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Patrick R. James

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MUNICIPAL DEFENSES TO ANTITRUST LIABILITY

Patrick R. James*

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I. INTRODUCTION

As a result of recent Supreme Court decisions, municipalities¹ have been faced with an increasing number of antitrust suits. Along with these suits comes the danger of massive liability in the form of treble damages, years of litigation, expensive attorney's fees for defense of such suits,² and uncertainty as to what actions will subject the municipality to antitrust liability. In one municipal antitrust case the plaintiffs sought treble damages in excess of \$540,000,000;³ if divided among the residents of the defendant cities, the damages would exceed \$28,000 for each family of four.⁴ The possible devastating effect of these damages becomes even more real since the United States Supreme Court has held that there is no basis for al-

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1. The term "municipality" is used generically and is intended to encompass all local governments including cities, villages, towns, townships, counties and other general function units of local governments.

2. The dissenting Justices in *City of Lafayette v. Louisiana Power & Light Co.*, noted that "[l]egal fees to defend one current antitrust suit have been estimated as at least one-half million dollars a month." 435 U.S. 389, 441 n.3 (1978) (Stewart, J., dissenting) (citing N.Y. Times, June 27, 1977, p. 41, col. 6; *id.*, Sept. 4, 1977, sec. 3 p.5, col. 1).

3. *Id.* at 440, 442 n.1 (1978) (Blackmun, J., dissenting).

4. *Id.*

lowing federal courts to fashion a right under federal law for contribution between defendants in a federal antitrust case.⁵ To make matters worse, municipal officials can and have been held personally liable in such suits. In a recent case the Fifth Circuit Court of Appeals reinstated a jury verdict of 2.1 million dollars against the Mayor of the City of Houston.⁶ If these damages are trebled, the Mayor is facing a personal judgment of 6.3 million dollars. A municipality may be faced with an antitrust lawsuit for a multitude of activities, including regulation of cable television businesses,⁷ operation of electric utility systems,⁸ operation of sewage treatment services,⁹ provision of public water supplies,¹⁰ denial of a telephone franchise,¹¹ zoning,¹² leasing of parking spaces for baseball games,¹³ regulating parking lot operators,¹⁴ operation of a municipal airport,¹⁵ regulating on-airport car rental concessions,¹⁶ regulation and licensing of taxis,¹⁷ awarding a wrecker tow-in contract,¹⁸ solid waste management,¹⁹ the regulation of hospital facilities²⁰ and the

5. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

6. *Affiliated Capital Corp. v. City of Houston*, 700 F.2d 226 (5th Cir.), *reh'g granted*, 1983-2 Trade Cases (CCH) ¶ 65,597 (1983).

7. *E.g.*, *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *Affiliated Capital Corp.*, 700 F.2d at 226.

8. *E.g.*, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

9. *E.g.*, *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), *appeal filed*.

10. *E.g.*, *Community Builders v. City of Phoenix*, 652 F.2d 823 (9th Cir. 1981); *Lockary v. Kayfetz*, 1983-2 Trade Cases (CCH) ¶ 65,594 (N.D. Cal. 1983); *Schrader v. Horton*, 471 F. Supp. 1236 (W.D. Va. 1979).

11. *E.g.*, *Capital Telephone Co. v. City of Schnectady*, 1983-1 Trade Cases (CCH) ¶ 65,362 (N.D.N.Y. 1983).

12. *E.g.*, *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), *cert. denied*, — U.S. —, 103 S. Ct. 2122 (1983); *see Comment, Antitrust Laws, Zoning and Agreements to Zone Delegation of Police Powers after Lafayette v. Louisiana Power & Light*, 25 S.D. L. REV. 316 (1980).

13. *E.g.*, *Cincinnati Riverfront Colliseum v. City of Cincinnati*, 556 F.Supp. 664 (S.D. Ohio 1983).

14. *E.g.*, *Corey v. Look*, 641 F.2d 32 (1st Cir. 1981).

15. *E.g.*, *Pueblo Aircraft Serv. Inc. v. City of Pueblo*, 679 F.2d 805 (10th Cir. 1982). *See also Hill Aircraft & Leasing Corp. v. Fulton County*, 1983-2 Trade Cases (CCH) ¶ 65,478 (N.D. Ga. 1983).

16. *E.g.*, *Greyhound Rent-A-Car, Inc. v. City of Pensacola*, 676 F.2d 1380 (11th Cir. 1982), *cert. denied*, — U.S. —, 103 S. Ct. 816 (1983).

17. *E.g.*, *Campbell v. City of Chicago*, 45 Antitrust & Trade Reg. Rep. 605 (N.D. Ill. 1983); *Golden State Transit Corp. v. City of Los Angeles*, 1983-1 Trade Cases (CCH) ¶ 65,448 (C.D. Cal. 1983).

18. *E.g.*, *Kendrick v. City Council of Augusta*, 516 F.Supp. 1134 (S.D. Ga. 1981). *See also Goodner v. Bachofner*, 1977-1 Trade Cases (CCH) ¶ 61,369 (Wash. 1977).

19. *E.g.*, *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981), vacated and remanded in light of *City of Boulder*, 455 U.S. 931 (1982), *aff'd*, 1983-1 Trade Cases (CCH) ¶ 65,356 (N.D. Ohio 1983); *L&H Sanitation, Inc. v. Lake City Sanitation, Inc.*, No.

creation of an ambulance service system.²¹

The purpose of this article is to familiarize the reader with the current status of the "state action doctrine"²² and to suggest possible defenses to municipal antitrust suits based upon the state action doctrine, a municipal rule of reason, and the tenth amendment to the United States Constitution.

II. DEVELOPMENT OF THE STATE ACTION DOCTRINE

In *Parker v. Brown*²³ the United States Supreme Court held that the federal antitrust laws did not prohibit a state as a sovereign from imposing certain anticompetitive restraints as an act of government. Thus evolved the state action doctrine²⁴ under which it was assumed that all governmental entities, including state agencies or other subdivisions of a state, were, because of their status, exempt from the antitrust laws. However, in *Goldfarb v. Virginia State Bar*,²⁵ after over thirty years of virtual silence in the area, the Supreme Court gave the first signs of erosion of the *Parker* doctrine. In *Goldfarb* the Court concluded that fee schedules enforced by a state bar association were not mandated by ethical standards established by the state supreme court and, therefore, were not immune from antitrust attack. *Goldfarb* made it clear that, for the purposes of the *Parker* doctrine, not every act of a state agency is that of the

B-C-82-93 (E.D. Ark. Oct. 19, 1983); *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Area Solid Waste Agency*, 557 F. Supp. 131 (S.D. Iowa 1982), *aff'd*, 1983-2 Trade Cases (CCH) ¶ 65,575 (8th Cir. 1983).

20. *E.g.*, *Huron Valley Hospital, Inc. v. City of Pontiac*, 466 F. Supp. 1301 (E.D. Mich. 1979), vacated and remanded, 666 F.2d 1029 (6th Cir. 1982).

21. *E.g.*, *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956 (W.D. Mo. 1982), *aff'd*, 705 F.2d 1005 (8th Cir. 1983); *Springs Ambulance Service, Inc. v. City of Rancho Mirage*, 1983-2 Trade Cases (CCH) ¶ 65,646 (C.D. Cal. 1983).

22. The state action doctrine is based upon the Supreme Court's holding in *Parker v. Brown*, 317 U.S. 341 (1943). It has been called the *Parker* doctrine, the state action exemption and the state action immunity. *E.g.*, *City of Lafayette*, 435 U.S. at 393 n.8 ("The word 'exemption' is commonly used by courts as a shorthand expression for *Parker's* holding. . . ."); *Sound, Inc. v. A.T.&T.*, 631 F.2d 1324, 1331 n.8 (8th Cir. 1980). *But see City of Boulder*, 455 U.S. at 63 (Rehnquist, J., dissenting) ("state action" doctrine is not an exemption at all, but instead a matter of federal preemption."); Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 Nw. U.L. REV. 71, 71-72 n.4 (1974) (terming *Parker* doctrine "as one of 'exemption' is really a misnomer. . . ."). For the purposes of this article, the term "state action doctrine" is intended to encompass all of these references.

23. 317 U.S. 341 (1943).

24. *Parker* was not the first case imposing such a defense. In *Olsen v. Smith*, 195 U.S. 332, 344, 345 (1904), the Court first indicated that such a defense may exist. However, *Parker* is recognized as the first case enunciating the state action doctrine.

25. 421 U.S. 773 (1975).

state as a sovereign.²⁶

One year later in *Cantor v. Detroit Edison Co.*,²⁷ the Court, in a plurality opinion, found that there was no antitrust immunity when a state agency passively accepted a public utility's tariff. In rejecting the utility's reliance on the *Parker* doctrine, the Court concluded that the state's policy on the challenged activity was neutral and that, for this reason, the state action doctrine did not apply. The next major decision involving the state action doctrine was *Bates v. State Bar of Arizona*²⁸ in which the Court considered the applicability of the antitrust laws to a ban on attorney advertising directly imposed by the Arizona Supreme Court. In holding that the antitrust laws were inapplicable, the *Bates* Court noted that the Arizona Supreme Court is "the ultimate body wielding the State's power over the practice of law . . . and, thus, the restraint is 'compelled by direction of the State acting as a sovereign.'" ²⁹

Although these cases appeared to be setting a trend for the erosion of the state action doctrine, they were still only concerned with state agencies or private parties. However, in 1978 this trend expanded to include municipalities. In *City of Lafayette v. Louisiana Power & Light Company*³⁰ the Supreme Court, in a plurality opinion written by Justice Brennan, concluded that the state action doctrine exempted "only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly. . . ." ³¹ Thus, for the acts of a municipality or its officers to come under the state action doctrine, there must be evidence that the state authorized or directed it to act as it did.³² An adequate state mandate for anticompetitive activities of a municipality exists when it is found that the state contemplated the kind of activity complained of. The Court added that it is not necessary for the municipality "to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit."³³

City of Lafayette was followed two years later by *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*,³⁴ a case in

26. *Id.* at 791.

27. 428 U.S. 579 (1976).

28. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

29. *Id.* at 360 (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975)).

30. 435 U.S. 389 (1978).

31. *Id.* at 413.

32. *Id.* at 414.

33. *Id.* at 415.

34. 445 U.S. 97 (1980).

which state regulations provided for a private price fixing arrangement. In holding that the state action doctrine did not apply, the Court held that there were two standards for antitrust immunity under *Parker v. Brown*. "First, the challenged restraint must be ' . . . clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."³⁵ Thus, with very little analysis or discussion, the Court added a second prong to the state action exemption test—active state supervision.³⁶ In 1982 the Supreme Court delivered its most recent opinion dealing with the state action doctrine. In *Community Communications Co. v. City of Boulder*³⁷ the Court held that an ordinance enacted under a city's home rule³⁸ power does not satisfy the "clear articulation and affirmative expression" requirement.

[P]lainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive action for which municipal liability is sought.³⁹

In light of the opinions in *City of Lafayette*, *Midcal* and *City of Boulder*, it is apparent that municipalities are not automatically exempt from federal antitrust laws under the *Parker* doctrine.⁴⁰ However, this does not mean that all anticompetitive activities are subject to antitrust restraints, nor does it preclude municipal governments from providing services on a monopoly basis.⁴¹ Thus, activities which might appear anticompetitive when engaged in by private parties may be viewed differently when adopted by local governments.⁴²

35. *Id.* at 105 (quoting *City of Lafayette*, 435 U.S. at 410).

36. The Court first indicated that such a requirement might be imposed in *Bates*, 433 U.S. at 362, but did not make it a part of the state action doctrine test until the decision in *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

37. 455 U.S. 40 (1982).

38. Local governments having home rule power are authorized to act without first obtaining specific permission from state legislatures or state constitutions. See 48 MINN. L. REV. 643, 645, 650.

39. *Id.* at 55.

40. *City of Lafayette*, 435 U.S. at 408-09. The state action doctrine "is in the nature of an affirmative defense" and should be pleaded as such. See *Cantor*, 428 U.S. 579, 600.

41. *City of Lafayette*, 435 U.S. at 413, 416-17.

42. *City of Boulder*, 455 U.S. at 57 n.20; *City of Lafayette*, 435 U.S. at 417 n.48.

III. THE STATE ACTION DOCTRINE

A. *Clearly Articulated and Affirmatively Expressed*

The Court in *City of Boulder* held that a municipality is not exempt from antitrust scrutiny unless it acts "in furtherance or implementation of clearly articulated and affirmatively expressed state policy. . . ." ⁴³ This does not mean that the municipality must point to a specific, detailed legislative authorization. It need only show that the challenged activity was clearly within the legislative intent or that the legislature contemplated the kind of action complained of. ⁴⁴ The Eighth Circuit has held that this requirement "is comprised of two elements: [1] The legislature must have authorized the challenged activity, and [2] it must have done so with an intent to displace competition." ⁴⁵ As a practical matter, the municipal antitrust defendant can meet the first element by relying upon applicable state law, court decisions, and/or state agency action. ⁴⁶ Virtually any state action explicitly authorizing or, in some cases, impliedly authorizing the challenged activity should be sufficient to meet the "authorization" requirement. ⁴⁷ The second element is met if "the legislature contemplated the kind of action complained of." ⁴⁸ "In other words, a sufficient state policy to displace competition exists if the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity." ⁴⁹

The fact that a municipality has home rule powers should have no impact upon a court's decision as to the applicability of the state

43. *City of Boulder*, 455 U.S. at 52.

44. *Id.* at 49-50 n.12 (citing *City of Lafayette v. Louisiana Power & Light Company*, 532 F.2d 431, 434-35 (5th Cir. 1976)); *City of Lafayette*, 435 U.S. at 415.

45. *Gold Cross Ambulance*, 705 F.2d at 1011 (citing *City of Boulder*, 455 U.S. at 51-52; *City of Lafayette*, 435 U.S. at 415).

46. See *infra* notes 52-55 and accompanying text.

47. Defendant municipalities should cite virtually every applicable statute and the court decisions construing those statutes to show state authorization. See *Gold Cross*, 705 F.2d at 1010 n.6; *Town of Hallie*, 700 F.2d at 382-83; *Hybud Equipment Co. v. City of Akron*, 1983-1 Trade Cases (CCH) ¶ 65,356 at 70,121-22 (N.D. Ohio 1983); *Capital Telephone Co. v. City of Schnectady*, 1983-1 Trade Cases (CCH) ¶ 65,362 at 70,152-153 (N.D. N.Y. 1983); *Guthrie v. Genesee County*, 494 F. Supp. 950, 955-56 (W.D.N.Y. 1980); *Schrader v. Horton*, 471 F. Supp. 1236, 1242 (W.D. Va. 1979). See also *Deak-Perera Hawaii, Inc. v. Department of Health*, 553 F. Supp. 976, 982-84, 986-88 (D. Hawaii 1983).

48. *City of Lafayette*, 435 U.S. at 415; *Gold Cross*, 705 F.2d at 1012. P. AREEDA & D. TURNER, ANTITRUST LAW § 212.3a (Supp. 1982).

49. *City of Lafayette*, 435 U.S. at 415; *Gold Cross*, 705 F.2d at 1012. For discussion as to what the "contemplation" requirement entails see *City of Lafayette*, 435 U.S. at 415; *Town of Hallie*, 700 F.2d at 381 nn.9 & 10; *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 995 (3rd Cir. 1982), cert. denied, — U.S. —, 103 S.Ct. 388 (1982); Rogers, *Municipal Antitrust Liability in a Federalized System*, 1980 ARIZ. ST. L.J. 305, 363-66 (1980).

action doctrine. It is only where the municipality attempts to rely upon these home rule powers to show that its activity was "contemplated" by the State that the state action doctrine is not applicable.⁵⁰ The issue to be focused upon is whether there is other state authorization, independent of home rule authority, contemplating the challenged anticompetitive activity.⁵¹ State authorization and contemplation can be found from comprehensive regulatory schemes,⁵² state supreme court decisions,⁵³ actions of state agencies,⁵⁴ or even broad authority created under state law to undertake the challenged activity.⁵⁵

Although the Court has held that the test of "clear articulation and affirmative expression" of state policy is met when the municipal action is directed or authorized by the State,⁵⁶ there are still a number of lingering cases indicating that the municipal action must be required or compelled by the state before the activity is exempt from antitrust liability.⁵⁷ This confusion has been all but laid to rest in light of three recent opinions by the Fifth, Seventh and Eighth Circuits. In *Town of Hallie v. City of Eau Claire*⁵⁸ the Seventh Cir-

50. *City of Boulder*, 455 U.S. at 55. In such a situation, the Court has held that "the state's position is one of mere neutrality" and can hardly be said to have been "contemplated." *Id.*

51. See *supra* notes 45-49 and accompanying text.

52. *E.g.*, *Gold Cross*, 705 F.2d at 1011.

53. *First American Title Co. v. South Dakota Land Title Assoc.*, 714 F.2d 1439, 1451 (8th Cir. 1983). See also *Euster*, 677 F.2d at 994 n.4, 996 n.6; *Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706, 717 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978); *P. AREEDA & D. TURNER*, *supra* note 48 at § 212.2c (Supp. 1982).

54. *Bates*, 433 U.S. at 350; *Euster*, 677 F.2d at 992; *Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 275 (9th Cir. 1982); *Llewellyn v. Crothers*, 1983-1 Trade Cases (CCH) ¶ 65,358 at 70,135 (D. Or. 1983). *But see Goldfarb*, 421 U.S. at 791 ("fact that State Bar is a state agency for some limited purposes does not create an antitrust shield. . . .").

55. *Central Iowa Refuse Systems*, 557 F. Supp. at 136 ("only feasible way in which solid waste facilities could be acquired and constructed was through issuance of revenue bonds."). The Eighth Circuit, in affirming the district court's opinion in *Central Iowa Refuse* stated: "State authorization can perhaps be inferred from concurrent state acts evincing a policy favoring regulation or from a delegation of authority to a municipality to act in an area which has customarily been regulated in an anticompetitive manner. See Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518, 523 (1979)." *Central Iowa Refuse Systems v. Des Moines Solid Waste*, 1983-2 Trade Cases (CCH) ¶ 65,575 at 68,854 n.11 (8th Cir. 1983).

56. *City of Boulder*, 455 U.S. at 57 (quoting *City of Lafayette*, 435 U.S. at 416-17 (1978)).

57. *E.g.*, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Sound, Inc. v. A.T.&T.*, 631 F.2d 1324, 1334-35 (8th Cir. 1980) (*but see infra* n.68); *Springs Ambulance Service, Inc. v. City of Rancho Mirage*, 1983-2 Trade Cases (CCH) ¶ 65,646, at 69,282 (C.D. Cal. 1983); *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025, 1031, 1040 (N.D. Tex. 1978); *Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 526 F. Supp. 276, 279 (E.D. Cal. 1981).

58. 700 F.2d 376 (7th Cir. 1983).

cuit concluded that state compulsion is not required to exempt a municipality from antitrust liability.⁵⁹ The court discussed *City of Lafayette* and *City of Boulder* and stated that the critical inquiry was whether the anticompetitive conduct constituted state action.⁶⁰

We hold that any municipality acting pursuant to clearly articulated and affirmatively expressed state policy which evidences an intent of the legislature to displace competition with regulation—whether compelled, directed, authorized, or in the form of a prohibition—is entitled to antitrust immunity because conduct pursuant to such a policy would constitute state action.⁶¹

The second decision, *Affiliated Capital Corp. v. City of Houston*,⁶² in reversing the district court, adopted by reference a large portion of the district court's opinion.⁶³ Included in that portion of the opinion adopted was a specific holding that "[t]he state subdivision, however, need not be able 'to point to a specific detailed legislative authorization. . . .'"⁶⁴ The third case, *Gold Cross Ambulance v. City of Kansas City*,⁶⁵ expressly rejected the plaintiff's claim that the state must compel or command the municipalities' action.⁶⁶ The court cited *City of Boulder*, noting that it "repeated with approval the language regarding state authorization or contemplation of the challenged restraint used by the plurality in *City of Lafay-*

59. *Id.* at 381.

60. *Id.*

61. *Id.*

62. 700 F.2d 226 (5th Cir.), reh'g granted, 1983-2 Trade Cases (CCH) ¶ 65,597 (1983).

63. *Id.* at 237 (*Affiliated Capital Corp. v. City of Houston*, 519 F. Supp. 991, 1012-1029 (S.D. Tex. 1981)).

64. *Affiliated Capital Corp.*, 519 F. Supp. at 1027 (quoting *City of Lafayette*, 435 U.S. at 415). "Instead, 'an adequate state mandate for anticompetitive activities of cities . . . exists when it is found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'" *Id.* (quoting *Lafayette*, 435 U.S. at 415 (quoting the lower court, 532 F.2d 431, 434)).

Affiliated Capital Corp. was followed less than a month later by *United States v. Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532, 537 (5th Cir. 1983), which held that compulsion should not be required of state defendants. However, relying upon *Goldfarb*, 421 U.S. 773, the court in *Southern Motor Carriers* held that the compulsion requirement is applicable to private parties seeking to avail themselves of the defense of the state action doctrine. 702 F.2d at 535-36, 537 n.10, 540 n.15. See also *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592 n.28 (1976) (quoting *Goldfarb*, 421 U.S. at 791); *Hybud Equip. Corp. v. City of Akron*, 1983-1 Trade Cases (CCH) ¶ 65,356 at 70,122 (N.D. Ohio 1983). The full extent to which the state action doctrines may be applicable to private parties is beyond the scope of this article.

65. 705 F.2d 1005 (8th Cir. 1983). The decision in *Gold Cross* was cited with approval in *Central Iowa Refuse Systems v. Des Moines Solid Waste*, 1983-2 Trade Cases (CCH) ¶ 65,575 at 68,857 (8th Cir. 1983).

66. *Id.* at 1012 n.11.

ette. . . ."⁶⁷ *Town of Hallie, City of Houston* and *Gold Cross* are but three in a long line of recent cases holding or implying that the municipal action need not be directed or compelled by the state in order for the municipality to be exempt from antitrust liability.⁶⁸

Finally, although the state action doctrine can normally be ruled upon as a matter of law, the Eighth Circuit has indicated that allegations of fraud and/or illegal conduct can deprive a municipality of its protection under the state action doctrine. In *Westborough Mall v. City of Cape Girardeau*⁶⁹ the plaintiffs alleged that municipal officials thwarted normal zoning procedures with regard to the development of the plaintiff's property. In reversing the district court's early dismissal of the case based upon the state action doctrine, the court stated:

Even if zoning in general can be characterized as "state action," . . . a conspiracy to thwart normal zoning procedures and to directly injure the plaintiffs by illegally depriving them of their property is not in the furtherance of any clearly articulated state policy [citations omitted].⁷⁰

67. *Id.*

68. *E.g., Euster*, 677 F.2d at 995 ("the state need not have contemplated the precise action complained of as long as it contemplated the kind of action to which objection was made"); *Pueblo Aircraft Service v. City of Pueblo, Colo.*, 679 F.2d 805, 808-10 (10th Cir. 1982); *Southern Motor Carriers*, 672 F.2d at 473; *Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580, 590-91 (7th Cir. 1977), remanded for further consideration in light of *City of Lafayette*, 435 U.S. 992 (1978), *aff'd* as to antitrust claims, 583 F.2d 378, 379 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979); *Golden State Transit Corp. v. City of Los Angeles*, 1983-1 Trade Cases (CCH) ¶ 65,448 at 70,557 (C.D. Cal. 1983); *Llewellyn v. Crothers*, 1983-1 Trade Cases (CCH) ¶ 65,358 at 70,135 (D.C.Or. 1983); *Central Iowa Refuse v. Des Moines Metropolitan Area Solid Waste Agency*, 557 F. Supp. 131, 136 (S.D. Iowa 1982), *aff'd* 1983-2 Trade Cases (CCH) ¶ 65,575 (8th Cir. 1983); *Gold Cross*, 538 F. Supp. at 963. State direction or compulsion "should not be read as an independent requirement for state action immunity; rather its presence or absence should serve only as strong evidence about state intent." Areeda, *Antitrust Immunity for "State Action" after Lafayette*, 95 HARV. L. REV. 435, 438 (1981).

Dictum in *Sound, Inc.*, 631 F.2d 1324, seems to indicate that unless state law required anticompetitive activity, a public utility is not exempt from antitrust liability. *Id.* at 1334-35. However, a close reading of *Sound, Inc.*, reveals that the court looked at four factors in ruling upon whether the state action doctrine was applicable. *Id.* at 1344. The discussion in *Sound, Inc.* as to whether the activity was required was only one of the four factors. This discussion was only relevant to the determination of the application of the state action doctrine and was not dispositive. Additionally, *Sound, Inc.*, which was decided two years before *City of Boulder*, involved a private party seeking immunity under the state action doctrine and not that of a municipality. It has previously been noted that the public/private distinction is important with regard to the state action doctrine. See *supra* note 64. To the extent that the *Sound, Inc.* decision may hold that a state mandate is required, this holding is overruled sub silentio by *Gold Cross*.

69. 693 F.2d 733 (8th Cir. 1982).

70. *Id.* at 746. The court cited *Sound, Inc.*, 631 F.2d at 1334; *Stauffer v. Town of Grand*

In light of the *Westborough* opinion, a plaintiff apparently need only raise a facial claim of fraud or improper motive to get past an early dismissal based upon the state action doctrine.⁷¹

In *Llewellyn v. Crothers*⁷² an Oregon district court apparently rejected the holding in *Westborough*. The court specifically held that *state officials* did not lose their immunity under the state action doctrine even if it were true that their actions were motivated by bad faith.⁷³ The *Llewellyn* decision is appealing since it looks only at the challenged activity, not the motivation behind it, and prevents federal courts from examining the subjective motivation behind the municipal decision making process.⁷⁴

Lake, 1981-1 Trade Cases (CCH) ¶ 64,029 at 76,330 (D.C. Col. 1980); *Mason City Center Associates v. City of Mason City*, 468 F. Supp. 737, 741-44 (N.D. Iowa, 1979), and *Guthrie v. Genesee County*, 494 F. Supp. 950, 955-58 (W.D. N.Y., 1980), in support of its holding.

71. Such a decision will conceivably allow plaintiffs with meritless cases to hold municipalities hostage to antitrust claims for years on end. In order to avoid years of litigation, massive legal fees for defense, and the uncertainties of a jury trial, many cities will no doubt be forced to capitulate to these meritless claims and settle before the time of trial. At least one writer has suggested that, "it would seem desirable for a court, presented with conspiracy or abuse allegations, at least to require reasonable specificity in some initial substantiating evidence before accepting such allegations as a ground for rejecting an otherwise valid immunity claim." Skitol, "*State Action*" Immunity: *Government's Traditional (Now Constricted) First Defense*, at 26 (unpublished article prepared for use in connection with the ABA National Institute on "Antitrust Liability of Urban, State and Local Governments"). See 44 ANTITRUST & TRADE REG. REP. (BNA) 801 (April 14, 1983). Such a holding would at least lessen the chances of municipalities being held hostage to meritless antitrust suits.

As a practical matter, it may be wise for municipal defendants faced with meritless claims of fraud or improper motive *not* to move for early dismissal based on the state action doctrine. To do so would bring the case before the judge under the worst possible facts. Instead (and unfortunately) it may be better to take early discovery measures and then move for summary judgment based on the state action doctrine and provide supporting affidavits and depositions demonstrating that the plaintiff's claims of fraud or illegal motive are baseless. *But see* *L&H Sanitation, Inc. v. Lake City Sanitation, Inc.*, No. B-C-82-93 (E.D. Ark. Oct. 19, 1983).

72. 1983-1 Trade Cases (CCH) ¶ 65,358 (D.C.Or. 1983).

73. *Id.* at 70,139. The court added, however, that its earlier finding of active supervision was crucial to its analysis. *Id.* at 70,139 n.1. If the challenged actions of the state officials were improper, they could have been attacked under the Oregon Administrative Procedure Act and in state courts. *Id.*

Because the actions of [the state officials] were not overturned in the state supervisory process, "wise and efficient federalism" concerns . . . require the court to conclusively presume that, although the actions of [the state officials] might have been motivated by bad faith animosity against chiropractors, the actions nonetheless represent the best interests of the state as well, and constitute state action immune from the antitrust laws under *Parker* and its progeny. [citations omitted].

Id. See also Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. L. REV. 435, 449-50, 453 (1981) ("'Ordinary' errors or abuses in the administration of powers conferred by the state should be left for state tribunals to control.").

74. Such a holding finds support in *Euster*, 677 F.2d at 997 n.7, where the court stated: "The Supreme Court has never held that motivation is a factor in the "state action" analysis,

If the *Westborough* decision is followed, it is unclear whether all improper or erroneous municipal activities will possibly subject the municipality to liability. In other words, will good faith activity, even though erroneous, subject a municipality to antitrust liability?⁷⁵ One can conceivably see the antitrust laws being turned into "good government" statutes—a purpose for which they were clearly not intended.

Any local government abuses can be prevented by federal and state law such as civil rights laws under § 1983 of the Civil Rights Act, conflict of interest law, sunshine laws, public disclosure of interest of public officials, and freedom of information laws. More important, public interest is protected by the ballot box.⁷⁶

It is doubtful that the court in *Westborough* intended to impose the danger of antitrust liability on municipalities as a cure-all for all improper or erroneous activity.⁷⁷

B. *Active State Supervision*

In California Retail Liquor Dealers Assoc. v. Midcal Aluminum,

apart from the standards outlined in *Midcal*." See also Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 717 (3rd Cir. 1978), cert. denied, 439 U.S. 966 (1978) ("the state need not have contemplated the precise action complained of as long as it contemplated the kind of action to which objection was made"). It should be noted that the court in *Westborough* did not state whether an objective or a subjective standard should be applied. The Supreme Court has recently held that under 42 U.S.C. § 1983 an objective standard should be applied in determining whether the governmental official is entitled to good faith immunity. Harlow v. Fitzgerald, — U.S. —, 102 S.Ct. 2727 (1982).

75. The court in Llewellyn v. Crothers, 1983-1 Trade Cases (CCH) ¶ 65,358 at 70,137-138 (D.Or. 1983) expressly held that state action protected under the *Parker* doctrine does not lose its protection because it is erroneous under state law. There are a multitude of activities in which a municipality can mistakenly participate, but which should not be considered a violation of the antitrust laws, e.g., bidding discrepancies, failure to follow established guidelines, municipal officials meeting with clientele, etc.

76. Williamson, *Commentary: The Reagan Administration's Position on Antitrust Liability of Municipalities*, 32 CATH. U. L. REV. 371, 378 (1983). See also Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. L. REV. 435, 449-50, 453 (1981).

77. In *L&H Sanitation, Inc. v. Lake City Sanitation, Inc.*, No. B-C-82-93 (E.D. Ark. Oct. 19, 1983), a case decided after this article was written, the court found that the actions of the defendant city council members constituted state action and was therefore "exempt from the operation of the federal antitrust laws." Slip Opinion at 7. The court made this finding despite allegations of a "sweetheart deal" and claims of bidding irregularities. *Id.* at 2. Although the plaintiffs strongly argued that the decision in *Westborough* barred dismissal of the antitrust claims, the court held that the state action doctrine protected the municipal defendants from antitrust liability. Instead, the court reviewed the propriety of the challenged activity under 42 U.S.C. § 1983 (1976). *Id.* at 8. The decision in *L&H Sanitation, Inc.* is compelling as it prevents the antitrust laws from being turned into "good government" statutes, yet still provides an avenue for relief from improper governmental actions.

Inc.,⁷⁸ a case involving California's system for wine pricing, the Court enunciated the second leg of the two pronged test for the state action exemption: "The policy must be 'actively supervised' by the State itself."⁷⁹ After the decision in *Midcal* it was questionable whether a showing of active state supervision was necessary for municipalities to be afforded protection under the state action doctrine. Instead, many commentators argued that the *Midcal* formula, *i.e.*, active state supervision, applied only to private anticompetitive behavior and not to local governments.⁸⁰ This uncertainty was increased following the Supreme court's opinion in *City of Boulder* in which the Court stated that an ordinance enacted under Boulder's home rule power did not satisfy the "clear articulation and affirmative expression" requirement.⁸¹ Since the ordinance failed the first prong of the test, the Court specifically held that it did "not reach the question whether that ordinance *must or could* satisfy the 'active state supervision' test focused upon in *Midcal*."⁸²

The few post-*City of Boulder* decisions addressing this issue have held that the active state supervision requirement does not apply to municipalities.⁸³ One opinion, *Town of Hallie v. City of Eau Claire*,⁸⁴ concluded that it would be unwise to require a city performing a traditional municipal function (sewage collection and transportation) to meet the high standard of active state supervision.⁸⁵ *Town of Hallie* was followed by the Eighth Circuit decision

78. 445 U.S. 97 (1980).

79. *Id.* at 105.

80. Areeda, *supra* note 76, at 445 n.50, 450; Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 ARIZ. ST. L.J. 305, 341. See also Yetter, *Local Government Exemption from Antitrust Laws: Community Communications Company v. City of Boulder*, 56 FLA. B.J. 565, 567 (1982).

81. *City of Boulder*, 455 U.S. at 51-52 n.14.

82. *Id.* (emphasis added). Justice Rehnquist dissented and stated: "The Court understandably avoids determining whether local ordinances must satisfy the 'active state supervision' prong of the *Midcal* test. It would seem rather odd to require municipal ordinances to be enforced by the State rather than the city itself." *Id.* at 71 n.6. Justice Rehnquist was joined by Chief Justice Burger and Justice O'Connor in his dissent.

83. See, e.g., *Pueblo Aircraft Serv.*, 679 F.2d at 805; *Golden State Transit Corp. v. City of Los Angeles*, 1983-1 Trade Cases (CCH) ¶ 65,448 at 70,558 (C.D. Cal. 1983); *Central Iowa Refuse*, 557 F. Supp. at 137. Some courts have taken the safe route and held that, although active state supervision is not required, if it were required it has been met. E.g., *Gold Cross*, 705 F.2d at 1015; *Hybud*, 1983-1 Trade Cases (CCH) ¶ 65,356 at 70,124; *Capital Telephone Co. v. City of Schnectady*, 1983-1 Trade cases (CCH) ¶ 65,362 at 70,152 (N.D.N.Y. 1983).

84. 700 F.2d 376 (7th Cir. 1983), *appeal filed*.

85. *Id.* at 384. The *Town of Hallie* decision is supported not only by logic, but also by the various opinions written by the Justices on the state action doctrine. Chief Justice Burger has repeatedly distinguished between proprietary and governmental activities with re-

in *Gold Cross Ambulance v. City of Kansas City*⁸⁶ in which the Court concluded that:

[T]he state supervision requirement is intended to control the potential for abuse created by authorizing private persons to make anticompetitive decisions and to insure that those decisions are consistent with the clearly articulated and affirmatively expressed state policy at stake. Because municipal officials generally are politically accountable to the citizens they represent for the decisions regarding the challenged restraint, state supervision is not as necessary to prevent abuse as in the private context.⁸⁷

The court in *Gold Cross*, like the court in *Town of Hallie*, held that the challenged activity in *Gold Cross* (provision of ambulance service) was a *traditional governmental function* and therefore outside the state supervision requirement.⁸⁸ Judge Heaney, writing for the majority, specifically chose not to address “the question of whether municipal conduct which is outside the scope of such a traditional governmental function and which may pose a more significant threat to competition may require active state supervision to qualify for protection under the *Parker* doctrine.”⁸⁹

The question thus becomes: What is a traditional governmental function and what test does one employ to determine whether the challenged activity is indeed a traditional governmental function? The courts in *Town of Hallie* and *Gold Cross*, either by design or accident, borrowed the phrase “traditional governmental function” from the Supreme Court’s opinion in *National League of Cities*

gard to the state action exemption. *City of Lafayette*, 435 U.S. at 422-24 (concurring opinion); See also *City of Boulder*, 455 U.S. at 71 n.6 (Rehnquist, J., dissenting). Likewise, the Court itself has noted that governmental activities may be treated differently on some occasions. See *supra* notes 40 and 41 and accompanying text. The reason for this is readily apparent: Municipalities are by their very nature anticompetitive at least in some aspects. See *infra* note 140. Police and fire protection, sewage and waste disposal, zoning and water treatment are all local government activities and should be afforded protection from the antitrust laws. It is only when a municipality enters into the sphere of private enterprise that the “active state supervision” requirement should be enforced.

86. 705 F.2d 1005 (8th Cir. 1983). The court rejected the district court’s conclusion that the state action doctrine also required that the challenged restraint be actively supervised by the state. *Id.* at 1014. The holding of the district court that the active state supervision requirement applied to the municipality is the only known holding of its kind in a post-*City of Boulder* case.

87. *Id.*

88. *Id.* at 1014 n.13. This holding was cited with approval in *Central Iowa Refuse Systems v. Des Moines Solid Waste*, 1983-2 Trade Cases (CCH) ¶ 65,575 at 68,857 (8th Cir. 1983).

89. *Id.* Likewise, the court in *Town of Hallie* specifically reserved a ruling on this issue. 700 F.2d at 384 n.18.

v. Uesry.⁹⁰ In that case, Justice Rehnquist, writing for the majority,⁹¹ enunciated a non-exclusive list of traditional operations of state and local governments.⁹² These areas included "fire prevention, police protection, sanitation, public health, and parks and recreation."⁹³ Additionally, a lower court has concluded that the Court added public schools and hospitals to this list.⁹⁴ Justice Rehnquist noted that these are activities which states have traditionally provided for their citizens and that these activities are vital to the state's "separate and independent existence."⁹⁵ Subsequent lower court decisions have added the following to this non-exclusive list of traditional governmental functions: Solid waste disposal,⁹⁶ operation of a municipal airport,⁹⁷ provision of ambulance service,⁹⁸ sewage treatment⁹⁹ and public water supplies.¹⁰⁰ The following are included in the growing list of activities that are not considered to be traditional governmental functions: The operation of a railroad engaged in interstate commerce,¹⁰¹ operation of electric utility systems¹⁰² and operation of a pro golf shop on a municipally owned golf course.¹⁰³

90. 426 U.S. 833 (1976). Subsequent to the decisions in *Town of Hallie* and *Gold Cross*, the Eighth Circuit found that solid waste disposal is a traditional municipal activity, *Central Iowa Refuse Systems v. Des Moines Metro Solid Waste*, [1983-2 CCH] Trade Cases [65,575, at 68,857 (8th Cir. 1983), and declined to address the defendants' tenth amendment argument based upon *National League of Cities*. The effect of the decision in *National League of Cities* upon the state action doctrine will be discussed in detail, *infra*. For present purposes, however, the decision is useful in determining what is a "traditional governmental function."

91. Justice Blackmun joined in the opinion (making it a majority opinion) with the understanding that he viewed the opinion as adopting a balancing approach. *Id.* at 856.

92. *Id.* at 851.

93. *Id.*

94. *San Antonio Metropolitan Transit Auth. v. Donovan*, 557 F. Supp. 445, 451 (W.D. Tex. 1983).

95. 426 U.S. at 851.

96. *Central Iowa Refuse Systems v. Des Moines Solid Waste*, 1983-2 Trade Cases (CCH) ¶ 65,575 (8th Cir. 1983); *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187, 1195 (6th Cir. 1981). See also *L&H Sanitation, Inc.*, No. B-C-82-93, Slip Opinion at 7-8.

97. *Pueblo Aircraft Serv.*, 679 F.2d at 810-11; *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1034 (6th Cir. 1979). See also *Deak-Perera Hawaii, Inc. v. Department of Transportation*, 553 F. Supp. 976, 984 (D. Hawaii 1983).

98. *Gold Cross*, 705 F.2d at 1014 n.13.

99. *Town of Hallie*, 700 F.2d at 383-84.

100. *Schrader v. Horton*, 471 F. Supp. 1236, 1242 (W.D. Va. 1979), *aff'd*, 626 F.2d 1163 (4th Cir. 1980).

101. *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 685 (1982).

102. *City of Lafayette*, 435 U.S. at 424 (Burger, J., concurring).

103. *Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 590 (7th Cir. 1977), remanded for further consideration in light of *City of Lafayette*, 435 U.S. 992 (1978), *aff'd* as to anti-trust claims, 583 F.2d 378 (1978), *cert. denied*, 439 U.S. 1090 (1979).

Unfortunately, the Supreme Court has provided little guidance in determining what is a "traditional governmental function" and has left it to the lower courts to fashion their own tests. At least one court has correctly held that "traditional governmental functions" does not mean only those which are "time-honored, hoary, or historic."¹⁰⁴ Instead, it includes those traditional governmental functions "which the public has come to expect and demand in light of the change of times and needs of society."¹⁰⁵ In *Amersbach v. City of Cleveland*¹⁰⁶ the court noted that there were certain elements common to each of those services and activities which had been classified as traditional governmental functions.¹⁰⁷

Among these elements are: (1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain; (3) government is the principal provider of the service or activity; and (4) government is particularly suited to provide the service or perform the activity because of a community wide need for the service or activity.¹⁰⁸

Although these elements provide a workable framework for some traditional governmental services,¹⁰⁹ it is not flexible enough to encompass all situations.¹¹⁰ For example, the first requirement would appear to invalidate garbage collection, sewage treatment, water supplies and the provision of ambulance services since the provision of these services would *not* involve more than "little or no direct expense."¹¹¹ Additionally, the third and fourth requirements eliminate the possibility of these services being provided by private par-

104. *Alewine v. City of Council of Augusta*, 505 F. Supp. 880, 889 (S.D. Ga. 1981).

105. *Id.*; see also *Dove v. Chattanooga Area Regional Transp. Auth.*, 539 F. Supp. 36, 40 (E.D. Tenn. 1981), vacated and remanded on other grounds, 701 F.2d 50 (6th Cir. 1983) ("the terms 'traditional' or 'integral' are to be given a meaning permitting expansion to meet the changing times").

106. 598 F.2d 1033 (6th Cir. 1979).

107. *Id.* at 1037.

108. *Id.*

109. *E.g.*, *San Antonio Metropolitan Transit Auth.*, 557 F. Supp. at 453-54; *Dove*, 539 F. Supp. at 39-41.

110. In *Alewine v. City of Council of Augusta*, 505 F. Supp. 880, 889 (S.D. Ga. 1981), modified, 699 F.2d 1060 (11th Cir. 1983), the court discussed the *Amersbach* test and refused to strictly apply it to the transit operations of the City of Augusta: "I do not consider the *Amersbach* test to be conclusive in this case, nor that it should be strictly applied in any case. Obviously, it was correct for application to the municipal airport of Cleveland, but it need not be strictly applied here." *Id.*

111. See *supra* note 109.

ties under supervision by the municipality.¹¹² A suggested modification of the *Amersbach* framework would be as follows:

- (1) The government service or activity benefits the community as a whole and is available to the public;
- (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain;¹¹³
- (3) government (a) is the principal provider of the service or activity or (b) actively supervises a private party in its provision of the service or activity; and
- (4) the service or activity is such that the most practical way to provide it is in an anticompetitive manner or on a monopoly basis.

This framework would allow municipalities enough flexibility to provide and expand the concept of traditional governmental services, (e.g., airports) and meet the ever increasing needs and demands of its citizenry.¹¹⁴

If the challenged activity is not a traditional governmental function, or if the municipality is responsible for supervising a private party in its provision of a government service or activity, the question then becomes, "What is active state supervision?" Unfortunately, federal courts have provided little guidance on this question.¹¹⁵ One writer has suggested that "adequate supervision" is composed of the following elements:

The first element of adequate supervision by the state is that ultimate decision making authority be effectively lodged not in private firms, but in the state, either by adequate review or by adequate advance specification of what private decisions are permissible.¹¹⁶

112. *E.g.*, *Gold Cross*, 705 F.2d at 1005; *Town of Hallie*, 700 F.2d at 376.

113. There is little judicial tolerance of anticompetitive municipal activities which are undertaken for a profit. *E.g.*, *City of Lafayette*, 435 U.S. at 424 (Burger, J., concurring) ("[T]he running of a business enterprise is not an integral operation in the area of traditional government functions"); see also *Alewine*, 505 F. Supp. at 889; *Schrader v. Horton*, 471 F. Supp. at 1242. However, few would argue that the private party providing a governmental service under "adequate supervision" should not be allowed a reasonable profit for his services.

114. This framework should only be used as factors to consider in determining whether the service or activity is a traditionally governmental service. Failure to meet one of the factors should not necessarily result in a ruling that the activity is "non-governmental."

115. The Court in *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), found that the active state supervision requirement was not met since the state had no direct control over the wine prices and did not review the reasonableness of the prices set by wine dealers. *Id.* at 100, 105-06.

116. Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693, 721 (1974).

A second requirement for adequate supervision ought to be that the regulatory process be sufficiently independent of those subject to regulation.¹¹⁷

These elements, although intended to apply to private parties, should be sufficient to fulfill the active state supervision requirements enunciated in *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*¹¹⁸ The active supervision requirement is imposed to assure that the provider of the activity or service does not abuse his position, but instead uses it for the purpose for which it was intended.¹¹⁹ Arguably, municipalities by their very nature are subject to state supervision because abuse of power and improper actions are subject to attack under state law.¹²⁰

Once the elements for adequate supervision are present, a party should not lose its protection under the state action doctrine simply because the supervision is defective.¹²¹ At least one court has held that municipalities acting pursuant to state policy should not be made to suffer if the state fails to fulfill its supervisory responsibilities.¹²² Another reason that defective supervision should not deprive a party of its protection under the state action doctrine is that

117. *Id.* at 722. Posner's third element or requirement was that "the adequate supervision requirement can be met even when the state in some sense authorizes but does not compel private action." *Id.* at 725.

118. 445 U.S. 97, 105-06 (1980).

119. See *supra* note 86 and accompanying text. See also *Miller v. Oregon Liquor Control Commission*, 688 F.2d 1222, 1226-27 (9th Cir. 1982).

Unchecked private power is itself a *bete noire* of antitrust policy, and unsupervised private decisionmaking [sic], loosed from the discipline of competition, is likely to further neither the interests sought to be furthered by the antitrust laws, nor any state interests that may weigh against those laws. Therefore, it seems reasonable to require, as a condition of antitrust validity, that the regulation substituted by the state for competition include an adequate measure of supervision—independent, effective and free of conflicts of interest. This will furnish a check on private power, and it will facilitate the vindication of antitrust interests through regulation.

Posner, *supra* note 115, at 720.

120. See *supra* notes 73 and 76 and accompanying text.

121. *Llewellyn v. Crothers*, 1983-1 Trade Cases (CCH) ¶ 65,358 at 70,138 (D.Or. 1983).

The court grounds its conclusion in the fact that the Sherman Act was intended to reach conduct of private individuals or corporations—not the activities of a state. Given this basis, the court finds it difficult to see why supervised state action that would ordinarily be immune under *Parker* should lose that immunity because it is erroneous under state law.

Llewellyn v. Crothers, 44 Antitrust Trade Reg. Rep. (BNA) 887, 888 (D.Or. 1983).

122. *Llewellyn*, 1983-1 Trade Cases (CCH) ¶ 65,358 at 70,138. Likewise, private parties should not be held liable if a municipality, under a duty to "actively supervise," fails to do so. If, however, the failure to supervise is brought about by the actions of the private party (or municipality), this casts doubt upon whether the supervision was "adequate" in the first place.

"[i]f an erroneous state agency could lead to loss of *Parker* exemption, the parties aggrieved by such action would have an incentive to keep silent or fail to institute available procedures in the state system even though they might be successful in curing the error by their action."¹²³ In such a situation a party, by its inaction, could create an antitrust action when one might not otherwise exist.¹²⁴

IV. DEFENSES

Once a court rules that a municipality is not protected under the state action doctrine, there are still a number of defenses that a municipality could and should raise to avoid liability or at least limit damages. This article focuses upon and develops two such defenses. The first is a municipal rule of reason which finds support from the Court's language in *City of Lafayette*¹²⁵ and *City of Boulder*.¹²⁶ The second is based upon the Supreme Court's interpretation of the tenth amendment in *National League of Cities v. Usery*.¹²⁷ Although only two defenses to municipal antitrust liability are focused upon in this article,¹²⁸ the reader should be aware that numerous other defenses are available.¹²⁹ Even if liability is found, there are strong arguments against the imposition of damages¹³⁰ and especially against the imposition of treble damages.¹³¹

123. *Id.*

124. *Id.*

Insofar as the *Parker* immunity rests on federalism grounds, the existence of a mechanism for adequate supervision should suffice to establish the exemption, regardless of whether aggrieved parties take advantage of those mechanisms.

Id.

125. 435 U.S. 389 (1978).

126. 455 U.S. 40 (1982).

127. 426 U.S. 833 (1976).

128. Plus the application of the state action doctrine as a defense.

129. For an excellent discussion of defenses based upon the conspiracy doctrine, *Noerr-Pennington*, abstention and *respondeat superior*, see Vanderstar, *Liability of Municipalities Under the Antitrust Laws: Litigation Strategies*, 32 CATH. U.L. REV. 395, 401-11 (1983).

130. The court in *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956, 969 n.10 (W.D. Mo. 1982), *aff'd on other grounds*, 705 F.2d 1005 (8th Cir. 1983), held that even if the plaintiffs were entitled to relief under the facts of the case "the City should [not] be held liable in damages to plaintiffs." Although the court did not cite authority for its holding, there is support for it. See *City of Lafayette*, 435 U.S. at 401-402; *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 561 n.2, *reh'g denied*, — U.S. —, 102 S.Ct. 3502 (1982) (quoting *Areeda, Antitrust Immunity for 'State Action' after Lafayette*, 95 HARV. L. REV. 435, 455 (1981)); Note, *Municipal Antitrust Liability: Applying City of Lafayette v. Louisiana Power & Light Co.*, 31 BAYLOR L. REV. 563, 581 (1979).

Municipal defendants being sued in their individual capacities may also raise a defense of good faith immunity. *Harlow v. Fitzgerald*, — U.S. —, 102 S.Ct. 2727 (1982); *Affiliated Capital Corp. v. City of Houston*, 700 F.2d 226, 237 (5th Cir. 1983); *Westborough Mall v.*

Such defenses, however, are beyond the scope of this article and will not be specifically developed.

A. *Municipal Rule of Reason*

After opening the doors to municipal antitrust liability, the plurality in *City of Lafayette* went out of its way to make it clear that not all municipal activities will necessarily be subject to antitrust liability: "Today's decision does not threaten the legitimate exercise of government power, nor does it preclude municipal government from providing services on a monopoly basis."¹³² In its final footnote, the Court indicated that it might be receptive to the development of a municipal rule of reason: "It may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local gov-

City of Cape Girardeau, 693 F.2d 733, 740 (8th Cir. 1982); *Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 273 (9th Cir. 1982).

131. Justice Brennan, writing for the plurality in *City of Lafayette*, left open the question of whether treble damages are recoverable against a municipality: "But those [prior] cases do not necessarily require the conclusion that remedies appropriate to redress violations by private corporations would be equally appropriate for municipalities; nor need we decide any question of remedy in this case." 435 U.S. 401-402 (footnotes omitted). Any argument that municipalities are not subject to treble damages should begin with the holding in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), in which the Court reviewed the legislative history of 42 U.S.C. § 1983 and held that municipalities are immune from punitive damages under section 1983. Similarly, there is little question that treble damages have punitive aspects. *E.g.*, *Texas Indus. Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct"); *P. AREEDA & D. TURNER*, 2 ANTITRUST LAW § 311b ("whether or not compensatory damages ever punish, treble damages are indisputably punishment"). See also *Walker Process Equip. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 180 (1965) (Harlan, J., concurring); *Phonetele, Inc. v. A.T.&T.*, 664 F.2d 716, 739 n.60 (9th Cir. 1982). But the punitive aspect is not the only reason for the imposition of treble damages. *Hydrolevel*, 456 U.S. at 572-73 n.10, 575 (treble damages designed only in part to punish; also designed to deter future antitrust violations and encourage private challenges to antitrust violations). A review of the Court's analysis in *City of Newport* reveals that the decision is analogizable to treble damages under the Clayton Act (codified 15 U.S.C. § 15 (1976)).

Several writers have also argued that municipalities are immune from treble damages. *E.g.*, Civiletti, *The Fallout from Community Communications Co. v. City of Boulder: Prospects for a Legislative Solution*, 32 CATH. U.L. REV. 379, 385-87 (1983); Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518, 545-47 (1979); Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. U.L. REV. 71, 78 n.34 (1974). However, it will be extremely difficult for a municipality to avoid the mandatory language of the Clayton Act, *City of Lafayette*, 435 U.S. at 440 n.30, 442-43 (Stewart and Blackmun, J.J., dissenting), and the only court squarely facing the issue to date has held that treble damages are applicable to municipalities. *Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 526 F. Supp. 276, 281-82 (E.D. Cal. 1981).

132. *City of Lafayette*, 435 U.S. at 416-17.

ernment."¹³³ This footnote, which was quoted with approval by the Court in *City of Boulder*,¹³⁴ cited as its authority a law review article by Paul Posner.¹³⁵ Posner takes "the position that, absent persuasive reasons to the contrary, state regulations should be invalidated whenever it achieves results which, if privately arranged, would violate antitrust laws."¹³⁶ He argues, however, that there are two possible justifications for upholding state regulations that thwart competition. One of these justifications, which he labeled a "rule of reason,"¹³⁷ recognizes the fact that "the difference between government action and private action may be of critical importance in terms of the principals and purposes of the antitrust laws."¹³⁸ Thus, by citing the Posner article it is arguable that the Court in *Lafayette*, impliedly stated that a municipal rule of reason could be applied.

How the municipal rule of reason will evolve, if indeed it will, is unclear. The traditional rule of reason test is "whether the challenged contracts or acts were unreasonably restrictive of competitive conditions."¹³⁹ In short, the true test under the rule of reason is whether the restraint promotes competition or whether it suppresses or destroys competition.¹⁴⁰ A strict application of the traditional rule of reason would be of little or no help to municipalities since "[v]irtually any government or regulation will have an impact, however slight, on competition. . . ."¹⁴¹ In apparent recognition of this

133. *Id.* at 417 n.48.

134. *City of Boulder*, 455 U.S. at 57 n.20.

135. Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693 (1974).

136. *Id.* at 703.

137. *Id.* at 705. Despite the fact that a literal reading of section one of the Sherman Act would declare every contract, combination, or conspiracy in restraint of trade to be illegal, the Supreme Court has long applied a rule of reason. Under the rule of reason, only contracts, combinations, or conspiracies which *unduly* restrict competition or unduly obstruct the course of trade are illegal. *E.g.*, *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

138. Posner, *supra* note 134, at 705.

139. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 690 (1978).

Unreasonableness under that test could be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

Id. at 690 (footnotes omitted).

140. *Id.* at 691.

141. Areeda, *Antitrust Immunity for "State Action" after Lafayette*, 95 HARV. L. REV. 435, 439 (1981). More often than not these actions are taken in spite of, not because of, economic considerations. Thus, all municipal activity should not be found to have antitrust consequences:

fact, the Court in *City of Boulder*, after citing the pertinent footnote from *City of Lafayette*,¹⁴² compared the holdings in two previous Supreme Court cases.¹⁴³ In one the Court struck down an anticompetitive restraint imposed by private agreement¹⁴⁴ and in the other held that anticompetitive effect is an insufficient basis for invalidating a state law.¹⁴⁵ If this same distinction is applied to municipalities, then the mere fact that an ordinance may have an anticompetitive effect cannot itself constitute a sufficient reason for invalidating the ordinance.¹⁴⁶

Although the traditional rule of reason does not apply to monopolies,¹⁴⁷ the municipal rule of reason should apply to monopolistic activities or services provided by municipalities or private parties who are adequately supervised by the municipality.¹⁴⁸ Special consideration should be given to traditional government services or those necessary to protect the public health, safety and welfare.¹⁴⁹

[M]unicipal antitrust violations should not be found if private parties could lawfully have engaged in the same conduct. For example, a corporate official may lawfully decide to grant an exclusive franchise, or to buy a certain product only from one supplier; this conduct should not become unlawful merely because the official works for a city. State statutes may require competitive bids or allocation of business among several suppliers, but any violations of these statutes would be remediable in state courts.

The Supreme Court, 1977 Term, 92 HARV. L. REV. 57, 284-85 (1978) (footnotes omitted).

142. 435 U.S. at 417 n.48.

143. *National Soc'y of Professional Eng'rs*, 435 U.S. 679; *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

144. *National Soc'y of Professional Eng'rs*, 435 U.S. at 687-92.

145. *Exxon Corp.*, 437 U.S. at 133.

146. *Id.*

147. *National Soc'y of Professional Eng'rs*, 435 U.S. at 689-90. Indeed, the court expressly held that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id.* at 696.

148. See *supra* notes 115 to 119 and accompanying text.

149. However, Justice Rehnquist, joined by Chief Justice Burger and Justice O'Connor, dissented in *City of Boulder*, arguing that under *Professional Engineers* "an ordinance could not be defended on the basis that its benefit to the community, in terms of traditional health, safety, and public welfare concerns, outweigh [*sic*] it [*sic*] anticompetitive effect." *City of Boulder*, 455 U.S. at 66. *But see* Posner, *supra* note 115, at 712. On the other hand, modification of the rule of reason for municipalities "opens up a different sort of Pandora's Box." 455 U.S. at 67. Justice Rehnquist argues that such a modification would allow federal courts "to sit as a 'superlegislature to weigh the wisdom of legislation'" and that such review would be "reminiscent of the *Lochner* era." *Id.* at 67-68. Such an argument ignores the Court's comparison of the holdings in *Professional Engineers* and *Exxon*. See *supra* notes 141-145 and accompanying text. See also *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288, 289-90, 292 (8th Cir. 1978) (decision not to reopen old airport "a governmental problem, to be solved by the electorate through its proper officials"); *Miller & Son Paving, Inc. v. Wrightstown Township Civic Ass'n*, 443 F. Supp. 1268, 1272 (E.D. Pa. 1978), *aff'd*, 595 F.2d 1213 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979) (challenged activity appropriate for political arena and outside the Sherman Act). The application of a municipal rule of reason would

because many of these vital services are inherently monopolistic.¹⁵⁰ Very often the only economically feasible way a municipality can provide services necessary to protect the public health, safety and welfare is on a monopoly basis.¹⁵¹ This alone should be sufficient justification under a municipal rule of reason.¹⁵² Additionally, monopoly service should be allowed for the operations of traditional government functions if the service or activity would be best served by monopoly service.¹⁵³

Thus, under a municipal rule of reason, anticompetitive activity reasonably necessary to protect the public health, safety and welfare should not subject a municipality to antitrust liability. Only non-proprietary activities would be encompassed within such a rule and the municipality would be required to choose the lesser restrictive alternative.¹⁵⁴

Any discussion of a municipal rule of reason would be incomplete without mentioning *Affiliated Capital Corp. v. City of Houston*,¹⁵⁵ the only case to date applying a per se rule¹⁵⁶ in a municipal antitrust case.¹⁵⁷ In *Affiliated Capital Corp.* a group of Houston bus-

not allow federal courts to question the wisdom of local legislation any more than the present rule of reason allows federal courts to question business judgments. Instead, the court would only decide whether the challenged activities were truly necessary and, if so, whether there were lesser restrictive alternatives available to the municipality.

150. For example, police, fire, sewage and water are almost always provided solely by a municipality. As such, they are monopolies. Few would argue that the provision of these services on a monopoly basis would subject a municipality to a section two violation of the Sherman Act. Even if the actions of the municipality did not come under the state action doctrine, certainly it is under no danger of Sherman Act liability for such actions.

151. *E.g.*, *Central Iowa Refuse*, 557 F. Supp. at 131.

152. Justice Blackmun, in his concurrence in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), made the following argument for a rule of reason:

I would apply, at least for now, a rule of reason taking it as a general proposition that state-sanctioned anticompetitive activity must fall like any other if its potential harms outweigh its benefits. This does not mean that state-sanctioned and private activity are to be treated alike. The former is different because the fact of state sanction figures powerfully in the calculus of harm and benefit. If, for example, the justification for the scheme lies in the protection of health or safety, the strength of that justification is forcefully attested to by the existence of a state enactment.

Id. at 610-11.

153. *E.g.*, *Kurek*, 557 F.2d at 590-91. *See supra* note 112 and accompanying text.

154. *See supra* note 148.

155. 700 F.2d 226 (5th Cir.), *reh'g granted*, 1983-2 Trade Cases (CCH) ¶ 65,597 (1983).

156. "The per se doctrine labels as illegal any practice to which it applies, regardless of the reasons for the practice and without extended inquiry as to its effects." L. SULLIVAN, ANTITRUST 153 (1977).

157. The City of Houston was dismissed as a party with the concurrence of the plaintiff. *Affiliated Capital Corp.*, 700 F.2d at 237 n.15. However, the Mayor of Houston remained in the suit as a defendant, and a 2.1 million dollar judgment was rendered against him. *Id.* at 230.

nessmen bidding on cable television franchises agreed to seek separate parts of the city.¹⁵⁸ The court assumed for the purposes of discussion that cable television is a natural monopoly and stated that if there was to be competition it could only be before the franchise was granted.¹⁵⁹ Unfortunately, there was no such competition. The court stated that most agreements challenged under section one of the Sherman Act¹⁶⁰ are analyzed under the rule of reason.¹⁶¹ However, a "limited number of practices have been condemned by *per se* rules."¹⁶² The court found that agreement to "cut the pie" was "the classic horizontal territorial restraint for which the *per se* rule was designed."¹⁶³

The application of a *per se* rule in *Affiliated Capital Corp.* is unfortunate.¹⁶⁴ Clearly, the actions of the Mayor and the Houston businessmen were improper and would not have been protected under the traditional rule of reason. More importantly, however, these actions would not have been protected under a municipal rule of reason. There were (1) less restrictive alternatives, *e.g.*, competition bidding, (2) the activity was not necessary to protect the public health, safety, and welfare, and (3) the private parties were not adequately supervised. Instead of mechanically applying the *per se* doctrine the court should have applied a municipal rule of reason to strike down the improper actions of the defendants.¹⁶⁵ The *per se*

158. Mayor McConn had let it be known that he did not want to choose between competing applicants. He wanted the applicants to work together, resolve any overlaps in their territories and present him with a finished product. He abdicated his responsibility in the franchising process to a group of powerful Houston businessmen. In turn, these businessmen became "friendly competitors" in an effort to segment the city among themselves and prevent any outsiders from competing with them.

Id. at 228.

159. *Id.* at 234.

160. 15 U.S.C. § 1 (1976).

161. 700 F.2d at 235.

162. *Id.* at 236. "'Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements.' Northern Pac. R. Co. v. United States, 356 U.S. 1, 5, . . . (1958). . . ." *Id.* at 236 n.13.

163. *Id.* at 236.

164. The court seemed blinded by the improper actions of the Houston businessmen and the misfeasance (if not malfeasance) of the Mayor and failed to consider what other options it had. The decision appears to be a classic example of "bad facts making bad law." Fortunately, the Fifth Circuit has voted in favor of granting a rehearing en banc. *Affiliated Capital Corp. v. City of Houston*, 1983-2 Trade Cases (CCH) ¶ 65,597 (5th Cir. 1983).

165. See Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518, 539 n.159 (1979) in which the author argues that "the *per se* rules that have been developed in the context of private anticompetitive conduct should not be applied to deprive

doctrine has no place in a municipal antitrust suit since almost all municipal activity will have an effect on competition.¹⁶⁶

B. *Tenth Amendment*

Closely related to the state action doctrine, which is based upon our dual system of federalism,¹⁶⁷ is the defense that municipalities providing traditional governmental services in an anticompetitive fashion are protected by the tenth amendment.¹⁶⁸ The threshold question regarding a tenth amendment defense to antitrust liability is whether the state action doctrine itself is based upon the tenth amendment. In addressing this issue, the origin of the state action doctrine becomes more than an academic question and could effectively bar a tenth amendment defense. If the state action doctrine is grounded solely upon the tenth amendment, the constitutionality of the application of the Sherman Act to municipalities will have already been decided by the *Parker* cases. However, if the state action doctrine is grounded on some other basis, or is only partially grounded on the tenth amendment, then a municipality should be allowed to assert a tenth amendment defense. Unfortunately, the courts have failed to squarely address this issue. In *Kurek v. Pleasure Driveway and Park District*¹⁶⁹ the court stated that "*Parker* announced no rule of antitrust *exemption* or *immunity*; rather, it determined that the Sherman Act was not intended to apply in the first place to the type of state-mandated activities there at issue."¹⁷⁰ At least one writer has argued that the state action doctrine "is a doctrine of judicial creation which is dependent upon the Supreme Court's interpretation of the Sherman Act itself."¹⁷¹ It would appear that the state action doctrine is based both upon statutory con-

municipal defendants of the governmental interest defense." This "governmental interest defense" has many of the earmarks of a municipal rule of reason.

166. See *supra* note 140 and accompanying text.

167. *City of Boulder*, 455 U.S. at 53; *City of Lafayette*, 435 U.S. at 415; *Parker*, 317 U.S. at 351.

168. The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the State's respectively, or to the people."

169. 557 F.2d 580 (7th Cir. 1977), remanded for further consideration in light of *City of Lafayette*, 435 U.S. 992 (1978), *cert. denied*, 439 U.S. 1090 (1979).

170. 557 F.2d at 587 n.5. However, the Court both in *City of Boulder* and *City of Lafayette*, repeatedly refers to the "*Parker* exemption."

171. Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 Nw. U.L. REV. 71, 80 (1974). The author argues that the "*Parker* decision . . . is one of non-applicability" and that "[t]o term this doctrine as one of 'exemption' is really a misnomer since conduct which does not violate an act hardly needs to be exempted from its operation." *Id.* at 72 n.4.

struction and the tenth amendment.¹⁷² This being the case, a municipality should be able to assert a defense against antitrust liability relying solely upon the tenth amendment.¹⁷³

The leading case recognizing that tenth amendment protection should be afforded municipalities is *National League of Cities v. Usery*.¹⁷⁴ In *National League of Cities*, the Supreme Court held that Congress did not have authority under the commerce clause to enact amendments to the Fair Labor Standards Act (hereinafter FLSA) of 1938¹⁷⁵ which extended its minimum wage and maximum hour provisions to almost all employees of states and their political subdivision. In addressing the issue, Justice Rehnquist, writing for the Court,¹⁷⁶ stated that the Court must resolve whether the States' powers to determine wages paid to employees that carry out government functions were "functions essential to separate and independent existence . . . so that Congress [could] not abrogate the States' otherwise plenary authority to make them."¹⁷⁷ After reviewing the estimated impact of the FLSA legislation on state and local governments, he concluded that the Act affected the manner in which these governmental services would be provided to its citizenry.¹⁷⁸ Justice Rehnquist distinguished between the impact of the FLSA upon private employers who must find ways to increase their gross income to pay higher wages, and the impact upon a state, which is a coordinate element in our federal system, and concluded that the FLSA amendments interfered with traditional aspects of state

172. Comment, *National League of Cities and the Parker Doctrine: The Status of State Sovereignty Under the Commerce Clause*, 8 FORDHAM URB. L.J. 301, 314 (1980). One writer has suggested that *Parker v. Brown* involved interpretation of the Sherman Act since Congress had not acted specifically to prohibit state agricultural establishment programs. Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 ARIZ. ST. L.J. 305, 321. If Congress acted expressly to prohibit the stabilization program and the program "were found to be an exercise of an 'integral' or 'traditional' government function, the Congressional enactment would presumably give way to principles of state sovereignty, as in *National League of Cities*." *Id.*

173. The state action doctrine appears to be based partially upon general principles of state sovereignty, Rogers, *supra* note 171, at 326 n.154, but is construed much more broadly because of the Court's interpretation of the Sherman Act. Thus, reliance upon sovereign immunity is a narrower defense, *id.* at 322, 329, and will necessarily involve the application of different principles.

174. 426 U.S. 833 (1976).

175. 29 U.S.C. §§ 201-19 (1976 & Supp. 1981).

176. Justice Blackmun wrote a concurring opinion; Justices Brennan, White, Stevens and Marshall dissented; and Justice Douglas took no part in the consideration of the case.

177. 426 U.S. at 845-46.

178. *Id.* at 846-47. The most tangible effect of the FLSA was the increased costs that compliance with the Act "will visit upon state and local governments, and in turn upon the citizens who depend upon those governments." *Id.* at 846.

sovereignty.¹⁷⁹

Justice Rehnquist went to great lengths to distinguish between private employers and the governmental provision of essential services, finding this distinction to be crucial to the validity of the Act.

For even if we accept appellee's assessments concerning the impact of the amendments, their application will nonetheless significantly alter or displace the States' abilities to structure employer/employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' "separate and independent existence."¹⁸⁰

The Court held that Congress did not have the authority under the commerce clause¹⁸¹ to enact the challenged amendments because they did not comport with the federal system. According to the Court, the challenged amendments operated "to directly displace the States' freedom to structure integral operations in the areas of traditional government functions. . . ."¹⁸² The Court concluded that, since local governments are political subdivisions which derive their authority and power from their respective states, interference with these integral governmental services provided by local governments, is likewise beyond the reach of Congress under the commerce clause.¹⁸³ Justice Blackmun, although joining the opinion of the Court, did so with the understanding that he viewed the Court's opinion as adopting a balancing approach and not outlawing the exercise of federal power where the federal interest is great and state compliance with the federal standard is essential.¹⁸⁴

National League of Cities represents the highwater mark of municipal protection under the tenth amendment.¹⁸⁵ In *Hodel v. Vir-*

179. *Id.* at 848-49.

180. *Id.* at 851 (citations and footnotes omitted).

181. U.S. CONST. art. I, § 8, cl. 3.

182. 426 U.S. at 852.

183. *Id.* at 855 n.20.

184. *Id.* at 856.

185. *See, e.g.,* Equal Employment Opportunity Comm'n v. Wyoming, — U.S. —, 103

*ginia Surface Mining and Reclamation Association*¹⁸⁶ the Court interpreted *National League of Cities* as establishing three requirements before legislation enacted under the congressional commerce power will be held invalid.

First, there must be a showing that the challenged statute regulates the 'States as States.' Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'¹⁸⁷

However, even if these three requirements are met, a tenth amendment challenge to congressional commerce power may still be unsuccessful if the nature of the federal interest advanced justifies State submission.¹⁸⁸

In *Equal Employment Opportunity Commission v. Wyoming*¹⁸⁹ the Court had an opportunity to review its holding in *National League of Cities*. The Equal Employment Opportunity Commission (hereinafter EEOC) had brought an action against the state of Wyoming under the Age Discrimination and Employment Act¹⁹⁰ challenging the state's policy of mandatory retirement of its game wardens at age fifty-five. The Court cited the *Hodel* test¹⁹¹ and noted that even if these three requirements are met, there are still situations in which the nature of the federal interest advanced may justify state submission.¹⁹² In applying the *Hodel* test¹⁹³ the Court

S.Ct. 1054 (1983) (application of Age Discrimination Act to state and local governments is valid); *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678 (1982) (tenth amendment does not prohibit application of Railway Labor Act to state owned railroad); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (Surface Mining Control and Reclamation Act not an interference with traditional government function); *United Transp. Union v. Long Island Railroad Co.*, 634 F.2d 19, 24 (2d Cir. 1980), *rev'd*, 455 U.S. 678 (1982), and cases cited therein.

186. 452 U.S. 264 (1981).

187. *Id.* at 287-88 (citations omitted). This language was cited with approval in *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 684 (1982).

188. *Hodel*, 452 U.S. at 288 n.29.

189. — U.S. —, 103 S.Ct. 1054 (1983).

190. 29 U.S.C. § 621-34 (1976 and Supp. V 1981).

191. *See supra* note 186 and accompanying text.

192. *E.E.O.C. v. Wyoming*, — U.S. at —, 103 S.Ct. at 1061.

193. The Court held that the first prong of the test—federal regulation of "States as States"—was plainly met. *Id.* at —, 103 S.Ct. at 1061. It added, however, "that it is precisely this prong of the *National League of Cities* test that marks it as a specialized immunity doctrine rather than a broad limitation on federal authority." *Id.* at — n.10, 103 S.Ct. at 1061 n.10.

cited *National League of Cities* and concluded that the degree of federal intrusion in this case was "sufficiently less serious than it was in *National League of Cities*. . . ." ¹⁹⁴ The Act simply required the state to achieve its goals in a more individualized fashion ¹⁹⁵ and it did not require the state to abandon its goals or the public policy decisions underlying them. ¹⁹⁶ The most tangible consequence of the intrusion of federal regulations into the states' sphere in *National League of Cities* was the financial effect. ¹⁹⁷ Since enforcement of the Age Discrimination Act would not have a direct or obvious negative effect on state finances, the federal intrusion in this case was less serious. ¹⁹⁸ The decision in *Equal Employment Opportunity Commission v. Wyoming* should not be read as a withdrawal from the Court's earlier position in *National League of Cities*; it simply clarifies and applies the standards and tests regarding the application of the tenth amendment to state and local governments. ¹⁹⁹

Although the Court has refused to expansively interpret the holding in *National League of Cities*, it has still sought to maintain a distinction between traditional governmental functions and those performed primarily by the private sector. ²⁰⁰ To the extent that the federal regulation regulates a traditional government function and endangers the state's "separate and independent existence," the regulation will only be upheld if there is a great federal interest. ²⁰¹ This does not mean that a federal regulation enacted under the commerce clause is invalid simply because it displaces the state's exercise of its police powers. ²⁰² The Court has squarely held that nothing in *National League of Cities* compels or even hints that the tenth amendment prohibits Congress from displacing state police power laws regulating private conduct. ²⁰³

194. *Id.* at —, 103 S.Ct. at 1062.

195. "[T]he State may still, at the very least, assess the fitness of its game wardens and dismiss those wardens whom it reasonably finds to be unfit." *Id.* at —, 103 S.Ct. at 1062.

196. *Id.* at —, 103 S.Ct. at 1062.

197. *Id.* at —, 103 S.Ct. at 1062-63.

198. *Id.* at —, 103 S.Ct. at 1063.

199. *But see* *Spring Ambulance Service, Inc. v. City of Rancho Mirage*, 1983-2 Trade Cases (CCH) ¶ 65,646 at 69,286 to -287 (C.D. Cal. 1983).

200. In *United Transportation Union* the Court reemphasized this distinction: "Just as the Federal Government cannot usurp traditional state functions, there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation." 455 U.S. at 687.

201. *Id.* at 686-87.

202. *Hodel*, 452 U.S. at 291.

203. *Id.* at 290-91.

The plurality in *City of Lafayette v. Louisiana Power and Light Co.*²⁰⁴ disregarded any application that *National League of Cities* could have to its decision.²⁰⁵ Justice Burger, on the other hand, devoted a large portion of his concurring opinion to applying *National League of Cities* to the facts of *City of Lafayette*, arguing that the running of a business enterprise (electric utility system) is not a traditional government function and thus is not exempt from anti-trust scrutiny.²⁰⁶ Justice Burger's application of *National League of Cities* to the state action doctrine appears to have been correct at least to the extent that the Sherman Act, like the challenged legislation in *National League of Cities*, is enacted under Congress' commerce power.²⁰⁷

The Court's total disregard of the possible application of the holding in *National League of Cities* to the state action doctrine has

204. *City of Lafayette*, 435 U.S. 389.

205. *Id.* at 430-31 (Stewart, J., dissenting). The plurality's only mention of *National League of Cities* was in its rejection of an eleventh amendment immunity argument in which it stated that its emphasis "that municipalities are 'exempt' from antitrust enforcement when acting as state agencies implementing state policy to the same extent as the State itself, makes it difficult to see how *National League of Cities* is even tangentially implicated." *Id.* at 412 n.42. Curiously, this footnote was cited by the Court in *Jefferson County Pharmaceutical Ass'n v. Abbott Labs.*, — U.S. —, — n.6, 103 S.Ct. 1011, 1014 n.6 (1983), in holding that state and local government hospitals are not exempt from the Robinson-Patman Act, 15 U.S.C. §§ 13-136, 21a (1976).

The availability of the eleventh amendment as a defense to municipal antitrust liability is beyond the scope of this article. "Generally, however, eleventh amendment immunity has not extended to counties and cities. See *Mt. Healthy City School Dist. v. Doyle*, [429 U.S. 274, 280], 97 S.Ct. 568, 572 (1977); *Lincoln County v. Luning*, 133 U.S. 529 (1980) (eleventh amendment immunity does not extend to counties)." Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1069 n.20 (1977). See also *Highfield Water Co. v. Public Serv. Comm'n*, 488 F. Supp. 1176, 1194 (D. Md. 1980). The decision in *National League of Cities* has been criticized for protecting municipalities from congressional regulation under the commerce clause based upon the tenth amendment and not explaining the appearance of inconsistency with regard to its treatment of municipalities under the eleventh amendment. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usury*, 86 YALE L.J. 1165, 1169-70 n.20 (1977).

206. *City of Lafayette*, 435 U.S. at 422-24. Justice Stewart, who was joined by Justices White and Rehnquist in his dissent, was also perplexed by the Court's disregard of *National League of Cities*. *Id.* at 430-31.

207. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 605-06 (1976) (Blackmun, J., concurring); *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 425 U.S. 738, 743 n.2 (1976); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940); *Atlantic Cleaners and Dyers v. United States*, 286 U.S. 427, 434 (1932). See also Comment, *National League of Cities and the Parker Doctrine: The Status of State Sovereignty Under the Commerce Clause*, 8 FORDHAM URB. L. J. 301, 313 (1980); Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. U.L. REV. 71, 84-85 (1974). But see Justice Rehnquist's dissent in *City of Boulder* arguing that the state action doctrine is not an exemption but a matter of "federal preemption under the Supremacy Clause." 455 U.S. at 63.

left the door open for lower courts to determine the extent to which it is applicable. The court in *Hybud Equipment Corp. v. City of Akron*²⁰⁸ discussed the holding in *National League of Cities* and stated that "Tenth Amendment values should not be narrowly read when Congress has not expressly or by clear implication displaced a traditional exercise of local police power."²⁰⁹ The court went on to hold that solid waste management is a traditional area of local concern supported by tenth and eleventh amendment values,²¹⁰ as such, the court held that "plenary, governmental power to deal with such local problems affecting the public interest should not be preempted or displaced" by the Sherman Act.²¹¹

The only other decision squarely addressing the issue of the application of the tenth amendment to municipal antitrust suits is *Gold Cross Ambulance v. City of Kansas City*.²¹² In that case Kansas City officials had created an ambulance service system which allowed only one ambulance company to operate in the city, under authority granted to it by state law²¹³ and the exercise of its police power.²¹⁴ Although the court held that the actions were protected under the state action doctrine,²¹⁵ it still chose to rule upon Kansas City's argument that the federal antitrust laws intruded on the regulation of its own affairs and therefore violated the tenth amendment.²¹⁶ The court discussed the holdings in *National League of Cities* and *Hodel* and, although neither was an antitrust case, noted that "the concept of Tenth Amendment restraint on federal regulation can have applicability when the antitrust laws infringe on the police power of a state."²¹⁷ The court stated that the antitrust laws would prohibit the

208. 654 F.2d 1187 (6th Cir. 1981), remanded for further consideration in light of *City of Boulder*, 455 U.S. 931, (1982), *aff'd*, 1983-1 Trade Cases (CCH) ¶ 65,356 (N.D. Ohio 1983).

209. *Id.* at 1196.

210. *Id.* The availability of the eleventh amendment as a defense is beyond the scope of this article. See *supra* note 203.

211. *Id.*

212. 538 F. Supp. 956 (W.D. Mo. 1982), *aff'd*, 705 F.2d 1005 (8th Cir. 1983). The Eighth Circuit, however, based its affirmance on the state action doctrine and specifically did "not address the issue of whether the plaintiffs' Sherman Act claims against [the defendants] are barred by the tenth amendment to the United States Constitution." 705 F.2d at 1015 n.16.

Author's Note: After this article was written, the case of *Springs Ambulance Service, Inc. v. City of Rancho Mirage*, 1983-2 Trade Cases (CCH) ¶ 65,646 (C.D. Cal. 1983), was handed down. *Springs Ambulance Service, Inc.* held that the tenth amendment had only a narrow application to municipal antitrust suits.

213. 538 F. Supp. at 964.

214. *Id.* at 967.

215. *Id.*

216. *Id.*

217. *Id.* at 967-68 and n.7. The district court cited *Hybud*, 654 F.2d 1187, and *Jefferson*

State of Missouri and the City of Kansas City from enacting ambulance service regulations necessary to protect their citizens and, in this sense, "the antitrust laws are attempting to regulate 'states as states' and the 'municipalities as municipalities.'"²¹⁸ The court went on to conclude that regulation of ambulance service is a governmental function and an attribute of state sovereignty.²¹⁹ Thus, "[c]ompliance with the federal antitrust laws in this case would directly impair the ability of the State of Missouri and the City of Kansas City to structure integral operations in their traditional government function of providing for the health and safety of their citizens."²²⁰

In light of the *Hybud* and *Gold Cross* decisions, it would appear that municipal antitrust defendants not protected under the state action doctrine may be able to successfully assert a defense that the plaintiff's Sherman Act claims are barred by the tenth amendment. The municipality must first demonstrate that the challenged activity is a traditional governmental function.²²¹ If the challenged activity is indeed a traditional governmental function, then it must meet the tests set out in *Hodel*²²² in order to be protected under the tenth amendment. Although this defense will be much more narrowly construed than the state action defense, it may be a viable alternative when there are allegations of improper motive.²²³ Since there is no requirement of actions protected under the tenth amendment being "in furtherance of a clearly articulated and affirmatively expressed state policy," improper motive should not bar an early dismissal on this basis.

County Pharmaceutical Ass'n v. Abbott Laboratories, 656 F.2d 92 (5th Cir. 1981), cert. granted, 455 U.S. 999 (1982), as authority for this proposition. In *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, — U.S. —, 103 S.Ct. 1011 (1983), the Supreme Court reversed the Fifth Circuit and held "that the sale of pharmaceutical products to state and local government hospitals for resale in competition with private pharmacies is not exempt from the proscriptions of the Robinson-Patman Act." *Id.* at —, 103 S.Ct. at 1023. This decision is fully consistent with *National League of Cities* since there was no showing that the sale of pharmaceutical products was a traditional government function and it is doubtful that the challenged activity would have been protected under the *Amersbach* framework.

218. 538 F. Supp. at 968.

219. *Id.* at 968-69.

220. *Id.*

221. *Id.* This requirement is easily met when the challenged activity has been previously held to be a traditional government function. See *supra* notes 89-112 and accompanying text. Failing this, the challenged activity should be subjected to the test set out previously. See *supra* note 112 and accompanying text.

222. See *supra* note 186.

223. See *supra* notes 69-76, discussing *Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982).

V. CONCLUSION

The Supreme Court's decisions in *City of Lafayette* and *City of Boulder* have left municipalities with little guidance concerning what activities may subject them to antitrust liability. However, this uncertainty also provides room for the development of specialized municipal defenses. One such defense is a municipal rule of reason which would allow anticompetitive or even monopolistic activity when necessary to serve the needs of the public. Another defense is based upon the tenth amendment and its application to municipalities providing traditional governmental services. Courts considering municipal antitrust defenses should be guided by principles of federalism and the idea that municipalities are a vital part of our dual system of sovereignty. As such, municipalities should be afforded additional protection since they are, indeed, "different" than private parties.

In time, the state action doctrine and defenses to municipal antitrust liability will become settled and municipalities will have more guidance for their actions.²²⁴ For now, however, municipalities are on the forefront of a developing body of law and must assert new and innovative defenses when faced with claims of antitrust violations.

224. Senator Strom Thurmond has recently introduced a bill to clarify the application of antitrust laws to municipalities. The text of the bill is as follows:

S. 1578. A bill to clarify the application of the Federal antitrust laws to local governments.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Local Government Antitrust Act of 1983".

Sec. 2. The Federal antitrust laws shall not apply to any law or other action of, or official action directed by, a city, village, town, township, county, or other general function unit of local government in the exercise of its regulatory powers, including but not limited to zoning, franchising, licensing, and the establishment of monopoly public services, but excluding any activity involving the sale of goods or services by the unit of local government in competition with private persons, where such law or action is valid under state law, except to the extent that the Federal antitrust laws would apply to a similar law or action of, or official action directed by, a State. For purposes of this section, the term "Federal antitrust laws" means the antitrust laws, as such term is defined in the first section of the Clayton Act (15 U.S.C. 12), and section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

Thurmond Introduces Bill to Extend Parker to Local Governmental Regulation, 45 ANTI-TRUST & TRADE REG. REP. (BNA) 22, 22-23 (July 7, 1983). If passed in its present form the bill would clarify many of the issues addressed in this article, but there would still be unanswered questions, e.g., whether the bill applies retroactively and whether the antitrust laws would apply to similar actions directed by a state.