

Table of Contents

	Page
PREFACE TO THE SECOND EDITION	v
PREFACE TO THE FIRST EDITION	vii
ACKNOWLEDGMENTS TO THE FIRST EDITION	xi
TABLE OF FIGURES	xxxi
TABLE OF CASES	xxxiii

PART I. AN INTRODUCTION TO THE STUDY OF ANTITRUST LAW

Chapter 1. Defining Competition Policy for a Global Economy ..	2
A. "Harvest King"—The Lysine Cartel.....	4
<i>United States v. Andreas</i>	5
Sidebar 1-1: "Vitamins, Inc."	13
B. Identifying the Core Questions of Antitrust Law	16
1. What Are the Purposes of Competition Law Systems?	16
a. What Economic Purposes Can They Serve?	17
Market Power and Its Consequences: The Case of the Coffee Shop	17
i. Demand	17
ii. Supply and Perfect Competition	21
iii. Market Power	26
iv. The Consequences of the Exercise of Market Power	27
v. The Benefits of Competition	29
b. What Non-Economic Purposes Can They Serve?	32
<i>United States v. Brown University</i>	33
Sidebar 1-2: Non-Economic Values and Competition Policy	37
2. What Conduct, Public or Private, Can Impair the Proper Functioning of Markets?	40
a. What Do We Mean by "Anticompetitive" Conduct?	41
i. Introducing the Concept of "Antitrust Injury"	42
<i>Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.</i>	42
ii. Distinguishing Collusive From Exclusionary Anticompetitive Effects	45
<i>JTC Petroleum Co. v. Piasa Motor Fuels, Inc.</i>	49
b. Justifying Intervention: When Can Markets Be "Self-Correcting"?	53
3. What Forms Can Competition Law Systems Take?	56
a. The Structure of Legal Rules	57
b. Design of the Enforcement Mechanism	58
Sidebar 1-3: Ramifications of Decentralized Enforcement	59
c. Remedies	61
d. The Role of the Courts	62
e. The Scope of the Law	63
4. What Role Does Ideology Play in Answering the Core Questions of Competition Policy?	63
a. Ideological Origins	63

	Page
B. Identifying the Core Questions of Antitrust Law—Continued	
b. The Influence of Industrial Organization Economics	65
c. The Chicago School of Antitrust	66
d. The Harvard School of Antitrust	67
e. Post-Chicago Antitrust Analysis	69
C. An Introduction to Economic Proof	72
1. What Are the Effects of Business Conduct on Economic Welfare?	72
2. How Can the Effects of Business Conduct on Economic Welfare Be Demonstrated?	76
Sidebar 1–4: Economics and the Development of Legal Rules	77
D. Conclusion	80
Appendix to Chapter 1	81

PART II. CONDUCT HAVING COLLUSIVE ANTICOMPETITIVE EFFECTS

Chapter 2. Concerted Action Among Competitors (“Horizontal” Agreements)	88
A. The Evolution of “Unreasonableness” Under Section 1 of the Sherman Act	89
B. The Evolution of the Per Se Ban on Price-Fixing by Competitors	93
1. Foundation Cases: <i>Trenton Potteries</i> and <i>Socony-Vacuum Oil</i>	93
<i>Note on Antitrust Law Developments During the Great Depression</i>	95
<i>United States v. Socony-Vacuum Oil Co.</i>	97
Sidebar 2–1: Defining and Justifying the Contemporary Per Se Rule	103
2. Rule of Reason or Per Se: Tensions Emerge in the Modern Treatment of Price-Fixing	107
<i>Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.</i>	107
<i>Arizona v. Maricopa County Medical Society</i>	116
Sidebar 2–2: <i>Maricopa</i> as Seen Through the Marshall and Powell Papers	122
C. Market Division by Competitors	128
<i>United States v. Topco Associates, Inc.</i>	129
<i>Palmer v. BRG of Georgia</i>	136
D. Group Boycotts Having Collusive Effects	138
Sidebar 2–3: Use of the “Group Boycott” Label	141
<i>Federal Trade Commission v. Superior Court Trial Lawyers Ass’n</i>	144
E. Collusive Effects and the “Rule of Reason”	153
1. Origins of the Traditional “Rule of Reason”	154
<i>Board of Trade of City of Chicago v. United States</i>	154
<i>National Society of Professional Engineers v. United States</i>	159
<i>Note on the Rule of Reason After Nat’l Soc’y Prof’l Eng’rs and Broadcast Music</i>	164
2. Ancillary Restraint Analysis—An Alternative Approach to Defining Reasonableness	165
<i>United States v. Addyston Pipe & Steel Co.</i>	166
Sidebar 2–4: “Efficiency” and the <i>Addyston Pipe</i> Revival Movement	171
<i>Note on the Supreme Court’s Decision in Dagher (2006)</i>	173
F. Modern Trends: The Search for a More Structured and Operational Rule of Reason	175
<i>National Collegiate Athletic Ass’n v. Board of Regents of the University of Oklahoma</i>	175
<i>Note on the Development of the “Quick Look”</i>	185
<i>California Dental Association v. Federal Trade Commission</i>	187
<i>Note on Antitrust and the Professions</i>	201

	Page
F. Modern Trends: The Search for a More Structured and Operational Rule of Reason—Continued	
Sidebar 2–5: The Contemporary Rule of Reason: Core Economic Concepts With Multiple Frameworks	202
G. Joint Ventures and Strategic Alliances	211
1. Categorizing Joint Ventures by Function	212
2. Possible Anticompetitive Effects of Joint Ventures	213
<i>Polygram Holding, Inc. v. Federal Trade Commission</i>	215
3. The Variegated Legal Framework for Analyzing Joint Ventures ...	222
H. Conclusion	224
I. Problems and Exercises	224
Problem 2–1: Mountain Medical	224
a. The Facts	224
b. The Problem	224
c. Skills Exercise	225
Problem 2–2: Midwest Truck Leasing	225
a. The Facts	225
b. The Problem	226
c. Skills Exercise	226
Chapter 3. Distinguishing Concerted From Unilateral Action	227
A. Antitrust’s Special Scrutiny of Collective Action	229
<i>Copperweld Corp. v. Independence Tube Corp.</i>	230
<i>Note on the Rationale for Scrutinizing Concerted Action</i>	234
B. The Modern Economics of Collusion	235
1. The Problems of Collusion and Their Solutions: Three Case Studies	236
Case Study I: The Rise and Fall of OPEC	237
Case Study II: Tacit Coordination—A Gasoline Station Hypothetical	237
Case Study III: Factors Facilitating or Frustrating Coordination—A Delicatessen Hypothetical	240
2. Incomplete Coordination	245
3. Solving Cartel Problems in Practice	247
<i>In re Brand Name Prescription Drugs Antitrust Litigation</i>	247
Sidebar 3–1: The Prisoner’s Dilemma	251
C. The Development of Traditional Conspiracy Law	253
1. Collusion in the Shadow of Antitrust: Coordination Strategies for the Firms and Proof Strategies for Plaintiffs	254
2. Inferring Conspiracy From Circumstantial Evidence: <i>Interstate Circuit</i>	256
<i>Interstate Circuit, Inc. v. United States</i>	257
3. The Development and Evolution of the “Parallelism Plus” Doctrine	264
<i>American Tobacco Co. v. United States</i>	264
Sidebar 3–2: The Turner/Posner Debate on Conscious Parallelism	268
<i>Matsushita Electric Industrial Co. v. Zenith Radio Corp.</i>	270
Sidebar 3–3: <i>Matsushita</i> —Perspectives From the Marshall Papers	278
<i>Note on the Evolution of Attitudes at the Supreme Court About Burdens of Pleading and Production in Antitrust Cases: From Conley and Poller to Matsushita and Twombly</i>	279
4. Information Exchange: An Introduction to Facilitating Practices ..	283
<i>Williamson Oil Co., Inc. v. Philip Morris USA</i>	288
<i>Note on Information Sharing as an Independent Sherman Act Violation</i> ..	297

	Page
D. Integrating Traditional Legal Analysis and Modern Economics: Contemporary Agreement Issues	301
1. Increasing Access to Direct Evidence	301
Sidebar 3-4: Leniency Programs	302
2. Circumstantial Proof of Agreement: Revisiting Parallelism and Plus Factors as a Basis for Inferring Agreement	304
<i>United States v. Foley</i>	304
<i>Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.</i>	311
Sidebar 3-5: What is an Agreement?	335
E. Policing Incipient Dangers	337
1. Invitations to Collude	338
<i>United States v. American Airlines, Inc.</i>	338
2. Unilateral Facilitating Practices	343
<i>E.I. Du Pont De Nemours & Co. v. Federal Trade Commission</i>	345
Sidebar 3-6: The Economic Effect of "Most Favored Customer" Provisions	347
F. Conclusion	349
G. Problems and Exercises	349
Problem 3-1: Durab	349
a. The Facts	349
b. The Problem	350
c. Skills Exercise	350
 Chapter 4. Distribution Relationships Having Collusive Effects (Vertical Intrabrand Agreements)	 352
A. Vertical Price and Non-Price Restraints: <i>Sylvania</i> and <i>Leegin</i>	356
1. A Brief History of the Antitrust Treatment of Vertical Intrabrand Restraints	356
2. The Court Charts a New Course for Intrabrand Non-Price Restraints: The <i>Sylvania</i> Decision	358
<i>Continental T.V., Inc. v. GTE Sylvania Incorporated</i>	359
Sidebar 4-1: Dealer Relations After <i>Sylvania</i>	369
3. Closing the Circle: Reconciling <i>Sylvania</i> and <i>Dr. Miles</i>	370
<i>Leegin Creative Leather Products, Inc. v. PSKS, Inc.</i>	375
Sidebar 4-2: After <i>Leegin</i>	392
4. Resale Price Maintenance and Antitrust Injury	406
<i>Pace Electronics, Inc. v. Canon Computer Systems, Inc.</i>	407
B. Exclusive Distributors and Suppliers	411
<i>E & L Consulting, Ltd. v. Doman Industries Ltd.</i>	413
<i>Note on Intrabrand Competition and the "Single Monopoly Profit" Theory</i>	417
Sidebar 4-3: Antitrust, Dealer Relations and Arbitration	419
C. Characterization Challenges	422
<i>NYNEX Corp. v. Discon, Inc.</i>	422
<i>Note on Discon Remand</i>	426
D. Distributional Relationships in the European Union: The Article 81 Approach	426
E. Conclusion	428
F. Problems & Exercises	428
Problem 4-1: Pomegranate Apparel	428
a. The Facts	428
b. Problem & Skills Exercise	430

	Page
Chapter 5. Mergers Among Competitors (“Horizontal Mergers”)	431
A. A Primer on Merger Analysis in the U.S.	432
1. Introduction to the Statutory Framework	432
2. Motives for Merger Among Rivals	433
3. Historical Perspectives on Merger Enforcement	436
B. The Emergence and Erosion of the Structural Paradigm	437
1. Guide to the Cases	437
2. The Emergence of the Structural Presumption	439
<i>Brown Shoe Co. v. United States</i>	439
<i>United States v. Philadelphia National Bank</i>	442
<i>Note on Von’s Grocery and Pabst Brewing</i>	447
3. The Erosion of the Structural Presumption	448
<i>United States v. General Dynamics Corporation</i>	449
<i>Note on the Structural Presumption and the 1982 Merger Guidelines</i>	452
Sidebar 5-1: The Sound of Silence: The Supreme Court and Merger Policy Since 1975	452
<i>United States v. Baker Hughes, Inc.</i>	455
<i>Note on Buyer Power</i>	462
<i>Federal Trade Commission v. H.J. Heinz Co.</i>	463
Sidebar 5-2: Beyond Horizontal and Vertical: Conglomerate Mergers and Potential Competition	468
C. Merger Analysis Under the DOJ/FTC Merger Guidelines	472
Sidebar 5-3: Pre-Merger Notification and the Merger Enforcement Process in the U.S.	474
1. Market Definition, Market Participants, and Market Concentration (Horizontal Merger Guidelines § 1.0)	479
a. The Evolution of Market Definition Standards	481
<i>United States v. E. I. du Pont de Nemours & Co.</i>	482
<i>Note on Cross-Price Elasticity of Demand</i>	490
Sidebar 5-4: The Cellophane Fallacy	490
b. Market Definition Under the Merger Guidelines	491
Sidebar 5-5: Controversies in Market Definition: Submarkets, Price Discrimination Markets, and Cluster Markets	496
c. Identifying Market Participants	499
d. Measuring Market Concentration	500
<i>Note on Mathematical Properties of the HHI</i>	504
Sidebar 5-6: Inferring Market Power From Market Concentration: The Economics of the Structural Presumption	505
<i>Federal Trade Commission v. Cardinal Health, Inc.</i>	507
2. Competitive Effects	517
a. Coordinated Competitive Effects	518
Sidebar 5-7: Criminal Cartel Prosecutions and Coordinated Competitive Effects	519
<i>Hospital Corporation of America v. Federal Trade Commission</i>	522
Sidebar 5-8: Mavericks and the Coordinated Competitive Effects of Mergers	529
Sidebar 5-9: Competitor vs. Customer Complaints	533
b. Unilateral Competitive Effects	535
<i>Note on the Economics of Unilateral Effects: The Merger of Crunchies and Fruities</i>	539
<i>Federal Trade Commission v. Staples, Inc.</i>	542
<i>Note on the Merger Challenges in Oracle and Whole Foods</i>	553
Sidebar 5-10: Comparative Perspectives: Merger Enforcement in the U.S. and E.U.	554
3. Supply Substitution and Entry	559
<i>United States v. Waste Management, Inc.</i>	559
<i>Note on Entry Analysis in the Merger Guidelines</i>	564

	Page
C. Merger Analysis Under the DOJ/FTC Merger Guidelines—Continued	
Sidebar 5–11: The Ethics of Taking Discovery From One Client in Connection With Another Client’s Proposed Merger	566
4. Efficiencies	568
<i>Federal Trade Commission v. Staples, Inc.</i>	570
<i>Note on Efficiencies and Consumer Welfare</i>	571
5. Failing Firms	573
Sidebar 5–12: Merger Remedies	574
D. Conclusion	577
E. Problems and Exercises	577
Problem 5–1: Chic Shampoo	577
a. Facts	577
b. Problem and Skills Exercise	578
Problem 5–2: Super Propane	578
a. Facts	578
b. Problem and Skills Exercise	579

PART III. CONDUCT HAVING EXCLUSIONARY EFFECTS

Chapter 6. Exclusionary Conduct by a Single, Dominant Firm ...	582
A. The Economics of Exclusion	588
1. <i>Lorain Journal</i> Case Study	588
<i>Lorain Journal Co. v. United States</i>	588
2. The Modern Economics of Exclusion: Raising Rivals’ Costs	592
B. Traditional Analysis of Exclusionary Conduct	598
1. <i>Alcoa</i> and the Origins of the Power + Conduct Framework	598
<i>United States v. Aluminum Co. of America</i>	600
<i>Note on the Origins of Alcoa’s Market Share Benchmarks</i>	607
Sidebar 6–1: Durable Goods Monopoly—Three Economic Issues	612
2. Injecting Economic Analysis Into the Market Definition Process Via Cross-Elasticity of Demand: The <i>Cellophane</i> Decision (and Fallacy)	618
<i>United States v. E. I. du Pont de Nemours & Co.</i>	620
Sidebar 6–2: The Section 2 Conduct Standard After <i>Alcoa</i> —Flirting with No Fault	620
C. The Contemporary Law and Economics of Monopolization	622
1. Non-Price Exclusionary Conduct	623
<i>Aspen Skiing Co. v. Aspen Highlands Skiing Corp.</i>	624
<i>Note on Kodak and the Economics of Market Power in Aftermarkets</i>	637
<i>United States v. Microsoft Corp.</i>	640
<i>Note on Microsoft Prosecution in the European Union</i>	657
2. Predatory Pricing	659
<i>Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.</i>	661
<i>Note on Weyerhaeuser and Predatory Overbuying</i>	673
Sidebar 6–3: The Economic Debate About Predatory Pricing: A Short History	675
3. Integrating the Treatment of Non-Price Exclusionary Conduct and Predatory Pricing: The Challenges of Assessing Bundled Rebates and Other Mixed Conduct	680
<i>Cascade Health Solutions v. PeaceHealth</i>	683
Sidebar 6–4: Should There Be a Unitary Standard for Judging Exclusionary Conduct?	699
4. Unilateral Refusals to Deal as Exclusionary Conduct	706
<i>Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP</i>	707
<i>Note on the Status of Essential Facilities and Leveraging after Trinko</i>	715

	Page
C. The Contemporary Law and Economics of Monopolization—Continued	
<i>Note on “Cheap Exclusion”</i>	717
Sidebar 6–5: Comparative Perspectives: The Treatment of Anticompetitive Single Firm Conduct in the U.S. and E.U.	718
5. Refusals to License Intellectual Property Rights	722
<i>CSU, L.L.C. v. Xerox Corp.</i>	724
Sidebar 6–6: The Continuing Controversy Over Antitrust Liability for Unilateral Refusals to License Intellectual Property Rights	729
6. Product Design and Development Decisions	736
Sidebar 6–7: <i>Berkey Photo</i> and the Ethical Dilemmas of Antitrust Litigation	738
<i>Note on Business Torts and the Antitrust Laws</i>	745
7. Pattern or Practice: Preparing a “Monopoly Broth”	746
D. The Offense of Attempt to Monopolize	747
<i>Spectrum Sports, Inc. v. McQuillan</i>	748
E. Remedies	753
<i>Note on the Success of Conduct Remedies in Monopolization Cases</i>	753
<i>United States v. Microsoft Corp.</i>	755
F. Conclusion	761
G. Problems and Exercises	762
Problem 6–1: Amerinet	762
a. The Facts	762
b. Problem and Skills Exercise	763
Problem 6–2: Mountain Air	763
a. The Facts	763
b. Problem and Skills Exercise	764
Chapter 7. Concerted Conduct Having Exclusionary Effects	765
A. Exclusionary Group Boycotts	766
1. Foundation Cases: From <i>Eastern States</i> to <i>Klor’s</i>	767
2. Contemporary Analysis of Exclusionary Group Boycotts	771
<i>Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.</i>	771
<i>Note on Toys “R” Us and the Continued Vitality of the Northwest Wholesale Stationers Framework</i>	777
<i>United States v. Visa U.S.A., Inc.</i>	778
Sidebar 7–1: The Economics of Two-Sided Markets With Network Effects	786
B. Interbrand Vertical Restrictions	788
1. Tying and the “Leveraging” Problem	791
<i>Jefferson Parish Hospital District No. 2 v. Hyde</i>	794
Sidebar 7–2: The Per Se Rule, The Rule of Reason, and Tying—A View From the Marshall Papers	808
Sidebar 7–3: The Economics of Tying	810
<i>United States v. Microsoft Corp.</i>	815
2. Exclusive Dealing: The Basis and Limits of Foreclosure Analysis ..	823
Sidebar 7–4: Section 3 of the Clayton Act and the Role of “Incipiency” ...	823
<i>Note on Standard Stations and Tampa Electric</i>	825
<i>Jefferson Parish Hospital District No. 2 v. Hyde</i>	828
<i>Omega Environmental, Inc. v. Gilbarco, Inc.</i>	830
<i>Note on the Treatment of Exclusive Dealing in Microsoft and Dentsply</i>	840
Sidebar 7–5: Assessing the Contemporary Law and Economics of Exclusive Dealing	843
C. Vertical Mergers	851
1. Vertical Merger Analysis Before 1980	851
<i>Brown Shoe Co. v. United States</i>	852
<i>Note on Ford Motor Co. v. United States (Autolite)</i>	856

	Page
C. Vertical Mergers—Continued	
Sidebar 7-6: Vertical Integration and Transaction Cost Economics	857
2. Vertical Merger Analysis Since 1980	859
<i>Note on the Federal Vertical Merger Guidelines—1982, 1984</i>	859
<i>Note on the “Single Monopoly Profit” Theory</i>	861
<i>O’Neill v. Coca-Cola Co.</i>	865
<i>Note on Eliminating Double Marginalization</i>	870
Sidebar 7-7: The Influence of Post-Chicago Exclusionary Effects Theories on Vertical Merger Enforcement Trends in the U.S. and E.U.	871
D. Secondary Line Price Discrimination and the Challenge of <i>Morton Salt</i>	873
Sidebar 7-8: The Economics of Price Discrimination	875
<i>Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.</i>	879
<i>Note on the FTC’s Diminishing Enforcement of the Robinson Patman Act and the Consent Order in In re McCormick & Co. (2000)</i>	884
E. Conclusion	887
F. Problems and Exercises	887
Problem 7-1: Printing Products Corporation	887
a. The Facts	887
b. Problem and Skills Exercise	888
Problem 7-2: Printing Products—Machine Cartridge Merger	888
a. The Facts	888
b. Problem and Skills Exercise	889
Problem 7-3: “Buy the Best for Less at Best’s”	889
a. The Facts	889
b. Problem and Skills Exercise	890

PART IV. CONSTRUCTING THE MODERN ANTITRUST CASE

Chapter 8. Integrating Core Concepts With More Structured Antitrust Analysis	892
A. Establishing a Cognizable Theory of Anticompetitive Effects	893
1. Antitrust Injury: Revisiting the <i>Brunswick</i> Formulation	893
<i>Distinguishing Collusive and Exclusionary Antitrust Injury: Note on Brunswick and Monfort</i>	894
2. The Expansion and Modern Demands of <i>Brunswick</i>	897
<i>Big Bear Lodging Association v. Snow Summit, Inc.</i>	897
Sidebar 8-1: The Political Economy of Antitrust Injury	902
B. Anticompetitive Effects and Market Power	905
Sidebar 8-2: Collusive vs. Exclusionary Effects: Are There Two Kinds of Market Power?	906
1. Establishing an Antitrust Violation Through Evidence of Actual Anticompetitive Effects	907
<i>Re/Max International v. Realty One, Inc.</i>	909
<i>Toys “R” Us, Inc. v. Federal Trade Commission</i>	915
Sidebar 8-3: Actual Anticompetitive Effects, Market Power, and the Diminishing Vitality of the <i>Copperweld</i> “Gap”	918
<i>Note on Actual Anticompetitive Effects Affecting Non-Price Competition</i> ...	922
Sidebar 8-4: The Role of Information as Non-Price Competition	923
2. When Circumstantial Evidence of Market Power Justifies the Inference of Anticompetitive Effects	926
Sidebar 8-5: The “Single Inference” Method for Inferring Anticompetitive Effects	927
<i>Tops Markets, Inc. v. Quality Markets, Inc.</i>	937

	Page
C. Case Study: Proving Anticompetitive Effects Before Agencies and Courts in the <i>Microsoft</i> Prosecution	941
Testimony of Frederick R. Warren-Boulton	942
Testimony of Franklin M. Fisher	949
Testimony of Richard L. Schmalensee	953
<i>United States v. Microsoft Corp.</i>	964
D. The Role of Intent in Antitrust Analysis	965
<i>California Dental Association v. FTC</i>	969
E. The Expanding Role of Conditions of Entry	971
<i>Rebel Oil Co. v. Atlantic Richfield Co.</i>	972
<i>Note on Allocating the Burden of Production With Respect to Entry</i>	977
<i>Tops Markets, Inc. v. Quality Markets, Inc.</i>	980
Sidebar 8-6: Defining and Proving Entry Conditions	983
F. Rebutting the Contemporary Antitrust Case: The Role of Business Justifications and Efficiencies	987
1. Defining and Incorporating Efficiencies Into Non-Merger Antitrust Analysis: The Foundation Cases	988
<i>Continental T. V., Inc. v. GTE Sylvania Inc.</i>	989
<i>Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.</i>	990
<i>Note on Defining and Incorporating Efficiencies Into Non-Merger Antitrust Analysis: The Role of Expanding Output and Lower Costs</i>	991
2. The Definition and Treatment of Efficiencies Under Government Guidelines	992
3. The Challenges of Proving Efficiencies and Business Justifications	996
<i>Aspen Skiing Co. v. Aspen Highlands Skiing Corp.</i>	997
<i>Eastman Kodak Co. v. Image Technical Services, Inc.</i>	997
Sidebar 8-7: The Crucial Role of Expert Testimony in Contemporary Antitrust Analysis	999
4. Legally Non-Cognizable Business Justifications	1004
<i>Arizona v. Maricopa County Medical Society</i>	1005
5. The Limited Role of Statutory Exemptions	1009
G. Structuring the Analysis of Anticompetitive Effects, Efficiencies, and Business Justifications	1011
H. Conclusion	1013
I. Problems and Exercises	1013
Problem 8-1: Crunchies-Fruities Strategic Alliance	1016
Problem 8-2: Crunchies-Natural-Wholesome Acquisition	1017
Problem 8-3: FrunchCo. as a Dominant Firm	1018
Chapter 9. Implementing Competition Policy Rules: The Structure of Antitrust Enforcement	1019
A. Designing and Implementing an Antitrust Enforcement System	1019
1. A Taxonomy of Implementation Functions	1019
2. Factors Shaping Institutional Design Choices	1023
a. Distributing Competition Policy Power: The National Level	1023
b. Distributing Competition Policy Authority: International Relations	1025
3. The Competition Policy Implementation Status Quo	1025
B. Defining the Boundaries of National Jurisdiction	1026
1. Interstate Commerce Requirement	1027
<i>Summit Health, Ltd. v. Pinhas</i>	1027
2. Foreign Jurisdictional Barriers	1030
a. Comity	1032
<i>Hartford Fire Insurance Co. v. California</i>	1032

	Page
B. Defining the Boundaries of National Jurisdiction—Continued	
b. The Substantial Effects Test: Sorting out the Relationship Between Hartford Fire and the FTAIA	1038
<i>F. Hoffmann-La Roche Ltd. v. Empagran S.A.</i>	1038
c. Act of State Doctrine	1047
d. Foreign Sovereign Immunity	1047
Sidebar 9-1: Suing OPEC	1047
e. International Tensions	1051
Sidebar 9-2: Paths to International Convergence	1052
C. An Overview of the American System for Prosecuting and Adjudicating Antitrust Violations	1055
1. National Prosecutors: The Department of Justice and the Federal Trade Commission	1055
Sidebar 9-3: Detecting Antitrust Violations: The Role of Information Gathering	1056
2. State Prosecutors: State Attorneys General and the Multistate Antitrust Task Force of the National Association of Attorneys General	1058
3. Adjudication: The Role of the Courts	1060
D. Antitrust Enforcement Under the U.S. Constitutional Scheme: Antitrust Federalism and Antitrust's Relationship With the First Amendment	1061
1. Federal Regulation	1062
2. State Regulation	1064
<i>Parker v. Brown</i>	1064
<i>California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.</i>	1068
<i>Note on Seminole Tribe, Sovereign Immunity and the Continued Vitality of the Parker Framework</i>	1073
3. Intervention by Municipal and Other Local Authorities	1076
4. Preemption	1077
Sidebar 9-4: Revisiting Immunities Based on Government Intervention—U.S. and Comparative Perspectives	1078
5. Petitioning	1080
<i>Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.</i>	1082
E. Private Rights of Action	1086
1. Injury to Business or Property	1089
2. Antitrust Injury	1089
3. Direct Purchasers	1089
<i>Illinois Brick Co. v. Illinois</i>	1089
Sidebar 9-5: The Aftermath of <i>Illinois Brick</i> : ARC America and the Emergence of Multi-Jurisdictional Antitrust Litigation	1095
4. Standing	1098
<i>Associated General Contractors of California Inc. v. California State Council of Carpenters</i>	1098
5. Defenses Based on <i>in Pari Delicto</i> and Unclean Hands	1105
F. Remedies for Antitrust Violations	1106
1. Criminal Sanctions	1106
<i>United States v. F. Hoffmann-La Roche Ltd.</i>	1107
2. Civil Remedies	1111
a. Lawsuits as Remedies	1111
b. Judicially-Imposed Remedies	1113
i. Controls on Conduct	1113

	Page
F. Remedies for Antitrust Violations—Continued	
<i>National Society of Professional Engineers v. United States</i>	1114
<i>Note on the Success of Conduct Remedies in Monopolization Cases</i>	1116
ii. Divestiture	1116
<i>United States v. Microsoft Corp.</i>	1118
Sidebar 9–6: Federal Settlements, the Tunney Act and Statutory Preclusion Under Section 5 of the Clayton Act	1124
3. The Private Treble Damages Remedy	1128
a. Why “Treble” Damages?	1128
Sidebar 9–7: The Economics of Penalties	1129
<i>Note on Disgorgement and the Mylan Litigation</i>	1135
b. Calculating Antitrust Damages	1137
<i>J. Truett Payne Co. v. Chrysler Motors Corp.</i>	1138
<i>Conwood Co. v. United States Tobacco Co.</i>	1141
Sidebar 9–8: Legal Procedure and Settlement	1146
G. Conclusion	1148
H. Problems and Exercises	1149
Problem 9–1: Sweet Co.	1149
a. The Facts	1149
b. The Problems	1150
c. Skills Exercise	1150
Problem 9–2: Maverick Motors	1150
a. The Facts	1150
b. The Problem	1151
c. Skills Exercise	1152
Chapter 10. Innovation, Intellectual Property, and the “New Economy”	1153
Sidebar 10–1: Antitrust Principles and the “New Economy”	1154
A. Antitrust and Innovation	1162
<i>Note on Innovation and the Scope of Intellectual Property Protection</i>	1163
1. Manipulation of Product Standards and Certifications	1165
<i>American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.</i>	1166
2. Suppression of Rival Innovation by a Dominant Firm or Firms	1168
<i>United States v. Microsoft Corp.</i>	1169
3. Suppression of Rival Innovation Through Acquisition	1171
B. New Technologies, New Conduct and the Adaptability of Antitrust	1172
1. Changing Technologies and Market Definition	1172
<i>Standard Oil Company (Indiana) v. United States</i>	1174
Sidebar 10–2: Innovation Markets	1178
2. New Forms of Cooperation, Collaboration and Exclusion: The Internet as a Marketplace	1181
a. Internet Free Riding	1181
<i>In re Fair Allocation System, Inc.</i>	1181
b. Cyberspace Joint Ventures: Two Case Studies	1183
Sidebar 10–3: Competitive Analysis of Internet Joint Ventures	1187
C. Antitrust and Intellectual Property: Perspectives	1192
1. The Rise and Fall of the “Nine No-Nos”	1194
<i>In the Matter of Xerox Corporation</i>	1196
<i>SCM Corporation v. Xerox Corp.</i>	1199
2. Changing Times, Changing Attitudes: The Intellectual Property Guidelines (1995)	1203

	Page
C. Antitrust and Intellectual Property: Perspectives—Continued	
3. Contemporary Issues at the Crossroads of IP and Competition	
Policy	1206
a. Single Firm Licensing Practices	1206
b. Acquisition of IP Rights (“IPRs”) and the Role of “Block- ing Patents”	1208
c. Patent Pools and Cross-Licensing	1209
<i>Patents for MPEG-2 Technology</i>	1210
<i>Note on the Role of the PTO in Defining the Scope of Patent Protection</i>	1219
d. Standard Setting and IP Rights	1220
<i>In the Matter of Dell Computer Corporation</i>	1221
Sidebar 10-4: Open vs. Closed Access to Industry Standards	1226
<i>Note on Abuse of Standard Setting: The Rambus and Unocal Litigations</i>	1228
e. Antitrust Counterclaims that Attack the Validity of Pat- ents	1229
<i>Walker Process Equipment Inc. v. Food Machinery and Chemical Corp.</i>	1229
<i>Nobelpharma AB v. Implant Innovations, Inc.</i>	1232
f. The Settlement of Patent Infringement Actions Between Actual or Potential Rivals	1237
<i>Andrx Pharmaceuticals, Inc. v. Biovail Corp.</i>	1237
<i>Note on the FTC’s Litigation Against Schering-Plough</i>	1246
D. Conclusion	1248
E. Problems and Exercises	1248
Problem 10-1: U.S. IP Guidelines Problem 5 (“Distinguishing Horizontal from Vertical Arrangements”)	1248
Problem 10-2: U.S. IP Guidelines Problem 8 (“Exclusive Dealing”)	1249
Problem 10-3: U.S. IP Guidelines Problem 9 (“Horizontal Restraints”)	1249
Problem 10-4: U.S. IP Guidelines Problem 11 (“Acquisitions of Intellectual Property Rights”)	1250
Appendix A. Selected Antitrust Statutes	1251
Appendix B. Selected Antitrust Resources on the Internet	1263
INDEX	1265