

CONTENTS

<i>Forward</i>	x
<i>Preface</i>	xi
Chapter 1	1
Sherman Act—General	1
A. Instruction 1: Purpose	1
B. Instruction 2: Sherman Act Section 1	2
C. Instruction 3: Rule of Reason	3
1. Instruction 3A: Rule of Reason—Overview	3
2. Instruction 3B: Rule of Reason—Proof of Competitive Harm	5
3. Instruction 3C: Rule of Reason—Evidence of Competitive Benefits	8
4. Instruction 3D: Rule of Reason—Balancing the Competitive Effects	9
D. Instruction 4: Interstate Commerce.....	10
E. Instruction 5: Foreign Commerce	11
Chapter 2	13
Section 1 of The Sherman Act	13
A. Contract, Combination, or Conspiracy	13
1. Instruction 1: Definition, Existence, and Evidence	13
2. Instruction 2: Parallel Conduct.....	17
3. Instruction 3: Corporations.....	19
4. Instruction 4: Participation and Intent.....	21
5. Instruction 5: Withdrawal.....	23
B. Horizontal Price Fixing.....	25
1. Instruction 1: General Elements	25
2. Instruction 2: Pricing Agreements and Joint Ventures.....	27
3. Instruction 3: Good Intent Not a Defense	29
4. Instruction 4: Reasonableness of Prices No Excuse.....	30
5. Instruction 5: Evidence of Competition	31
6. Instruction 6: Evidence of Price Charged.....	32
7. Instruction 7: Evidence of Similarity	33
8. Instruction 8: Evidence of Exchange of Price Information	34
C. Horizontal Nonprice Restraints.....	36

	1. Instruction 1: Allocation of Customers	36
	2. Instruction 2: Allocation of Territories or Geographic Areas	38
	3. Instruction 3: Allocation of Product Markets	40
	4. Instruction 4: Agreement to Limit Production	42
	5. Instruction 5: Group Boycott—Elements of Per Se Unlawful Horizontal Concerted Refusal to Deal.....	44
	6. Instruction 6: Group Boycott—Elements of Per Se Unlawful Concerted Refusal to Deal on Nondiscriminatory Terms	47
	7. Instruction 7: Exclusion From or Being Disadvantaged by a Membership Organization.....	49
	8. Instruction 8: Use of Membership Organization to Commit Antitrust Violations—Per Se Cases	51
	9. Instruction 9: Use of Membership Organization to Commit Antitrust Violations—Rule of Reason Cases	54
	10. Instruction 10: Trade Organization May Commit Antitrust Violations	57
	11. Instruction 11: Misuse of Industry Standard Setting or Product Evaluation.....	59
	12. Instruction 12: Liability of Association for Acts of an Agent	62
	13. Instruction 13: Liability of Member for Acts of Association.	63
	14. Instruction 14: Collaborative Purchasing Arrangement	64
D.	Vertical Restraints.....	66
	1. Instruction 1: Elements of Vertical Restraints	66
	2. Instruction 2: Price Maintenance Defined.....	68
	3. Instruction 3: Elements of Resale Price Maintenance.....	69
	4. Instruction 4: Suggested Resale Prices.....	70
	5. Instruction 5: Elements of Exclusive Dealing.....	71
	6. Instruction 6: Exclusive Dealing—Additional Considerations	73
	7. Instruction 7: Agreement (Comment and Reference to Other Instructions).....	76
	8. Instruction 8: Unilateral Action of Supplier	77
	9. Instruction 9: Communications between Suppliers and Distributors.....	79
	10. Instruction 10: Distributor Complaints to Suppliers	80
	11. Instruction 11: Distributor Responding to Supplier’s Policy Changes	81
	12. Instruction 12: Other Reasons for Termination or Refusal to Deal	82
	13. Instruction 13: Consignment Sales.....	83
E.	Tying Arrangements	84
	1. Instruction 1: Definition	84

2.	Instruction 2: Rationale for Prohibition of Tying Arrangements	85
3.	Instruction 3: Elements—Per se Unlawful Tying	86
4.	Instruction 4: Elements—Unlawful Tying under Rule of Reason	88
5.	Instruction 5: Presence of Two Products.....	90
6.	Instruction 6: Trademarks as Distinct Tying Products	91
7.	Instruction 7: Proof of Conditioning	93
8.	Instruction 8: Existence of Market Power With Respect to the Tying Product.....	94
9.	Instruction 9: Foreclosure of a Substantial Volume of Commerce With Respect to the Tied Product	97
10.	Instruction 10: Interest of Defendant in Market for Tied Product	98
11.	Instruction 11: Business Justification Defense.....	99
12.	Instruction 12: Full-Line Forcing.....	101
Chapter 3	103
Section 2 of The Sherman Act	103
A.	Monopolization—General	103
1.	Instruction 1: Elements.....	103
2.	Instruction 2: Monopoly Power Defined.....	105
3.	Instruction 3: Relevant Market—General	107
4.	Instruction 4: Relevant Product Market	109
5.	Instruction 5: Relevant Product Market—Supply Substitutability	113
6.	Instruction 6: Relevant Geographic Market	114
7.	Instruction 7: Existence of Monopoly Power—Indirect Proof	116
8.	Instruction 8: Existence of Monopoly Power—Direct Proof	122
9.	Instruction 9: Willful Acquisition or Maintenance of Monopoly Power.....	124
B.	Monopolization—Refusal to Deal and Leveraging	127
1.	Instruction 1: Essential Facility.....	127
2.	Instruction 2: Unilateral Refusal to Deal with a Competitor	130
3.	Instruction 3: Leveraging	134
C.	Monopolization—Predatory Pricing.....	136
1.	Instruction 1: General.....	136
2.	Instruction 2: Definition	137
3.	Instruction 3: Impossibility of Recoupment	139

4.	Instruction 4: “Predatory” Pricing Distinguished from “Competition”	141
5.	Instruction 5: Test of Profitability	143
6.	Instruction 6: Prices Based on Expectations about Costs.....	145
7.	Instruction 7: Prices Below Average Variable Cost but Above Marginal Cost.....	146
8.	Instruction 8: Prices Above Average Variable Cost But Below Average Total Cost (Inglis Standard).....	147
9.	Instruction 9: What Products Must Be Considered in Determining Whether Prices Are Below Cost.....	149
10.	Instruction 10: Prices That Meet Competition	151
11.	Instruction 11: What Price “Meets” Competition	153
12.	Instruction 12: Volume and Market Share Discounts	154
D.	Attempt to Monopolize	156
1.	Instruction 1: Elements.....	156
2.	Instruction 2: Anticompetitive Conduct.....	159
3.	Instruction 3: Specific Intent	161
4.	Instruction 4: Dangerous Probability of Success.....	165
E.	Conspiracy to Monopolize.....	168
1.	Instruction 1: Elements.....	168
2.	Instruction 2: Existence of a Conspiracy.....	170
3.	Instruction 3: Monopoly Power.....	171
4.	Instruction 4: Specific Intent	172
	Chapter 4	176
	Patents	176
A.	Patents—General	176
1.	Instruction 1: Introduction.....	176
2.	Instruction 2: Relation to Antitrust Laws	180
B.	Patent Acquisition (Sherman Act Section 1)	182
1.	Instruction 1: General.....	182
2.	Instruction 2: Sherman Act Section 1—Elements (Patents). 184	
3.	Instruction 3: Sherman Act Section 1—Rule of Reason (Patents).....	186
C.	Patent Acquisition (Sherman Act Section 2)	190
1.	Instruction 1: Sherman Act Section 2—Elements (Patents) ¹ 190	
2.	Instruction 2: Sherman Act Section 2—Monopoly Power (Patents).....	195
3.	Instruction 3: Sherman Act Section 2—Attempted Monopoly—Elements (Patents).....	197

4.	Instruction 4: Sherman Act Section 2—Attempted Monopoly— Specific Intent (Patents)	199
5.	Instruction 5: Sherman Act Section 2—Attempted Monopoly Dangerous Probability of Success (Patents).....	201
D.	Patent Licensing.....	203
1.	Instruction 1: Price Restrictions On Licensees Who Are Competitors	203
2.	Instruction 2: Customer, Territorial, and Field of Use Restrictions—Elements.....	206
3.	Instruction 3: Customer, Territorial, and Field of Use Restrictions—Rule of Reason	210
4.	Instruction 4: Customer, Territorial, and Field of Use Restrictions—Scope of Patent Coverage	212
5.	Instruction 5: Customer, Territorial, and Field of Use Restrictions—Pretext or Sham	214
6.	Instruction 6: “Grantback” Provisions—Elements.....	216
7.	Instruction 7: “Grantback” Provisions—Rule of Reason.....	217
8.	Instruction 8: Refusals to Deal	220
9.	Instruction 9: Tying	222
E.	Patent Pools.....	223
1.	Instruction 1: General.....	223
2.	Instruction 2: Sherman Act Section 1 (Price Fixing, Territorial Allocations, and Other Restrictions)—Elements	225
3.	Instruction 3: Sherman Act Section 1—Rule of Reason	229
F.	Other Patent Misconduct	233
	Instruction 1: Fraudulent Procurement	233
	2. Instruction 2: Sham Enforcement.....	236
	Chapter 5	242
	Robinson-Patman Act	239
A.	Seller Liability—Section 2(a).....	239
1.	Instruction 1: General Definition of Price Discrimination ...	239
2.	Instruction 2: Elements.....	241
3.	Instruction 3: Sale of Commodities.....	245
4.	Instruction 4: Reasonably Contemporaneous Sales	247
5.	Instruction 5: Like Grade and Quality.....	249
6.	Instruction 6: Net Prices	251
7.	Instruction 7: Competitive Injury—General	254
8.	Instruction 8: Competitive Injury—Primary Line.....	255
9.	Instruction 9: Predatory Pricing	258

10. Instruction 10: Competitive Injury—Secondary and Tertiary Line	259
11. Instruction 11: Functional Discounts	264
12. Instruction 12: Meeting Competition Defense	267
13. Instruction 13: Cost Justification Defense.....	271
14. Instruction 14: Changing Conditions Defense	273
B. Buyer Liability—Section 2(f).....	275
1. Instruction 1: General.....	275
2. Instruction 2: Elements.....	277
3. Instruction 3: Sale of Commodities.....	278
4. Instruction 4: Reasonably Contemporaneous Sales	279
5. Instruction 5: Like Grade and Quality.....	280
6. Instruction 6: Net Prices	281
7. Instruction 7: Competitive Injury	282
8. Instruction 8: Functional Discounts	283
9. Instruction 9: Meeting Competition Defense	284
10. Instruction 10: Cost Justification Defense.....	286
11. Instruction 11: Changing Conditions Defense	288
12. Instruction 12: Knowing Inducement.....	289
C. Other Robinson-Patman Provisions and Issues	290
1. Instruction 1: Brokerage Payments/Commercial Bribery—§ 2(c)	290
2. Instruction 2: Advertising and Promotional Allowances and Services -§§ 2(d) and 2(e)	293
3. Instruction 3: Availability	297
4. Instruction 4: Single Seller	298
5. Instruction 5: Note on Damages in Robinson-Patman Cases	299
Chapter 6	305
Causation And Damages	301
A. Clayton Act Section 4 Requirements.....	301
1. Instruction 1: Injury and Causation	301
2. Instruction 2: Business or Property	304
B. Damages	305
1. Instruction 1: Antitrust Damages—Introduction and Purpose	305
2. Instruction 2: Antitrust Damages—Bifurcated Trial.....	307
3. Instruction 3: Basis for Calculating Damages	308
4. Instruction 4: Causation and Disaggregation	311
5. Instruction 5: Damages for Purchasers—Overcharges Based on Horizontal Price Fixing, Output Restriction, Market Allocation, or Other Agreements Not to Compete.....	313

6. Instruction 6: Damages for Purchasers—Damages for Tying Arrangements	314
7. Instruction 7: Damages for Purchasers—Class Damages	315
8. Instruction 8: Damages for Competitors—Lost Profits.....	316
9. Instruction 9: Damages for Competitors—Future Lost Profits	318
10. Instruction 10: Damages for Competitors—Going Concern Value or Goodwill	320
11. Instruction 11: Damages for Competitors—Preparedness to Enter Business	322
12. Instruction 12: Damages for Sellers—Buyer Price Fixing...	323
13. Instruction 13: Expert Testimony	324
14. Instruction 14: Mitigation.....	325
15. Instruction 15: Multiple Plaintiffs	327
16. Instruction 16: Plaintiff’s Participation	328
17. Instruction 17: Joint and Several Liability	330
Chapter 7	337
Miscellaneous	332
A. Certain Defenses and Exemptions	332
1. Instruction 1: Statute of Limitations.....	332
2. Instruction 2: Fraudulent Concealment	333
3. Instruction 3: Noerr-Pennington—Lobbying	343
4. Instruction 4: Sham Litigation.....	346
B. Invocation of the Fifth Amendment.....	349
1. Instruction 1: Invocation of the Fifth Amendment—by a Party or a Witness Identified with a Party	349
2. Instruction 2: Invocation of the Fifth Amendment—by a Nonparty Witness.....	351
C. Clayton Action Section 5(a)—Evidentiary Effect of Litigated Government Judgments	354
1. Instruction 1: Criminal Conviction.....	354
2. Instruction 2: Civil Judgment.....	355