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THE IMMUNITY OF LOCAL GOVERNMENTS AND THEIR OFFICIALS FROM ANTITRUST CLAIMS AFTER CITY OF BOULDER

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I. Introduction

On January 13, 1982, the United States Supreme Court rendered an opinion against the City of Boulder, Colorado, which expanded the potential liability of local governmental entities and their officials to claims under the federal antitrust laws.¹ The Supreme Court essentially held that a municipality cannot obtain immunity from antitrust claims unless it satisfies a stringent test. Due to the broad language of the opinion, virtually every activity in which a local governmental entity engages, including the traditional activities of zoning, licensing, franchising, purchasing and operating public utilities, has become subject to antitrust challenges that may require a trial on the merits.

In the wake of this decision, several municipal law experts predict that a wide range of local government activities will be examined for antitrust problems and warn local governments to brace themselves for an onslaught of antitrust lawsuits. Others warn that the ruling effectively destroys the "home rule" movement in this country, will interfere severely with local government efforts to

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govern and provide services, and will reconcentrate power at the state level.\textsuperscript{2}

This decision has come at an unfortunate time. The economic slow-down has caused budget problems for local governments and has forced them to seek new methods of purchasing and new sources of revenue. The likelihood of legal challenges by affected companies has increased while, at the same time, the Supreme Court has limited the use of traditional protective shields. Moreover, the states, which normally could be expected to cooperate with local governments, view the recent developments as an opportunity to increase their power and revenue at the expense of local governments. For example, twenty-three states, including Colorado, joined as amicus curiae in asking the Court to deny antitrust immunity to the City of Boulder.\textsuperscript{3}

Recognizing the concern and uncertainty that the recent Supreme Court decision has created, this article attempts to analyze the meaning of this decision for local governments. It will summarize the legal standards applied in this area, discuss the types of local activities that may be affected, and suggest guidelines for reducing the risk of both being sued for a violation of the antitrust laws and suffering an adverse verdict.

II. THE PURPOSES OF THE ANTITRUST LAWS

The basic purpose of the antitrust laws is to promote and protect vigorous, free and open competition in the marketplace. The antitrust laws are based on a Congressional belief that such competition provides the strongest guarantee that the American consumer will obtain the best product at the lowest price,\textsuperscript{4} and more courts are accepting this as the principal antitrust goal.\textsuperscript{5}

There are four broad antitrust statutes: the Sherman Act,\textsuperscript{6} the

\begin{itemize}
\item \textsuperscript{3} 102 S. Ct. at 851 n.7. The states that joined as amicus curiae were Alaska, Arkansas, Colorado, Delaware, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, Texas, Vermont, West Virginia and Wisconsin.
\item \textsuperscript{4} R. Bork, The Antitrust Paradox 50-66 (1978).
\item \textsuperscript{5} See United States v. Topco Assoc., Inc., 405 U.S. 596, 610 (1972).
\item \textsuperscript{6} 15 U.S.C. §§ 1-7 (1976).
\end{itemize}
Clayton Act, the Robinson-Patman Act, and the Federal Trade Commission Act. The federal antitrust laws were enacted under the power to regulate commerce and, therefore, apply only if interstate or foreign commerce is affected.

III. THE PROVISIONS OF THE ANTITRUST LAWS

The Sherman Act, enacted in 1890, was the first modern federal antitrust statute and continues to be the most important. Section 1 declares illegal all contracts, combinations or conspiracies in restraint of trade or commerce. It reaches all agreements, arrangements or understandings, whether written, oral or implied, between two or more persons, usually competitors, which unreasonably restrain trade.

Courts have determined that business practices which involve collusive action between competitors, customers or suppliers are clearly unreasonable restraints of trade and, therefore, are classified as “per se” violations of the antitrust laws. Per se violations include agreements to fix prices, agreements with competitors to limit the production of goods or competition in product quality, agreements with competitors to divide markets by territory or class of customers, boycotts or concerted refusals to deal with competitors, agreements fixing or directly affecting resale prices, and tying arrangements which condition the sale of one product on the customer's agreement to purchase another product.

Courts have found that other business transactions and practices are not so pernicious as to be treated as “per se” illegal, but these

12. Id. at § 1.
activities may violate the Sherman Act if they unreasonably re
strain trade or damage competition. Non-per se conduct is tested
by the "rule of reason" which requires careful examination and
weighing of all the circumstances surrounding the challenged con-
duct.20 The judicial inquiry focuses on the nature and effect of the
restraint, the condition of the market before and after the restraint
was imposed, the object the defendant is attempting to achieve,
the reason for adopting the particular restraint, and the existence
of less destructive ways of achieving the defendant's legitimate
goals.21 The antitrust considerations involved in these transactions
and practices can be extremely complex, and the business practices
that are measured by the "rule of reason" include vertical agree-
ments which restrict a person's right to sell to a particular geo-
graphic area or a particular class of customers,22 reciprocal dealing
arrangements,23 agreements requiring a person to purchase all of
his requirements of a given product from another person,24 exclu-
sive dealing arrangements,25 and unfair or deceptive methods of
competition.26 Section 2 of the Sherman Act covers unilateral busi-
ness activity and prohibits the monopolization or attempted mo-
nopolization of a market for a particular product or service.27

While the Sherman Act applies to restraints of trade which have
a present anticompetitive effect, the Clayton Act renders unlawful
practices which may result in an unreasonable restraint of trade in
the future. The Clayton Act prohibits the sale or lease of products
on the condition that the customer not deal in competitive prod-
ucts, tying the sale of one good to another, and certain mergers and
acquisitions, any one of which may substantially lessen competi-
tion or tend to create a monopoly.28

23. Southern Concrete Co. v. United States Steel Corp., 535 F.2d 313, 317 (5th Cir. 1976),
cert. denied, 429 U.S. 1096 (1977); Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th
Cir. 1971).
Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975).
26. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 560-62 (1st
Cir. 1974), cert. denied, 421 U.S. 1004 (1975); Albert Pick-Barth Co. v. Mitchell Woodbury
Corp., 57 F.2d 96 (1st Cir.), cert. denied, 286 U.S. 552 (1932).
The Robinson-Patman Act reaches the discriminatory pricing of goods among competing non-governmental buyers. The Federal Trade Commission Act authorizes the Federal Trade Commission to enforce the federal antitrust laws and prohibits "unfair methods of competition" and "deceptive practices." However, the latter two statutes have little applicability to local governmental activities and therefore are not discussed in this article. With these basic principles in mind, an examination of the potential liability of local governmental entities and their officials under the antitrust laws follows.

IV. Exemptions from the Antitrust Laws

A. The City of Boulder Decision

In 1943, the United States Supreme Court recognized that although Congress expressed a preference for using competition to regulate private businesses, states may substitute regulation for competition and impose anticompetitive restraints as an act of government. Parker v. Brown involved a Sherman Act challenge to a California agricultural marketing program established by state statute which expressly restricted competition among raisin growers and fixed the prices at which growers could sell their products. The purpose of the statute was to conserve California’s agricultural wealth and prevent economic waste in marketing the state’s agricultural goods.

The Supreme Court assumed that the program would violate the Sherman Act if it had been the product of a private agreement. In upholding the statute and thereby establishing the "state action" exemption to the Sherman Act, the Court emphasized that the program had been established by state legislation and was administered by a state commission appointed by the governor and approved by the state senate. The commission approved agricul-

32. Id. at 346.
33. Id. at 350.
tural policies following public hearings. In essence, the state created the machinery for the state program and enforced it through the commission.\textsuperscript{34} Since the program "derived its authority . . . from the legislative command of the state"\textsuperscript{35} and was administered in detail by the state itself, the Court concluded that the Sherman Act did not apply.\textsuperscript{36} The Court explained that the Sherman Act was directed at "individual and not state action" and was not intended to nullify state governmental action.\textsuperscript{37}

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.\textsuperscript{38}

The Court was not presented with the question "of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade."\textsuperscript{39}

The Supreme Court did not discuss the application of state action immunity to local governments until thirty-five years later in City of Lafayette v. Louisiana Power & Light Co.\textsuperscript{40} In that case, two cities which owned and operated electric utility systems sued a private utility company. The utility counterclaimed against one city, asserting that its requirement that customers purchase electricity from it as a condition to receiving water and gas service violated the Sherman Act. The city claimed exemption under the state action doctrine because it was a political subdivision of the state. The Supreme Court rejected the city's defense and held that local governmental entities are not automatically exempt from antitrust liability simply because they are subdivisions of the state.\textsuperscript{41}

The members of the Court could not agree on a majority opinion

\textsuperscript{34} Id. at 352.
\textsuperscript{35} Id. at 350.
\textsuperscript{36} Id. at 352.
\textsuperscript{37} Id.
\textsuperscript{38} Id. at 350-51.
\textsuperscript{39} Id. at 351-52.
\textsuperscript{40} 435 U.S. 389 (1978).
\textsuperscript{41} Id. at 408.
and City of Lafayette did not establish a clear standard for determining local government immunity. The four-Justice plurality argued that we are a nation of states under our federalism principles and that “[c]ities are not themselves sovereign. . . .”42 As a result, they concluded, cities are exempt from antitrust liability only when their anticompetitive actions are “directed or authorized” and supervised by the state as part of its “clearly articulated and affirmatively expressed” policy to substitute regulation or monopoly for competition.43 Although Chief Justice Burger concurred in the decision, his reasoning was entirely different. He distinguished between “the proprietary enterprises of municipalities” and their “traditional government functions” and stated that the state action exemption should not apply when cities are engaged in business activities.44 Several subsequent cases attempted to follow and give meaning to the City of Lafayette holding, but they spawned differing versions of the proper test for state action immunity and confused, rather than clarified, the applicable legal standard.45

The Supreme Court’s January, 1982, opinion in Community Communications Co. v. City of Boulder,46 dispelled some of the confusion, but did so at the cost of establishing a strict test for local government exemption from antitrust claims. In effect, the Supreme Court declared that competition is the preferred, rather than an alternative, economic model and required that all exemptions be strictly construed.

The case arose from Boulder’s regulation of cable television services to its residents. Boulder had franchised Community Communications Company (“CCC”) to provide cable television service to the Boulder area for several years. CCC limited its service to retransmitting television signals to portions of the city shielded from normal service by surrounding hills. After industry technology improved, CCC notified Boulder that it intended to increase its offering and expand its business into other areas of the city. Another

42. Id. at 412.
43. Id. at 410, 414.
44. Id. at 422-24.
45. E.g., Shrader v. Horton, 1980-1 Trade Cas. (CCH) ¶ 63,146 (W.D. Va. 1979) (emphasis on governmental versus proprietary nature of activity); Caribe Trailer Sys., Inc. v. Puerto Rico Maritime Shipping Auth., 1979-1 Trade Cas. (CCH) ¶ 62,576, 77,317-77, 318 (D.D.C. 1979) (compulsion by state not required); Jordon v. Mills, 1979-1 Trade Cas. (CCH) ¶ 62,704 (E.D. Mich. 1979) (immunity granted although City of Layfayette standards were not met because regulation of prisons is a primary governmental function).
46. 102 S. Ct. 835 (1982).
cable television company also expressed an interest in providing
cable service in the city. Because of its concerns that a cable com-
pany has a tendency to become a natural monopoly and that CCC
might not be the best cable operator for the city, Boulder en-
couraged applications from other companies. Since expansion by
CCC would hamper the ability of other companies to compete and
discourage them from entering the market, the city council passed
an ordinance prohibiting CCC from expanding into other areas of
the city for three months. The city council announced that it in-
tended to invite new businesses to enter the market during this
moratorium.\textsuperscript{47}

CCC sought a preliminary injunction to prevent Boulder from
restricting its expansion, alleging that such a restriction violated
Section 1 of the Sherman Act. Boulder claimed that its ordinance
was immune from antitrust liability under the state action
dociline.\textsuperscript{48}

The Supreme Court rejected Boulder's argument in a five to
three decision and held that "home rule" ordinances are not ex-
empt from antitrust scrutiny.\textsuperscript{49} Since a city is not a sovereign en-
tity within our dual system of federal government, it can qualify
for and obtain state action immunity only to a limited extent. The
Court established the following standard for determining whether
local government activity comes within the state action exemption:
a city ordinance is not exempt from antitrust scrutiny "unless it
constitutes the action of the State . . . itself in its sovereign capac-
ity . . . or unless it constitutes municipal action in furtherance or
implementation of clearly articulated and affirmatively expressed
state policy. . . ."\textsuperscript{50} The state policy referred to consists of the

\textsuperscript{47} Id. at 837-38.
\textsuperscript{48} Id. at 838.
\textsuperscript{49} The District Court had determined that the state action exemption under \textit{Parker v. Brown} was "wholly inapplicable" to Boulder's ordinance. 485 F. Supp. 1035, 1039 (D. Colo. 1980). A divided panel of the Tenth Circuit Court of exemption under \textit{Parker v. Brown} was "wholly inapplicable" to Boulder's ordinance. 485 F. Supp. 1035, 1039 (D. Colo. 1980). A divided panel of the Tenth Circuit Court of Appeals reversed on the grounds that, in con-
trast to \textit{City of Lafayette}, no proprietary interest of the city was involved, and that the
city's regulation was the only control exercised by state or local government and represented
the only expression of policy on this matter. Thus, it held that Boulder's actions satisfied the
criteria for the \textit{Parker v. Brown} state action exemption. 630 F.2d 704 (10th Cir. 1980).
The Supreme Court reversed the Tenth Circuit's decision. 102 S. Ct. at 839.
\textsuperscript{50} 102 S. Ct. at 841. The requirement that the state policy to replace competition with
regulation be "clearly articulated and affirmatively expressed" had been established in prior
Supreme Court decisions. \textit{City of Lafayette}, 435 U.S. at 410; New Motor Vehicle Bd. v.
Orrin W. Fox Co., 439 U.S. 96, 109 (1978); California Retail Liquor Dealers Ass'n v. Midcal
state's intention "to displace competition with regulation or monopoly public service."\textsuperscript{51}

With regard to the first element of the test, Boulder contended that the ordinance was enacted pursuant to the broad "home rule" powers granted to cities by the Colorado constitution, which conferred on the cities every power in local affairs previously possessed by the state legislature. Therefore, the city claimed that it was acting as the state in local matters and the ordinance was an act of state government. The Supreme Court easily disposed of this argument by declaring that "[w]e are a nation not of 'city-states' but of States" and municipalities "are not themselves sovereign."\textsuperscript{52}

The \textit{Parker} state action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitation: Ours is a "dual system of government," . . . which has no place for sovereign cities.\textsuperscript{53} [citation omitted]

The Supreme Court then focused on the second element of its state action immunity test. Boulder asserted that it may be inferred from the "home rule" authority given by the Colorado constitution that the state legislature contemplated the kind of anticompetitive regulatory program objected to by CCC. The Court, however, found that the city's general grant of "home rule" power to act in local matters and enact ordinances did not satisfy the "clearly articulated and affirmatively expressed state policy" requirement because the state was merely allowing the city to do as it pleased and did not contemplate or authorize the specific anticompetitive ordinance. Although the city had broad authority, the position of Colorado's legislature was neutral regarding the particular municipal action taken.\textsuperscript{54}

But plainly 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 anticom-
petitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers granted," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality. . . . "We are here concerned with City action in the absence of any regulation whatever by the State of Colorado. Under these circumstances there is no interaction of state and local regulation. We have only the action or exercise of authority by the City." 55

The Supreme Court summarized its decision by stating that when the "State itself has not directed or authorized an anticompetitive practice, the State's subdivision . . . must obey the antitrust laws." 56 Thus, the basic lesson of City of Boulder is that local governments are not immune from antitrust liability unless their actions are specifically authorized by the state or are in furtherance of clearly articulated and affirmatively expressed state policy. General grants of power by the state to local governments to conduct local affairs are not sufficient.

B. The Future

The language of the City of Boulder opinion is broad and sweeping, covering virtually every aspect of local government activity, but leaving the exact parameters of the antitrust liability of local governments unestablished and key questions unanswered. Subsequent decisions are needed to clarify the antitrust exposure of local governments. Unfortunately, local governments will bear the burden and expense, through litigation, of defining the limits of their authority under the antitrust laws. The remaining sections of this article address the unresolved issues, the most recent applications of the City of Boulder decision, the areas of local government activity that already have been challenged and recommendations for minimizing potential antitrust exposure.

C. Unanswered Questions

The City of Boulder decision left open several questions that

55. Id. at 843 (quoting 630 F.2d at 704, 707).
56. 102 S. Ct. at 843-44 (quoting 435 U.S. at 416).
must be answered before the boundaries of a local government's antitrust liability can properly be defined. First, it is unclear whether a state must actively supervise a local government's activities in order for state action immunity to be available. In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, which involved a challenge to a state statute setting resale prices for all wine producers and wholesalers within the state, the Supreme Court stated that the state action exemption is available only where the local activity is (a) "clearly articulated and affirmatively expressed as state policy" and (b) "actively supervised by the State itself." Both standards must be satisfied, and the challenged program was denied immunity because it did not satisfy the second element, even though it met the first.

*City of Boulder* creates confusion about the proper standard for state action immunity because it did not track the *Midcal* language and only considered compliance with the first prong of the *Midcal* test. Since Boulder's ordinance did not satisfy the "clearly articulated and affirmatively expressed state policy" criterion, the Court did "not reach the question whether the ordinance *must* or could satisfy the 'active state supervision' test focused upon in *Midcal*." As a result, it is not clear that local government activity must be actively supervised by the state in order to be immune. If active state supervision is required, the burden on local governments to establish the exemption will be greater, and fewer local activities will be able to avoid a trial. This uncertainty can only be resolved by future decisions. Since it may be several years before there is a definitive answer to this question, local governments must be conscious of and attempt to satisfy the active state supervision criterion wherever feasible. Specific recommendations regarding this matter are discussed below.

The second unanswered question is whether a viable "public interest" defense exists for local government conduct that does not qualify for state action immunity. If allowed, this defense would protect local government actions in which the public health, safety and welfare purpose and benefits outweigh the anticompetitive effects. Although such a defense is not permitted in suits against private parties, a footnote in *City of Boulder* suggested a possible ex-

58. 445 U.S. at 105 (quoting 435 U.S. at 410).
59. 102 S. Ct. at 841.
60. 102 S. Ct. at 841 n.14 (emphasis added).
ception for local governments: "As we said in City of Lafayette, '[i]t 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 government.'" Additionally, Justice Stevens stated in his concurring opinion that there is an "obvious difference between a charge that public officials have violated the Sherman Act and a charge that private parties have done so."

While the Supreme Court has not described the different standards that might be applied in an analysis of local government conduct under the antitrust laws, courts may be inclined to balance the governmental purpose and public benefits against the anticompetitive effects. Several pre-City of Boulder decisions focused upon the public interest fostered by the challenged regulation in evaluating local government activity under the antitrust laws. For example, in Mason City Center Associates v. City of Mason City, Iowa, plaintiffs tried to exclude the testimony of city council members concerning the public interest they were trying to advance on the ground that it was irrelevant to the city's antitrust liability. The Court held that the governmental reasons and objectives of the city council members were relevant and admitted the testimony.

On the other hand, there is authority for the proposition that good motives are not a valid defense to an antitrust claim. In National Society of Professional Engineers v. United States, the Supreme Court rejected this argument, in litigation involving private parties, that price competition between professional engineers produces inferior engineering work endangering the public safety. Instead, the Court limited its inquiry to the impact of the challenged conduct on competitive conditions and struck down the ban on price competition among professional engineers.

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61. Id. at 843 n.20.
62. Id. at 844. Additional support for the proposition that local governments can raise a public interest defense is contained in Cantor v. Detroit Edison Co., 428 U.S. 579, 591 n.24 (1976), where Justice Stevens, joined by three justices, noted that there is a difference between official and individual action.
63. 1982-1 Trade Cas. (CCH) ¶ 64,566 (8th Cir. 1982); see Affiliated Capital Corp. v. City of Houston, 519 F. Supp. 991, 1023 (S.D. Tex. 1981).
65. Id. See Virginia Academy of Clinical Psychologists v. Blue Shield of Va., 624 F.2d 476, 485 (4th Cir. 1980) ("[I]t is not the function of a group of professionals to decide that competition is not beneficial in their line of work, we are not inclined to condone anticompetitive conduct upon an incantation of 'good medical practice.'").
While this reasoning possibly could be applied to the conduct of local governments, it is more likely that courts will fashion a public interest defense which relieves municipal action of antitrust liability even though the action is not entitled to immunity. Courts would then admit and rely upon testimony from local officials concerning the public interest objectives and reasons for their actions. Moreover, local governments have traditionally regulated and conducted local affairs, and courts have been quite reluctant to review the merits and reasonableness of local regulations. The courts probably will continue to sustain local government action that is undertaken in good faith to further legitimate public health, safety or welfare interests. Nevertheless, although a defense based on upholding justifiable and reasonable exercises of local authority will reduce the exposure of local governments to damage awards, it will not directly reduce the expenses of trial because any defense is a factual matter that must be established at trial.

The last unanswered question concerns the nature of the penalties that can be imposed against local governments and officials. Lower federal courts have offered some guidance in this area. Municipalities can be subject to injunctions, which enjoin them from continuing their anticompetitive activities. They may also be held liable for treble damages, which are calculated by multiplying the plaintiffs' actual loss by three, plus reimbursement of the plaintiffs' attorneys' fees and costs. The prevailing rule is that a court has no discretion to limit an antitrust award only to actual damages, and this rule is applicable when local governments are defendants. Claims against local governments and officials can easily reach millions of dollars.

Public officials can be held individually liable for antitrust violations if their conduct is outside the scope of their official authority and responsibility. For example, individual liability has been im-

66. The Supreme Court did not decide what remedies are appropriate against municipal officials in City of Boulder. 102 S. Ct. at 843 n.20.
posed on local government officials who actively participated in anticompetitive agreements with private parties and who used their positions to promote their own interests and economic benefit.\textsuperscript{70}

Finally, criminal penalties of imprisonment and fines are possible for antitrust violations.\textsuperscript{71} However, the United States Attorney General realistically can be expected to initiate a criminal prosecution against local governments or their officials only in extreme cases.\textsuperscript{72}

D. \textit{Recent Applications of the City of Boulder Decision}

Since the \textit{City of Boulder} opinion was issued, several cases have been decided which illustrate the difficulty local governments will have in demonstrating that particular actions were taken to implement the state’s clearly articulated policy of supplanting competition with regulation or monopoly public service.\textsuperscript{73}

A prime example is \textit{Hybud Equipment Corp. v. City of Akron},\textsuperscript{74} which involved an agreement by a city, county and state water authority to develop a solid waste recycling plant. The agreement provided that the city would construct and operate the plant and

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\textsuperscript{71} The penalties for criminal violations of the antitrust laws are quite severe. A violation of the Sherman Act is a felony for which a corporation, and presumably a local governmental entity, can be fined up to $1,000,000 for each offense. An individual who authorizes or participates in a violation of the Act is also guilty of a felony, punishable by a fine of up to $100,000 and a sentence of up to three years in prison for each offense. 15 U.S.C. §§ 1-3 (1976).

\textsuperscript{72} In his remarks before the National League of Cities on Apr. 30, 1982, Abbott B. Lipsky, the Deputy Assistant to the United States Attorney General, Antitrust Division, stated that the \textit{City of Boulder} decision does not raise the threat of criminal liability for local government officials except in extraordinary circumstances. \textit{See Supplementary Material, Trade Reg. Rep. (CCH) Filing No. 541, at 8 (May 10, 1982).} Similarly, in a June 30, 1982 hearing before the United States Senate Judiciary Committee, the Assistant Attorney General in charge of the Antitrust Division, William F. Baxter, stated that criminal indictments would not be brought against municipal officials when the legality of their conduct is uncertain or the conduct is openly undertaken without any intention to violate the law. \textit{Supplementary Material, Trade Reg. Rep. (CCH) Filing No. 549, at 6 (July 6, 1982).}

\textsuperscript{73} The recent decision in Phillips v. Crothers, 1982-1 Trade Cases (CCH) ¶ 64667 (D. Or. Feb. 12, 1982), is not very helpful in analyzing the impact of \textit{City of Boulder}. Phillips involved an antitrust suit brought against the medical director of the state workers’ compensation department for advising insurance companies in advance not to authorize injured workers to go to the plaintiff’s chiropractic clinic. It is not instructive because the court did not refer to the \textit{City of Boulder} decision, but rather focused on whether the defendant’s conduct was “compelled” by state statutes and regulations.

\textsuperscript{74} 654 F.2d 1187 (6th Cir. 1981), cert. granted and judgment vacated for further consideration in light of \textit{City of Boulder}, 102 S. Ct. 1416 (1982).
the county would dispose all of its solid waste at the plant. The state water authority's involvement was limited to regulating the types of materials handled by the plant. In order to guarantee a supply of solid waste for the plant, the city enacted an ordinance to establish a monopoly over local garbage collection and disposal practices. The ordinance prohibited the establishment of alternative waste disposal sites and required all garbage collectors to deposit all waste at the city's plant. The city was acting under its "home rule" powers granted by the Ohio constitution and specific state statutes which gave municipalities the authority to regulate garbage disposal. Several waste collectors and landfill operators sought injunctive relief against the city, alleging that its actions violated the federal antitrust laws by eliminating competition in the waste disposal industry. The Court of Appeals for the Sixth Circuit affirmed the district court's denial of the injunction.

The court reasoned that the Sherman Act did not apply to this situation because garbage collection and disposal are activities which are traditionally reserved to states and local governments, and the "home rule" provisions of the state constitution authorize the city to regulate garbage collection. The court further stated that the city's plenary governmental power to deal with local problems should not be preempted or displaced by the federal antitrust laws. Therefore, it held that the city was exempt from the Sherman Act.

The Supreme Court, however, vacated the decision and remanded the case to the appellate court for reconsideration in light of City of Boulder. Since the state statutes authorizing the city's regulation of garbage collection and disposal are broad and permissive in nature, it will be difficult to show a clearly articulated state policy to establish municipal monopolies over garbage collection and disposal, although participation of the state water authority will help. If the city's actions are not immune, the issue will be submitted to the finder of fact for determination on the merits.

Another application of City of Boulder is Mason City Center Associates v. City of Mason City, where a city and the individual

75. 654 F.2d at 1189-91.
76. Id. at 1195-96.
77. 102 S. Ct. 1416 (1982).
78. 468 F. Supp. 737 (N.D. Iowa 1979), aff'd, 1982-1 Trade Cas. (CCH) ¶ 64,566, 73,100 n.5 (8th Cir. 1982). The District Court rejected the defendant's state action defense before City of Boulder was decided, but the Court of Appeals stated that the District Court's deci
city council members were sued under federal antitrust law for denying an application for a zoning change. The city had adopted a comprehensive plan for regulating land uses in the city. The plan stressed the development of a compact central business district and avoidance of regional shopping centers on the edges of the city. The city later entered into an agreement with two developers for the development of a regional shopping center in the central business district. It further agreed to discourage any development contrary to the objectives of the comprehensive plan's downtown development proposal.79

The plaintiffs decided to construct a regional shopping center on the edge of the city and filed an application to rezone the property from agricultural to commercial use. When the city council denied the rezoning application, plaintiffs sued the city, the members of the city council and the developers for conspiring to exclude a competing shopping center in violation of the Sherman Act. Defendants claimed that their actions in refusing to rezone the property were exempt from the antitrust laws.80

The court rejected the state action immunity defense because the state zoning laws did not direct or contemplate that municipalities enter into anticompetitive agreements with private developers in connection with the exercise of their zoning powers. Although the zoning statutes had some anticompetitive effects, they did not reflect a clear and affirmative intent by the state to displace competition with regulation or monopoly public service. The state statutes merely empowered municipalities to set up zoning mechanisms and did not require them to make zoning decisions for the purpose of excluding or limiting competition.81 Furthermore, since the zoning laws were totally neutral on municipalities' entering into anticompetitive agreements with private developers as part of their zoning activities, there was no basis for finding that the state contemplated such action. The court also noted that the city could have exercised its zoning powers adequately and effectively without entering into anticompetitive agreements with private parties.82 In sum, the major obstacles to granting immunity to the defendants were that the zoning laws did not clearly reflect the

79. 1982-1 Trade Cas. (CCH) ¶ 64,566, 73,097-73,098.
80. Id.
81. 463 F. Supp. at 742-43.
82. Id. at 743.
state's intent to substitute regulation for competition and that the city entered into an anticompetitive agreement with private parties.

On the other hand, the City of Boulder test was satisfied in Pueblo Aircraft Services, Inc. v. City of Pueblo. The City of Pueblo operated a municipal airport and leased portions of the airport property to "fixed base operators", who conducted business and performed services at the airport. The lease agreements expressly required the operators to purchase all of their aviation fuel from the city. One of the operators was unsuccessful in bidding to extend the terms of its lease and subsequently filed an antitrust action against the city challenging its requirement that all aviation fuel be purchased from it.

The Tenth Circuit held that the city's operation of a municipal airport was exempt from the antitrust laws under the first part of the City of Boulder test. The decision was based on a state statute that specifically authorized the city to operate a municipal airport and stated that such operations are "hereby declared to be public, governmental functions, exercised for a public purpose and matters of public necessity. . . ." In view of this affirmative legislative action, the court found that the city was entrusted with some of the powers of the state for the public good and actually was acting as "an arm of the state." It was operating the municipal airport as a governmental, rather than proprietary, function on behalf of the state, and the benefits of its operation flowed to the general public and were not just for the particular advantage of the city's residents. Thus, the city's operation of the municipal airport qualified for state action immunity under the City of Boulder standards because it constituted the action of the state itself. Moreover, the court noted that in the absence of such express statutory direction, the operation of a municipal airport generally is regarded as a proprietary rather than a governmental function. Interestingly, the court applied a general immunity test to the municipal airport and did not attempt to determine whether the aviation fuel-tying ar-

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83. 1982-1 Trade Cas. (CCH) ¶ 64,668 (10th Cir. 1982).
84. Id. at 73,628-29.
85. Id. at 73,630 (quoting COLO. REV. STAT. § 41-4-101 (1973)).
86. Id. at 73,631-32.
87. Id. This decision dealt only with the first element of the City of Boulder test and did not consider whether the city's action was undertaken pursuant to a "clearly articulated and affirmatively expressed state policy."
88. Id. at 73,632.
rangement was specifically authorized as state policy.

These recent cases reflect the stricter standards imposed on local governments after the *City of Boulder* decision. They indicate that unless local governments are acting as the state itself or pursuant to a specific legislative directive, it will be difficult to satisfy the requirement of "clearly articulated and affirmatively expressed state policy." 89

V. LOCAL ACTIVITIES PREVIOUSLY CHALLENGED UNDER THE ANTI-TRUST LAWS

During the past several years, local governmental entities and officials have been subjected to an increasing number of lawsuits challenging their activities on antitrust grounds. The lawsuits cover a wide variety of local government activities, including some of the traditional, established functions of local governments. 90

89. A number of cases also are pending in which the actions of local governments have been challenged under the antitrust laws. For example, private hotel developers have sued the City of Richmond, Virginia, the city council, the planning commission, the Richmond Redevelopment and Housing Authority, and others for blocking construction of a competing hotel in one area of the city, while allowing another hotel to be built in a declining area that the city wanted to protect and develop. Richmond Hilton Assoc. v. City of Richmond, No. 81-1100-R (E.D. Va., filed Dec. 23, 1981). Hopefully, this case and others will further define the legal standards governing antitrust immunity for municipalities and suggest ways in which municipalities can avail themselves of that immunity.

90. For example, local governments and their officials have been sued under the antitrust laws for zoning decisions, see Stauffer v. Town of Grand Lake, 1981-1 Trade Cas. (CCH) ¶ 64,029 (D. Colo. 1980); Mason City Center Associates v. City of Mason City, 468 F. Supp. 737 (N.D. Iowa 1979), aff'd, 1982-1 Trade Cas. (CCH) ¶ 64,566 (8th Cir. 1982); regulating solid waste collection and disposal, see Glenwillow Landfill, Inc. v. City of Akron, 485 F. Supp. 671 (N.D. Ohio 1979), affirmed sub nom., Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), cert. granted and judgment vacated for further consideration in light of *City of Boulder*, 102 S. Ct. 1416 (1982); controlling the installation of electrical distribution and outdoor lighting systems, see Grason Elec. Co. v. Sacramento Mun. Util. Dist., 526 F. Supp. 276 (E.D. Cal. 1981); prohibiting competition with municipal water and sewer services, see Community Builders, Inc. v. City of Phoenix, 652 F.2d 823 (9th Cir. 1981) (immunity granted); Shadrer v. Horton, 1980-1 Trade Cas. (CCH) ¶ 63,146 (W.D. Va. 1979) (immunity granted); awarding cable television service franchises, see 102 S. Ct. 835 (1982); Affiliated Capital Corp. v. City of Houston, 519 F. Supp. 991 (S.D. Tex. 1981); adding new requirements to public contract awards, see City of Atlanta v. Ashland-Warren, Inc., 1982-1 Trade Cas. (CCH) ¶ 64,527 (N.D. Ga. 1981); awarding park concession licenses, see Kurek v. Pleasure Driveway and Park Dist., 557 F.2d 580 (7th Cir. 1977), vacated and remanded for reconsideration in light of *City of Lafayette*, 453 U.S. 992, reinstated in pertinent part 583 F.2d 378 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1979); regulating fixed base operators at municipal airports, see Pueblo Aircraft Serv., Inc. v. City of Pueblo, 498 F. Supp. 1205 (D. Colo. 1980), aff'd, 1982-1 Trade Cas. (CCH) ¶ 64,668 (10th Cir. 1982) (immunity granted); Guthrie v. Genesee Cty., New York, 494 F. Supp. 950 (W.D. N.Y. 1980); Pinehurst Airlines, Inc. v. Resort Air Serv., Inc., 476 F. Supp. 543 (M.D.N.C. 1979); awarding an
Although local governments and their officials were granted immunity in some cases, several of the aforementioned decisions no longer are valid under the standards established by City of Boulder. More importantly, the number of antitrust lawsuits filed against local governments as well as the types of local activities subjected to such lawsuits may increase in view of the broad ruling in City of Boulder. The list of challenged activities undoubtedly will grow in the years ahead due to the significant expansion in local government antitrust liability, and the omission of an activity from this list is no assurance of immunity.

VI. RECOMMENDATIONS FOR REDUCING ANTITRUST EXPOSURE

The next important consideration concerns the steps local governments can take to reduce the risk of being sued for a violation of the antitrust laws. Despite the broad implications of City of Boulder, some local government activities are not likely candidates for antitrust actions for two reasons. First, there is either an affirmatively expressed state interest and policy sufficient to meet the Supreme Court’s test or, second, the activities are conducted in an open, ministerial manner that does not adversely affect competition. A typical example of the latter is the purchase of items through public solicitation of bids.

However, the publicity generated by City of Boulder has alerted persons who deal with local governments to new antitrust remedies, and the current economic recession has made businesses more litigious when contracts or expectations are lost. Although this should make local governments more cautious they need not be

airport taxicab monopoly, see Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978); awarding a bus service contract, see Crocker v. Padnos, 483 F. Supp. 229 (D. Mass. 1980) (immunity granted); awarding a parking lot franchise, see Corey v. Look, 641 F.2d 32 (1st Cir. 1981); regulating the sale of alcoholic beverages, see Grendel's Den, Inc. v. Goodwin, 662 F.2d 88, rev'd on other grounds upon rehearing en banc, 662 F.2d 102 (1st Cir. 1981), appeal filed sub nom., Larkin v. Grendel's Den, Inc., 50 U.S.L.W. 3422 (Nov. 10, 1981); enforcing a deceptive trade practice ordinance, see Fugazy Continental Corp. v. Midgley, 1982-1 Trade Cas. (CCH) ¶ 64,537 (S.D.N.Y. 1981) (immunity granted); preventing a developer from participating in an urban housing and redevelopment plan, see Cedar-Riverside Assocs., Inc. v. United States, 1978-2 Trade Cas. (CCH) ¶ 62,346 (D. Minn. 1978) (immunity granted); and challenging development in a suburb of a city, see Miracle Mile Assocs. v. City of Rochester, 1979-2 Trade Cas. (CCH) ¶ 62,735 (W.D.N.Y. 1979) (immunity granted).

91. For example, the following lower court decisions probably would not satisfy the City of Boulder test if reexamined today: Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981); Stauffer v. Town of Grand Lake, 1981-1 Trade Cas. (CCH) ¶ 64,029 (D. Colo. 1980).
passive observers. Local governments can and should take several affirmative steps to minimize their antitrust exposure and reduce their risk of becoming involved in antitrust litigation.

A. Advise local government decision-makers of the antitrust law requirements.

As an initial preventive measure, persons in policy-making and managerial positions should be advised of the general prohibitions and pitfalls of the applicable antitrust laws to increase their awareness of and sensitivity to antitrust problems. Each local government should circulate a written outline of the basic antitrust requirements and prohibitions and consider conducting an educational seminar for persons in policy and decision-making positions.

B. Review the state statutes governing particular areas of local activity.

The first step in actually analyzing the possible antitrust liability of a local government is to examine the provisions of the state constitution and the applicable state statutes controlling its operations in specific areas. The areas in which the local government is acting as an arm of the state or under a clearly articulated state policy to replace competition with regulation should be identified. This will enable the local government to concentrate on protecting activities that are not immune.92

C. Examine the local government’s activities for potential antitrust problems.

Each local government should identify areas of particular antitrust concern. This can be done by examining the local government’s activities, and isolating areas which are likely to present antitrust problems and are not protected by open and objective decision-making processes. An extremely careful review should be made of the areas involving antagonistic economic interests, such as zoning or franchising, and other areas which involve the expenditure of large sums of money or offer private parties large gains or losses. Once these high risk areas are identified, local governments should consider implementing the following possible alternatives

92. If City of Pueblo is followed, a general statute may protect anticompetitive subordinate activities not specifically mandated by the state.
for reducing antitrust exposure.

D. *Seek protective legislation from the state legislature.*

The surest method of avoiding antitrust liability is to obtain the enactment of state legislation that clearly and affirmatively expresses a state policy of replacing competition with regulation and delegates to local governments responsibility to carry out that policy. The legislation should apply statewide, not just to a particular locality, and it is not sufficient simply to authorize local governments to act anticompetitively. If the legislation does not command or direct a specific anticompetitive activity, it should acknowledge the need for different policies in different areas and set out detailed standards and procedures to define the situations in which anticompetitive practices can be implemented.

While the legislation preferably should be limited to a specific area of local activity, it may be possible to obtain legislation that attempts to exempt all local government activities from antitrust liability. For example, a bill has been introduced in the Colorado legislature which contains state recognition of the essential role of local governments in accomplishing the public purposes of the state and expressly directs local governments to displace competition with regulation. However, such broad legislation probably will not succeed because it offers no clearly delineated standards.

Proposed legislation also should attempt to comply with the active state supervision standard. Sufficient state supervision of local regulatory activity probably can be accomplished by providing for the availability of review by a state board or commission, judicial review in the state courts, the authority of the legislature to enact and amend implementing regulations or the authority of the legislature to establish local government advisory commissions.

There are limitations to this legislative approach. First, local governments might object to operating under such detailed state regulation. Second, where large expenditures or important issues are involved, state governments may not be willing to delegate authority to local governments or authorize anticompetitive conduct. As previously stated, Colorado and twenty-two other state governments filed briefs with the United States Supreme Court opposing

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94. *But see supra* 1982-1 Trade Cas. (CCH) ¶ 64,668 and note 104.
Boulder's claim of home rule exemption. It appears that state governments saw this case as an opportunity to recoup state powers that were lost to home rule governments. Third, some activities may require particularized treatment, and statewide regulations and centralized policy-making may not be feasible.

E. Articulate the public interest objectives of local activities.

"Good motives" are not a direct defense to antitrust violations; however, motives can be important in assessing the economic consequences of local government conduct and the legality of that conduct if it is challenged under a rule of reason analysis. As a result, local governments should develop a written statement of the public interest reasons and objectives for activities likely to be challenged under the antitrust laws. If these reasons and objectives are stated and followed, the local government should be able to demonstrate that the regulation is motivated by good faith governmental concerns and not anticompetitive concerns restricted by the antitrust laws. For example, in *Hybud Equipment Corp. v. City of Akron,* the City of Akron could have developed a written record showing that its monopoly of solid waste collection was necessary to support a solid waste disposal facility which had long-term health and economic implications for the entire community.

F. Competition should be restricted only to the minimum extent necessary.

Whenever competition in a particular area is to be regulated or restricted, the local government should assess the anticompetitive effects of the proposed action, determine whether restricting or eliminating competition is really necessary and, if so, search for alternative ways of accomplishing its goals that are less restrictive of competition. Regulations should restrict competition only to the minimum extent necessary to satisfy the stated public interest. Local governments can reduce their antitrust exposure by being sensitive to the anticompetitive effects of their actions and adopting the least restrictive anticompetitive act capable of accomplish-

95. See *supra* note 3.
97. *City of Lafayette,* 435 U.S. at 425-26 n.6 (Burger, C.J., concurring); *Cantor,* 428 U.S. at 597 & n.37; *Mason City Center Assocs.,* 468 F. Supp. at 743, aff'd, 1982-1 Trade Cas. (CCH) ¶ 64,566 (8th Cir. 1982).
ing their public purpose.

G. Establish objective criteria and procedures for decision-making processes.

A court is more likely to defer to a local government’s decision if it believes the decision was reached in a procedurally fair and thorough manner. Moreover, since plaintiffs are sometimes motivated by a sense of having been treated unfairly, fair treatment both reduces the risk of suit and the likelihood of an outraged jury. Therefore, whenever possible, local governments should develop and publish objective criteria and procedures for their various decision-making processes. Especially in the high risk areas, critical decisions should be based on established procedures and written recommendations that weigh the alternatives and articulate the public policy concern(s).

In awarding contracts or franchises, local governments should use competitive bidding procedures if feasible. Particularly where bids involve non-quantifiable factors, the initial decision of which bid to accept should be made by a municipal employee who reports to the governing council or board, rather than by the elected officials themselves. Employees who have met privately with the bidding parties should be removed from the final decision-making process. Where meetings with private parties are necessary, they should not be conducted by the ultimate decision-maker. Rather, the ultimate decision should be based on written reports by staff or consultants and on comments by the interested parties.

When open bids are not possible, local governments should hold public meetings or hearings to consider such actions as the granting of contracts or franchises and zoning decisions. Public meetings or hearings also should be held whenever a local government is considering regulatory or anticompetitive practices, and the meetings should emphasize the public need for the proposed governmental action. All affected parties should be given a fair and full opportunity to be heard on these decisions.

Although private meetings are frequently necessary as sources of information and understanding between government and business, they are dangerous. Private meetings should be conducted carefully since many antitrust lawsuits allege conspiracies between the local governments and private parties. Since Section 1 of the Sherman Antitrust Act requires a contract, combination or conspiracy,
unilateral acts are exempt. Therefore, all municipal actions should be undertaken unilaterally, not pursuant to an agreement or understanding with private parties. Unilateral action is crucial because it defeats allegations of an illegal contract or conspiracy and avoids judicial findings that the state legislature did not contemplate that its local governments would enter into anticompetitive agreements with others in connection with the exercise of their governmental powers.

When private meetings are necessary, the government representative making the private contacts should not be the decision-maker, and in every case the final decision-making process should be as separate from the private conference stage as possible. An additional buffer could be created by having a consultant investigate the matter and recommend actions to the decision-makers.

Finally, local officials must avoid even the appearance of impropriety relating to conflicts of interest by declining to participate in matters that may affect their individual interest or benefit them directly or indirectly. In sum, by adhering to fair, objective procedures for their decision-making processes, local governments will create fewer disgruntled parties and will reduce the likelihood of being sued for violations of the antitrust laws. These precautions also will reduce the risk of being charged with participating in conspiracies or deviating from established criteria or procedures to the benefit of favored parties.

VII. Conclusion

City of Boulder significantly increased the potential antitrust liability of local governments and their officials. This decision probably will lead to antitrust scrutiny of virtually every aspect of local activity and an increase in legal challenges to those activities. Local governments should prepare for the new challenges and legal battles by educating their employees to antitrust principles, closely examining the statutes that authorize them to act in certain areas and evaluating specific activities for potential antitrust problems. They also should consider protective legislation for high risk areas and implement objective procedures to insure that decisions are made fairly and for the purpose of protecting the public interest. Furthermore, local government officials should limit private meetings and communications with interested persons in order to decrease the chance of being charged with participating in a conspiracy or agreement with others.
Although the antitrust exposure of local governments has increased, the exact nature of that exposure as yet has not been clearly defined. Additional court decisions are needed to clarify the extent to which local governments will be held accountable under the antitrust laws. By taking the steps outlined above, local governments can help shape and define their antitrust destiny in a more acceptable manner.