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## Book Review [Private Antitrust Litigation]

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## BOOK REVIEW

PRIVATE ANTITRUST LITIGATION, by Barry Kellman. Chicago, IL: Commerce Clearing House, Inc. 1986. Pp. v + 651. Hardcover. \$49.50.

*Reviewed by George J. Alexander\**

Is antitrust dead? A book written in a prior decade would not have addressed that problem. However, with deregulation abroad and antitrust deemphasized in Washington, is there a need for a book on private antitrust litigation?

In his book, Professor Kellman quickly points out that the volume of federal litigation is very low. Only one recent Supreme Court decision has involved the government, and not since 1978 has the government successfully litigated a liability claim before the Court. Even in the lower courts, a government case is a comparatively rare event.<sup>1</sup> "Yet antitrust litigation has, in quantity terms [sic], exploded,"<sup>2</sup> the author asserts. The explosion comes, of course, from private antitrust litigation. To prove his point, Professor Kellman asserts that "just over six times as many"<sup>3</sup> private antitrust actions were commenced in 1980 as in 1960. This argument would be more persuasive if the author had used a year subsequent to 1980 because a number of the more limiting antitrust precedents came in the 80's.<sup>4</sup>

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1. B. KELLMAN, PRIVATE ANTITRUST LITIGATION vi, vii (1985) [hereinafter KELLMAN].

2. KELLMAN, *supra* note 1, at vii.

3. *Id.*

4. See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing, 106 S. Ct. 2613 (1985) (market power required for per se boycott); National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984) (price fixing governed by rule of reason in special cases); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (per se tying requires substantial market power in tying product); Monsanto Co. v. Spray-Rite Services Corp., 465 U.S. 752 (1984) (dictum requiring proof that resale price maintenance defendant did not act independently).

Even so, Professor Kellman is clearly correct.<sup>5</sup>

The changes of the recent past have been the product of increasing application of economic principles to law. Professor Kellman appears to disapprove of this trend.<sup>6</sup> "The point is this: Antitrust is law, not economics; and it is enforced by the judiciary, not academia."<sup>7</sup> He is right again. Courts continue to defy economists in announcing antitrust principles.<sup>8</sup> It is Professor Kellman's goal to overcome a tendency he decries—that of over generalizing on the basis of a few cases—by discussing virtually all cases decided in the area over the last decade. He claims his chief contribution is organizing rather than merely presenting the law.<sup>9</sup>

Professor Kellman begins his effort by defining an elusive concept in antitrust: competition. " 'Competition' means the same thing in antitrust law as it does in athletics; it is a process of interaction in which each individual participant strives to obtain scarce rewards, subject to the right of every other participant to do the same." This is a competition that antitrust protects, according to the author.<sup>10</sup> In teaching Antitrust, this commentator has spent up to five weeks pursuing the Court's meaning of competition, and is surprised at so facile a definition. How would it apply to Chief Justice Warren's definition of competition in *Brown Shoe Co. v. United States*?<sup>11</sup> In

5. After 1980, the number of private antitrust suits declined. In 1980, 1457 private antitrust suits were commenced in U.S. District Courts while in 1960 there had only been 228. By 1985, the number of cases filed had dropped to 1052. If 1985 (the date of publication) had been the reference point, Professor Kellman could claim that there were 4.6 times as many private cases as in 1960 not "just over 6 times" as many. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 128 (1984); LAWYER'S ALMANAC 814 (1986).

6. Kellman is of the opinion that:

There is a tendency, all too prevalent, to view cases in isolation and thereby over-generalize on the basis of too little information. There is another tendency to not examine legal cases at all but to view antitrust as a *tabula rasa* upon which to formulate elegant models of consumer welfare. Worst of all, there is a tendency to reduce antitrust law to the one-dimensional pursuit of economic efficiency while ignoring the lesson of nearly a century of enforcement and litigation that antitrust should be a multi-dimensional integration of principles, capable of development over time.

KELLMAN, *supra* note 1, at v.

7. *Id.*

8. "Keifer-Stewart and Albrecht place horizontal agreements to fix prices on the same legal — even if not economic — footing as agreements to fix minimum or uniform prices." *Arizona v. Maricopa County Medical Society*, 451 U.S. 332, 348 (1982) (emphasis added).

9. KELLMAN, *supra* note 1, at viii.

10. *Id.* at vi.

11. "It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, lo-

fact, commentators who thought that competitors were the principal beneficiaries of antitrust and those who thought antitrust was designed to serve consumer welfare, derived their definition of competition from the Clayton Act,<sup>12</sup> rather than from case law. Before leaving the preface Professor Kellman has issued a challenge. Antitrust is not what this commentator and most other academics have always taught in class. It cannot be derived from generalizations about a small number of cases, but must be found by looking at the totality of cases for at least a ten year period. The reader should therefore feel quite free to disregard any critical comments in this review by attributing them to an academic's refusal to accept those premises.

It is undeniable that the book is filled with citations to lower court cases that have not generally found their way into antitrust commentary. The book is divided into four major parts. The first part covers the core of antitrust in 191 pages. It follows equally sized sections on exemptions, on who may be sued and what may be recovered, and finally on procedural issues. Generally, there are 25 chapters with each chapter boasting a short, usually two or three page, summary in which the rules discussed in the chapter are set forth. These summaries are no doubt useful to those wishing a fast overview of the field.

A more catholic view of antitrust cases apparently does not lead to a view of antitrust which differs from that developed by concentrating on leading Supreme Court precedent. Understandably, federal courts are particularly mindful of Supreme Court precedents in the field of antitrust. The major sections of antitrust law do not define such central concepts as the meaning of restraint of trade,<sup>13</sup> monopolization,<sup>14</sup> substantially to lessen competition.<sup>15</sup> Over time courts have given them meaning and the Supreme Court's definitions have naturally been the ones that have prevailed. Even given his broader perspective, Professor Kellman spends the first half of his chapter on mergers and acquisitions, principally talking about Supreme Court merger cases. In other areas, however, Supreme Court cases are minimized by the discussion of the more numerous lower court cases.

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cally owned businesses." *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

12. "[A]sset acquisition is prohibited where the effect of the acquisition may be substantially to lessen competition. . . ." Clayton Act § 7, 15 U.S.C. § 19 (1985).

13. Sherman Act § 1, 15 U.S.C. § 1 (1985).

14. *Id.* at § 2, 15 U.S.C. § 2.

15. Clayton Act §§ 3, 7, 15 U.S.C. §§ 15, 19 (1985).

Sometimes the result is curious. For example, in discussing the criteria of culpability in exclusion of competitors, Professor Kellman cites *Silver v. New York Stock Exchange*<sup>16</sup> as the "leading decision in this area."<sup>17</sup> He sees it as epitomized in *Denver Rockets v. All-Pro Management, Inc.*<sup>18</sup> in which the court announced a three-pronged test the third element of which was "[t]he association provides procedural safeguards which assure that the restraint is not arbitrary and which provides a basis for a judicial review."<sup>19</sup> He then acknowledges the Supreme Court decision in *Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co.*<sup>20</sup> and correctly quotes it as saying, "The absence of procedural safeguards can in no sense determine the antitrust analysis. . . . [T]he antitrust laws do not themselves impose on joint ventures a requirement of process."<sup>21</sup>

When he discusses resale price maintenance he cites *Albrecht v. Herald Co.*<sup>22</sup> for the proposition that maximum price fixing is illegal per se. He asserts that "while *Albrecht* has not been significantly limited, neither has it been expanded."<sup>23</sup> He simply does not acknowledge its express reaffirmation in *Arizona v. Maricopa County Medical Society*<sup>24</sup> which he cites himself in the chapter on collusion.<sup>25</sup> In discussing the state action exemptions Professor Kellman cites *Sears, Roebuck & Co. v. Stiffel Co.*<sup>26</sup> for the position that "[t]he patent provision of the Constitution is strictly limited in that a patent monopoly may not be used in disregard of the antitrust laws."<sup>27</sup> *Stiffel* involved neither a "patent monopoly" nor a violation of the antitrust laws. The Supreme Court simply indicated that Illinois' unfair competition law could not, in effect, extend protection comparable to patent protection to unpatentable designs. Its law was preempted by the patent power given to Congress in article I section 8 of the Constitution. The citation of *Stiffel* does little to add to the author's citation of *Parker v. Brown* which crisply deals with the same point. "A state does not give immunity to those who violate the

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16. 373 U.S. 341 (1963).

17. KELLMAN, *supra* note 1, at 43.

18. 325 F. Supp. 1049 (C.D. Cal. 1971).

19. *Id.* at 1064, 1065.

20. 105 S. Ct. 2613 (1985).

21. KELLMAN, *supra* note 1, at 47.

22. 390 U.S. 145 (1968).

23. KELLMAN, *supra* note 1, at 105.

24. 457 U.S. 332 (1982).

25. KELLMAN, *supra* note 1, at 7.

26. 376 U.S. 225 (1964).

27. KELLMAN, *supra* note 1, at 203.

Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."<sup>28</sup>

As these examples indicate, one can quibble with some of the book's assertions. In the main, however, the reader will find a wealth of information about antitrust in its pages. The author attempts not only to reconcile Supreme Court decisions, which by itself would be a sufficiently heroic act, but he attempts to include the reconciliation of lower court cases as well. Given the goal of rationalizing and organizing so large a body of law, the author should be commended irrespective of minor flaws.

As this commentator admitted at the beginning of the review, he was probably made more critical than usual. The suggestion by a law professor that the academic perspective of the field is inappropriate is too threatening, and may well be wrong.

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28. *Id.* at 202 (citing *Parker v. Brown*, 317 U.S. 341, 351 (1943)).

