



## Don T. Hibner, Jr.

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### PRACTICE AREAS

- Corporate
- Antitrust and Trade Regulation
- Litigation

### OVERVIEW

Don T. Hibner, Jr. is a member of the law firm of Sheppard, Mullin, Richter & Hampton and is located in its Los Angeles, California office.

### Areas of Practice

Mr. Hibner has specialized in antitrust litigation and counseling since admission to the Bar and has been a frequent contributor to programs of the Antitrust Section, its National Institutes, PLI and other programs, as well as contributor to various Law Reviews. For two years he served as a faculty member of the Southern Methodist University Short Course on Antitrust: Law and Litigation.

### EDUCATION

- LL.B., Stanford University, Board of Editors, Volumes 13 and 14, *Stanford Law Review*, 1962
- B.A., Stanford University, 1955

### ADMISSIONS

- California
- U.S. Supreme Court

### HONORS

- Antitrust Lawyer of the Year, Antitrust and Unfair Competition Law Section, Bar of California , 2002

### MEMBERSHIPS

- Board of Directors, Section on Antitrust Law, Los Angeles Bar Association
- Member, Editorial Board, *Antitrust Law Developments* Annual Developments Committee, 1999-2001
- Advisor, California State Bar Antitrust Law Executive Committee, 1998-2007
- Chairman, ABA Antitrust Section Committee on Franchising, 1987-1990
- Member At Large, Council, Section on Antitrust Law, American Bar Association. Liaison Counsel Member, Franchising Committee, 1982-85
- Past chairman, Private Antitrust Litigation Committee, Franchising and Distribution Law Committee
- Chair, Executive Committee, Los Angeles County Bar Association, Section of Antitrust Law, 2000-2001. Member, Executive Committee 1979-99.

## ARTICLES

- Analyzing Conspiracy Claims Under Capper-Volstead, *Law360*, January 24, 2012
- A Slippery Slope in Ohio's Rock Salt Market, *Law360*, December 8, 2011
- Case Study: SPX V. Master Cool, *Law360*, September 7, 2011
- Exorcising Specter Of Aguilar With Spirit Of Twombly, *Law360*, February 4, 2010
- The Cartwright Act at 100 - A History of Complementary Antitrust Enforcement - A Celebration, *Competition*, Vol 17, No. 2, Fall 2008
- Competition Implications of the California Supreme Court Decision in ABC International Traders, Inc., February 27, 1997

## Law Reviews

"Per Se" or Not "Per Se" – A Historical "Quick Look" at Minimum RPM Under California Law, 18 *Competition L.J.* (Spring 2010) (with Heather M. Cooper).

"The Cartwright Act at 100 -- A History of Complementary Antitrust Enforcement -- A Celebration," 17 *Competition L.J.* 81 (2008) (with Heather M. Cooper).

"Attempts to Monopolize: A Concept in Search of Analysis," *ABA Antitrust Law Journal*. 34:165, 167, 1967.

"Oligopoly Under Attack: New Approaches to an Old Problem," *St. Johns L. Rev.* 44:529 Spring 1970.

"Bigness and Pricing Problems," *ABA Antitrust Law Journal*, 41:1, 1971-72.

"National Institute on Everyday Living With the Antitrust Laws," *ABA Antitrust Law Journal*. 44:450, 1975.

"Selected Problems in Vertical Restraint Cases," *Mercer Law Rev.* 26:389, Winter 1975.

Antitrust Symposium: Section 2 of the Sherman Act "Has the Ninth Circuit Attempted to Monopolize Attempts to Monopolize?," *Southwestern Univ. Law Rev.* 10:35-131, 1978.

"Litigation as an Overt Act in Furtherance of an Attempt to Monopolize," *Ohio St. Law Journal*. 38:245, 1977.

Use and Abuse of Judicial Proceedings as an Antitrust Violation. "Litigation as an Overt Act - Development and Prognosis," *ABA Antitrust Law Journal*. 46:711, Summer 1977.

Proof of Damages: Some Selected Damages. "Introductory Remarks," *ABA Antitrust Law Journal*. 49:977, March 1981.

"Antitrust Considerations Relating to Joint Ventures, Teaming Agreements, Co-Production Agreements and Leader-Follower Agreements," *Antitrust Law Journal*. 51:705, 1982.

"The Return Of The Yankee Trader: The Export Trading Act of 1982."

Panelist, "Discussion of Two Joint Venture Hypotheticals," *Antitrust Law Journal*. 54:1157

(1985)

"The Silver Anniversary of an Antitrust Sea-change: Continental T.V. and Brunswick at Twenty-Five, Competition (Fall 2002) (with Andrea B. Hasegawa).

"Analysis of Small Business Franchise Act of 1999: A Lion in the Street," Competition (Fall 2000).

"What Lawyers Should Know About Markets – the Good, the Bad and the Ugly," The Federal Lawyer (Fall 2002) (with Suzanne Drennon).

### **Treatises**

Editor, Antitrust and Unfair Competition Law Section, State Bar of California, "California Antitrust & Unfair Competition Law" (4<sup>th</sup> 2010).

Co-Author, Chapter 4 "Joint Ventures and Franchises", Antitrust and Unfair Competition Law Section, State Bar of California

Co-Author, Chapter 13 "Exemptions, Immunities and other Defenses to Antitrust Liability", Antitrust and Unfair Competition Law Section, State Bar of California

Chapter 19, "The Consumer's Legal Remedies Act," Antitrust and Unfair Competition Law Section, State Bar of California

Co-Author of two chapters, "ABA Antitrust Law Section, State Antitrust Practice and Statutes," 2009

Co-Author Chapter 1, "The Sherman Act," *Antitrust Adviser*, editions 1, 2 and 3.

Contributing Editor, *Antitrust Developments* (2d Ed. 1984).

Contributing Editor, *Antitrust Law Developments* (4th), Chapter VIII (1998-9 Supp.).

Revising Editor, Chapter VII, Antitrust Developments. (2d and 3d editions).

Co-Author, Civil Jury Instructions, ABA Section of Antitrust Law, 1972.

### **Antitrust Law Blog Articles**

"ANDA Automatic Stay of FDA Approval Does Not Defeat Standing in Sham Litigation Antitrust Counterclaim", September 20, 2011

"Antitrust Counterclaim in Patent Infringement Action Lacks Plausible Allegations of Competitive Injury", August 22, 2011

"Aftermarket Monopolization Claims Dismissed as Afterthought", July 11, 2011

"In Secret Rebate Case, If It Walks Like A Duck, Allegations That It Will Also Quack Are Plausible", June 16, 2011

"Federal Court Finds Allegations of "Bad Faith" in Sprinkler License Agreements to be

"Vox Clamantis in Deserto", May 13, 2011

"Expanded Standing, or "Back to Basics"? Flash Memory Direct Purchasers Found to Have Standing to Assert Walker Process Claims", March 29, 2011

"Lights Out for Resale Price and Dual Distribution Class Action", January 10, 2011

"Cross-Market Claims Flunk *Twombly*", April 28, 2010

"Delay Caused by Court Injunction Is Not "Antitrust Injury"", February 17, 2010

"Where There Is an "At-Will," There Is a Way", February 17, 2010

"Spirit of *Twombly* Exorcises Specter of Revived Aguilar Claims", January 25, 2010

"Strike Three: Plaintiffs Again Fail to Allege Facts of Collusion in Oligopoly Market", December 16, 2009

""Per Se" or Not "Per Se" - An Historical "Quick Look" at Minimum RPM Under California Law", November 10, 2009

"Ninth Circuit Finds That New Home Buyer Plaintiffs Fail To Satisfy *Per Se* Tying Element That Amount Of Commerce Not Be "Insubstantial" "Zero Foreclosure" Is Less Than 'De Minimus.'", September 3, 2009

"Allegations That Domestic Steel Producers Violated Section 1 Of The Sherman Act Through Reciprocal Calls For "Production Discipline" And Output Reduction Constitute "Plus Factors," And Survive *Twombly* Attack", July 9, 2009

"PMPA Franchise Agreement Disavowing Plaintiff's Claim to an Exclusive Market and Geographic Territory Trumps Alleged Oral Commitment", June 12, 2009

"Eighth Circuit Affirms Dismissal of Antitrust Claims Against Amway", June 12, 2009

"California Supreme Court Clarifies the Meaning of "Any Damage" as a Standing Requirement Under California's Consumers Legal Remedies Act", March 6, 2009

"The Cartwright Act At 100 - A History Of Complementary Antitrust Enforcement - A Celebration", January 8, 2009

"*Twombly* Meets Leegin. Failure of Plaintiff to Allege "Plausible" Entitlement to Relief Constitutes Failure to Allege "Antitrust Injury."", January 8, 2009

"What Part of "No" Don't You Understand? Unequivocal Refusal to Deal Triggers Statute of Limitations", January 8, 2009

"California Court of Appeal Drops The Other Shoe: Pass-on Defense Viable", August 15, 2008

"Competitors of Copier Equipment Provider Entitled to a 'Kodak Moment' in Alleging a Single Provider Relevant 'Aftermarket' in Avoiding a Motion to Dismiss", May 7, 2008

"In a Case Alleging an Illegal Tie 'Zero Foreclosure' Means 'Zero Case' Duh," February 7, 2008

"Quizno's Franchisees Do Not 'Get It Their Way'", January 9, 2008

"Fifth Circuit Upholds Hearst's Termination of Newspaper Distributors", November 14, 2007

"Lights Go Out For Remaining Plaintiffs in California Wholesale Electricity Antitrust Cases", April 5, 2007

"Well Pledged Conspiracy to Refuse to Deal with Distributor Survives Motion to Dismiss: The Moral: Just Because Conduct is Not 'Per Se' Illegal, Does Not Mean That It Is 'Per Se' Legal", January 8, 2007

"Antitrust Tying Arrangements: 'Per Se Or Not Per Se - That Is The Question.' Buyers' Real Estate Agent Fails To Offer Evidence Of Anticompetitive Foreclosure In The Tied Product Market", August 7, 2006

"Price Gouging - An Elusive Term House Passes H.R. 5253, Seeking To Create First Federal Gasoline Price Gouging Law", June 8, 2006

"Of Justice Alito, Antitrust, And The Looking Glass", February 7, 2006

"General Electric/Honeywell Merger Prohibition Upheld by European Court of First Instance - 'Conglomerate Effects' Analysis Represents 'Manifest Errors of Assessment'", January 7, 2006

"California Court of Appeals Affirms Dismissal of 'Unfairness' Claim on Ground", November 7, 2005

"Patent Misuse and Antitrust Tying Analysis - Close But Imperfect Substitutes", October 7, 2005

"DC Circuit Hits High Note In 'Three Tenors' Case - Petition For Review of FTC Decision in Polygram Holding, Inc. Denied", September 7, 2005

"Horse Show Governing Body Mileage Rule Against Competing Horse Shows is Subject to Summary Judgment on Ground of Implied Antitrust Immunity", July 17, 2005

"Supermarket Revenue Sharing Agreement is Not Immune from Antitrust Scrutiny", July 7, 2005

"FTC Approves Chevron's Acquisition of Unocal on Condition of Release of Patent Rights to CARB Reformulated Gasoline", July 7, 2005

"Supreme Court Rules Against State Law Bans on Interstate Direct Shipment of Wine", June 7, 2005

"'Active Supervision' Standard of Midcal not Applicable to Conduct of Sovereign. Multistate Tobacco Settlement is *Parker* and *Noerr* Exempt Both for State and Private Parties", May 17, 2005

"Dentsply International, Inc. In Violation of Section 2 for Monopoly Maintenance Through Use of Exclusivity Clauses", April 4, 2005

"Of Bats and Sunshine: Presumption of Market Power in Patent Tying Case Alive but Rebuttable", March 8, 2005

## **SPEECHES**

- Moderator and Panelist, "The Law of Pricing. Antitrust and Unfair Competition Perspectives," "'Per Se' Or Not 'Per Se': An Historic 'Quick Look' At Minimum RPM Under California Law" (with Heather M. Cooper), 19th Annual Golden State Antitrust Law Institute, Antitrust and Unfair Competition Law Section of the State Bar of California, October 22, 2009
- Panelist, "The Future of Resale Price Maintenance: How Close to Per Se Lawful Will We Get?" Los Angeles County Bar Association Section of Antitrust Law and Business Practices, Los Angeles, California, September 11, 2007
- Moderator, "Metered Tying and Intellectual Property," Southwestern L.J. Symposium, Antitrust and Intellectual Property in Global Context, February 23, 2007
- Lecturer, "Market Competitiveness: Does State Antitrust Law Need To Be Updated? Or Have the Courts Already Done Enough?" Los Angeles County Bar Association Section of Antitrust Law and Unfair Business Practices, January 27, 2006
- Testimony and Statement, California senate Judiciary Committee (subcommittee on Anti-Competitive Conduct and the Marketplace), August 23, 2005
- Testimony and Statement, Antitrust Modernization Commission, July 28, 2005
- Program Chair and Lecturer, "The California Energy Crisis: Who's to Blame," Los Angeles County Bar Association Section of Antitrust Law and Unfair Business Practices, February 20, 2003
- Lecturer, Franchisee Protection: "A Lion In the Street" - Analysis of Small Business Franchise Act of 1998, 7th Annual Golden State Antitrust and Unfair Competition Law Institute, October 21, 1999
- Program Chair and Lecturer, Unilateral Effects In Merger Analysis - An Evidentiary Prognosis, paper to have been delivered at Los Angeles County Bar Association Section of Antitrust Law Meeting, February 25, 1999
- "Comments On United States v. Microsoft From the Viewpoint of the Unretained Antitrust Practitioner," State of California Section of Antitrust Law, Golden State Institute, October 22, 1998
- "How Antitrust Practice Has Changed Over the Past Thirty Years," Los Angeles County Bar Association Antitrust Section, October 14, 1998
- "Closing the Ring: A Return To First Principles: Some Comments on State Oil Co. v. Khan," Los Angeles County Bar Association Antitrust Section, February 11, 1998
- Lecturer, "Franchising: Recent Developments in the Laws Governing Encroachment," Los Angeles County Bar Association Section of Antitrust Law, May 8, 1996
- Lecturer, "Kodak: The Trial - Afterthoughts About Aftermarkets," Los Angeles County Bar Association Section of Antitrust Law, November 15, 1995
- Lecturer, "Representing Clients Under Investigation," Golden State Antitrust and Trade Regulation Institute, October 27, 1995
- Moderator and Panelist, "Antitrust Implications of Selected Patent Law Issues - Look What They've Done to My Song, Ma," Los Angeles County Bar Association Section of Antitrust Law, March 21, 1995

- Lecturer, "Ethics and the Antitrust Litigator - Responding to Government Investigations," Golden State Antitrust and Trade Regulation Institute, October 6, 1994
- Lecturer, "What Lawyers Should Know About Markets--The Good, The Bad and The Ugly," Phoenix, Arizona, February 21, 1994
- Lecturer, "Diesel Electric: A Competition Analysis," Los Angeles County Bar Association Section of Antitrust Law, November 17, 1993
- Lecturer, Antitrust Implications of Credit Manager Associations, National Association of Credit Managers Meeting, Hotel Del Coronado, San Diego, California, June 20, 1991
- Lecturer, "Litigation Under the California Cartwright Act," Los Angeles County Bar Antitrust Section Meeting, "Antitrust for State Court Judges," October 2, 1990
- Lecturer, "California Antitrust Developments — 1989-1990," California State Bar Annual Antitrust Section Meeting, Monterey, California, August 24-27, 1990
- Lecturer, "What to do When the Federal or State Antitrust Prosecutors Show Up at Your Client's Door," ALI-ABA Third Annual Antitrust Law Course, San Francisco, California, May 10-11, 1990
- Chairman, "Franchise Protection: Laws Against Termination and the Establishment of Additional Franchises," ABA Antitrust Section Franchise Committee Monograph #17, March 1990
- Panelist, 30th Annual Antitrust Law Institute - "Monopolies and Joint Ventures," 1989
- Panel Member, "Follow-On Private Treble Damage Cases To Government Criminal Prosecutions," ABA Antitrust Section Civil Practice and Procedures Committee, ABA Annual Meeting, Honolulu, Hawaii, August 8, 1989
- "The Cartwright Act Revisited," Los Angeles Lawyer, May 1989
- "Federalism In Merger Enforcement: The Role of the States," Los Angeles County Bar Association Antitrust Section, April 25, 1989
- Moderator, "Tying and Exclusive Dealing Arrangements in the Franchise Context," Committee on Franchising, ABA Antitrust Section, April 7, 1989
- Panelist and Moderator, "Litigation Under The False Claims Act," Los Angeles Bar Association Section on Antitrust Law, January 12, 1989
- "Antitrust Basics," Fundamentals on Franchising (ABA Forum on Franchising), June 17, 1988
- "Antitrust Issues In Franchising, The View From The United States and Canada," Antitrust L.J., ABA Annual Meeting, 1988
- Lecturer, Antitrust Issues in Beverage Dispensing, National Soft Drink Dispensing Association, Palm Springs, California, March 17, 1986
- Lecturer, "Government Contracts and Antitrust," Los Angeles County Bar Association, Antitrust Section, March 1986
- Lecturer, "U.S. Antitrust Jurisdiction re 1982 Export Trading Company Act and Timberline," 25th Annual Advanced Antitrust Seminar "International Trade," PLI, 1986
- Lecturer, "Antitrust Issues for Bottlers," International Soft Drink Exposition and Conference, Anaheim, California, November 19, 1985
- Panelist, "Joint Ventures - Antitrust Problems and Opportunities, ABA Section of Antitrust Law, New York, November 14-15, 1985
- Panelist, "Vertical Restraints Guide," Meeting Los Angeles County Bar Association Section of Antitrust Law, January 1985
- PLI Panelist, 23rd Annual Advance Antitrust Seminar — "Horizontal Problems," 1984

- Panelist, "Export Trading Company Act of 1982," Los Angeles County Bar Association Section of Antitrust Law, July 1984
- Lecturer, "Antitrust Issues Of Doing Business In A Multinational World: International Joint Ventures and Export Trading Co. Act," Los Angeles County Bar Association, Antitrust Section, May 1984
- The Conference Board Panelist, "Conspiracy Law Workshop," New York, New York, March 1984
- Lecturer, "Emerging Brunswick Defense," Meeting of Los Angeles County Bar Antitrust Section, 1982
- Lecturer, "Antitrust Aspects of Weapons Procurement," Annual Meeting of Public Contracts Section, ABA, San Francisco, California, August 1982
- Panelist, "Antitrust Aspects of Export Trading Company Act of 1982," Meeting Los Angeles County Bar Section on International Law, 1982
- Panelist, "Strategies and Techniques In Applying Merger Guidelines in Specific Situations," Fordham University Law School, Law & Business, Inc., San Francisco, California, 1982
- Practising Law Institute (PLI) Panelist on Antitrust Law, 1972, 1973, 1974, 1976-81
- Panelist, "Proxy Contests and Battles for Corporate Control," PLI, 1981
- Panelist, Private Antitrust Litigation Committee Miniprogram on "Use of Paralegals," Spring Meeting, 1981
- Lecturer, "Is Colgate Dead?" Meeting of Los Angeles County Bar Antitrust Section, 1981
- 20th Annual Advanced Antitrust Law Seminar, "Problems of Horizontal Arrangements: Production and Product Creating Joint Ventures Among Competitors," PLI, 1981
- Lecturer, "Drafting Documents in Plain English," PLI, 1981
- Panelist, Annual Meeting of the Ohio State Bar Association Antitrust Institute, 1980
- Southern Methodist University Short Course On Antitrust: Law and Litigation (Lectures on Robinson-Patman Act, Trade Associations and Joint Ventures), Colorado Springs, 1979 and 1980
- Panelist on Antitrust Law, New York Law Journal, 1979
- Panelist, "Tender Offers and Proxy Contests," PLI, 1979
- Panelist, "Discovery Techniques," Association of Business Trial Lawyers seminar, Santa Barbara, California, 1979
- Testimony, Proposed Bayh Bill S.1468 on Contribution, Senate Judiciary Committee, Fall 1979
- 18th Annual Advanced Antitrust Law Seminar, "Mergers and Joint Ventures," PLI, 1979
- Lecturer, "Price Discrimination Under the Robinson-Patman Act, Marketing and Distribution Regulations and Restraints," PLI, 1978
- 17th Annual Advanced Antitrust Law Seminar, "International Trade and the Antitrust Laws," PLI, 1978
- Second Annual Antitrust Symposium, "Section 2 of the Sherman Act," PLI, 1977
- Lecturer, "Repeal of the Trade Laws: Impact on Product Distribution," PLI, 1976
- Lecturer, "Problems Under the Magnuson-Moss Warranty Act," New York Law Journal, 1976
- Lecturer, "Practical Antitrust Problems in Control and Distributorship in Dealer Resale Activities - The Private Practitioner's View," PLI, 1975

- "Dual Distribution, Market and Franchising," PLI, 1974