An Overview of Antitrust Law

Antitrust law is the law of competition, and it is perhaps the least understood law of all. This article provides an overview and explanation of the essential principals of antitrust law, along with comments on certain recurring themes and recent developments in the voluminous case law by which the courts have struggled to give meaning and practical effect to the principal antitrust statutes.

What Is Antitrust Law? Broadly speaking, antitrust laws seek to promote fair competition on the merits and to protect consumers and wronged competitor businesses from anti-competitive business practices — practices undertaken in effort to undermine competitive commercial behavior in a given market or line of commerce.

The antitrust laws therefore forbid the wrongful acquisition or preservation of monopoly power, the abuse of monopoly power in order to establish a new monopoly, and concerted restraints of trade (i.e., business practices undertaken by two or more firms that improperly stifle or suppress "competition on the merits" in a given market). They also govern proposed mergers and acquisitions that are sufficiently large to constitute a threat to competition, and they address commercial practices that pose an arguable danger to competition on the merits in a properly defined antitrust market.

The Principal Antitrust Offenses. Antitrust law is the law of competition. It is concerned with wrongs committed against competition on the merits in a given line of commerce or market. It is never enough for a plaintiff to allege that it has been harmed by an unscrupulous defendant. Rather, an antitrust plaintiff must show that the defendant or defendants have undermined competition in a distinct market, and that this injury to competition in general has specifically harmed the plaintiff in particular. Thus a plaintiff in an antitrust case must make a showing of "antitrust harm" with ensuing "antitrust injury" to the plaintiff itself.

Allow me the following example to illustrate the point more vividly. If I own a restaurant in San Diego, and if I maliciously set fire to two other restaurants because I resent their flourishing success, I have clearly broken the law: I can be prosecuted criminally for arson and sued by the wronged, destroyed restaurants for intentional malfeasance,

tortious interference, and very likely other civil wrongs. But my act, however evil, causes no harm to the thriving restaurant scene in San Diego. I have done nothing that even remotely upsets "competition on the merits" for restaurant dining in San Diego.

But suppose that my restaurant and the two other restaurants are all located on a remote island in the far away Pacific. If I burn them to the ground, then my restaurant alone will be the one restaurant remaining for the residents of this otherwise idyllic island. Suppose that I start charging them $50 for a plate of eggs and potatoes, quipping that "if they don't like my service, they can eat at some other restaurant — oh, I forgot, there are no other restaurants!" My act of arson, if done under such circumstances, has likely caused harm to competition on the merits for restaurant services on this island.

Let's suppose further that this remote Pacific Island is a territory of the United States and is therefore subject to U.S. antitrust law. When I am sued for redress under these laws, my clever antitrust attorneys will argue that, whatever else I might have done, I have not harmed competition on the merits because if I try to raise my prices for my restaurant services, others will soon establish competing restaurants to sell to customers who are disenchanted with my prices. This is the stuff of antitrust law, not mere arson and malicious misconduct. In this case, I would likely lose and be forced to pay three times the value of the harm that my misconduct has caused to competitors and customers alike, assuming the customers started a class action and my two ruined competitors also brought their own suit for lost profits. This is because a successful plaintiff in an antitrust case is entitled to treble damages and attorney's fees and often can also obtain injunctive relief.

Suppose that I set the fire in San Diego, but I have done so because my restaurant and the two others are the only ones in the area that serve a rare delicacy cuisine known to its aficionados as "Fuji-style cooking". In such a case my erstwhile competitors might sue me under the antitrust laws for causing antirust harm in the market for "Fuji-style cooking in the San Diego region".

In other words, antitrust law is the law of competition, and it exists to resist harm done to an entire market, not harm done merely to a particular business or consumer.

The antitrust laws are set forth in various federal statutes, most notably the Sherman Act and the Clayton Act. There are also copycat statutes in virtually every state. The

federal statutes use conspicuously general language to proscribe “monopolization” and “restraints of trade,” leaving to the courts the task of articulating what is meant by these terms. The California antitrust statutes in effect adopted the federal prohibition of restraints of trade, but do not prohibit monopolization, and in recent years the federal courts and the California courts have diverged in their analysis of trade restraints.

The two principal antitrust offenses are “monopolization” and “conspiracy to restrain trade.” There is a third signal antirust offense, “abuse of dominant position”, which is not expressly forbidden under the U.S. laws, but which is proscribed by the competition laws of other jurisdictions, most notably the European Union and Canada. In the U.S., a plaintiff can assail this kind of offense by claiming misuse of existing monopoly power to establish a new monopoly (monopolization) or in an attempt to do so (attempted monopolization).

Monopolization. “Monopolization” occurs when one firm deliberately destroys or impairs its rivals, so that it can acquire “monopoly power” over a particular line of goods or services that it sells. Monopoly power means the power to raise prices or reduce output for an indefinite duration without fear of being undersold by a rival who can offer a substitute good or service. A wily monopolist might choose to implement policies or practices whose ostensible purpose is to improve its offerings, but whose calculated effect and real purpose are to impose prohibitive burdens or costs on smaller, vulnerable rivals so that they can no longer compete against it.

Not every instance of monopoly power is unlawful. Some firms acquire it by superior skill or from fortuitous circumstance. It is a violation of antitrust laws, however, for one firm to employ measures whose purpose is to destroy its rivals so that it can acquire or preserve monopoly power over a certain line of goods or services for which there is no readily available substitute (e.g., the market for food wrapping, but not the market for either cellophane wrapping or tin foil, since either kind of wrapping is a readily available substitute for the other).

To prove monopolization, it is usually necessary to prove the “relevant product and geographic market” in which the monopolization is alleged to have occurred. A claimant seeking relief for alleged monopolization must therefore establish the proper “definition” of the relevant market, and then demonstrate that (1) the alleged monopolist indeed possesses monopoly power in this market; (2) the monopolist

acquired or preserved its monopoly position by employing exclusionary or anti-competitive practices that excluded its rivals from the market; and (3) the claimant suffered proximate losses in direct consequence of the anti-competitive exclusion. A claimant can be a wrongly excluded competitor, a suffering customer, or a class representative of suffering customers (i.e., customers who have been obliged to submit to higher prices or other commercial disadvantages).

It is likewise an offense for two firms to conspire together to monopolize a given market or line of commerce, or for a firm to attempt to monopolize a market or line of commerce. Attempted monopolization occurs when a firm employs predatory practices by which it aims to destroy rivals and acquire monopoly power, but only if there exists a "dangerous probability" that it will succeed in the endeavor unless it is checked by the antitrust laws.

These monopolization offenses are set forth in Section 2 of the Sherman Act and in the many cases that have interpreted this statute.

Conspiracies to Restrain Trade. In addition, it is unlawful for two or more firms to act in concert to restrain trade in a given line of commerce. Certain kinds of trade restraints are deemed per se violations. To prove a per se violation of Section 1 of the Sherman Act, it is not necessary to prove the relevant market or any anti-competitive consequence caused by the challenged conduct. It is sufficient to prove that the challenged conduct occurred, and that it is rightly characterized as a recognized per se offense. The per se offenses include horizontal price-fixing (but not resale price maintenance), bid-rigging, horizontal market allocation, and certain kinds of group boycotts (coordinated refusals-to-deal by which the targeted companies cannot obtain supplies or access that they require in order to remain viable competitors in specified lines of commerce).

Other kinds of commercial practices are not deemed per se violations, but appear on their face to be so clearly anti-competitive in nature and likely effect that the courts will condemn them as unlawful trade restraints after a "quick look" at them. This is the so-called quick-look analysis that is sometimes applied to condemn a challenged restraint of trade.

Other practices are deemed impermissible trade restraints only upon being shown to violate the so-called "rule-of-reason": A claimant in a rule-of-reason case must show that two or more firms have acted in concert to impose trading practices that demonstrably harm competition on the merits in the relevant market, thereby causing specific harm to the claimant. The courts have elaborated a standard of proof that requires the claimant to make certain showings, which, if made, then oblige the defendants to proffer pro-competitive justifications for their challenged practices. The claimant can still prevail afterwards by establishing that the pro-competitive purposes could have been reasonably accomplished by less restrictive measures, or that these pro-competitive justifications serve as mere pretexts for anti-competitive practices.

To prove a "rule of reason" offense, it is typically necessary to establish the "relevant product and geographic market" in which two or more firms have formed a "contract, combination or conspiracy" in order to restrain trade. The conspiracy need merely be a tacit understanding. Broadly speaking, a restraint of trade is a predatory commercial practice undertaken by co-conspirators that impedes competitors, suppliers, customers or other market participants from engaging in rational, pro-competitive conduct. The usual result of such practices is to afford the conspirators increased sales at the expense of competitors or to allow them to make sales on terms and conditions that the customers would not accept or prefer in a freely competitive market. The typical result is that customers are constrained to purchase goods or services on terms that they would not accept if the conspirators had not undermined competition on the merits for their business. Often the undesirable result is that consumers must pay higher prices or accept inferior service from less responsive, complacent suppliers who have succeeded at excluding or impairing would-be competitors. The range of commercial practices that can constitute an unlawful restraint of trade are very broad, but it can be difficult and expensive for a claimant to prove restraints of trade under the so-called "rule of reason."

Defendants in Section 1 cases sometimes proclaim the lofty pro-competitive purposes of their challenged practices, but a closer inspection sometimes reveals that their supposed pro-competitive aims are neither promoted by the practices in question nor even related to them in any meaningful way.

The offense of conspiracy to restrain trade is set forth in Section 1 of the Sherman Act and in the voluminous case law that interprets this statute. California's Cartwright Act likewise prohibits trade restraints undertaken by two or more independent entities so

long as the conduct in question exerts a substantial effect on businesses or consumers in California. The California courts historically have adopted federal case law interpretations of Section 1 in order to decide claims brought under the Cartwright Act, but some California courts have declined to adopt certain modern federal precedents in antitrust and competition cases.

Antitrust Offenses, Further Discussed. What exactly are antitrust offenses? It might be said that an antitrust offense is a tort committed against a market rather than against a particular business or person in the market. As discussed above, the classic antitrust offenses are (1) the obtaining of monopoly power by improper means, (2) the preservation or enlargement of monopoly power by improper means, (3) the abuse of monopoly power in one market to obtain monopoly power in another market, and (4) conspiring to sabotage "competition on the merits" by means of exclusionary or predatory "restraints of trade".

A monopoly is not necessarily evil, nor does its mere existence violate the antitrust laws. Monopolies are deemed necessary or even useful in some markets: For example, it was thought until recently that electrical power could be best furnished by local monopolies, none of whom ever competed against the others (this circumstance finally might change because of recent developments in the relevant technologies).

Nevertheless, it is always a violation of antitrust law to use anti-competitive or predatory practices to acquire monopoly power in a particular market, or to use such methods to preserve or enlarge monopoly power, or to abuse monopoly power in one market in effort to obtain a monopoly in another market. It is likewise a violation of antitrust law for two or more firms to act together in order to sabotage competition on the merits or engage in any of the per se offenses. These practices — monopolization and trade restraints — constitute the bread and butter of antitrust law.

Mergers and Acquisitions. Moreover, two competitors in a particular marketplace cannot usually merge together, nor can one acquire another, nor can they otherwise have a fusion of their businesses, if by the fusion they acquire either monopoly power or an overly dominant position that is deemed harmful to consumers. The question is typically decided by the FTC and/or DOJ-Antitrust, to which the would-be business couple applies for approval in advance of the merger or acquisition. These matters are sometimes litigated if the FTC and/or DOJ-Antitrust refuse to assent to the proposed

merger, acquisition or other fusion, but the proponents of the proposal wish to challenge the refusal. Sometimes a proposed merger, acquisition or other fusion is allowed only if the merged operations divest certain assets or operations so as to avoid perceived anti-competitive consequences that might otherwise arise from the merger or acquisition. It is never possible to analyze a proposed merger or acquisition without defining the proper market for antitrust purposes and analyzing how this market will operate after the proposed merger or acquisition takes place. Thus the DOJ-Antitrust has issued extensive guidelines that explain how antitrust markets should be defined for the purpose of analyzing a proposed merger or acquisition. These guidelines explain how the DOJ-Antitrust analyzes proposed horizontal and non-horizontal mergers and acquisitions.

The Antitrust Statutes. The antitrust laws are set forth in various federal and state statutes. The federal statutes address interstate commerce, while the state ones address intrastate commerce within the state. Owing to a very expansive interpretation of the term "interstate commerce," virtually any significant commercial transaction can be said to affect "interstate commerce" and therefore be deemed subject to federal antitrust regulation. Even so, some practitioners prefer for various reasons to plead their antitrust claims in state court, even when so doing means overlooking significant aspects of the case.

The state statutes and case law incorporate the federal standards, so that in most instances it is not possible to litigate an antitrust case in state court without having a thorough grasp of federal antitrust law.

Here is a brief summary of the principal federal statutes, followed by general comments on the state statutes, nearly all of which are expressly modeled after the Sherman Act:

- The Sherman Act. This statute is the premier article of federal law. It is the original, principal, and foremost antitrust statute in the United States, setting forth the broad statutory proscriptions that act as a "charter of the marketplace" and "constitution of competition law" in American jurisprudence. The Sherman Act in its current form provides both civil remedies and criminal penalties for the principal antitrust violations — conspiracies to restrain trade, monopolization, attempted monopolization, and conspiracies to monopolize. The Sherman Act is worded in broad, open-ended language, so that clever competitors cannot elude

its provisions by lawyerly evasions and obfuscation. Its detractors have argued that the statutory language is so broad and open-ended as to be almost meaningless, and that this circumstance has allowed the courts excessive discretion in interpreting and applying it, so that the antitrust law has become arbitrary and unpredictable. The rejoinder to this argument is that the Sherman Act sets forth the fundamental standards, and it is for the courts to decide in each case whether the challenged conduct constitutes monopolization of a line of commerce or the concerted imposition of an improper restraint of a line of commerce. A century of case law has helped to provide clarity and meaning to this statute, establishing how it is supposed to be applied in order to forbid and sanction illegal trade restraints and monopolization. Every antitrust lawyer must be familiar with this case law, especially the leading cases issued by the U.S. Supreme Court and in the local appellate circuit.

- The Clayton Act. This law is another federal statute that imposes restrictions on proposed mergers and acquisitions. It also supplements the Sherman Act, prohibiting certain kinds of commercial practices that excessively stifle competition on the merits. It sets forth various civil remedies. Indeed, it was the Clayton Act that established a private right of redress for civil relief under the Sherman Act (at 15 U.S.C. § 15). In addition, the Clayton Act usefully allows the courts to enjoin anti-competitive conduct before it actually causes harm.

- The Robinson-Patman Act. This law is also a federal statute, and it prohibits specific business practices such as price-fixing and price-discrimination. It does so in technical, specific language that makes it the very reverse of the Sherman Act. It serves as a supplement to both the Sherman and Clayton Acts and is sometimes invoked by civil litigants who have also brought claims under the other two Acts. This statute is increasingly viewed by the courts and antitrust experts as anachronistic and problematic because of its overly technical requirements.

- The Federal Trade Commission Act. This is another federal statute that established the Federal Trade Commission ("FTC"), which has regulatory authority to enforce the Sherman Act, the Clayton Act, and the Robinson-Patman Act. Significantly, Section 5 of the FTC Act confers additional authority on the FTC, allowing it to test the limits of antitrust policy. An aggrieved firm that

concludes that it has no civil remedy under the Sherman Act or Clayton Act might decide that its best recourse is to complain to the FTC, asking that it invoke its authority under Section 5 of the FTC Act in order to investigate the matter and initiate administrative proceedings in order to enjoin the challenged conduct.

- The Hart-Scott-Rodino Act. This federal statute imposes disclosure requirements for certain kinds of mergers, acquisitions, and other fusions of two or more business operations. The duty to make a disclosure depends on the size of the transaction and the size of the participating companies. If a firm wishes to conduct a transaction that is covered by this Act, it must first make prescribed disclosures to the FTC and Department of Justice-Antitrust Division, either of which can thereafter object to the transaction, grant conditional approval (e.g ., require a post-merger divestiture), or decline to object within the statutory deadline. It is sometimes possible to obtain expedited approval (i.e., a waiver of the obligatory waiting period). If the FTC or DOJ-Antitrust objects, the proponents of the merger can challenge the objection, abandon the transaction, or modify their proposal and re-submit it.

- The State Statutes. In addition to the federal statutes, each state in the United States has its own antitrust statutes. These statutes, which govern intrastate commerce, typically incorporate the statutory proscriptions and case law interpretations of the Sherman Act, which remains the statute of reference and premier article of antitrust legislation in the United States.

The Courts and Antitrust Theory. Since the antitrust statutes are couched in general language (e.g., "it is an offense to conspire to restrain trade"), they have no practical meaning until the courts actually enforce them against the businesses accused of violating them. It is therefore impossible to understand antitrust law merely by reading the applicable statutes. It is necessary to know the cases as well as their underlying reasoning, and it is equally necessary to have a thorough grasp of antitrust theory (antitrust economics), which is elaborated and debated by economists and law professors across the country, and which is often referred to expressly in the cases.

Why Antitrust Law Matters. Antitrust law matters to consumers and businesses that have been either harmed by anti-competitive abuses or accused of employing them. The underlying purpose of the antitrust laws is to promote robust competition in the

markets and to prohibit anti-competitive monopolists, cartels, and conspiracies. To read more on this point, please see the following article at this link.

Antitrust Sanctions, Civil and Criminal. An antitrust offender sued in civil court risks paying treble damages (three times the value of proven harm caused by its offense), as well substantial attorney's fees and costs. An antitrust defendant, even if it prevails, cannot recover its attorneys' fees, unless the case was demonstrably frivolous. An antitrust offender might also be enjoined — i.e., ordered to curtail certain business practices during the lawsuit and perhaps ordered to do so permanently if the suspended practices are deemed at trial to be antitrust violations. Antitrust cases are usually very costly to the alleged offender even if it prevails, but under the new pleading standards a frivolous or poorly conceived case can be quickly terminated upon a well-stated motion to dismiss. Firms that are tempted to monopolize a market or collude with others in order to gain an insurmountable advantage over customers or rivals should well consider the perils of private antitrust enforcement before embarking on their venture. The very practices that might generate outsize profits today might later involve the participating firms in outsize antitrust litigation tomorrow.
Conversely, an antitrust plaintiff can recover treble damages, injunctive relief, and its attorney's fees and costs of suit (but not experts' fees). In some cases, antitrust plaintiffs can obtain very substantial judgments against solvent firms that must pay them.

In really egregious cases, which typically concern the well-established per se violations of Section 1 of the Sherman Act, the alleged offenders might be subjected to criminal prosecutions, and their officers and employees might be personally indicted, tried, and convicted. Criminal prosecutions of antitrust law are typically conducted by the Antitrust Division of the United States Department of Justice ("DOJ-Antitrust"), as well as by state prosecutors. The FTC, as noted above, has strong regulatory powers and can readily refer matters to the DOJ or act in concert with it. The DOJ-Antitrust sometimes collaborates with the United States Attorney's Office, particularly in cases in which the charges include both antitrust offenses and alleged mail fraud, bank fraud, wire fraud and/or RICO violations. The DOJ-Antitrust prosecutes both criminal and civil claims, and the FTC prosecutes civil and administrative claims.

A corporation convicted of a criminal violation can be ordered to pay enormous restitution and fines, and an individual can be ordered to pay enormous restitution and fines as well as serve substantial terms in prison (up to ten years in a federal prison!). If

a corporation is convicted of a criminal violation, it will usually be sued civilly by the civil victims of the offense. It is often sued merely upon news of an indictment or ongoing criminal investigation. Sometimes a convicted firm must try to wade through a ruinous succession of civil cases from competitors and customers. In many instances, a criminal conviction for antitrust violations foretells the demise of the company that receives it.

Criminal prosecutions principally concern price-fixing, bid-rigging, horizontal market allocations, and other brazen instances of antitrust wrongdoing. To prevail in a criminal prosecution, the government must prove each element of the alleged offense beyond a reasonable doubt and must prove that the defendant acted with the requisite "scienter" or criminal intent. The requirement of scienter was imposed by the US Supreme Court in a case whose reach has been significantly limited by appellate courts that have ruled that criminal intent in a prosecution for a per se offense merely means the intention to commit an act in furtherance of a common plan by which the per se violation was committed. Since most criminal violations concern per se offenses, the requirement of proving criminal intent has been entirely circumscribed by these cases, but the rationale for this limitation seems dubious (at least to the author of this article), and the issue will likely be revisited by the US Supreme Court at some point or other.

The Origins of Antitrust Law, Briefly Stated. Antitrust law makes more sense if you have some understanding of its origins. What, for example, does "antitrust" mean? As with everything else, it all makes much more sense if you understand the first principles.

Antitrust law is really the law of competition. The term "antitrust" merely refers to the enormous "trusts" set up in the U.S. in the late 1800s by the infamous "robber baron" magnates. These trusts directly and indirectly controlled entire markets for petroleum production and transport, steel production, banking, railroad transport, and various related industries and services. These trusts imposed a stranglehold on competition in the different markets in which they operated and threatened to undermine the charter principles of free-market economics. If unchecked, they would have resulted in a society living at the mercy of a handful of monopolies and oligopolies that completely dominated all the key sectors of the economy. By their immense concentration of monopoly power and market power, they would have been able to raise prices, restrict

output, and exclude competitors with impunity. The “antitrust laws” were enacted to redress this evil and to establish the law of competition in the United States.

Defending competition on the merits is the true aim of antitrust law. If a competitor merely employs a “sharp practice” that is harmful to a rival or its customer, the antitrust laws offer no relief. Broadly speaking, the antitrust laws take effect only where (1) predatory competitors collude with one another in order to undermine “competition on the merits”‘; or (2) one or more predatory competitors act to exclude or undermine other competitors in order to establish or preserve a monopoly position that one of them holds; or (3) a proposed merger, acquisition or exclusive supplier arrangement threatens to lessen competition unacceptably in a properly defined market. In each of these instances, the risk is that one or more predatory competitors or a newly enlarged firm can sell goods or services at higher prices without fear that their customers can seek relief by purchasing substitute goods or services from a rival. Protecting “competition on the merits” and stopping predatory abuses that cannot be redressed by ordinary competitive processes — these are the proper aims of antitrust law, though not always the result.

The antitrust laws aim to accomplish these purposes, and to this end they are worded in remarkably open-ended language, so as to anticipate the sophistication and cunning of the predatory firms, which, if given the tiniest loophole, would exploit it perfectly.

The Inescapable Injustice of Antitrust Law. The courts have tried for nearly a century to give meaning to the broad standards enunciated in the principal antitrust statutes, and not surprisingly they have often contradicted one another in their rulings: Some courts have been disposed to find antitrust violations in every corner, while others have refused to see it in even the most brazen instances of predatory exclusions and anti-competitive conspiracies. It sometimes seems as though the many decisions, if considered as a whole, appear to be an unwieldy, incoherent hodge-podge of ad hoc improvisations that hopelessly contradict one another, if not in specific outcomes then in their underlying reasoning.
If laws should be generally understood in advance by the population whom they are supposed to govern, then the antitrust laws have largely been a failure, since their meaning and practical effect become clear only after the courts develop specific applications of the broad standards given in the underlying statutes — which they do only when called upon by an aggrieved private litigant or a government prosecutor.

Thus one competitor might object to the business practices of its more successful rival. It then brings an antitrust suit, or complains about the matter to the DOJ. A civil antitrust case is brought, or, in some instances, a criminal proceeding is initiated. The court, having been thus summoned, now decides whether or not there has been an antitrust violation — and this it does by applying the general formulas of the statutes to the specific business practices under challenge. Whether or not the practice is improper becomes known only after the court has ruled. This is inevitably followed by appeals made by the losing party, and then by further appeal. The entire process can last for years.

This is a very curious brand of law, and one that appears to fail the first test of all laws: Is it generally understood to forbid certain conduct in advance of the fact, or is its application unpredictable, unknowable, seemingly arbitrary, and therefore disruptive?

Even so, firms that set out to destroy competition on the merits tend to be skillful, subtle, and infinitely more pernicious to society than mere ordinary tortfeasors. The antitrust laws offer meaningful redress, sufficient incentives to private litigants to enforce the laws of competition, and real deterrence to those firms that might otherwise be inclined to seek profits by crushing competitive conditions in the markets in which they operate. The antitrust laws must be stated in general terms, or else they would be successfully eluded. The evil of these laws is therefore a necessary one in this author's opinion.

The Injustice Is Necessary. It is impossible to foresee every sort of business arrangement that might constitute an unfair practice that impedes the marketplace, and it is therefore impossible to enumerate the forbidden practices. Thus the antitrust laws limit themselves to the statement of general principles, and leave to the courts and regulatory authorities the difficult task of applying these principles to contested business practices. In effect, the antitrust statutes are a "constitution of the marketplace," setting forth the broad principles of how markets should operate. The civil and criminal penalties, including the onerous burden of treble damages, seem necessary because they deter anti-competitive behavior, and also because they give strong incentive to victims to come forward to complain of antitrust misconduct, which never could be adequately policed by the DOJ, the FTC, or state prosecutors without the active cooperation of the aggrieved competitors or customers whom the offender has run out of business or gouged into paying monopoly prices.

Litigating An Antitrust Case. The devil truly does lie in the details, and it cannot be emphasized enough how important it is to pay close attention to every item of communication sent or received by the concerned parties. But none of this Spartan attention matters a whit, unless the person paying it has a well-formed theory of the case that he has set out to prove. In antitrust litigation, as in all other kinds of trial work, he who tells the better story wins the case. But the story will ring false, unless it is backed up by the facts, which can be culled only by a painstaking review of everything in sight and everything that is not in sight as well. You have to know what to ask for, whom to ask, what to look for once you have the requested materials, and how to organize it all.

Antitrust cases are won by perseverance, determination, unflagging attention to the trifles, and all of this in service to proving a larger theory of the case that will convince both judge and jury.