BOOK REVIEW


Reviewed by HERBERT HOVENKAMP*

Even with only two of a planned eight volumes published, Earl Kintner's *Federal Antitrust Law* 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, and long sections on the common law of trade restraints and the legislative history of the Sherman Act. It also includes shorter sections on the constitutionality of the Sherman Act, commerce clause limitations on Sherman Act jurisdiction, and the reach of the federal antitrust laws to activities occurring

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2 Id. at 39-124.
3 Supra note 1, at 1-38.
4 Id. at 125-242.
5 Id. at 243-84.
6 Id. at 285-98.
outside the United States. 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.

Kintner's work should be regarded as a treatise for antitrust practitioners. It is substantially less theoretical than its chief competitor, Antitrust Law, 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 is highly theoretical and generally develops the "Areeda-Turner thesis" 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).
10 III P. AREEDA & D. TURNER, supra note 9, at 148 et seq.
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. 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.

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, not all courts have adopted it. 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 and the legislative history of the Sherman Act—are


III P. Areeda & D. Turner, supra note 9, at 154.

See II E. Kintner, supra note 1, at 360, 412.


I E. Kintner, supra note 1, at 39-124.

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\textsuperscript{18} and section 3 of the Clayton Act\textsuperscript{19} have been held to condemn tying arrangements.\textsuperscript{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.\textsuperscript{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-

\textsuperscript{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

\(^{22}\) See id. at 350-61.


\(^{24}\) See I F. AREEDA & D. TURNER, supra note 9, at 321-45.


\(^{27}\) See II 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.\textsuperscript{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.\textsuperscript{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.
