BOOK REVIEW

A Treatise on the Antitrust Laws of the United States: Federal Antitrust Law. By Earl Kintner. Cincinnati: Anderson Publishing Co. 1980. Two of Eight Projected Volumes. Vol. I: pp. xvi, 427; Vol. II: pp. xv, 579, index.

Reviewed by HERBERT HOVENKAMP*

Even with only two of a planned eight volumes published, Earl Kintner's *Federal Antitrust Law*[1] is already an important addition to the legal literature, largely because of its value to practicing lawyers. The two completed volumes of this treatise introduce the federal antitrust laws and survey the Sherman Act. Volume I contains an introduction to the economic theory of antitrust,[2] and long sections on the common law of trade restraints[3] and the legislative history of the Sherman Act.[4] It also includes shorter sections on the constitutionality of the Sherman Act,[5] commerce clause limitations on Sherman Act jurisdiction,[6] and the reach of the federal antitrust laws to activities occurring

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[1] E. KINTNER, A TREATISE ON THE ANTITRUST LAWS OF THE UNITED STATES: FEDERAL ANTITRUST LAW (1980) [hereinafter cited as E. KINTNER]. Future volumes will include two on the Robinson-Patman Act, 15 U.S.C. §§ 13-13(b), 21(a) (1976), and the Clayton Act, 15 U.S.C. §§ 12-27 (1976); two on the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1973); one on practice, procedure, and enforcement; and a final volume containing appendices, tables, and index. Earl W. Kintner is a senior partner with the Washington, D.C. law firm of Arent, Fox, Kintner, Plotkin & Kahn, and former Chairman and General Counsel of the Federal Trade Commission.

[2] IE. KINTNER, *supra* note 1, at 1-38.

[3] *Id.* at 39-124.

[4] *Id.* at 125-242.

[5] *Id.* at 243-84.

[6] *Id.* at 285-98.

outside the United States.[7] Volume II generally surveys those practices prohibited under the Sherman Act, beginning with section 1 and proceeding through section 3, which applies the antitrust laws in United States territories and the District of Columbia.[8]

Kintner's work should be regarded as a treatise for antitrust practitioners. It is substantially less theoretical than its chief competitor, *Antitrust Law*,[9] by Areeda and Turner. Kintner's volumes rely much more heavily on case law as a source for antitrust, and less than Areeda and Turner do on the academic literature of antitrust scholars and economists. As a result, Kintner's work is remarkably different from the Areeda and Turner volumes. Antitrust for Areeda and Turner is contained in a highly organized and internally consistent theoretical framework. However, someone reading their volumes cannot escape the impression that *Antitrust Law* is really Professors Areeda and Turner telling what antitrust law ought to be. On the other hand, Kintner's work is far more descriptive. He rarely presents six words without providing a footnote to a string of cases. This results in a less coherent ideology of antitrust than Areeda and Turner present, but Kintner's volumes do a better job of displaying antitrust as it appears in the judicial opinions, with all its inconsistencies and irrationalities.

A typical example of this difference between these treatises is the treatment each makes of the offense of predatory pricing. Areeda and Turner's discussion[10] is highly theoretical and generally develops the "Areeda-Turner thesis"[11] for identifying and

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[7] *Id.* at 299-339.

[8] II E. KINTNER, *supra* note 1, at 1-300 (covering § 1 of the Sherman Act), 301-499 (covering § 2 of the Sherman Act), 500-30 (covering § 3 of the Sherman Act).

[9] P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (vols. I, II, III 1978; vols. IV, V 1980) [hereinafter cited as P. AREEDA & D. TURNER]. *See* Rhodes, Book Review, 15 GA. L. REV. 530 (1981); Rhodes, Book Review, 13 GA. L. REV. 1110 (1979).

[10] III P. AREEDA & D. TURNER, *supra* note 9, at 148 *et seq.*

[11] *See* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). Areeda and Turner's proposals in this article sparked an extensive scholarly debate, and even forced Professors Areeda and Turner to modify their initial thesis. *See* R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 144-60 (1978); Areeda & Turner, *Williamson on Predatory Pricing*, 87 YALE L.J. 1337 (1978); Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L.

condemning predatory pricing: Pricing above reasonably anticipated average variable cost should be presumed lawful, while pricing reasonably anticipated to be below average variable cost should be conclusively presumed unlawful.[12] By comparison, Kintner's shorter and less theoretical analysis of predatory pricing does little more than refer the reader to a collection of cases that are at best confusing and inconsistent.[13]

The relative value of each of these treatises depends on the needs of the particular reader. Areeda and Turner sell a coherent theory of antitrust—but that theory is dominated by the ideology of Areeda and Turner and the Harvard school. For example, although the Areeda-Turner theory of predatory pricing is very influential,[14] not all courts have adopted it.[15] It can then be misleading to state the Areeda-Turner test for predatory pricing as the law. On the other hand, Kintner is not often sidetracked by theory. If one court has said that the moon is yellow and another that it is orange, Kintner is likely to quote both opinions and let the reader take his choice.

Although the Kintner treatise is designed for practitioners, the antitrust lawyer may find more academic and historical material in these volumes than he cares to have. Two-thirds of the first volume—the long sections on the common law of trade restraints[16] and the legislative history of the Sherman Act[17]—are

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REV. 869 (1976); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977); Williamson, *Williamson on Predatory Pricing II*, 88 YALE L.J. 1183 (1979).

[12] III P. AREEDA & D. TURNER, *supra* note 9, at 154.

[13] *See* II E. KINTNER, *supra* note 1, at 360, 412.

[14] *See* Pacific Eng'r & Prod., Inc. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); Hanson v. Shell Oil Co., 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); National Ass'n of Reg. Util. Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976).

[15] *E.g.*, Inglis & Sons Baking Co. v. ITT Continental Baking Co., 461 F. Supp. 410 (N.D. Cal. 1978), *aff'd in part, rev'd in part, remanded*, 652 F.2d 917 (9th Cir. 1981); Transamerica Computer Co. v. IBM Corp. [1979] 2 Trade Cas. ¶ 62,989.

[16] I E. KINTNER, *supra* note 1, at 39-124.

[17] *Id.* at 125-242. Much of Kintner's treatment of the legislative history repeats the work of Kintner himself and other scholars. *See* E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (1978); W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT (1965); H. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1955); Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

of chiefly historical interest. While a knowledge of the intent of the framers of the antitrust laws is frequently important in litigation, Kintner's discussion of the legislative history is probably more than a practitioner needs.

The most troublesome element of Kintner's antitrust treatise is its organization. This work is organized entirely around the antitrust statutes, section by section. While such organization might work well in other areas of the law, it makes little sense in antitrust, where the coverage of the various statutes overlaps considerably. For example, both section 1 of the Sherman Act[18] and section 3 of the Clayton Act[19] have been held to condemn tying arrangements.[20] The Clayton Act is used more often, and most practicing antitrust lawyers would identify section 3 of the Clayton Act as the "tying statute." However, the structure of this treatise has obliged Kintner to present virtually the entire law of tying arrangements in his discussion of section 1 of the Sherman Act.[21] He will presumably repeat a substantial part of this material when he discusses the Clayton Act in a future volume. The practitioner generally begins with a set of facts—a problem that his client brings to him—and goes from there to find the sources of law. A well-designed treatise ought to do the same thing. Kintner's rigid organization around the statutes ex-

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[18] 15 U.S.C. § 1 (1976).

[19] 15 U.S.C. § 14 (1976).

[20] *See* International Salt Co. v. United States, 332 U.S. 392 (1947). Although both statutes have been used to condemn tying arrangements, the jurisdictional coverage of the statutes is different. The Sherman Act, 15 U.S.C. §§ 1-7 (1976), reaches restraints in or affecting interstate commerce, *see, e.g.*, McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232 (1980), while the Clayton Act, 15 U.S.C. §§ 12-27 (1976), extends only to restraints that are actually in the flow of interstate commerce. *See* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974). In addition, the Sherman Act applies to tying arrangements in certain areas, like business services and real property, where the Clayton Act is generally held inapplicable. *See* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Times Picayune Pub. Co. v. United States, 345 U.S. 594 (1953). Finally, there is a debate in the circuit courts today about whether the Clayton Act and the Sherman Act impose different substantive tests for determining the legality of tying arrangements. At least two circuits have held that the tests under the two acts are virtually identical. *See* Spartan Grain and Mill Co. v. Ayers, 581 F.2d 419, 428 (5th Cir. 1978); Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1214 (9th Cir. 1977). *See also In re* Data Gen. Corp. Antitrust Lit., 490 F. Supp. 1089, 1100 (N.D. Cal. 1980). *Compare* Rental Car of N.H., Inc. v. Westinghouse Elec. Corp., 496 F. Supp. 373 (D. Mass. 1980).

[21] *See* II E. KINTNER, *supra* note 1, at 223-62.

hibits a kind of legal formalism that belies the intent of these volumes to be designed for practitioners.

The same difficulty generally applies to Kintner's analysis of market power[22] in his discussion of section 2 of the Sherman Act.[23] Market power is an important element of the offenses of monopolization and attempt to monopolize; however, it is also important for analyzing mergers and tying arrangements. A more practical approach, particularly for practitioners, would be to address questions of market power generally, as Areeda and Turner do.[24]

Kintner's structural framework may create more problems in future volumes. For example, many questions of antitrust standing, procedure, and jurisdiction arise in the context of sections 4[25] and 12[26] of the Clayton Act. This treatise promises to deal with the Clayton Act in volumes III and IV, and with general questions of procedure and enforcement in volume VII.[27] The author would do well to defer his discussion of sections 4 and 12 of the Clayton Act to his procedural volume.

A comment on Kintner's use of economic theory is in order. Kintner begins with a generally excellent, if brief, introduction to the economic theory underlying antitrust.[28] Here Kintner argues that although there is precedent for the use of "non-economic criteria" in determining antitrust liability, "there is more than ample authority to establish that economic issues were the fundamental, if not exclusive, concern of the Sherman Act's drafters."[29] However, having argued for an economic model, Kintner abandons most of his concern for economic theory in the subsequent chapters on the substantive law of antitrust. Thus, for example, he develops with virtually no criticism the notion that the creator of a tying arrangement can use "leverage" to transform market power in the tying product into monopoly profits in the tied product.[30] Here Kintner relies exclusively on the cases, even though the case law has been broadly

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[22] *See id.* at 350-61.
[23] 15 U.S.C. § 2 (1976).
[24] *See* II P. AREEDA & D. TURNER, *supra* note 9, at 321-45.
[25] 15 U.S.C. § 15 (1976).
[26] 15 U.S.C. § 22 (1976).
[27] *See* I E. KINTNER, *supra* note 1, at xiii.
[28] *Id.* at 1-38.
[29] *Id.* at 33.
[30] II E. KINTNER, *supra* note 1, at 223-62.

criticized as being predicated on an incorrect economic theory.[31]

These problems aside, this is a well-done treatise that supports Mr. Kintner's long-held reputation as a lucid and painstaking antitrust scholar whose work is especially helpful to practicing attorneys.[32] It takes the antitrust lawyer directly to the sources of law. If that law is misleading, confusing and inconsistent, it is largely the fault of the judiciary and not of Mr. Kintner.

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[31] *See* Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957); Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis*, 30 LAW & CONTEMP. PROB. 552 (1965); Markovitz, *Tie-ins, Reciprocity and the Leverage Theory*, 76 YALE L.J. 1397 (1967); Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506 (1974); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958). *But see* Bauer, *A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis*, 33 VAND. L. REV. 283 (1980). Bauer appears to accept a modified version of the leverage theory.

[32] *See* Clark, Book Review, 67 A.B.A. J. 460 (Apr. 1981), McSweeney, Book Review, 59 WASH. U.L.Q. 585 (1981).