

BOOK REVIEW

ANTITRUST QUESTIONS AND ANSWERS. By Edwin S. Rockefeller. Washington, D.C.: The Bureau of National Affairs, Inc., 1974. Pp. xix, 683. \$18.50.

*Reviewed by Kent E. Mast**

It is probably fair to state that every publication of a source book purporting to provide answers to basic antitrust questions is greeted with some degree of eager anticipation by both attorneys and businessmen. Even the experienced antitrust attorney sees benefit from a source of accurate summary information upon which he may rely for analytical inspiration and relief for his harassed memory. Meanwhile, a businessman hopes for a method by which he may avoid the trauma which occurred when he excitedly described his most brilliant and successful business venture, while watching the color slowly drain from his attorney's face.

It is unlikely that any publication can fully satisfy both of these objectives. Although Mr. Rockefeller's compilation, billed on its dust jacket as a "deskbook for lawyers and corporate executives," also fails to do so, it nevertheless offers an approach which brings it reasonable success in comparison to similar works and renders it a worthwhile addition to the source materials of both attorneys and executives. Mr. Rockefeller has organized his book by stating a number of questions that a businessman might ask his attorney. Thus, the answers given by the author are oriented toward clearly stated problems rather than toward broad areas of concern. His work thereby achieves the laudable purpose of providing at least the basis for resolutions, instead of general comment, while at the same time reflecting the flowing interrelationship of the antitrust laws. Consequently, one of the most valuable characteristics of this work is its relatively close relation to the manner in which antitrust issues are actually dealt with in the context of business operations.

As Mr. Rockefeller acknowledges, his effort was largely based upon previous analyses published from time to time in the weekly Bu-

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reau of National Affairs' *Antitrust & Trade Regulation Report*.¹ The author prepared the book as a rewritten and updated compilation of those previous presentations, which may also explain why the book treats certain questions and omits others that may seem more critical to the reader than those included.² After an amorphous and better left undone statement concerning the effects of corporate size, the book commences with "fundamental" questions, primarily Sherman Act issues, and proceeds through analyses of various issues organized by recognizable categories of business function to concluding material dealing with problems generated by regulatory agency and litigation practice.

Ignoring, for the moment, the inconsistency in the significance of issues selected for treatment, the book initially must be considered on the basis of what the author has chosen to provide. While the "answers" offered by Mr. Rockefeller generally summarize, in a helpful and cogent manner, core factors to be derived from the material, they sometimes omit critical analysis of the subject necessary to show the reader that the precedential scope of decisions may be limited by defective reasoning, specialized factual situations, or variances in the doctrine involved.³ Moreover, the basis for selection of decisions for

1. *Preface to E. ROCKEFELLER, ANTITRUST QUESTIONS AND ANSWERS v (1974)* [hereinafter cited as *E. ROCKEFELLER*]. Some of the BNA material was compiled in earlier bound volumes: *J. SCOTT & E. ROCKEFELLER, ANTITRUST AND TRADE REGULATION TODAY: 1967 (1967)*; *J. SCOTT, ANTITRUST AND TRADE REGULATION TODAY: 1969 (1969)*. These books are simply reprints of analyses published in the weekly issues of BNA's *Antitrust & Trade Regulation Report*.

The use of these previously published analyses in *Antitrust Questions and Answers* has an obvious defect—the author might be inclined to be less enthusiastic about adequately covering the most recent material. For example, "Bathtub Conspiracies," *E. ROCKEFELLER 27*, is taken from an analysis published in October 1967 in the *Antitrust & Trade Regulation Report*. It has been updated by citing a few of the more recent cases, such as *Fortner Enterprises v. United States Steel*, 394 U.S. 495 (1969), and the conclusion has been changed to indicate that the case upon which the section is based was reversed.

2. For example, the initial section, "Trust and Antitrust—Some Fundamentals," omits any specific treatment of the interstate commerce requisites of the Sherman Act. The section pertaining to price discrimination omits any specific discussion of scope of the term "commodities" in Section 2(a) of the Robinson Patman Price Discrimination Act, 15 U.S.C. 13(a) (1970), and the segment dealing with private actions omits analysis of applicable venue provisions, the effect of fraudulent concealment upon the statute of limitations, and tax aspects of payments made in connection with treble damage proceedings. Of course, the importance of such omissions depends, in part, on the needs of the reader, and views may differ as to whether pages might have been better devoted to other subjects.

3. For example, the discussion of "The 'In Pari Delicto' Defense," *E. ROCKEFELLER 588-93*, omits analysis of decisions subsequent to *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), e.g., *Columbia Nitrogen Corp. v. Royster*

specific description or comment is sometimes not apparent, and the reader may be left with the unfortunate misimpression that the case selected is the "leading" authority or that it is typical of all other decisions on the same subject matter.⁴

A bothersome corollary to this presentation is the method of raising discussion points by use of indefinite terminology such as "some" might argue, it "might" be, or there exists a "feeling" to some effect, etc.⁵ This approach may have the effect of depriving the reader of perspective by providing him the "actual" with the "maybe" under the same trappings. "Some" might think that the earth is flat, but in educating one concerning the subject, greater emphasis would properly be given to scientific evidence that it is round. It is an advantage to this book that such thoughts or opinions are raised, but their limitations might be better marked.

Another difficulty with the material presented is that the analyses are sometimes disconnected and disorganized in presentation. Discussion may proceed from case to case without benefit of a purposeful progression and with only occasional interspersions of premises or conclusions. In some instances, the reader arrives at the end of the "argument" knowing that his journey was eventful and informative, but without clear knowledge of the destination he has reached.⁶ Moreover, the question posed may sometimes be broader than the answer provided. For example, the "answer" to the question "Are public utilities exempt from the antitrust laws?"⁷ fails to treat the issue on the state level and omits any reference to the location of the pertinent discussion earlier in the book.⁸ More importantly, the discussion under

Co., 451 F.2d 3 (4th Cir. 1971); Premier Elec. Constr. Co. v. Miller-Davis Co., 422 F.2d 1132 (7th Cir. 1970); Dobbins v. Kawasaki Motors Corp., 362 F. Supp. 54 (D. Ore. 1973); Skouras Theatres Corp. v. Radio-Keith-Orpheum, 58 F.R.D. 357 (S.D.N.Y. 1973), and does not treat the question arising where the activity sought to be protected by injunctive relief constitutes a violation of the antitrust laws, see Credit Bureau Reports, Inc. v. Retail Credit Co., 476 F.2d 989 (5th Cir. 1973). Moreover, there is no mention of the "unclean hands" defense which, while discredited, often seems the perfect and logical defense to the uninitiated.

4. For example, in that section dealing with "Activities Under State Regulation," E. ROCKEFELLER 70-74, equal emphasis with the cases utilized might have been given to Marnell v. United Parcel Serv. of America, Inc., 1971 Trade Cas. ¶ 73,761 (N.D. Cal. 1971), and George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970). Moreover, collateral recognition could have been given to issues arising from conspiracy allegations in the state action context. See California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); Wainwright v. National Dairy Prods. Corp., 304 F. Supp. 567 (N.D. Ga. 1969). See also note 3 *supra*.

5. *E.g.*, E. ROCKEFELLER 23-24, 27, 38, 81-83, 97, 127-28, 429.

6. *E.g.*, *id.* at 70-74, 39-44, 103-11.

7. *Id.* at 408-19.

8. See *id.* at 70-74.

the heading "which bank mergers are permitted under the antitrust laws?"⁹ omits any analysis of the numerous decisions, at various court levels, dealing with the effort to apply potential competition theory to bank mergers.¹⁰

However, the more fundamental difficulty with this work is that, while it is in part addressed to the businessman, it fails to meet some of the primary needs of businessmen in the antitrust context. For example, this book, like others of its type, does not take the time to point out to the businessman that many phrases included within his occupational vocabulary take up a different, technical, and often dangerous meaning when they are used in an antitrust context. Simple words such as "trends," "markets," and "competitors" are used by even the most sophisticated businessman casually to express business concepts as understood by the user. This same businessman is often later amazed and chagrined to find his company expending extensive sums in legal fees to defend against a different meaning given to the same word by a government or private antitrust attorney.

Moreover, a book which purports to advise a businessman concerning dealings with government agencies should provide him with candid and useful information upon which he can base realistic decisions. For example, a businessman should be told of the informal, but real, organizational relationships that exist within the Federal Trade Commission.¹¹ The businessman should be advised of how the agency works in actual practice, how it is constituted, where decisions are made, and other factors pertinent to his choice of business activities, as well as to the timing of those activities. Recognizing that such information would be subjective, it may also be the most valuable. When a book, such as this, broaches the topic "FTC Fairness"¹² and omits this sort of information, it really has not said anything at all. Furthermore, a book has stopped short when it states that certain factors will

9. *Id.* at 419-20.

10. *E.g.*, *United States v. Connecticut Nat'l Bank*, 362 F. Supp. 240 (D. Conn. 1973); *United States v. Idaho First Nat'l Bank*, 315 F. Supp. 261 (D. Idaho 1970); *United States v. First Nat'l Bank*, 301 F. Supp. 1161 (S.D. Miss. 1969), to which the recent case of *United States v. Marine Bancorporation, Inc.*, 94 S. Ct. 2856 (1974), can now be added.

11. This omission is surprising since Mr. Rockefeller has served as assistant to the general counsel (1958-59) and, later, as executive assistant (1959-61) to the Chairman of the Federal Trade Commission. Perhaps he believes these matters have already been dealt with sufficiently in his *Desk Book of FTC Practice and Procedure*. See, *e.g.*, Ch. 5, "Dealing with the Federal Trade Commission," in E. ROCKEFELLER, *DESK BOOK OF FTC PRACTICE AND PROCEDURE* 27-37 (1972).

12. E. ROCKEFELLER 486. This section is devoted to FTC press releases and to the FTC's efforts to obtain industrywide compliance with antitrust laws.

lead to a more "competitive spirit" between the enforcement agencies and thereby "more enforcement activity"¹³ without informing the businessman that this may also lead to investigation of the same matter by both agencies with inconsistent results.

There is a great need in the antitrust area for a summary source book combining a statement of the law with the reality of its application. *Antitrust Questions and Answers* does not completely fulfill this need. Nevertheless, this book will be informative to the businessman because it provides him with a statement of the law in readable and brief form. It will be helpful to the antitrust attorney for the same reason. Thus, even though this book does not fully meet the needs of either, it does provide a wealth of information in readily accessible form and, consequently, is a valuable addition to the materials available.

13. *Id.* at 232.