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Antitrust & Local Government, Search and Seizure

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BOOK REVIEWS

ANTITRUST & LOCAL GOVERNMENT. Edited by James V. Siena. Cabin John, Maryland: Seven Locks Press, Inc., 1982. pp. xvii, 211. \$19.95.

Reviewed by Howard Feller and J. Robert Brame, III***

The United States Supreme Court's recent decision in *Community Communications Co. v. City of Boulder*¹ has been aptly described as "a lightning bolt - with potentially thunderous repercussions."² *City of Boulder* basically established that local government activity is not immune from federal antitrust laws unless it is undertaken pursuant to a clearly articulated and affirmatively expressed state policy to replace competition with regulation or monopoly public service.³

City of Boulder represents a significant expansion of the antitrust liability of local governments and their officials. The practical effect of the ruling is that local governments must increase their sensitivity to antitrust risks and implement plans and procedures to minimize those risks. Unfortunately, however, the Court did not precisely define the nature and scope of the antitrust liability of local governments. Thus, it created uncertainty among local government officials as to the extent of their antitrust exposure and among municipal attorneys as to the preventative measures needed to reduce the potential antitrust liability.

The responses have included both political and educational solutions. There have been Congressional hearings,⁴ seminars conducted by a wide variety of groups, and numerous articles and papers. One of the best responses was a seminar sponsored by The National League of Cities to explore the ramifications of *City of Boulder*. The presentations were col-

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1. 455 U.S. 40 (1982).

2. Civiletti, *The Boulder and Lafayette Decisions: Antitrust or Anti-Cities?*, in ANTI-TRUST & LOCAL GOVERNMENT 181, 182 (J. Siena ed. 1982).

3. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52 (1982). A more detailed discussion of the implications of this decision is contained in Brame and Feller, *The Immunity of Local Governments and Their Officials from Antitrust Claims After City of Boulder*, 16 U. RICH. L. REV. 705 (1982).

4. *Local Government Antitrust Liability: The Boulder Decision, Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 2nd Sess. (1982).

lected in a book, *Antitrust & Local Government*⁵. One stated goal of *Antitrust & Local Government* was to introduce municipal officials and lawyers to the "new" world of antitrust and antitrust lawyers to the mystery of municipal law. In this it succeeded. It is an excellent resource book for local government attorneys and officials who now must include antitrust considerations in their daily activities. *Antitrust & Local Government* is neither a treatise nor a hornbook. Such books would be useful, but there are too few decisions applying *City of Boulder* to justify hornbook treatment at this time.⁶ Appropriately, *Antitrust & Local Government* does not offer the answer; rather, it offers the reader the insights and sometimes conflicting perspectives of 22 experts in the fields of antitrust law and public administration, including law professors, private antitrust attorneys, local government attorneys, and local government officials.

In bringing the widely divergent views and opinions of its authors under one cover, *Antitrust & Local Government* offers a lively and interesting debate that requires the reader to make his own assessment of the meaning of the decision for his situation. For example, Stephen Susman reflects the optimism of plaintiffs' lawyers who suddenly see fresh fields to plow after an era of reduced antitrust enforcement. He believes that the decision will help improve municipal functions because local governments will be discouraged from granting preferences to special interest groups and "wealthy, politically active businesses and individuals."⁷ The opposite view is represented by Jeffrey Howard and Benjamin Civiletti, a former U.S. Attorney General. They warn that the decision could seriously disrupt local government decision-making and may create an explosion of harmful antitrust litigation. Howard concluded that *City of Boulder* will subject localities "to the same kind of antitrust 'pistol-whipping' that the private sector has endured for years."⁸ Similarly, Civiletti criticized the Supreme Court for failing to consider the basic reality of modern government that local governments have become the sovereign equivalents of states. Citizens have demanded more and more from their localities and local governments have responded by assuming responsibilities in many areas of service.⁹

Antitrust & Local Government thus provides an important and useful introduction to antitrust lawyers and municipal officials seeking guidance for dealing with the impact of the *City of Boulder* decision. It contains

5. ANTITRUST & LOCAL GOVERNMENT (J. Siena ed. 1982).

6. Although the writers sometimes disagree on the proper interpretation or application of specific matters, the book contains a good index and case table that allows the reader quick access to all of the discussions of a case or point.

7. Susman, *The Perspective of a Plaintiff's Lawyer*, in ANTITRUST & LOCAL GOVERNMENT 21, 22-23 (J. Siena ed. 1982).

8. Howard, *The Perspective of a Defendant's Lawyer*, in ANTITRUST & LOCAL GOVERNMENT 34, 40 (J. Siena ed. 1982).

9. See *infra* note 2 at 181-82.

lengthy discussions on the meaning of the case and its applicability to particular areas of local government conduct. Many of the authors address the crucial questions that remain open and unanswered after *City of Boulder*¹⁰ - 1) is active state supervision of the specific municipal activity required in order for the municipality to obtain immunity? 2) how precise does the state's grant of authority have to be to confer immunity on the local government? 3) do the *per se* rules of antitrust illegality apply to local government conduct?¹¹ and 4) will the rule of reason analysis be broadened to include public welfare concerns or will the standards of antitrust liability be the same for local governments as for private businesses?¹²

The book also offers practical advice on steps local governments can take to reduce the risks of being sued for antitrust violations¹³ and the manner in which actual lawsuits should be defended.¹⁴ It also furnishes concrete suggestions for drafting legislation designed to grant immunity to local governments from antitrust claims.¹⁵ Finally, a substantial portion of the book is devoted to a detailed analysis of *City of Boulder's* effect on the specific municipal activities of land use planning and zoning, cable television franchising and regulation, environmental management and resource recovery, procurement and contracting, municipally owned and managed businesses, and franchising, licensing and regulating.

The central message of *Antitrust & Local Government* is that local governments must pay careful attention to the provisions of the antitrust laws in conducting their activities. Since the legal context in which local governments operate has been dramatically altered by *City of Boulder*, local governments and their officials should educate themselves about the requirements of the antitrust laws and attempt to structure their conduct so as to avoid running afoul of its prohibitions. *Antitrust & Local Government* provides attorneys and local government officials with a

10. See essays written by Stephen D. Susman, Lawrence A. Sullivan, Edward W. Barnett, Gregory S. Lashutka, John H. Shenefield, Benjamin R. Civiletti and Abbott B. Lipsky, Jr.

11. Certain business practices which involve collusive action between competitors, customers or suppliers have been determined to be clearly unreasonable restraints of trade and are classified as "per se" violations of the antitrust laws. *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958).

12. Some business practices are not so pernicious as to be treated as "per se" illegal, but may violate the antitrust laws if they unreasonably restrain trade or damage competition. Non-per se conduct is tested by the "rule of reason" which requires careful examination and weighing of all the circumstances surrounding the challenged conduct. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

13. See essays written by Edward W. Barnett, Gregory S. Lashutka and Douglas W. Vanscoy.

14. See essays written by James vanR. Springer and William H. Hefty.

15. See essays written by Gregory S. Lashutka, Leonard Orland, David T. Stitt and James V. Siena.

thoughtful, comprehensive and sound foundation for evaluating municipal conduct and preparing for possible legal challenges under the anti-trust laws.

SEARCH AND SEIZURE. By John W. Hall, Jr. New York: The Lawyers Co-Operative Publishing Co., 1982. pp. XXViii, 768. \$67.50.

*Reviewed by Ronald J. Bacigal**

Any new publication on search and seizure law must be measured against Professor LaFave's treatise on the fourth amendment.¹ LaFave's treatise is undoubtedly *the* definitive work in the field,² but it does have its practical drawbacks. Both its size and its price may be a bit intimidating to the average practitioner.³ John Hall's recent book, *Search and Seizure*, does not attempt to compete as a learned treatise on the fourth amendment, but more modestly seeks to present search and seizure law comprehensively⁴ but concisely enough to provide a ready working tool for practicing attorneys. Viewed in this light, the book is quite useful.

The format of the book facilitates quick access to brief statements on specific aspects of search and seizure law. A typical chapter in the book begins with a three or four paragraph introduction which identifies the subject matter addressed and notes how the subject matter relates to other chapters. There then follows a section dealing with the development of the law, in which the author briefly summarizes major United States Supreme Court cases. The remainder of a typical chapter consists of short sections in which the author organizes the subject into numerous sub-categories. Many chapters conclude with a short discussion of "practice pointers," which advise defense counsel of possible avenues of attack on the particular type of search under consideration, and advise the prosecution of possible justifications or alternative bases for the search. Several chapters also contain a practical and quite elaborate "checklist" to be used in preparing a motion to suppress.

A valuable reference guide, of course, must be substantively accurate.⁵ Mr. Hall performs admirably in summarizing Supreme Court cases and in reporting the directions taken by the lower courts. To qualify as a "ready working tool" a book must not only be accurate, but must also be structured to facilitate quick and easy access. Mr. Hall provides such a struc-

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1. LAFAVE, A TREATISE ON THE FOURTH AMENDMENT (West 1978).
2. For a review of LaFave's treatise, see, Bacigal, Book Review, 12 RUT. L.J. 547 (1981).
3. LaFave's treatise is three volumes and over two thousand pages.
4. There is no coverage of electronic eavesdropping, wiretapping or surveillance.
5. I cannot resist pointing out to Mr. Hall that when he cites my articles, he spells my name correctly in the footnotes but incorrectly in the text.

ture by dividing his subject matter into more than 500 sections, each of which addresses a narrow point of law. A quick glance at the table of contents enables the reader to find the section pertinent to his inquiry. The reader can also make use of a very detailed index which directs him to relevant sections. The book does lack a table of United States Supreme Court cases, although many of the individual chapters begin with a bibliography of major cases.

Mr. Hall's writing style is pleasant, and his candor is quite refreshing. When he feels that the Supreme Court has been inconsistent or less than forthright in its opinions, he clearly says so. The recent case of *United States v. Payner*⁶ is characterized as "facially contradictory and impossible to reconcile with the deterrence rationale, yet the majority somehow did it."⁷ An author who accurately reports the law and speaks his mind is a pleasant change from attempts at total objectivity, which often make dull reading. There are times, however, when law and personal opinion shade into each other, perhaps leaving the unwary reader confused as to what the court has said and what Mr. Hall has said. Consider this statement: "The court at present is following the balancing approach, and a true balancing approach will of necessity often recognize that certain rights cannot be balanced because the government interest cannot outweigh them."⁸ When this reviewer read (and reread) that statement he was unsure whether it was Mr. Hall or the Court that had recognized that there exist "certain rights" which cannot be outweighed. Apparently Mr. Hall contends that this is the Court's position, for he goes on to state that *Smith v. Maryland*⁹ "lends significant support to this conclusion."¹⁰ But the significant support Mr. Hall finds in *Smith* is dicta in a footnote.¹¹ The question of whether certain rights limit the operation of the balancing approach is an interesting but unanswered question in fourth amendment jurisprudence.¹² Perhaps this reviewer has misread Mr. Hall's statements in this area, but they are sufficiently ambiguous to confuse other readers. Such occasional mingling of opinion and reporting does not significantly detract from the book so long as the reader takes care to separate the two.

Overall the book fulfills its goal of being a ready working tool for practicing attorneys. It is well written, contains a wealth of material, and is organized to facilitate easy access to specific subject matters. Mr. Hall's book should be a valuable aid to criminal law practitioners.

6. 447 U.S. 727 (1980).

7. J. HALL, SEARCH AND SEIZURE 611 (1982).

8. *Id.* at 42.

9. 442 U.S. 735 (1979).

10. See HALL, *supra* note 7, at 42.

11. *Smith v. Maryland*, 442 U.S. 735, 740 n. 5 (1979).

12. See Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L.F. 763, 786.