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# Federal Antitrust Law: Vols. 1 and 2

W. Donald McSweeney

# BOOK REVIEW

FEDERAL ANTITRUST LAW. By Earl W. Kintner.[1] Cincinnati, Ohio: Anderson Publishing Co. 1980. Vols. I & II. Pp. xvi, 427; xv, 579. $137.00 for set of two volumes.

*Reviewed by W. Donald McSweeney*[2]

## I. INTRODUCTION

In 1980 Mr. Kintner, an experienced antitrust practitioner with a distinguished background of public service at the Federal Trade Commission, produced the first two volumes of a projected eight volume treatise on the antitrust laws of the United States. It will, indeed, be a voluminous work when completed.

The Introduction states that the purpose of the treatise is "to provide a careful analysis of all of the major federal antitrust statutes, as well as current legislative thinking and the principal judicial and administrative opinions, rules and guidelines and legal writing on the subject."[3] The first two volumes have fulfilled this stated purpose with respect to the Sherman Act. The basic antitrust statute is well covered.

Volumes I and II are comprehensive compilations of the legal authorities but with scant critical analysis. It is a valuable compilation for anyone practicing antitrust law as well as for those judging it.

The books are hard cover and seem well-bound, with a pocket for which pocket supplements are promised. Each book contains a detailed table of contents of only that volume, but each contains a useful index to both volumes.

Volumes I and II cover sections 1, 2, and 3 of the Sherman Act. Volumes III and IV will deal with the Robinson-Patman Act and sections 3, 7, 7A, and 8 of the Clayton Act. Volumes V and VI will deal with the Federal Trade Commission Act. Volume VII will discuss antitrust practice, procedure, and enforcement. The concluding volume will include a master index, statutes, selected appendices, a table of

1. A.B., 1936, LL.D., 1970, DePauw University; J.D., 1938, Indiana University. Senior Partner, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C. Former Chairman and General Counsel, Federal Trade Commission. Member, District of Columbia and Indiana bars.

2. A.B., 1941, LL.B., 1948, Harvard University. Partner, Schiff, Hardin & Waite, Chicago, Illinois. Member, Illinois and Massachusetts bars.

3. I E. KINTNER, FEDERAL ANTITRUST LAWS xiii (1980).

cases, and a bibliography. The absence of a table of cases from the early volumes is a disadvantage.

## II. VOLUME I

In volume I, there is an Introduction to Federal Antitrust laws briefly discussing *laissez faire*, capitalism, socialism, and Marxism in sweeping terms. It is sort of a truncated social history of America, designed to place the Sherman Act in its historical perspective. Although rather high-sounding and somewhat overwritten, it serves its function.

The acknowledgments of assistance are profuse, and the author states: "From the outset this treatise has been viewed as a project of my law firm that was undertaken as a service to the legal profession."[4] The volume does perform a "service to the legal profession" in bringing together a vast amount of authorities to help a lawyer or judge determine what the law is. It is not, however, a searching critical analysis, nor does it pretend to teach what the law should be. It is objective and not argumentative.

The very extensive footnotes add to the value of this treatise as a research tool. Indeed, the footnotes in many parts of the book must be considered to understand fully what "the law is." Unfortunately, the copiousness and fine print of the footnotes detract from the readability. Part of the useful material in the footnotes might have been included in the text, and some footnotes might better have been omitted.

Being a "project" of a "law firm," although contributing to the breadth and depth of the research which went into this valuable work, may also help account for its somewhat awkward writing style. Also, the number of "major contributors" possibly proved an obstacle to a more searching analysis of many of the perplexing problems which arise under the antitrust laws.

The text of the first volume opens with a chapter on "Economic Theory and Policies": "The antitrust laws of the United States are rooted in a commitment to the promotion of free enterprise and the existence of competition in the marketplace."[5] There follows a summary discussion of economic theory. It is doctrinaire and replete with economic catchwords, but it is a balanced presentation.

The next chapter traces the English and American common law of

4. *Id.* at vx.
5. *Id.* at 1.

monopoly and trusts before the enactment of the Sherman Act, footnoted to many pre-1890 state court cases. It and other sections are rich in the history of antitrust and interesting to its students. The author believes that one must know the common-law origins of antitrust to understand the Sherman Act. There is even an appendix in volume I of old common-law English and American cases holding restraints to be reasonable.

Chapter 4 is a lengthy legislative history of the Sherman Act. It is valuable because it gathers this material in one place. The constitutionality and jurisdictional reach of the Sherman Act in both interstate and foreign commerce are considered in the next chapters. There are helpfully assembled theories in the relevant cases on special defenses available in foreign commerce cases: sovereign immunity, act of state doctrine, and foreign sovereign compulsion.

The first volume concludes with a discussion of the per se and rule of reason doctrines which is of considerable current interest because of the rebirth of the latter and the apparent disinclination of the Supreme Court to extend the per se doctrine.[6]

A busy practitioner, eager to know "what the law is right now," may not believe that the first volume is worth buying, but it should be part of any working antitrust library, particularly so as background for the second volume.

## III. VOLUME II

Volume II, covering sections 1, 2, and 3 of the Sherman Act, is an excellent objective presentation of the law supported by a wealth of authoritative citations of cases, statutes, and legal writings. There are no innovative approaches to solving problems arising under the Sherman Act, and, indeed, pioneering in such efforts does not seem to be Mr. Kintner's purpose. His presentation is "basic stuff." From a study of this treatise a student of antitrust could become very well grounded in the basics of the Sherman Act, but he would have to look elsewhere for a critique of its application. This treatise in these respects differs from other recently published antitrust works.[7]

6. Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

7. *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST (1977) and P. AREEDA & D. TURNER, ANTITRUST LAW (1978, 1980). For a comparison of the three treatises, see Adelman,

The specific practices which violate section 1 are discussed in detail. Next, monopolization, attempt to monopolize, and conspiracy to monopolize under section 2 are covered, compared, and contrasted. One section examines the effect of antitrust violations on the enforceability of contracts, and another discusses section 3, relating the Sherman Act's reach over United States territories and the District of Columbia.

The discussion of the intent required to establish a Sherman Act violation[8] does not make clear the difference announced in *United States v. United States Gypsum Co.*[9] between civil and criminal cases. In *Gypsum* the Court clearly distinguished a criminal from a civil violation[10] in holding that intent was a necessary element of a criminal Sherman Act violation. Mr. Kintner's interpretation of *Gypsum* is that its holding was merely that "general intent" may not "be inferred from the fact that the defendants engaged in activities which had an anticompetitive effect."[11] Actually, *Gypsum* goes beyond that result and requires more than what Mr. Kintner calls "general intent." After holding that intent is a necessary element of the Sherman Act crime, the Court went on to state what standard of intent is to be applied for finding a violation.[12]

In the section on horizontal price fixing, there is no discussion of the applicability of the rule of reason and the interesting implications of *Broadcast Music, Inc. v. CBS (ASCAP)*.[13] This case is noted under "copyrights"[14] as if it has no significance beyond "blanket copyright licenses." The broad language of the case is nowhere mentioned. There is no recognition of the admonition of Justice White in *ASCAP* that certain conduct which might be literal "price fixing" is not per se in violation of the Sherman Act and that not "all arrangements among actual or potential competitors that have an impact on price are *per se* violations . . . or even unreasonable restraints."[15] Such recognition of *ASCAP* would have provided some balance to the extensive reliance

Book Review, 25 ANTITRUST BULL. 891 (1980). For an analytical review of P. AREEDA & D. TURNER, *supra*, see Millstein, Book Review, 93 HARV. L. REV. 618 (1980).

8. II E. KINTNER, FEDERAL ANTITRUST LAWS 14-17 (1980).
9. 438 U.S. 422 (1978).
10. *Id.* at 435-36.
11. II E. KINTNER, *supra* note 8, at 15.
12. 438 U.S. at 443-44.
13. 441 U.S. 1 (1979).
14. II E. KINTNER, *supra* note 8, at 113-14.
15. 441 U.S. at 23.

on, and references to, *United States v. Socony-Vacuum Oil Co.*[16] The emphasis on *Socony-Vacuum* suggests that no type of so-called "price fixing" escapes per se condemnation.

The current significance attributed to *United States v. Aluminum Co. of America* (*ALCOA*)[17] throughout the discussion of section 2 fails to accord sufficient importance to the several recent rulings which deny section 2 claims.[18] At least one commentator notes "the demise of *ALCOA*" and believes it was given a "decent burial" in the Second Circuit.[19] The recent cases are not omitted from the treatise, but they are overshadowed by *ALCOA* and lost in the almost indiscriminate citing of so many writings.

In discussing the requirement of showing a dangerous probability of success to prove attempt to monopolize, although clearly recognizing the rejection outside of the Ninth Circuit of *Lessig v. Tidewater Oil Co.*[20] and its progeny,[21] Mr. Kintner devotes a surprising amount of space to this minority view.[22] Once again, however, Mr. Kintner refrains from taking a position, although he expressly recognizes that Professor Turner had espoused abandonment of the dangerous probability requirements even prior to *Lessig*.[23]

Although below-cost pricing evidencing intent to monopolize is mentioned,[24] there is no discussion as to what constitutes predatory pricing or what is meant by "below cost." Mr. Kintner does not enter the current debate on this subject.

## IV. CONCLUSION

Mr. Kintner does not, unlike some other authors, question the role of antitrust in our society. Although the Kintner treatise is not required reading for the antitrust expert, it is an important work in the field. The library of antitrust practitioners and judges will be enriched by it.

16. 310 U.S. 150 (1940). References to the case are in II E. KINTNER, *supra* note 8, at 63-64, 72-74, 84.

17. 148 F.2d 416 (2d Cir. 1945).

18. *See* California Computer Prods., Inc. v. IBM, 613 F.2d 727 (9th Cir. 1979); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied,* 444 U.S. 1093 (1980); Telex Corp. v. IBM, 510 F.2d 894 (10th Cir.), *cert. dismissed,* 432 U.S. 802 (1975).

19. Robinson, *Recent Antitrust Developments-1979*, 80 COLUM. L. REV. 1 (1980).

20. 327 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964).

21. II E. KINTNER, *supra* note 8, at 427.

22. *Id.* at 423-31.

23. *Id.* at 428.

24. *Id.* at 414 n.58.