
a. Market Concentration	98
b. Barriers to Entry	99
c. Sales Methods	99
d. Product Homogeneity	100
e. Facilitating Devices	100
2. The Cartel Members	101
a. Firm Size	101
b. Efficiency	101
c. Extent of Participation	102
d. Incentives to Cheat and Cartel Countermeasures	102
3. Variations on Horizontal Collusion	103
a. Horizontal Territorial or Customer Division	103
b. Market Share Agreements	104
c. Output Reduction Schemes	104
B. Express and Tacit Collusion: An Introduction to the Oligopoly Problem	104
1. Oligopoly and the Sherman Act	105
2. Possible Approaches to the Oligopoly Problem	105
a. The Structural Approach	105
b. The Conduct Approach	106
3. The Agreement Requirement and the Antitrust Laws	106
a. Circumstantial Evidence of Express Collusion	106
b. Detecting and Challenging Tacit Collusion	109
1) Evidence of Markets Conducive to Tacit Collusion	109
2) Evidence That Collusion Is Occurring	109
a) Basing Point Pricing by Agreement	112
b) Basing Point Pricing in the Absence of an Agreement	112
3) Tacit Collusion and the FTC Act	112
C. Joint Ventures and Other Ancillary Restraints Under § 1 of the Sherman Act	114
1. Joint Ventures: The Threat to Competition	114
a. The Firms Participating in the Venture Are Competitors	114
b. The Participants Control a Large Market Share	114
c. The Joint Venture's Activities Affect Price or Output	115
d. The Venture Is Exclusive	115
2. Joint Ventures: Economic Rationales	115
a. Economies of Scale and Scope	115

b.	Economies of Distribution	116
c.	Solving Free Rider Problems	116
d.	Joint Ventures in Network Industries	118
e.	Joint Ventures and the Problem of Market Information	119
1)	Market Information and Efficiency	119
2)	Market Information and Collusion	119
f.	Joint Ventures as Market Facilitators	121
g.	Joint Ventures and Mergers	122
D.	Horizontal Agreements and the Per Se Rule: The Problem of Characterization	122
1.	Price-Affecting Conduct	123
2.	Public Conduct	124
3.	Conclusion: Some Guidelines for Deciding to Apply the Per Se Rule or the Rule of Reason	125
4.	The “Quick Look” for Highly Suspicious, or “Nearly Naked” Restraints	125
E.	The Death of the Intra-Enterprise Conspiracy Doctrine	126
F.	Review Questions	127
III.	MONOPOLIZATION, ATTEMPT TO MONOPOLIZE AND PREDATORY PRICING	129
A.	Single-Firm Monopolization	132
1.	The Formulation of the Monopolization Offense	132
a.	The Development of the Offense	132
b.	The Modern Formulation of the Offense	133
2.	Monopoly Power in a Relevant Market	133
a.	Measuring Market Power Directly	134
b.	The Market Share Proxy	134
c.	Measuring the Relevant Product Market	135
1)	Identifying the Relevant Product Market	135
2)	Computing the Market Share	137
3)	Cross Elasticity of Demand	137
a)	The <i>Cellophane</i> Fallacy	138
b)	The Usefulness of the Concept of Cross Elasticity of Demand	140
4)	Measuring Elasticity of Supply	140
a)	Time of Entry	140
b)	Measuring the Output/Capacity of Competitors	140
c)	Judicial Recognition of Elasticity of Supply	142
d.	Measuring the Relevant Geographic Market	142
e.	How Big a Share of the Relevant Market Is Required?	143
f.	Entry Barriers	143
3.	Conduct Requirements	144
a.	The Rule of Reason in Monopolization Cases	144

1) Injury to Competition and Injury to Competitors	144
2) Intent	144
a) Specific and General Intent	145
b) Subjective and Objective Evidence of Intent	145
b. Illustrative Exclusionary Practices	145
1) Predatory Pricing	146
2) Mergers to Monopoly	146
3) Purchase and Shutdown of Rivals' Plants	146
4) Expansion of Output or Capacity	146
5) Price Discrimination	147
6) Vertical Integration	147
7) Price and Supply "Squeezes"	148
8) Exclusionary Discounting Practices	149
9) Tying Arrangements	150
10) "Predatory" Product Innovation; Failure to Predisclose . . .	151
11) Exclusionary Abuses of the Patent System	153
12) Raising Rivals' Costs	155
13) Refusal to Deal With a Competitor	155
14) "Essential Facility" Doctrine	156
B. Attempt to Monopolize	157
1. The Common Law and the Offense of Attempt to Monopolize . . .	157
2. Specific Intent	157
a. The Problem of Identifying Illegitimate Intent	158
b. Judicial Attempts to Define Illegitimate Intent	158
3. Dangerous Probability of Success	159
a. The Purpose of the Dangerous Probability Requirement	159
b. Dangerous Probability and Market Power	159
4. Conduct Requirements	159
a. Basic Premises for Evaluating Conduct	160
b. Business Torts Distinguished	160
C. Predatory Pricing as Monopolization or Attempt to Monopolize . . .	160
1. Antitrust Policy and the Problem of Predatory Pricing	161
2. How Often Does Predatory Pricing Occur?	161
3. The Areeda-Turner Test for Predatory Pricing	161
a. The Orthodox Formulation of the Areeda-Turner Test	161
1) The Average Variable Cost (AVC) Surrogate	162
2) The Basic Presumptions of the Areeda-Turner Test	163
3) The Areeda-Turner Test and the Elements of the Attempt Offense	163
b. The Areeda-Turner Test in the Courts	164
1) Computation of Average Variable Cost	164
2) The Proper Role of Intent	165
3) The Proper Response to "Limit" Pricing	165

4. "Dangerous Probability of Success": When Is Predatory Pricing Plausible?	166
a. High Barriers to Entry	166
b. The Problem of Excess Capacity	166
c. Predatory Pricing and the Nonmonopolist, Recoupment	167
D. Predatory Pricing Under the Robinson–Patman Act	168
1. The Recoupment Theory of Predatory Pricing	168
2. The Effect of the Robinson–Patman Act	168
3. The Brooke Group Revision of Robinson–Patman Act Predatory Pricing Law	169
E. Predatory Buying	170
F. Conspiracy to Monopolize	170
G. Review Questions	171
IV. VERTICAL INTEGRATION AND VERTICAL MERGERS	173
A. Introduction: The Nature of Vertical Integration	175
1. Three Methods of Vertical Integration and Why Firms Choose Them	175
a. The Nature of the Service or Product	175
b. The Size of the Firms	175
c. The Applicable Antitrust Laws	176
2. Two Forms of Vertical Integration	176
a. Ownership	176
b. Contract	176
3. Antitrust Treatment of the Forms of Vertical Integration	176
4. Forward and Backward Vertical Integration	177
B. Vertical Integration, Efficiency and Antitrust Policy	177
1. Vertical Integration and Efficiency	178
a. Production Cost Savings From Vertical Integration	178
b. Transaction Cost Savings From Vertical Integration	179
c. "Double Marginalization," or the Problem of Market Power Held by Other Firms	180
d. Vertical Integration and Optimum Product Distribution	181
2. Perceived Dangers to Competition From Vertical Integration	182
a. Increased Market Power	182
b. Barriers to Entry	183
c. Price Discrimination	183
d. Rate Regulation Avoidance	184
e. Vertical Integration by Cartels	185
C. Vertical Mergers	185
1. Vertical Mergers in the Case Law	185
a. Subjective Intent and Pre–1950 Merger Law	186
b. The Law of Vertical Mergers Since 1950	186
1) The Foreclosure Theory	186

2) The Entry Barrier Theory	188
2. Vertical Mergers and the 1984 Justice Department Merger Guidelines	189
a. Increased Barriers to Entry	189
b. Vertical Mergers and Collusion	190
c. Rate Regulation Avoidance	190
D. Review Questions	190
V. TIE-INS, RECIPROCITY, EXCLUSIVE DEALING AND THE FRANCHISE CONTRACT	193
A. Introduction	195
B. Judicial Tests for the Illegality of Tie-Ins	195
C. The Ambiguous Problem of Tie-Ins and Consumer Welfare	195
D. Tie-Ins, Market Power, and the Per se Rule	196
1. The Difference Between the Sherman Act and Clayton Act Tests	196
2. The Consequences of a Two-Fold Test	196
a. Rule of Reason Ties in the Absence of Market Power	196
b. Per se Illegal Tie-ins	197
3. The Emerging Unity of the Sherman Act and Clayton Act Tests	199
4. Market Power in Markets for Intellectual Property	199
E. Why Do Courts Condemn Tie-Ins and Why Do Firms Use Them?	200
1. The Leverage and Entry Barrier Theories	200
a. Double Monopoly Profits	201
b. Barriers to Entry in the Tied Product Market	202
2. Evasion of Statutory Price Regulation	203
3. Tie-Ins as Price Discrimination and Metering Devices	204
a. Price Discrimination	204
b. Tie-Ins as Metering Devices	206
4. The Two-Product Test	207
a. A Shortcoming in the Judicial Test?	207
b. The "Separate Products" Requirement	207
5. Coercion	210
a. Coercion as Conditioning	210
b. Other Meanings of "Coercion"	211
c. Private Damages Actions and the "Coercion" Requirement	212
F. Tie-Ins and the Franchise Contract	213
1. Franchise Ties and Price Discrimination	213
2. Franchise Ties Yield More Franchise Locations	213
3. Full-Line Forcing	214
G. Reciprocity	214
1. Reciprocity and the Leverage Theory	215
2. Reciprocity and Price Discrimination	215
3. Reciprocity and Cartels	216