American Bar Association, Section of Antitrust Law, Monopolization and Dominance Handbook (2011)

The American Bar Association's Monopolization and Dominance Handbook (the "Handbook") is a new desktop reference that both newcomers to antitrust and experienced practitioners should find highly useful, both for basic educational background concerning Section 2 of the Sherman Act, and for its detailed application to diverse sets of facts. Rich in its citations to source material and material for further reading, the Handbook has many different aspects that should prove useful to audiences having an interest in the antitrust law applicable to single-firm conduct under Section 2 of the Sherman Act.

For the beginner, the Handbook provides a thorough overview of basic legal background, and a discussion of economic rationales underpinning the law of monopolization, along with basic discussions of monopoly power and other broad themes. These chapters of the Handbook provide a solid grounding in basic concepts that run through the law of monopolization. Portions of these discussions are borrowed heavily from the ABA's earlier Market Power Handbook (2005), but the Handbook appropriately abbreviates that content to provide opening background for a broader examination of the law of monopolization generally.

In its discussion of basic principles, the Handbook admirably avoids ideological biases of the type that were prevalent, for example, in the Department of Justice report on Competition and Monopoly (2008). Unlike current ABA Model Jury Instructions in Civil Antitrust Cases (2005), for example, the Handbook recognizes that existing case law generally permits inferences of market power from direct evidence of anticompetitive effects, and that market definition and market share analysis are not legally necessary when compelling direct evidence of anticompetitive effects is present. In areas where there is substantial controversy in the law, the Handbook eschews taking sides in debates of policy and doctrine, instead explicating areas of ambiguity or uncertainty and providing citations to commentators to whom the reader might turn to read more deeply. For example, with regard to existing disagreement in case law concerning whether the correct conjunction connecting power to "control prices" to power to "exclude competition" in standard definitions of monopoly power should be "and" or "or," the Handbook merely makes note of the controversy, describes rationales for differing points of view, and cites case law on both sides. For those who represent antitrust plaintiffs, this provides welcome relief from a perceived tendency of ABA voices to slant toward legal interpretations favorable to antitrust defense interests.

In some instances, the Handbook's discussion of basic principles glosses over important distinctions without adequate discussion. For example, the Handbook identifies "cross-elasticity of demand" as an important criterion in market definition, without distinguishing between product-specific "cross-elasticity" and the so-called "own elasticity" that most knowledgeable commentators consider the correct criterion in market definition. However, it seems unlikely that those confronting such technical questions will be misled by the Handbook, since the Handbook's initial chapters seem targeted principally only toward basic background for newcomers to the subject matter of monopolization.
For the benefit of more experienced antitrust lawyers, the Handbook also provides a thorough, detailed analysis of specific forms of monopolizing conduct. In addition to the forms of monopolizing conduct that are most frequently cataloged -- including predatory pricing, tying, bundled discounts, loyalty discounts, refusals to deal with rivals and exclusive dealing -- the Handbook also separately analyzes less frequently litigated forms of conduct such as methods of “cheap exclusion,” standard setting, use of otherwise unlawful means to obtain a monopoly, and monopsony. It does a thorough job of disentangling qualitatively different types of conduct that many confuse with one another, including various ways of inducing third parties to limit rivals’ ability to compete, such as loyalty discounts, bundling and slotting allowances, while also grouping them in ways that bring out effectively the characteristics that they have in common. Even sophisticated practitioners, when evaluating the lawfulness of new fact patterns under Section 2, will benefit from the Handbook’s carefully segmented discussion, which will assist them in identifying case law most relevant to nearly any specific fact pattern that they might be evaluating.

The Handbook then proceeds to separate discussions of the law concerning attempts and conspiracies to monopolize. This portion of the Handbook ties up loose doctrinal ends that generally have limited application in actual practice, but that involve distinct legal doctrines that can be confusing conceptually in a discussion of monopolization.

The Handbook also provides background concerning corresponding law of other jurisdictions relating to each specific monopolistic practice. For antitrust advisors to international clients, those discussions may provide a valuable perspective.

After its discussion of substantive U.S. antitrust law, the Handbook adds a general discussion of methods of enforcement and available remedies, followed by in-depth discussions of both leading historical examples and remedies in recent leading cases. The Handbook’s case method of explicating remedial issues should be useful to readers who are less familiar with actual antitrust practice, and should help them develop a clearer understanding of real world consequences of doctrinal issues analyzed in the earlier chapters. Finally, the Handbook provides a thorough discussion of mutijurisdictional issues concerning the law of monopolization, including leading examples of mutijurisdictional controversies, including those relating to Microsoft and Intel.

In sum, the Handbook should prove to be an economical, easily portable and valuable resource for nearly any attorney who wishes to understand the law of monopolization under Section 2 of the Sherman Act, regardless of their degree of experience in the field. I have not previously encountered as comprehensive, up-to-date and evenhanded an analysis of the subject matter.

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