

Book Review: A Casebook for Our Time

Andrew I. Gavil, William E. Kovacic, and Jonathan B. Baker

Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy

Thompson/West • 2002

Reviewed by A. Douglas Melamed

You can tell from the table of contents. This is a modern, sophisticated, and somewhat inside-the-Beltway casebook. Its most important contribution, among many, is that it organizes the materials conceptually, rather than formalistically, and thereby helps student and practitioner alike analyze antitrust issues the way they should be analyzed and the way they are in fact analyzed by the enforcement agencies and, increasingly, the courts. The extensive, thoughtful commentary and the copious citations to the current literature should make this an unusually useful casebook for the practitioner.

Organization

The book is organized into four parts. Part I provides an introduction and overview. Parts II and III cover the substantive issues of antitrust law. And Part IV focuses on contemporary and institutional issues.

Part I, entitled “An Introduction to the Study of Antitrust Law,” consists of a single chapter that is intended to illuminate basic principles of competition policy and what the authors call “three themes” of the casebook: How antitrust is “evolving from the analysis of discrete categories of behavior toward reliance on a set of core concepts, which economic theory has greatly influenced;” the “still unfolding trend toward globalization of antitrust law;” and the wide range of “skills demanded of the antitrust lawyer.” (*Casebook*, pp. 2–3.) While this Part could be criticized for being too long, especially if thought of as an introduction, and for giving short shrift to vertical or exclusionary issues, it effectively makes accessible to the student the economic principles and policy issues that form the foundation of contemporary antitrust analysis.

The organization of Parts II and III constitute, to this reader at least, the most valuable contribution of the book. Part II, entitled “Conduct Having Collusive Anticompetitive Effects,” deals with problems of collusion—antitrust problems that arise when competitors agree to diminish their rivalry—and Part III, entitled “Conduct Having Exclusionary Effects,” deals with problems of exclusion—antitrust problems that arise when conduct of one firm or group of firms threatens to weaken their rivals or exclude them from the market. Gavil, Kovacic, and Baker are not the first to see this distinction, but their casebook embodies the most comprehensive and up-to-date implementation of it.¹

■
A. Douglas Melamed
is a partner in the Washington, D.C., office of Wilmer, Cutler & Pickering. He was Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice, in 2000–2001.

¹ Judges Posner and Easterbrook made the same distinction in their casebook 20 years ago, and commentators and enforcements officials have articulated the distinction as well.

Organizing the materials around the distinction between collusion and exclusion enables the authors and the readers more clearly to understand the substantive issues.

The distinction between these two types of antitrust harm is fundamental to sound antitrust analysis. By organizing the casebook around that distinction, the authors have deliberately chosen to focus on the substantive and economic issue the distinction suggests—how might the conduct in question injure competition—rather than on the more formalistic issues suggested by books that are organized around legal categories, such as issues of agreement under Section 1 of the Sherman Act or mergers under Section 7 of Clayton Act, both of which encompass collusive and exclusionary problems. Organizing the materials around the distinction between collusion and exclusion enables the authors and the readers more clearly to understand the substantive issues. The authors' analysis of collusive and exclusionary group boycotts, for example, is both insightful in its own right and illustrative of the benefits of the book's structure. The same could be said of their treatment of distribution restrictions.

The structure of the book does have the effect of diverting attention from the more formalistic notions and shorthands that figure prominently in some of the cases, especially in the lower courts. These include, for example, the largely unsuccessful efforts of the courts to define a "group boycott" and the quantitative foreclosure tests used by some courts to determine the lawfulness of exclusive dealing arrangements. But these matters are for the most part discussed in the authors' extensive analytical text; and they are in any event matters that contemporary practitioners get to only at the end of their analysis, when assessing litigation risks or making arguments to courts. The authors have wisely chosen not to make them a major focus of the book.

The organization within Parts II and III is faithful to the authors' desire to avoid formal categories and to focus, instead, on economically based concepts. Part II thus proceeds, with understandable interruptions for such issues as how to distinguish concerted and unilateral action, from naked restraints like price fixing, to more complex competitor collaborations and joint venture issues, to vertical or distributor relationships with collusive or intrabrand effects, to horizontal mergers. The sequence is logical and effective.

Part III starts with dominant or single firm conduct and then covers concerted conduct having exclusionary effects, including both vertical agreements and vertical mergers. It thus sweeps into one part issues arising under Sections 1 and 2 of the Sherman Act, the Clayton Act, and the Robinson-Patman Act. The structure works, in part because, by beginning with single-firm exclusion, the book creates an understanding of the economics of exclusion that disciplines and provides a unified focus for the more disparate forms of concerted exclusionary conduct.

Part IV, entitled "Constructing the Modern Antitrust Case," consists of three chapters. Chapter 8, the first chapter in Part IV, reflects the authors' most questionable organizational decision. That chapter purports to apply the concepts discussed in Parts II and III in a more structured manner that reflects the way issues are likely to arise in a contemporary antitrust case or investigation. It focuses in depth on issues of antitrust injury, proving anticompetitive effects, the role of intent, entry, and efficiency.

These are, to be sure, issues that cut across the collusion/exclusion categories of Parts II and III. But the chapter appears repetitious of much that precedes it. And the discussion here of some issues, efficiencies in particular, obscures the different ways in which efficiencies affect the analysis in collusion and exclusion cases. The authors' decision to address these issues in a separate, later chapter might prove to be successful in the classroom; but it is likely that many teachers will choose to integrate the materials from this chapter into the earlier discussions of the issues in Parts II and III.

That is unlikely to be the case with the remainder of Part IV. Chapter 9 deals with the institutional

context of antitrust enforcement—issues of federalism, international jurisdiction, public and private enforcement, petitioning and state action limits on antitrust, and remedies. Chapter 10 deals with currently hot issues involving “innovation, intellectual property and the ‘new economy.’” (*Casebook*, p.1062.) The issues addressed in these chapters are sufficiently different from the broad themes developed in Parts II and III that the authors have prudently put them in a different and later part of the book.

Analysis

The book is distinctive in another important way as well, beyond its organization of the topics. It is rich in text, analysis, and explanation by the authors. Given the economic sophistication of the book, it is surprisingly light on supply and demand curves (this is not a criticism); but it uses, often and well, other forms of diagrams, flow charts, and tables to analyze cases and show the relationships between various concepts. Several of the notes compare U.S. and European approaches to competition law.

Although the leading cases of past and present are included, they are typically used after discussion and analysis to illustrate issues and problems. Other casebooks, by contrast, begin the various topics with cases, followed by questions and occasional commentary.

The difference is important. This is not a casebook for teaching students how to read cases, nor is it likely to appeal to those who want their students to learn antitrust inductively, by inferring principles from the cases. And it is not a casebook that just spells out the answers for the students. Instead, this book explicitly discusses the economic underpinnings of antitrust analysis, identifies key issues and then, with cases and problems, invites the reader to grapple with those issues at a more sophisticated level than is expected in a more traditional casebook.

The authors’ commentary is, for the most part, clear, sound, and imaginative. The authors draw upon their broad knowledge of the field, including the economic and legal literature and the analyses promulgated by the enforcement agencies. They are keenly aware of the current, unresolved issues affecting antitrust law and enforcement. The discussions of collusive and exclusionary effects, group boycotts, quick-look rule of reason, the economics of collusion, competitive effects of horizontal mergers, durable goods monopoly, raising rivals’ costs, exclusionary conduct, inferring market power, the economics of antitrust penalties, and antitrust principles in the “new economy” are especially illuminating.

Of course, having chosen to include so much of their analysis in the book, the authors provoke the reader to think about what he would say or how he would analyze the same issues. The authors’ discussion is not perfect, or at least it is not exactly what this reader would do, if, after having been armed with the authors’ rich analysis, he could add or amend to his liking. The things that might have been done differently, or even better, include the following, among others.

In Part I, the authors define “anticompetitive conduct” as conduct “likely to lead to the creation, maintenance, or enhancement of market power, or that involves the actual exercise of market power.” (*Casebook*, p.40.) That definition would encompass, for example, developing a new and better product, which is unambiguously desirable, and charging a supracompetitive price, which U.S. antitrust laws have long and wisely not regarded as illegal. “Anticompetitive conduct” is better defined with respect to the attributes of conduct that would cause it to be condemned under the antitrust laws if it had the effect of creating additional market power. One possible attribute of that type is that it does not create any efficiency, or at least not enough to be profitable for the potential defendant without the payoff of monopoly power. Also, the discussion of agreement in Part I and elsewhere does not clearly identify the question whether agreement is a legal conclu-

Instead, this book explicitly discusses the economic underpinnings of antitrust analysis, identifies key issues and then, with cases and problems, invites the reader to grapple with those issues at a more sophisticated level than is expected in a more traditional casebook.

sion applied to certain facts or, instead, a shared state of mind whose existence is sometimes inferred from circumstantial evidence.

The authors' effort in Part II to describe all variations of the rule of reason as being either "unstructured" in the *Chicago Board of Trade*² tradition or involving "ancillary restraints" in the *Addyston Pipe*³ tradition seems overstated. Neither identifies rigorously what the rule of reason is intended to ascertain (in collusion cases, whether the restraint on balance increases or decreases output), and together they leave the impression that there is no way, other than the unstructured way, to determine the lawfulness of a restraint that both enhances efficiency and restricts rivalry.

Also in Part II, the book would have been aided by inclusion of at least one joint venture case. And the authors missed an opportunity in the discussion of *Topco*⁴ to address the question whether an agreement can ever violate the antitrust laws by restricting competition that would not exist but for the agreement. The agencies treat this issue differently in the Intellectual Property and Competitor Collaboration Guidelines.

In Part III, the book should have given more attention to Justice Scalia's provocative dissent in *Kodak*.⁵ It should have inquired whether the errors in *Alcoa*⁶ were the result of an obsolete view of antitrust law or policy, on the one hand, or just mistaken economic analysis, on the other hand. The discussion of predation should have been more explicit about the limits of economic analysis and the policy judgments that are an ineluctable part of any predation rule that seeks both to reconcile competing dynamic and static concerns and to be administrable as a practical matter; and it should probably have included mention of the pending *American Airlines* case,⁷ which represents an effort to reconcile the insights of modern economics with the policy judgments embodied in cost-based predation rules.

Also in Part III, the authors should have mentioned the *Microsoft*⁸ case in their discussion of product design as exclusionary conduct. Their discussion of "monopoly broth" would have been richer if they had distinguished the idea of considering together various instances of lawful but aggressive conduct from the idea of aggregating various instances of anticompetitive conduct no one of which itself had a sufficient impact on competition to be unlawful. And the authors should have been clearer that vertical mergers are anticompetitive only if there is market power at both levels.

The development of analytical principles culminates with a discussion of the *Microsoft* case at the end of Chapter 8, in Part IV. It is the right place to end; but the authors do not end in what, to this reader, is quite the right the way. They note, with a typically thoughtful and illuminating diagram, the four-step analysis embraced by the court of appeals. The last step, which the court did not reach in the case, calls for weighing the anticompetitive harm of the conduct in question against its procompetitive justifications. The authors missed an opportunity to note that the court did not say how the weighing is to be done; the authors also did not discuss the solution to that

² *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231 (1918).

³ *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

⁴ *Topco Assocs., Inc. v. United States*, 405 U.S. 596 (1972).

⁵ *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

⁶ *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

⁷ *United States v. AMR Corporation*, No. 01-3202 (10th Cir.).

⁸ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc).

problem proposed by the United States in that case and whether the court simply did not reach that question or, instead, chose deliberately not to embrace the government's proposal.⁹

In the end, though, these are small points. Some are probably oversights by the authors; others may reflect no more than differences in judgment between the authors and this reader. Perhaps more important, they are in any event testament to the depth of the book and its ability to stimulate thought and raise questions at the frontiers of contemporary antitrust analysis.

Conclusion

Casebooks are like recipes: You cannot really be sure just by reading.¹⁰ But you have to start by reading. And, judging from the reading, this is a wonderful casebook that can teach a great deal to both student and practitioner. ●

⁹ See *generally* Brief for the United States and the Federal Trade Commission as Amici Curiae in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, at 8–15 & n.2 (S. Ct. No. 02-682, Dec. 2002).

¹⁰ This problem is particularly acute at the moment because the teachers' manual has not yet been published.