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ANTITRUST LIABILITY FOR MUNICIPAL AIRPORT OPERATIONS: WILL IT FLY?

WILSON CHU

ALMOST ALL OF THE major airports in the United States are owned and operated by state and local governmental authorities. Prior to the United States Supreme Court decision in 1978 in City of Lafayette v. Louisiana Power & Light Co., the operation of these airports enjoyed almost complete immunity from antitrust scrutiny. This immunity was derived from a broad reading of the so-called state action exemption of Parker v. Brown. The Parker holding was interpreted as providing a blanket exemption from antitrust liability for acts of states and their agencies, as well as for those of municipalities and certain special agencies authorized to operate regional airport authorities. The Parker decision, how-

1 Hermann, Airports and the Applicability of the Antitrust Laws, 45 ALB. L. REV. 353, 355 (1981). The only major public airports owned and operated by the federal government are Washington National Airport and Dulles International Airport. Id.
3 Hart, State Action Antitrust Immunity For Airport Operators, 12 TRANSP. L.J. 1, 2 (1980); Hermann, supra note 1, at 353. The scope of this article will be limited to the question of antitrust liability for the municipal airport operator. The issue of antitrust liability for those private parties who deal with the airports will not be examined. These private defendants may be immune, however, under the Noerr-Pennington Doctrine which holds that the Sherman Act does not apply to political lobbying to influence legislative enactments which result in a restriction of competition. See generally 1 P. Areeda, ANTITRUST LAW 62 (Supp. 1982) (discussing the relationship of the Noerr-Pennington and Parker immunities); Hermann, supra note 1, at 373.
4 317 U.S. 341 (1943).
5 For the purposes of this article, "municipalities" include counties and their agencies, cities and their agencies and other local governmental entities. See Hart, supra note 3, at 3.
ever, was narrowly interpreted by the Court in *City of Lafayette* which held that a municipal defendant's mere status as a governmental entity does not automatically entitle it to a grant of immunity for its anticompetitive actions. Thus, *City of Lafayette* had a restraining effect on the conduct of municipalities and other political subdivisions by exposing these entities to possible antitrust liability under the Sherman Act, which had previously been applied only to private defendants.

By requiring airport operators to structure their decision-making processes in light of potential municipal antitrust liability, *City of Lafayette* and its progeny place constraints on municipal airport operations beyond their regulation by the Federal Aviation Act and the normal market forces. Moreover, the recent decision in *Community Communications Co. v. City of Boulder* removes a substantial loophole for municipalities.

*City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. at 411. Actions of a state in its sovereign capacity, i.e., state actions, are still immune under the Parker doctrine. *Id.* at 409.


> Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade among the several states, or with foreign nations, is declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.

*15 U.S.C. § 1 (1976).* Section 2 of the Sherman Act provides, _inter alia_: "Every person who shall monopolize, or attempt to monopolize any part of the trade or commerce among the several states, or with foreign nations shall be deemed guilty of a felony . . . ." *15 U.S.C. § 2 (1976).*


*See, e.g., Continental Bus System v. City of Dallas, 386 F. Supp. 359, 363 (N.D. Tex. 1974) (Continental claimed that an "exclusive franchise" granted to Surtran at the Dallas-Fort Worth Regional Airport was violative of the Federal Aviation Act, 49 U.S.C. § 1349(a). Section 1349(a) provides that "there shall be no exclusive right for the use of any landing . . . facility upon which Federal funds have been expended.") See also, Hart, supra note 3, at 1.

*102 S. Ct. 835 (1982).*
City of Boulder held that the general grant of powers by the state to "home-rule" municipalities is insufficient to qualify the anticompetitive activity of such a municipality for the state action exemption. Taken together then City of Lafayette and City of Boulder firmly require that potentially anticompetitive acts by municipalities receive more specific state legislative authorization than a general grant of regulatory powers.

This article will focus on airport activity in the context of the municipality as a grantor of exclusive franchises to fixed base operators (FBO) and to ground transportation systems. First, a historical examination will be made of municipal airport antitrust cases decided before City of Lafayette. Second, cases decided after City of Lafayette will be discussed to trace changes in the judicial attitude toward and the application of the state action doctrine in the municipal defendant context. Third, in light of the developing municipal antitrust law, this article will explore several suggestions designed to help municipal airport operators avoid potential antitrust liability. Within this framework, the substantive issue of antitrust liability will be addressed in the event the threshold immunity is denied. Finally, this article will examine the type of sanctions and remedies available under the municipal antitrust laws and the need to limit the types of sanctions because of the municipality's status as a public entity.

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12 A "home-rule" municipality is one which is granted extensive powers of self-government by the state constitution. A "home-rule" municipality is "entitled to exercise 'the full right of self-government in both local and municipal matters' [and] the City Charter and ordinances supersede the laws of the State." Community Communications Co. v. City of Boulder, 102 S. Ct. at 837. Additionally, as some commentators have noted, "the fundamental purpose of home rule is to allow both the cities and the state to exercise power coordinately so that problems can be solved at either or both levels of government." Freilich and Carlisle, The Community Communications Case: A Return To The Dark Ages Before Home-Rule, 14 URB. LAW. No. 2 v (1982).

13 Community Communications Co. v. City of Boulder, 102 S. Ct. at 843.

I. STATE ACTION IMMUNITY: PARKER V. BROWN

Cases decided before City of Lafayette\textsuperscript{15} were generally liberal in granting state action immunity to a variety of government entities so long as the activity in question was a bona fide governmental activity.\textsuperscript{16} The almost automatic grant of immunity upon a finding of a governmental activity was partly based on an interpretation of the Sherman Act by the Court in Parker v. Brown\textsuperscript{17} which stated that "its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations."\textsuperscript{18}

Parker v. Brown is generally agreed to be the genesis of the state action defense.\textsuperscript{19} Parker involved an antitrust attack by a private raisin grower, Brown, who sought to enjoin administration of the California Agricultural Prorate Act.\textsuperscript{20} The Act authorized a program which was an anticompetitive scheme designed to cure a persistent problem of overproduction and the harmful effects of oversupply in the California raisin industry\textsuperscript{21} through maintenance of prices and the re-

\begin{footnotesize}
\begin{itemize}
  \item[16] See, e.g., Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 227 (9th Cir. 1975) (state action immunity was granted to city council which awarded an exclusive cable television franchise to CATV even though such actions resulted in a restraint of trade); Padgett v. Louisville & Jefferson County Air Bd., 492 F.2d 1258, 1260 (6th Cir. 1974) (airport board in contracting for cab service to the exclusion of independent cab drivers was exercising a valid governmental function to which the antitrust laws do not apply); Saenz v. University Interscholastic League, 433 F.2d 1026, 1027 (5th Cir. 1973) (a state agency, UIL, which disallowed use of Saenz's product in a contest was immune from the Sherman Act because it was a governmental entity). See also Hart, supra note 3, at 10.
  \item[17] 317 U.S. 341 (1943).
  \item[18] Id. at 351 (emphasis added).
  \item[19] The courts had dealt with the applicability of federal antitrust laws to state action prior to Parker. In Olsen v. Smith, 195 U.S. 332 (1904), an unlicensed pilot challenged Texas' pilot licensing laws claiming that the regulation suppressed the trade of unlicensed pilots in violation of the Sherman Act. The Court, however, found no antitrust violation, holding that "no monopoly or combination in a legal sense can arise from the fact that duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law." Olsen v. Smith, 195 U.S. at 345. In an earlier case, Lowenstein v. Evans, 69 F. Supp. 908 (D.S.C. 1895), a North Carolina liquor dealer challenged a South Carolina liquor monopoly. The court dismissed the suit holding that the state was not a person within the meaning of the Sherman Act. See Handler, Twenty-Fourth Annual Antitrust Review, 72 Colum. L. Rev. 1, 4 (1972).
  \item[21] Id. at 364. The purpose of the Prorate Act was to "conserve the agricultural
\end{itemize}
\end{footnotesize}
striction of competition. The program was supervised by a nine member Agricultural Prorate Advisory Commission, of which the Director of Agriculture was an ex-officio member, and the remaining eight members were appointed by the governor and confirmed by the state senate. Brown challenged the validity of the proration program as violative of the Commerce Clause and the Sherman Act. In holding that the raisin prorate program was not subject to Sherman Act scrutiny, the unanimous Court stated:

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 officer or its agents from activities directed by its legislature. In a dual system of government... an unexpressed purpose to nullify a state's control over its officer is not lightly to be attributed to Congress... The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

The Court concluded that the Sherman Act was a prohibition of "individual and not state action." In comparison,
the Court stated that the California prorate program would have been violative of the Sherman Act had it been organized and controlled solely by a conspiracy of private persons, individual or corporate.\textsuperscript{26}

II. PRE-CITY OF LAFAYETTE DECISIONS

Based on Parker's interpretation of the Sherman Act as prohibiting "individual and not state action,"\textsuperscript{29} the courts routinely upheld the state action defense against a variety of antitrust challenges to operators of municipal airports. In \textit{E.W. Wiggins Airways v. Massachusetts Port Authority},\textsuperscript{30} a fixed base operator (FBO),\textsuperscript{31} Wiggins, brought an antitrust action against the Massachusetts Port Authority (Authority) which owned and operated Boston's Logan Airport.\textsuperscript{32} The Authority was a special agency created by the Massachusetts legislature to operate Boston's airports and other transportation facilities.\textsuperscript{33} The Authority refused to renew Wiggins' FBO

\textsuperscript{26} 317 U.S. at 350-51.

\textsuperscript{27} Parker v. Brown, 317 U.S. at 352.

\textsuperscript{29} 362 F.2d 52 (1st Cit. 1966), \textit{cert. denied}, 385 U.S. 947 (1966).

\textsuperscript{30} An FBO provides ground support used in aviation, such as facilities, fuel, equipment, supplies and services. \textit{Id.} at 53 n.2

\textsuperscript{31} \textit{Id.} at 54.

\textsuperscript{32} \textit{Id.} at 55. The Massachusetts statute provides that "the Authority is hereby constituted a public instrumentality and the exercise by the Authority of the powers conferred by this Act shall be deemed and held to be the performance of an essential governmental function." \textit{MASS. ANN. LAWS} ch. 73, \textsection{} 32 (Michie/Law. Co-op. 1967) (emphasis added). Under a general grant of powers, the Authority was authorized to
lease\textsuperscript{34} pursuant to a decision to establish a competitor, Butler Aviation-Boston, Inc.,\textsuperscript{35} as the sole and exclusive FBO at Logan Airport.\textsuperscript{36} Wiggins' complaint alleged that the defendants entered into a combination in restraint of trade in violation of Section 1 of the Sherman Act.\textsuperscript{37} The Court of Appeals for the First Circuit, however, stated that the Authority was a public instrumentality performing an essential governmental function.\textsuperscript{38} Thus, in establishing an FBO monopoly, the Authority "was acting as an instrumentality or agency of the state, pursuant to legislative mandate imposed upon it to operate the airport and establish rules and regulations for its use."\textsuperscript{39} Accordingly, the First Circuit granted state action immunity to the Authority since the activity complained of was a restraint of competition resulting from governmental activity.\textsuperscript{40} Reaffirming \textit{Parker}, the court concluded that "the antitrust laws are aimed at private action, not at governmental action."\textsuperscript{41}

In \textit{Ladue Local Lines v. Bi-State Development Agency},\textsuperscript{42} the issue involved the power of the regional transportation authority to monopolize a public transportation market. The defendant, Bi-State, was an agency of Missouri and Illinois expressly authorized to own and operate, \textit{inter alia}, "airports . . . [and]"

\begin{itemize}
\item \textsuperscript{34} Wiggins Airways and Van Dusen Aircraft Supplies of New England were the original FBO's at Logan. Wiggins' lease expired December 31, 1959. The Authority denied Wiggins' request for a lease renewal, but it allowed Wiggins to continue its operations as a tenant at will. E. W. Wiggins Airways v. Massachusetts Port Auth., 362 F.2d at 54.
\item \textsuperscript{35} Defendants in the suit were the Authority, Butler Aviation-Boston, Inc., and Butler Company. \textit{Id.} at 53.
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{38} \text{\textsuperscript{39} Id.}
\item \textsuperscript{39} Wiggins previously filed a complaint with the Federal Aviation Authority (FAA) that establishment of Butler as Logan's sole and exclusive FBO was in violation of the Federal Aviation Act. \textit{Id.} at 54. \textit{See also supra} note 10 and accompanying text. The FAA's intervention, however, arrived too late to help Wiggins, which had already sold its airport facilities and equipment to Butler and had departed from the airport. 362 F.2d at 54.
\item \textsuperscript{40} \textit{Id.} at 55. \textit{See supra} note 33.
\item \textsuperscript{41} 362 F.2d at 55.
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} Id. (emphasis added).
\item \textsuperscript{44} 433 F.2d 131 (8th Cir. 1970).
\end{itemize}
passenger transportation facilities." Ladue Lines alleged that its competing business was destroyed by Bi-State's attempted monopolization of the school bus market. Ladue argued that the bussing of school children was not a recognized governmental function and that because such activity was proprietary in nature, Bi-State should not benefit from sovereign immunity. The court, however, rejected Ladue's distinction and held that under the Parker doctrine, "the antitrust laws do not apply whether the operation is labeled proprietary or governmental." The court reasoned that even if Bi-State had waived its sovereign immunity by engaging in a proprietary activity, Congress had not "impose[d] liability since antitrust laws are not directed at governmental action." In strict reliance on Parker, therefore, the court stated that the "right and remedy plaintiff seeks to invoke there is simply not available.

Municipal antitrust litigation arises not only in the context of a transportation authority acting as a monopoly but also where a public authority acts as a grantor of exclusive licenses. In Padgett v. Louisville Jefferson County Air Board, the Court of Appeals for the Sixth Circuit held that the outcome of the antitrust issue is no different where the transportation authority awards an exclusive contract to a private company to provide ground transportation at a public facility such as an airport. In Padgett, the Air Board awarded Yellow Cab

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43 Id. at 133.
44 Id. at 134. Bi-State's challenged anticompetitive activities were that it purchased most of the public service lines, charged an unreasonably low price for student passes, eliminated certain service charges, and acquired school bus service contracts without competitive bidding or was not the low bidder where bids were invited. Id.
45 Id. Ladue relied on the recognized distinction between governmental and proprietary activities in the context of tort and tax liability. Id.
46 Id. at 137.
47 Id. at 134. The court also cited E. W. Wiggins Airways as settled authority that "we do not reach any question of immunity since there was no attempt on part of Congress to impose liability [under the antitrust laws] in the first place." Id. at 135 (citing E. W. Wiggins Airways v. Massachusetts Port Auth., 362 F.2d at 56).
48 Id. at 134.
49 492 F.2d 1258 (6th Cir. 1974).
50 Id. at 1260.
Company a contract to service Louisville's airport.51 Padgett and other independent taxicab drivers brought an antitrust action for damages under the Sherman Act.52 In words clearly reflecting the pre-C'y of Lafayette attitude concerning the state action doctrine, the court stated, "we find it unnec-

essary to submit Parker to an extensive analysis for the pur-

poses of the instant case."53

The Padgett court's summary analysis relied on construc-

tion of the Kentucky statute which created the Air Board.54

The court concluded that the Air Board was a quasi-govern-

mental agency legislatively created to operate the airport.55

The court also found that the regulation of ground transpor-

tation services was necessarily incidental56 to the operation of

apartment facilities.57 Since the Air Board's decision to include

independent taxi drivers was well within its broad statutory
grant to "operate [the airport as] a virtual monopoly,"58 the
court concluded that the Air Board "was exercising a valid

governmental function to which the antitrust laws do not

apply."59

In Padgett, as well as in E.W. Wiggins and Ladue, the courts

granted state action immunity to regional transportation au-
thorities which were determined to have been exercising gov-

ermental functions. The activity was determined to be
governmental because it was based on the authorization of

51 Id. at 1259.

52 Id. at 1258.

53 Id. at 1259.

54 The Kentucky statute provides:

[Acquisition, establishment, construction, enlargement, improvement,
maintenance, equipping and operation of airports . . . and the exercise
of any other powers granted to air boards or municipalities in this chap-
ter, are hereby declared to be public, governmental and municipal functions, exercised
for a public purpose, and matters of public necessity. . .


55 Padgett v. Louisville & Jefferson County Air Bd., 492 F.2d at 1260.

56 See generally Hermann, supra note 1, at 355 (discussing central and subsidiary activ-


cities of airports and their relation to airport antitrust liability).

57 Padgett v. Louisville & Jefferson County Air Bd., 492 F.2d at 1260.

58 Id. See supra note 54.

59 Padgett v. Louisville & Jefferson County Air Bd., 492 F.2d at 1260.
state legislation. In all three cases, the statutes were construed as providing broad regulatory powers.

In Continental Bus System v. City of Dallas, the airport operators were cities rather than state-authorized agencies. The antitrust action was brought by Continental, a private bus company, against the cities of Dallas and Fort Worth. Continental alleged that the cities, by enacting identical ordinances prohibiting unlicensed competition with Surtran at the Dallas-Ft. Worth Regional Airport (DFW), had created a monopoly in violation of the Sherman Act. Since the defendants were cities, the District Court for the Northern District of Texas dispensed with the statutory construction and analysis upon which the previous cases had relied. The court held that the granting of the exclusive franchise to Surtran was a governmental activity; accordingly, Continental had no cause of action against the cities under the Sherman Act. Mindful of the blanket immunity the municipalities enjoyed under the state action doctrine, the district judge stated that "while one could question the wisdom of the cities' decision, one cannot question their legal right to implement that decision."

III. THE EROSION OF MUNICIPAL ANTITRUST IMMUNITY: CITY OF LAFAYETTE TO CITY OF BOULDER.

Although the state action immunity was generously ap-
plied, there were some circumstances which the United States Supreme Court refused to exempt so-called "governmental activities." In *Goldfarb v. Virginia State Bar*, a minimum fee schedule for attorneys was challenged as price fixing in violation of the Sherman Act. Setting forth the "compulsion test," the Court denied state action immunity because the state-related activity was not compelled by the state acting as sovereign. In *Cantor v. Detroit Edison Co.*, a retail druggist filed suit against Detroit Edison, a private utility company, complaining that Detroit Edison's policy of distributing free light bulbs to consumers restrained trade in the sale of light bulbs. Detroit Edison sought to invoke state action immunity because the cost of distribution was reflected in rates approved by the state's public utility commission. The Court rejected this argument, and held that commission approval was not a sufficient basis for exempting application of the antitrust laws. The Court's refusal to grant automatic state action immunity to any governmental activity, no matter how tangentially related to the state, clearly indicated the

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71 *Id.* at 775. The fee schedule was set by the Fairfax County Bar Association and enforced by the Virginia State Bar. *Id.*

72 The court stated:

The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign . . . . It is not enough that . . . anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.


73 Goldfarb *v.* Virginia State Bar, 421 U.S. at 790-91.


75 *Id.* at 581.

76 The Michigan Public Service Commission was the state regulatory body having jurisdiction to regulate public utilities. *Id.*

77 *Id.* at 585. *Cantor* has been distinguished as to its applicability to municipal antitrust because Detroit Edison was a private antitrust defendant. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977). See also Comment, *Application of the State Action Doctrine To Municipalities*, supra note 72, at 592 (discussing the status of the antitrust defendant as a test to define the state action exemption).
Court's desire to restrict the Parker doctrine to activities in which the state actually engages as a sovereign. Consequently, in light of Goldfarb and Cantor, the decision in City of Lafayette v. Louisiana Power & Light Co. was not surprising.

In City of Lafayette, a plurality of the Court refused to extend automatic antitrust immunity to municipalities under the state action doctrine. The suit was brought by two cities, Lafayette and Plaquemine (which owned and operated electric utility systems) against Louisiana Power & Light Company (LP&L), a private utility company, and others. The cities alleged that LP&L had committed various antitrust offenses which injured those operations of the city utilities conducted beyond the city limits. LP&L counterclaimed that the cities committed antitrust violations in the operation of their own utility companies. Claiming the state action defense, Lafayette contended that the mere status of the cities as governmental entities exempted them

79 Id. at 391. Lafayette's complaint also named Middle-South Utilities, Inc.; Central Louisiana Electric Co., Inc.; and Gulf States Utilities, which were all corporations engaged in the sale of electricity in Louisiana. Id. at 391 n.3.
80 Id. at 392. Among the alleged offenses, the cities claimed that the defendants monopolized the electric utility market by engaging in boycotts against the cities and by preventing the financing of construction of generating facilities beneficial to the cities through sham litigation and other improper means. Id. at 392 n.5.
81 Id. at 392. The counterclaim alleged that the cities had conspired to engage in sham litigation against LP&L, to exclude competition by using long-term supply contracts, and to displace LP&L by requiring customers of LP&L to buy electricity from the cities as a condition of continued water and gas service. Id. at 392 n.6.
from the antitrust laws under *Parker*. Raising Lafayette's reading of *Parker* as plain error, however, the Court stated that the state action doctrine was based on the principle of dual sovereignty wherein "a congressional purpose to subject to antitrust control the State's acts of government will not lightly be inferred." The Court further stated that since cities are not sovereign, they do not receive the same level of federal deference as do the states. Moreover, the Court expressed a fear of possible economic dislocation if cities were allowed "to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws." Accordingly, the Court refused to presume that Congress intended to exclude anti-competitive municipal action from the ambit of the antitrust laws.

The holding in *City of Lafayette*, however, did not totally foreclose antitrust immunity to municipalities. The Court recognized that a municipality may benefit from the state action doctrine where it acts as an instrumentality of the state pursuant to state policy to displace competition with the regulation or monopoly of a public service. For a political subdivision to assert a *Parker* defense, the Court stated that it

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84 *Id.* at 408. The cities interpreted *Parker* to exempt all governmental entities, whether state agencies or political subdivisions of the State. *Id.*
85 *Id.* at 412 (citing *Parker v. Brown*, 317 U.S. at 351). See *supra* note 26 and accompanying text.
86 *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 412.
87 *Id.* at 412-13. The Court considered the threat to the efficiency of the free market system. It stated: "If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." *Id.* at 408.
88 *Id.* at 412-13. Lafayette also relied on a public service argument contending that antitrust laws were not intended to apply to activities of a municipality whose existence is for the public benefit. *Id.* at 403. Furthermore, Lafayette contended that antitrust regulation is unnecessary since the welfare of its citizens is protected by the political process. *Id.* at 405-06. The Court rejected the first aspect of this argument because as a public corporation, a municipality's conduct is designed to benefit its citizens which is not more likely to comport with the national economic well-being than a private corporation acting in the interest of its shareholders. *Id.* at 406. The Court also rejected the political process aspect because aggrieved consumers living outside of the municipality had no political recourse at the municipal level. *Id.* at 403-06.
89 *Id.* at 413.
need not point to a specific detailed legislative authorization. Instead "an adequate state mandate for anticompetitive activities . . . 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.'"  

In order to determine whether there is a sufficient state mandate to displace the antitrust laws, the judicial inquiry must focus not only on the statutes but also on legislative history and state policy. In *New Motor Vehicle Board v. Orrin W. Fox Co.*, the Supreme Court applied the "legislative contemplation" test of *City of Lafayette* and found a state policy to displace competition where the challenged activity was a necessary consequence of engaging in the authorized activity. *Orrin W. Fox* involved a California act which allowed existing car dealers to restrict entry of new dealerships into their market areas upon protest to the state's New Motor Ve-

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90 *Id.* at 415.

91 *Id.* (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431, 434 (1976)). The dissent by Justice Stewart argued that the plurality's emphasis on state legislative action would greatly "impair the ability of a State to delegate governmental power broadly to its municipalities." *Id.* at 438 (Stewart, J., dissenting). In his concurring opinion, Chief Justice Burger proposed an alternate test based on whether the activity engaged in by the municipality was proprietary or governmental in nature. *Id.* at 418 (Burger, C.J., concurring). The Chief Justice stated that a proprietary enterprise engaged in by a municipality should not be exempt from the Sherman Act. *Id.* It should be noted, however, that the state legislature can engage in proprietary as well as governmental activity, thereby bestowing state action immunity to a proprietary activity which the Chief Justice states is not within the *Parker* doctrine. *Id.* Justice Stewart criticizes this distinction as a "quagmire," in that proprietary and governmental action are often indistinguishable. *Id.* at 433-34 (Stewart, J., dissenting) (quoting Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955)). See generally Comment, supra note 72 at 596. See generally P. AREEDA, ANTITRUST LAW at 51 (Supp. 1982).


93 Comment, supra note 72, at 586.

94 439 U.S. 96 (1978). *Orrin W. Fox* was decided only nine months after *City of Lafayette*.

95 See Comment, Application of the State Action Doctrine to Municipalities, supra note 72 at 584 (discussing the pros and cons of the legislative intent test).

96 P. AREEDA, ANTITRUST LAW 54 n.9 (Supp. 1982). Professor Areeda also suggests that as a matter of statutory interpretation, the courts should "assume that the legislature intends the 'reasonable' but requires more specific language or legislative history to justify the 'exceptional.' " *Id.* at 55.
hicle Board. Although the statute did not expressly declare an intent to displace competition, the Court nevertheless held that the statute was outside of the antitrust laws under the state action doctrine because the statutory scheme was a regulatory system "designed to displace unfettered business freedom."98

Orrin W. Fox exemplifies a broad construction of the "legislative contemplation" standard. In California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,99 the Court began to enforce a much stricter standard for antitrust immunity. In Midcal, the Court expressly adopted a two-prong test: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself.'100 The Court found that California's wine pricing system satisfied the first prong of the test since the legislative policy clearly states that its purpose was to permit resale price maintenance.101 The program failed to satisfy the second prong, however, because the state did not actively supervise the program.102 Consequently, the Court held that the entire pricing system was in violation of the Sherman Act because the "national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."103

Despite the rigidity of the "clear articulation and active supervision" standard, some courts treated "home-rule"104

98 Id. at 109. The Court further stated that "the Act does not lose this [state action] exemption simply because, as part of its regulatory framework, it accords existing dealers notice and opportunity to be heard before their franchisor is permitted to locate a dealership likely to subject them to injurious and possibly illegal competition." Id. at 110.
100 Id. at 105 (citing City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 410).
101 Id.
102 Id. The state merely enforced the price schedules established by private parties; it did not review the reasonableness of the price schedules; it did not engage in monitoring of market conditions or review of the entire program. Id. at 105-106.
103 Id. at 106.
104 See supra note 12.
provisions of state constitutions as sufficient authorization for anticompetitive municipal activity. But in *Community Communications Co. v. City of Boulder*, the Court rejected this argument and drew a "bright-line" between home-rule authorization and the required state authorization to qualify for municipal antitrust immunity. In that case, the city of Boulder passed an "emergency" ordinance which prohibited Community Communications Co. (CCC), an existing cable television company, from expanding its business into other areas of the city. The City Council announced that the moratorium was necessary because CCC's continued expansion during the drafting of a model cable television ordinance would discourage potential competitors. CCC filed for an injunction, alleging that Boulder's restriction was in violation of Section 1 of the Sherman Act. Boulder claimed the state action immunity under *Parker* because Colorado's Home Rule Amendment satisfied *Midcal*'s "clear articulation and affirmative expression" requirement. The city contended that the Home Rule Amendment's "guarantee of local autonomy" meant that its cable television regulation was "comprehended within the powers granted." But the Court rejected this contention because the Home Rule Amendment

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107 *Id.* at 838.

108 *Id.* Because of the greatly improved cable television technology, CCC sought to take advantage of the opportunity to expand its service to the entire city; however, the city council chose to invite new competing businesses to enter the Boulder market. *Id.* at 835-38.

109 *Id.* at 838.


111 Community Communications Co. v. City of Boulder, 102 S. Ct. at 842.

112 *Id.* (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 415).
was merely a neutral statement of the state's position with respect to the challenged anticompetitive municipal activity.113 The Court held that since the home rule relationship between the state and the city's anticompetitive activity was "one of precise neutrality," the "clear articulation and affirmative expression" requirement was not satisfied.114 Furthermore, the Court reinforced its position on municipal antitrust liability and the basic limitation of the state action doctrine by stating: "We are a nation not of 'city-states' but of States."115

It is important to note that the Court in City of Boulder expressly left open the question whether a municipal defendant must also satisfy the "active state supervision" test of Midcal.116 The Seventh and Eighth Circuits, however, have held "active state supervision" is not required in order for a municipal defendant to benefit from a state action defense. In Town of Hallie v. City of Eau Claire,117 the Court of Appeals for the Seventh Circuit held that the City of Eau Claire's refusal to provide sewage services to neighboring towns could not be attacked under federal antitrust laws because neither compulsion by state law nor active state supervision is required when the defendant is a municipality.118 Similarly, in Gold Cross Ambulance & Transfer v. City of Kansas City,119 the Court

113 Id. at 843.
114 Id. The Court also stated that in the phrase "contemplated within the powers granted," the term "granted" implied affirmative addressing on the subject by the State. Id. Accordingly, a neutral statement embodied in home-rule amendments lacks any affirmative address on a particular subject. Id.
115 Id. (citing Community Communications Co. v. City of Boulder, 630 F.2d 704, 717 (10th Cir. 1980) (dissent), rev'd, 102 S. Ct. 835 (1982)). In the dissent, Justice Rehnquist argues that the majority's opinion will radically alter the relationship between states and their political subdivisions by effectively destroying the home-rule movement thereby leaving municipalities limited autonomy over local concerns. Id. at 851 (Rehnquist, J., dissenting). See also Freilich and Carlisle, The Community Communications Case: A Return To The Dark Ages Before Home Rule, 14 URB. LAW. at V (1982).
116 102 S. Ct. at 841 n.14. The Court stated that "because we conclude in the present case that Boulder's moratorium ordinance does not satisfy the 'clear articulation and affirmative expression' criterion, we do not reach the question whether that ordinance must or could satisfy the 'active state supervision' test focused upon in Midcal."
117 700 F.2d 376 (7th Cir. 1983).
118 Id. at 381-82.
119 705 F.2d 1005 (8th Cir. 1983).
of Appeals for the Eighth Circuit held that the implementation of a single operator ambulance service by the city fell under the state action exemption because the active supervision requirement only applies when the defendants are private entities or individuals.\textsuperscript{120} Both courts recognized that the active supervision requirement was meant to control potential abuses, by private persons, of the authority conferred upon them to make anticompetitive decisions and to further insure that those decisions are consistent with the state policy at stake.\textsuperscript{121} Moreover, as both courts reasoned, in the municipal defendant context, active supervision would be unnecessary because local governments operate pursuant to the state's delegation of authority to engage in the challenged conduct.\textsuperscript{122} Lastly, the courts questioned the wisdom behind imposing an active supervision requirement, since "[i]t would seem rather odd to require municipal ordinances to be enforced by the state rather than the city itself."\textsuperscript{123} Therefore, a state action defense is available where a municipal defendant can point to a clearly articulated and affirmative state policy and this immunity is available even though active supervision does not exist.\textsuperscript{124}

With the decision of \textit{City of Boulder}, the law of municipal antitrust did a "judicial about-face" from blanket immunity for almost any anticompetitive governmental activity to limited immunity pursuant only to relatively strict requirements of state authorization. The following section will focus on municipal airport litigation after \textit{City of Lafayette} to examine not only the parallel application of the \textit{City of Lafayette/City of

\textsuperscript{120} \textit{Town of Hallie}, 700 F.2d at 384; \textit{Gold Cross Ambulance}, 705 F.2d at 1010.

\textsuperscript{121} \textit{Town of Hallie}, 700 F.2d at 384; \textit{Gold Cross Ambulance}, 705 F.2d at 1010.

\textsuperscript{122} \textit{Gold Cross Ambulance}, 705 F.2d at 1014 (quoting \textit{P. Areeda, Antitrust Law} 47 (Supp. 1982)).

\textsuperscript{123} \textit{Gold Cross Ambulance}, 705 F.2d at 1014 n.17 (quoting \textit{Community Communications Co. v. City of Boulder}, 102 S. Ct. 835 n.6 (Rehnquist, J., dissenting)); \textit{Gold Cross Ambulance}, 705 F.2d at 1015 (quoting \textit{Community Communications Co. v. City of Boulder}, 102 S. Ct. 835, 851 n.6 (Rehnquist, J., dissenting)).

\textsuperscript{124} \textit{Town of Hallie}, 700 F.2d at 384. The court in \textit{Town of Hallie} limited its holding to a local government performing a "traditional municipal function." \textit{Id}. Furthermore, the court expressly reserved the question whether a municipality undertaking an anticompetitive activity that falls outside the scope of a traditional governmental function must be actively supervised by the state. \textit{Id}. at n.18.
Boulder criteria, but also to examine how a few courts have circumvented this criteria.

IV. POST-CITY OF LAFAYETTE DECISIONS

In Woolen v. Surtran Taxicabs, the defendant cities attempted to seek antitrust immunity under two separate state laws. Suit was brought by independent taxicab drivers against Dallas, Ft. Worth, and Surtran. Surtran was owned and operated by the cities of Dallas and Fort Worth and was the exclusive licensee granted the right to pick up taxicab passengers at the DFW airport. Woolen and others alleged a Section 1 violation and sought injunctive relief and treble damages. The cities’ first contention was that a state policy to displace competition with the taxicab regulation was expressed in the Texas Municipal Airport Act. The District Court for the Northern District of Texas, however, relied on a provision of the Act which stated that no ordinance adopted by a municipality should be inconsistent or contrary to Texas or United States laws. The court then held that the plain

126 Id. at 1027. Surtran Taxicabs was a joint operation of Yellow Cab of Dallas and Fort Worth Cab and Baggage Company. Id. Pursuant to an invitation for competitive bids, the cities granted Surtran a permit to pick up passengers at DFW airport. Id. Thereafter, both cities adopted ordinances providing that only holders of permits issued by the Airport Board could provide ground transportation from the airport. Surtran held the only permit. Id.
127 Id. Treble damages is the measure of recovery for antitrust violations. The statute provides: “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained.” 15 U.S.C. § 15 (1976). Award of treble damages is mandatory. See Community Communications Co. v. City of Boulder, 102 S. Ct. at 848 (Rehnquist, J., dissenting).
128 461 F. Supp. at 1031. The defendant cities cited article 46d-4 of the Texas Municipal Airport Act, TEX. REV. CIV. STAT. ANN. arts. 46d-1-22 (Vernon 1969) as evidence of a state policy. This article provides as follows:

(a) In operating an airport . . . such municipality may . . . enter into contract . . . and other arrangements . . . with any person

. . .

(2) conferring the privilege of supplying . . . services or facilities at such airport . . . In each case the municipality may establish the terms and conditions and fix the charges, rentals or fees for the privileges or services . . .

TEX. REV. CIV. STAT. ANN. art. 4 (Vernon 1969).
129 461 F. Supp. at 1031. The provision states, “No ordinance, resolution, rule, regu-
meaning of the provision led to the conclusion that the Texas legislature did not contemplate anticompetitive actions by municipal airport operators.\textsuperscript{130}

The cities alternatively relied on Texas’ Home Rule legislation\textsuperscript{131} as evidence of state policy to displace competition.\textsuperscript{132} The court again rejected the cities’ argument, stating that, at most, the Home Rule provisions seem only to contemplate public safety regulation of transportation.\textsuperscript{133} Finally, the court stated that antitrust immunity granted by virtue of the Home Rule provisions would be a contradiction of the reasoning in \textit{City of Lafayette}:

If these provisions are viewed as evincing a state policy to implement the type of activity complained of here, then they would afford almost blanket exemption from antitrust laws for the activities of municipalities with regard to transportation. That is precisely the result that the Supreme Court sought to avoid in \textit{Lafayette}. \textit{[City of Lafayette]} did require greater evidence of state policy that can be gleaned from \textit{[Texas’ Home Rule Act]}.\textsuperscript{134}

Thus, the \textit{Woolen} court not only refused to find sufficient legislative intent to allow municipalities to regulate airport taxi service, but it also foreshadowed \textit{City of Boulder}’s refusal to permit Home Rule municipalities to regain the blanket immunity lost in \textit{City of Lafayette}. Moreover, it should be noted that the circumstances in \textit{Woolen} closely paralleled those of

\begin{itemize}
\item \textsuperscript{130} 461 F. Supp. at 1031.
\item \textsuperscript{131} Texas’ Home Rule Act granted full powers of local self-government including powers:
\begin{itemize}
\item 12. To prohibit use of any street . . . of the city . . . without first obtaining the consent of government authorities . . . .
\item 21. To regulate, license and fix the charges or fares made by any person owning, operating, or controlling any vehicle of any character used for the carrying of passengers for hire.
\end{itemize}
\item \textsuperscript{132} 461 F. Supp. at 1032.
\item \textsuperscript{133} \textit{Id}.
\item \textsuperscript{134} \textit{Id.} at 1031-32.
\end{itemize}
Continental Bus. A comparison of these two cases reveals that the opinion in City of Lafayette has effectively shifted the burden of proof from the municipal antitrust plaintiff into the municipal antitrust defendant, who must now prove the required state authorization.

In Pinehurst Airlines v. Resort Air Services, the District Court for the Middle District of North Carolina increased the burden of proof for municipalities. Instead of a statutory construction favoring immunity, the court emphasized a state legislative intent to confer antitrust liability. The defendant municipal Air Board claimed sufficient state authorization for granting an exclusive FBO lease to Resort Air Services under a municipal airport act similar to that in Woolen. The court relied on language of a particular section of the airport act which authorized municipal airport operators “to confer the privilege of concessions of supply upon its airport goods, commodities, things, services and facilities; provided that in each case in so doing the public is not deprived of its rightful, equal, and uniform use thereof.” The “rightful public use” language was construed by the court to “clearly contemplate that limits of some sort will be placed” on activities of municipally operated airports. Since the statutory language gave rise to a proper inference of antitrust scrutiny, the court concluded that the legislative intent behind the provision neither directed nor authorized the Airport Board’s grant of exclusive FBO status to Resort Air


138 Id. at 554.

139 The North Carolina statute provides: “Cities and towns authorized to establish airports. That governing body of any city or town in this state is hereby authorized to acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports . . . either within or without the limits of such cities and towns . . .” N.C. GEN. STAT. § 63-2 (1981).

140 476 F. Supp. at 553.


142 476 F. Supp. at 554.
In holding that municipal antitrust liability was proper, the court also stated that Resort Air Services' reliance on the "legislative contemplation" standard was misplaced because City of Lafayette required the defendant to show state direction and authorization of the challenged activity.\(^1\)

The Pinehurst court's inference of legislatively anticipated antitrust scrutiny for municipal airport operators was based, in part, on the great potential for anticompetitive abuses inherent in exclusive licensing of an FBO.\(^2\) But the potential anticompetitive abuses are not limited only to exclusive licensing. The abuses may also arise in circumstances where the municipal airport operators attempt to "squeeze out" competitors. In Guthrie v. Genesee County, New York,\(^3\) a competing FBO, Guthrie, alleged various anticompetitive activities such as a 100 percent increase in hanger rental rates and an additional 100 percent surcharge, which eventually forced Guthrie to leave the airport.\(^4\) In addition to denying any violation of antitrust laws, the defendant\(^5\) contended that the Sherman Act was inapplicable because the challenged activities were conducted pursuant to state legislative authorization to restrict competition.\(^6\) The county relied on the New York Municipal Airport Act which authorized the county to "lease or sub-lease real property or lease, contract or otherwise agree on an exclusive or non-exclusive basis for the entire operation of such airport."\(^7\) Although there was authorization to enter into exclusive agreement, the District Court for the Western District of New York held that the

\(^{143}\) Id. at 555.

\(^{144}\) Id. at 554 n.17. But see Town of Hallie and Gold Cross Ambulance supra notes 116-124 discussing the rejection of state direction with regard to a municipal defendant.

\(^{145}\) Id. at 553.

\(^{146}\) 494 F. Supp. 950 (W.D.N.Y. 1980).

\(^{147}\) Id. at 953. Other activities alleged were the county's refusal to allow Guthrie "client information" or office space in the terminal; the forced removal from the maintenance hanger of all FBO's except for Prior Aviation, a co-defendant; the erection of a snowfence which blocked Guthrie's access to the airport; and a refusal to allow fuel receipt and delivery privileges to Guthrie. Id. at 952-53.

\(^{148}\) The defendants were Genesee County and Prior Aviation Service, a competing FBO. Id. at 952.

\(^{149}\) Id. at 953.

\(^{150}\) Id. at 955 (citing N.Y. GEN. MUN. LAW § 352(5) (McKinney 1974)).
statutory language did not evidence that the legislature contemplated the surcharge and rental increases.\footnote{151} The county’s argument was rejected because it did not identify a state regulatory concern and because there was no indication of active supervision by the state as required by Midcal.\footnote{152} Furthermore, the court utilized the same “public use guarantee” analysis set forth in Pinehurst and concluded that the state legislature intended to impose substantial limits on the county’s authority to operate an airport rather than confer broad monopoly powers.\footnote{153}

Despite the general view that municipal airport enabling statutes are insufficient to confer state action immunity for a municipality’s anticompetitive actions, two recent lower court decisions\footnote{154} have held otherwise based on reasoning reminiscent of cases pre-dating City of Lafayette. Pueblo Aircraft Service v. City of Pueblo\footnote{155} involved a familiar fact situation. The plaintiff, Pueblo Aircraft, was an FBO doing business at Pueblo Memorial Airport along with two other FBO’s.\footnote{156} When Pueblo Aircraft’s lease expired, the City of Pueblo awarded it to a competitor, Pan-Ark, who was declared the successful bidder.\footnote{157} Pueblo Aircraft claimed a Section 1 violation.\footnote{158} The City defended by relying on the Colorado County Airport enabling statute.\footnote{159} The Tenth Circuit held

\footnote{151} Id. at 956.
\footnote{152} For a discussion of Midcal see supra notes 99-103 and accompanying text. See also Corey v. Look, 641 F.2d 32 (1st Cir. 1981). The First Circuit held that pursuant to Midcal, the defendant Public Transportation Authority failed to establish a “clearly articulated and affirmatively expressed” sovereign state policy favoring the Authority’s boycott of competitors in the parking market lot and that there was not active state supervision. Corey v. Look, 641 F.2d at 37. More importantly, the court in Corey overruled its decision in E.W. Wiggins as “no longer controlling on this issue.” Id. at 37 n.7.
\footnote{153} 494 F. Supp. at 957.
\footnote{156} Id. at 807.
\footnote{157} Id.
\footnote{158} Id.
\footnote{159} Id. The Colorado statute provides:

The acquisition of any lands for the purpose of establishing airports
... the acquisition of airport protection privileges; the acquisition, es-
that the county airport statute was an "affirmative legislative action" which granted the city an exemption from federal antitrust laws by declaring the operation of airports to be an exercise of a governmental function for a public purpose and in the public necessity.\textsuperscript{160} Surprisingly, the court based its decision on the governmental/proprietary activity distinction of Chief Justice Burger in \textit{City of Lafayette},\textsuperscript{161} a distinction which has not achieved general recognition as the sole criteria in state action inquiry.\textsuperscript{162} After correctly stating the law from \textit{Parker} to \textit{City of Boulder}, the Tenth Circuit applied the "legislative contemplation standard."\textsuperscript{163} In applying the "legislative contemplation" standard, the court in \textit{Pueblo Aircraft} relied on \textit{E. W. Wiggins},\textsuperscript{164} which held that the Port Authority was immune from antitrust laws because it was performing a

\textsuperscript{160} Pueblo Aircraft Serv. v. City of Pueblo, 679 F.2d at 809. The court also held that under \textit{City of Boulder}, exercise of powers granted to Pueblo under home rule authority was not sufficient to satisfy state action standards required by \textit{Midcal}. \textit{Id.} at 807.

\textsuperscript{161} City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 418 (Burger, C.J., concurring). See \textit{supra} note 73.1 for a discussion of Chief Justice Burger's concurrence.

\textsuperscript{162} See, e.g., City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 392-94. (plurality ignored the district court's finding that the challenged activity was proprietary); Pinehurst Airlines v. Resort Air Serv., 476 F. Supp. at 552 (commenting on \textit{City of Lafayette} plurality's view that state action inquiry was necessary regardless of the nature of the activity, the court stated that "with due deference to the Chief Justice's position, this Court is constrained to follow the approach suggested by the Lafayette plurality."); Ladue Local Lines v. Bi-State Dev. Agency, 433 F.2d at 135 (The court expressly rejected this distinction as "a fallacy.").

\textsuperscript{163} Under the "legislative contemplation" test a political subdivision does not necessarily have to point to a specific detailed legislative authorization. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 415. Instead, the requisite state mandate exists where "[t]he legislature contemplated the kind of activity complained of." \textit{Id.} Apparently, the Tenth Circuit interprets "the kind of activity" in broad terms, such as airport operations, electric utilities, public transportation, etc. Based on the Supreme Court's trend to require more specificity since \textit{City of Lafayette}, however, the Tenth Circuit's broad interpretation of "kind of activity" appears to be erroneous. The Supreme Court probably interpreted "kind of activity" narrowly, e.g., the regulation of FBOs, regulation of ground transportation at airports, price fixing of wine prices, etc.

\textsuperscript{164} For a discussion of \textit{E. W. Wiggins}, see \textit{supra} notes 30-41 and accompanying text. But see Corey v. Look, discussed \textit{supra} note 152 (overruling \textit{E. W. Wiggins} in light of \textit{City of Lafayette} and its progeny).
governmental function. The Pueblo Aircraft court's rationale was based on the conclusion that the Colorado airport statute clearly directed that the operation of municipal airports be a governmental activity. Since regulation of FBO's is within the scope of normal airport operations, the activity challenged was held to be within the legislative intent. Moreover, the court stated that "in its 'governmental capacity' a municipality acts as an arm of the state for the public good on behalf of the state rather than itself." Finally, it is important to note that the Tenth Circuit granted state action immunity without requiring a showing of active state supervision.

The Tenth Circuit's reasoning, however, would seem to fall short of the Supreme Court's reinterpretation of state action since its decision in City of Lafayette. As Midcal expressly reaffirmed, the governmental nature of the municipal activity alone is insufficient to constitute state action because this doctrine requires that the challenged activity be affirmatively authorized by the state in its sovereign capacity. Generally, it is for the state to implement the regulatory policy and the municipality to administer that state policy as an instrumentality of the state. Under Colorado's present system, the anticompetitive activity is initiated by the municipality

165 See supra notes 30-41 and accompanying text.
166 679 F.2d at 811.
167 Id. at 809-11. The court also stated that the airport is operated for the general public and not for the particular advantage of Pueblo inhabitants. Id. This argument is apparently to distinguish City of Lafayette, where the plurality stated that a municipality functions in the interests of its citizens which may often be at odds with national policy. City of Lafayette, 435 U.S. at 406-08. If what the Tenth Circuit says of airports is true, then all airports are necessarily for the benefit of the general public because the primary purpose of air transportation is long distance travel.
168 Pueblo Aircraft Serv. v. City of Pueblo, 679 F.2d at 810.
170 See supra notes 110-153 and accompanying text.
171 California Retail Liquor Dealers Assoc. v. Midcal Aluminum, 445 U.S. at 105. See also Town of Hallie; Gold Cross Ambulance supra notes 96.1-96.9 and accompanying text.
172 "[M]unicipal corporations are instrumentalities of the State for the convenient administration of government within their limits." City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 413. (quoting Louisiana ex rel. Folsom v. Mayor of New Orleans, 109 U.S. 285, 287 (1883)).
under general airport enabling act powers which the state legislature declares to be governmental. Arguably, this constitutes a governmental act of the municipality, not a governmental act of the state. As the Court in *Midcal* stated, "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement."\(^{173}\) Nevertheless, the United States Supreme Court denied certiorari to the petition in *Pueblo Aircraft*.\(^ {174}\)

V. AVOIDANCE OF MUNICIPAL ANTITRUST LIABILITY: AN OPERATIONAL FRAMEWORK

In terms of antitrust law coverage, the operators of municipal airports have experienced a virtual about-face from a period of blanket municipal antitrust immunity to the present policy of general municipal antitrust liability with only a narrow exception under the "clear articulation and affirmative expression" standard. This turnaround may hinder the efficient operation of municipal airports by their owners and operators who must make decisions under an ominous cloud of antitrust liability.\(^ {175}\) The Tenth Circuit's liberal interpretation of state action in *Pueblo Aircraft*, however, may indicate a standard which permits federal courts to find the required state legislative mandate from the broad enabling statutes which authorize operation of the nation's municipal airports. But if a court does find that the airport activity is not entitled

\(^{173}\) California Liquor Dealers Assoc. v. Midcal Aluminum, 445 U.S. at 106.

\(^{174}\) 51 U.S.L.W. 3498 (U.S. Jan. 11, 1983) (No. 82-352). In All-American Cab Co. v. Metropolitan Knoxville Airport Auth., 547 F. Supp. 509 (E.D. Tenn. 1982), the plaintiff taxi cab companies alleged that the airport's exclusive ground transportation services dispatcher discriminated among taxi services and monopolizing ground transportation at the airport. The court, however, held that the airport authority was exempted from antitrust laws because TENN. CODE ANN. § 42-4-102 (1980) declares the airport authority's purpose to be governmental. All American Cab, 547 F. Supp. at 511. The court primarily relied on *Pueblo Aircraft* and *Padgett* (a pre-*City of Lafayette* decision). *Id.* For a discussion of *Padgett*, see supra notes 49-59 and accompanying text.

\(^{175}\) Of course, activities of municipalities in general are affected; however, the focus of this article is on airport activities. Cf. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 439 (Stewart, J., dissenting) ("But a city contemplating such [monopolized public service] action in the interest of its citizens will be able to do so . . . only at the risk of discovering too late that a federal court believes that insufficient statutory direction existed . . . ").
to immunity from antitrust scrutiny, the substantive issue still must still be resolved: whether the activity challenged did in fact violate the Sherman Act. Finally, as a corollary to the substantive issue, the court must decide what sanctions are available against a municipal defendant.

A. The Pueblo Aircraft Standard

_Pueblo Aircraft_ stands for the proposition that if state legislation directs airport operation to be a governmental function for a public purpose and in the public necessity, and the activity complained of is within the scope of the airport's normal operation, then the airport is immune under the state action doctrine. The factor distinguishing the operating of municipal airports from other municipal functions is that airports benefit the general public, while an activity such as the operating of an electric utility primarily benefits the municipality's own citizens. Under the _Pueblo Aircraft_ standard, airport operators are able, in a practical sense, to achieve the same high level of operational freedom from antitrust scrutiny that was once available before _City of Lafayette_. In pre-_City of Lafayette_ cases, the courts looked to statutory language to determine the nature of the airport's function: if its activity was declared a governmental function, the airport was granted automatic immunity because _Parker_ held that antitrust laws do not apply to governmental actions. The _Pueblo Aircraft_ standard apparently would operate in the same manner.

The primary element of the _Pueblo Aircraft_ standard is that the state must clearly direct that airport operations be gov-

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176 679 F.2d 805 (10th Cir. 1982).
177 _Pueblo Aircraft_ Serv. v. City of Pueblo, 679 F.2d at 809-11. For a discussion of _Pueblo Aircraft_, see _supra_ notes 155-174 and accompanying text.
178 _Pueblo Aircraft_ Serv. v. City of Pueblo, 679 F.2d at 11. _See supra_ note 170.
179 _Cf. City of Lafayette v. Louisiana Power & Light Co._, 435 U.S. at 404. The Court stated that the municipal utility's practices "would provide maximum benefits for its constituents, while disserving the interests of . . . captive customers outside its jurisdiction." _Id_.
180 _See supra_ notes 175-69 and accompanying text.
181 _Id_.
ernmental for a public purpose and in the public necessity. The broadness of this standard lies in the fact that many states, in addition to Colorado, have similar airport acts containing the requisite statutory language. For example, the Texas Municipal Airports Act provides that the:

[O]peration, regulation, protection, and policing of airports . . . and [of] air navigation facilities, including the acquisition or elimination of airport hazards and the exercise of any other powers herein granted to municipalities and other public agencies, to be severally or jointly exercised, are hereby declared to be public and governmental function, exercised for a public purpose, and matters of public necessity . . .

This is the same airport act which the Woolen court regarded as being insufficient proof of legislative contemplation to invoke state action immunity. Pursuant to the Pueblo Aircraft standard, however, a Texas airport would be granted antitrust immunity because the Texas legislature declared the operation of municipal airports to be governmental functions exercised for a public purpose and in matters of public necessity. Therefore, so long as the challenged anticompetitive activity is within the normal scope of airport operations, Texas municipal airports are allowed to function under the umbrella of state action immunity as interpreted by Pueblo Aircraft.

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182 See Pueblo Aircraft Serv., 679 F.2d at 811.

[The] planning acquisition, establishment, construction, improvement, maintenance, equipment, and operation of airports and air navigation facilities, whether by the State separately or jointly with any political subdivision, and the exercise of any other powers granted to the department by this part are public and governmental functions, exercised for a public purpose, and are matters of public necessity.

185 It is submitted that those airports which are not statutorily declared to be exercising governmental functions will most likely be denied the state action immunity because, in the absence of express statutory direction, the operation of a municipal airport is generally a proprietary function. See Pueblo Aircraft Service v. City of Pueblo, 679 F.2d at 810-11. See, e.g., Pinehurst Airlines v. Resort Air Service, 476 F. Supp. 548 (M.D.N.C. 1979), discussed supra in notes 137-144 and accompanying text;
In order to come under the *Pueblo Aircraft* standard, the activity must also come within the normal scope of airport operations. This requirement is consistent with Justice Steven’s opinion in *Cantor* that an implied exemption from federal antitrust laws will be granted “only to the minimum extent necessary.”

To define which activities are within the normal scope of airport activities, one commentator has suggested a distinction between central and subsidiary activity in assessing potential antitrust liability. A central airport activity is one which “must encompass the power to engage in those pursuits necessary to enable the airport authority to fulfill its legislative obligation to provide airport services.”

Subsidiary activities are those which provide a broad range of services that cater more to the convenience of travelers rather than to their safe departure and arrival. Some typical subsidiary activities include car rental services, hotel accommodations, restaurants, bars, food and beverage concessions, newsstands, and gift shops. The antitrust implication attached to this distinction is that the subsidiary activity’s connection with legislative authorization is more tenuous, thereby increasing the potential for antitrust liability. Conversely, as one commentator stated, “the more

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Pueblo Aircraft Serv. v. City of Pueblo, 679 F.2d at 809.

*Cantor* v. Detroit Edison Co., 428 U.S. 579 (1976), discussed supra notes 74-77 and accompanying text. Professor Rogers, a noted antitrust authority, points out that the “minimum extent necessary” test of *Cantor* does not flow from *Parker*. Rather, this test has its origins in situations involving a conflict between federal regulatory policy and the antitrust laws. Furthermore, the preemption analysis basis of Justice Rehnquist’s dissenting opinion of *City of Boulder* was foreshadowed in 1978 by Professor Rogers when he stated that “*Cantor* represents the first attempt to transpose this [state action] standard to conflicts between state regulation and federal antitrust policy.” Rogers, *The State Action Antitrust Immunity*, 49 U. Col. L. Rev. 147, 166 (1978). See supra note 27, for a discussion of the federal preemption/exemption debate.

428 U.S. at 597.

Hermann, supra note 1 at 353.

*Id.* at 355-56. Examples of central activities include maintenance of runways and terminals, securing of FBO services and other activities which provide for safe takeoff and landing of airplanes, and the accommodation of passengers. *Id.* at 355.

*Id.* at 356. Subsidiary services may also be referred to as attendant services. *Id.*

*Id.*
central an activity is to the establishment and operation of an airport, the more likely it is to be found within the legislative mandate or authorization of the airport authority.\textsuperscript{194}

This central/subsidiary distinction would serve the purpose of providing some sort of benchmark for both the municipal airport operators and the judiciary to determine whether a particular activity falls within the Pueblo Aircraft standard. The more central the activity, the more likely it is that the legislature contemplated the activity to be within the operative scope of its airport act. The drawback to this distinction is that the exact scope of a central activity is difficult to ascertain.\textsuperscript{195}

Ground transportation and FBO leases are activities which the courts have declared to be central to the operation of an airport.\textsuperscript{196} All of the municipal airport antitrust cases previously discussed are either suits arising out of ground transportation regulation \textsuperscript{197} or those arising out of FBO regulation.\textsuperscript{198} These cases represent recurrent fact situations in which the municipality is a facility operator granting an exclusive privilege.\textsuperscript{199} Since most, if not all, of the major airport antitrust litigation concerns regulation of central activities, the defendant airports have a substantial defense under the Pueblo Air-

\textsuperscript{194} Id. at 355.

\textsuperscript{195} Id.

\textsuperscript{196} See, e.g., Padgett v. Louisville & Jefferson County Air Btl., 492 F.2d at 1260 ("the regulation of ground transportation services is necessarily incident to the management and operation of the airport facilities"); E. W. Wiggins Airways v. Massachusetts Port Auth., 362 F.2d at 53 n.2 ("A fixed based operation is vital to air transportation").


\textsuperscript{199} See P. Areeda, Antitrust Law 66 (Supp. 1982).
craft standard. The availability of this defense may eventually tip the scales in favor of the defendant airports by virtually negating the restraints of *City of Lafayette* and its progeny. The municipal airport operator, however, may also decide to grant exclusive privileges to provide a service which is questionable as to the centrality of its relation to necessary airport operations, i.e., a subsidiary activity. In such case, a fact-sensitive determination is required to define the airport’s operative scope and to ascertain whether the subsidiary service is an activity within the legislative intent of the state airport act. If the activity is determined to be outside the scope of the airport’s operations and therefore outside of the *Pueblo Aircraft* standard, then the airport operator may be subject to antitrust scrutiny under the rigid “clear articulation and active supervision” requirement of *Midcal*. Nevertheless, if the municipal airport operator is involved in an antitrust action, the suit will most likely arise out of the recurrent fact situation of ground transportation or FBO regulation creating an exclusive licensee. Because both ground transportation and FBO service are well-settled central activities, the airport operators should not be overburdened with judicial antitrust scrutiny since immunity is available under the *Pueblo Aircraft* standard.

B. **Procurement of State Authorization**

Another method for an airport operator to avoid antitrust liability is procurement of state authorization for the potentially anticompetitive activity. For a regulatory municipal ordinance to be exempt under the state action doctrine, the ordinance or activity must satisfy one of the following two criteria:

1) constitute action by the state itself in its sovereign capacity; or

2) i) constitute municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy to displace competition; and

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²⁰ See *supra* note 196 and accompanying text.
ii) There must be active state supervision.201

Since the airport operator is a municipality, Town of Hallie and Gold Cross Ambulance require only that there be a clearly articulated and affirmatively expressed state policy to displace competition.202 Active state supervision would not be required.203 Whether this standard is properly satisfied necessarily requires inquiry into state legislation to find the elusive state policy to displace competition. The inquiry must reveal state authorization for the municipality's anticompetitive actions.204 The test used to find the necessary legislative mandate is from City of Lafayette,205 in which the Court held "that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units 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."206 The search for a legislative mandate will involve the legislative history of the statute, as well as the statutory language itself. The major drawback of the "legislative contemplation" test is the absence of legislative history in most states, thereby making the search for a "clear expression" of state policy difficult when it is not evident on the face of the act.207

Despite the lack of legislative history, statutory authorization of airport regulatory activity is the source of immunity most often relied upon by municipal operators. The Pueblo Aircraft standard represents an alternative source, but statutory authorization rests on a more solid foundation pursuant to Supreme Court cases from City of Lafayette to City of Boulder. Statutory authorization is the most reliable source of immu-

201 Community Communications Co. v. City of Boulder, 102 S. Ct. 835 (1982).
202 For a discussion of Town of Hallie and Gold Cross Ambulance see supra notes 116-124 and accompanying text.
203 Id.
204 Professor Areeda emphasized the role of state authorization. He stated: "authorization helps distinguish state policy displacing antitrust laws from decisions made by subordinate governmental entities which have not been removed by the state from antitrust scrutiny . . . ." P. AREEDA, ANTITRUST LAW 371 (Supp. 1982).
206 Id. at 415.
207 Hermann, supra, note 1 at 371.
nity only so long as there is "clear articulation and affirmative expression" by the state. Under the statutory authorization approach, airport authorities must use a hindsight approach, i.e., the airport authority which implements a potentially anticompetitive program must fall back on the airport enabling act and hope that a state policy to allow the airport to so act was clearly articulated by the state legislation. As seen in decisions such as Woolen v. Surtran Taxi cabs, however, airport enabling acts are usually set out in terms too general to satisfy claims of "clear articulation and affirmative expression."

The prudent alternative for the foresighted municipal airport operator is to procure specific state authorization for those activities which may be potentially anticompetitive to the extent that antitrust scrutiny is warranted. Accordingly, before the municipal airport operator acts, he should have procured specific legislative authorization. In light of the "clear articulation and affirmative expression" standard, the following rule of thumb is advised: the more specific and direct the legislative mandate, the more likely the antitrust suit court will be to find that the municipality or airport authority is exempt from the proscriptions of the antitrust laws. The precision demanded of the statutory authorization requires: 1) the legislation must authorize the challenged activity and 2) that the legislature must do so with the intent to displace antitrust laws. This rule of thumb merely recognizes that "it will be necessary for a court to find that the legislation invoked by airport authorities explicitly or implic-
itly mandates the exercise of monopoly powers in the establishment or operation of the airport. 212

Procurement of specific legislative authorization, however, has drawbacks with regard to its practical applicability. A substantial problem is the fact that any act by the airport operator is anticompetitive to some extent. Consequently, any act may be open for challenge as anticompetitive in violation of the Sherman Act. For example, a losing bidder for an FBO lease at an airport may bring an antitrust suit alleging a conspiracy in restraint of trade against the airport board and the winning bidder. 213 Another drawback to procurement is the inherent inefficiency of petitioning the state legislature for special legislation on every occasion the airport operator may decide to implement some potentially monopolistic activity. But this procurement process may be what the plurality in City of Lafayette intended when it stated that municipalities may conduct anticompetitive acts only as an instrumentality of the state. 214

C. Municipal Antitrust Liability: The Substantive Issue

City of Lafayette and its progeny dealt only with the threshold question of antitrust immunity for municipalities. The mere fact that certain activities by the municipalities may no longer qualify under state action immunity does not necessarily mean that such actions actually violate the Sherman Act. The plurality in City of Lafayette merely held that a municipality's status as a governmental entity does not entitle it to an automatic exemption under the state action doctrine. 215 Moreover, the plurality expressly reserved the question of an-

212 Hermann, supra, note 1 at 372. See supra notes 125-152 and accompanying text. But see Pueblo Aircraft, 679 F.2d 805 (10th Cir. 1982), discussed supra in notes 155-174 and accompanying text.

213 See, e.g., Pueblo Aircraft, 679 F.2d 805 (10th Cir. 1982), discussed supra in notes 155-174 and accompanying text; Guthrie, 494 F. Supp. 950 (W.D.N.Y. 1980), discussed supra in notes 146-153 and accompanying text; E.W. Wiggins, 362 F.2d 52 (1st Cir. 1966), discussed supra in notes 30-41 and accompanying text. See also P. Areeda, Antitrust Law 56 (Supp. 1982).

214 City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 413.

215 Id. at 408.
titrust liability. Although once it is determined that the airport does not qualify for state action immunity, the trial court must still resolve the substantive issue of whether the municipal defendant did in fact violate the Sherman Act.

Despite having incidental effects on market competition, many challenged activities do not violate the antitrust laws. Without incurring antitrust liability, a private corporation has the right to grant an exclusive franchise and has a free choice to refuse to deal with any concessionaire in an area. A state subdivision also has the right to grant exclusive licenses at an airport since antitrust laws are equally applicable to governmental entities. Accordingly, although the political subdivision is not immune from antitrust liability, it does not necessarily follow that a substantive violation exists because both a subdivision and a corporation are "persons" within the antitrust laws who may grant exclusive licenses without violating the Sherman Act.

Furthermore, a municipal airport operating without benefit of state action immunity may be challenged on an activity which does not have a sufficient nexus to meet the requirements of the Sherman Act. The Sherman Act requires that a defendant municipality's activities have a direct and substantial impact on interstate commerce. In United States v. Yellow Cab, the United States sought to restrain a monopoly of taxicab services conveying railroad passengers to and from railway stations. The Supreme Court held that plaintiff failed to state a claim under the Sherman Act:

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216 Id. at 402. See also Community Communications Co. v. City of Boulder, 102 S. Ct. at 843 n.20 ("We do not confront the issue of remedies appropriate against municipal officials").


219 3 P. AREEDA & D. TURNER, ANTitrust LAW 263 (1974). Professor Areeda states that "as operator of a facility, even a private monopolist is allowed by the antitrust laws to have a single [exclusive] concessionaire." P. AREEDA, ANTitrust LAW 64 (Supp. 1982).

220 Community Communications Co. v. City of Pueblo, 102 S. Ct. at 843.

221 Id. See City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 397.


224 332 U.S. 218 (1947).
[w]hen local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation. And a restraint on or monopoly of that general local service, without more, is not proscribed by the Sherman Act.\(^2\)\(^2\)\(^5\)

Therefore, a monopoly of the ground transportation services at an airport is not sufficiently connected to interstate commerce to invoke the proscriptions of the Sherman Act. Accordingly, in a situation such as that in *Woolen v. Surtran Taxicabs*,\(^2\)\(^6\) in which cities monopolized the taxicab services at Dallas-Fort Worth Regional Airport, a court would not reach the question of antitrust liability. Although the cities would be denied state action immunity, the suit probably would be decided in favor of the airport operators because the substantive inquiry of antitrust liability would lead to dismissal under *United States v. Yellow Cab*.

In assessing municipal antitrust liability, the courts use either the *per se* rule or the rule of reason to determine whether an unreasonable restraint of trade exists in violation of Section 1 of the Sherman Act.\(^2\)\(^2\)\(^7\) These are the same tests used when there is a private defendant. The rule of reason inquires into "whether the restraint merely regulates and perhaps promotes competition or whether it suppresses or even destroys competition."\(^2\)\(^2\)\(^8\) The *per se* rule declares certain activities as unreasonable as a matter of law under Section 1.\(^2\)\(^2\)\(^9\)

\(^{225}\) Id. at 233.
\(^{228}\) Id. at 1014. Certain relevant factors taken in account by the rule of reason include:
(1) Facts particular to the business;
(2) The condition of the businesses before and after the restraint;
(3) The nature of the restraint and its effect;
(4) History of the restraint; and,
(5) The reason and purpose for adopting the restraint.
*Id.* (quoting Chicago Board of Trade v. United States, 246 U.S. 238 (1918)).
\(^{229}\) Id. The rationale for the *per se* rule is that such types of conduct "have a pernicious effect on competition and lack of any redeeming virtue . . . ." *Id.* (citing Northern Pac. R.R. v. United States, 365 U.S. 1 (1958)).
Judicially recognized *per se* violations of Section 1 are price fixing, market division or allocation, group boycott and tying arrangements.\(^{230}\)

Both the rule of reason and the *per se* rule were judicially created in a private business activity context;\(^{231}\) accordingly, application of either rule in the public municipality context requires certain modifications to compensate for the private public distinction. The first modification is that the *per se* rule should not be applicable to municipalities.\(^{232}\) As a public corporation, the municipality generally acts in the public interest.\(^{233}\) Upon engaging in one of the *per se* violations, however, the municipality will not be allowed to proffer any public benefit justification if the *per se* rule applied.\(^{234}\) The *per se* rule was created in a private business context where profit-maximization concepts lead to plainly anticompetitive conduct which is "without redeeming value."\(^{235}\) In contrast, the municipality's conduct, which is generally non-competition based, will have "redeeming virtues" such as broad public benefit and even some possibly pro-competitive effects.\(^{236}\) Use of the *per se* rule denies consideration of these virtues.

The rule of reason is the more desirable rule to apply to a municipal antitrust defendant because it takes into account

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\(^{230}\) Id. at 1014-15.


\(^{232}\) Id.


\(^{234}\) Once a *per se* violation is established, "no economic evidence will be received as to the precise harm they caused or the business excuse for their use." Beane, *supra* note 227 at 1014. See, e.g., Pueblo Aircraft Serv. v. City of Pueblo, 679 F.2d at 806 (where the city's lease agreement required all FBOs to purchase all aviation fuel to be used at the airport). If, however, the city was denied antitrust immunity, the court would have to exclude any justification for the *per se* violation when deciding on the question of antitrust liability. Therefore, the city would have been guilty of a Section 1 violation as a matter of law.

\(^{235}\) Hoskins, *supra* note 231 at 684-85.

\(^{236}\) Id.
the relevant circumstances of the type of conduct. Moreover, the rule of reason takes into account the public nature of the municipality because injury to the public must be established before a restraint will be held to violate this standard of liability. But since most of the relevant considerations were developed in the private defendant context, the rule of reason should be modified slightly to accommodate the municipality's public status. One commentator has suggested that unless the municipality's conduct falls within a per se category, "the ultimate resolution of antitrust issues will depend on an application of the rule of reason, which involves weighing the social harms and benefits, and consideration of less restrictive alternatives for achieving the desired benefits." The most important distinction between the rule of reason and the per se rule is that the rule of reason allows the courts to recognize that whether the activity is violative of the Sherman Act may depend on the status of the defendant. One court noted: "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 government."

D. Municipal Antitrust Sanctions

The United States Supreme Court has yet to rule on the availability of damages or other sanctions against public antitrust defendants. In City of Boulder, the most recent municipal antitrust decision, the Court again passed on this issue stating that "this case's preliminary posture makes it unnecessary for us to consider other issues regarding the applicability of the antitrust laws in the context of suits by private litigants against government defendants." The Court,

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237 See supra note 228 and accompanying text.
238 See Beane, supra note 227, at 1014.
239 See supra note 231 and accompanying text.
240 Curtin, supra note 233, at 36.
242 P. Areeda, ANTITRUST LAW 48 (Supp. 1982).
243 Community Communications Co. v. City of Boulder, 102 S. Ct. at 843 n.20.
however, did state that antitrust laws, like other federal laws imposing civil and criminal sanctions on “persons,” also apply to municipalities.\textsuperscript{244} Accordingly, the antitrust sanctions available against private defendants are presumably available against municipalities.

Both Sections 1 and 2 of the Sherman Act provide that a violation shall be deemed a felony.\textsuperscript{245} Corporate violations are punishable by a fine in the maximum amount of one million dollars.\textsuperscript{246} Violations by individuals are punishable by three years imprisonment or a fine in the maximum amount of one hundred thousand dollars.\textsuperscript{247}

The civil sanctions for violations are potentially the most devastating consequences for both private and public antitrust defendants. Section 4 of the Clayton Act provides for treble damages. It states: "A person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefrom . . . and shall recover threefold the damages by him sustained, and the cost of suit, including reasonable attorney’s fee."\textsuperscript{248} In addition to treble damages, private injunctive relief may be had under Section 16 of the Clayton Act, which provides that "any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by violation of the antitrust laws."\textsuperscript{249}

The spectrum for antitrust sanctions against municipal defendants is fairly broad, ranging from criminal conviction to treble damages. It is submitted that antitrust liability for municipalities should be limited to the granting of injunctive relief. Taking into account the public nature of the

\textsuperscript{244} Id. at 843.
\textsuperscript{245} Section 1 provides: “every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.” 15 U.S.C. § 1 (1976). Section 2 provides: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .” 15 U.S.C. § 2 (1976).
\textsuperscript{246} U.S. §§ 1,2 (1976).
\textsuperscript{247} Id.
municipality, it is doubtful that Congress meant to include state entities within the realm of the criminal and treble damage provisions. The dissent in City of Lafayette pointed out that awards of treble damages against a municipality could cause the bankruptcy of even a large city.\(^\text{250}\) Although the plurality in City of Lafayette suggested that treble damages might not be appropriate against a municipality,\(^\text{251}\) the simple fact remains that under the Clayton Act treble damages are mandatory.\(^\text{252}\)

Even if treble damages do not bankrupt a city, such liability is ultimately the burden of the city's taxpayers. Treble damages are appropriate against private corporations where the stockholders voluntarily assumed the risk by buying into the company.\(^\text{253}\) In contrast, a defendant municipality's taxpayers have no choice but to pay the necessary taxes to absorb the trebled liability.\(^\text{254}\)

Professor Areeda, a noted antitrust authority, argues that "it appears very doubtful that Congress intended to subject state or local government to federal control through criminal punishment of public officials or treble damages payable to private parties out of the public treasury."\(^\text{255}\) Federal control as described would violate the very principles of federalism on which the state action doctrine was founded in Parker v. Brown.\(^\text{256}\) Moreover, this type of federal control would have a chilling effect on the willingness of municipalities to provide new or innovative public services. In limiting municipal antitrust sanctions to injunction of future anticompetitive conduct, the courts will still be able to "effectuate federal antitrust policy, safeguard the competitive rights of private parties and avoid placing an unduly harsh burden upon

\(^{250}\) City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 440 (Stewart, J., dissenting). The plaintiff in City of Lafayette claimed $180 million in damages against the two cities. A trebled amount equalling $540 million would most likely bankrupt the two cities which had a combined population of a mere 75,000. Id.

\(^{251}\) Id. at 401-02 and n.22.

\(^{252}\) Id. at 440. See supra note 248 and accompanying text.

\(^{253}\) Hoskins, supra note 231, at 687.

\(^{254}\) Id.

\(^{255}\) P. Areeda, Antitrust Law 48 (Supp. 1982).

\(^{256}\) For a discussion of Parker v. Brown, 317 U.S. 341 (1943), see supra notes 19-28 and accompanying text.
municipalities."\(^{257}\)

The dissent in *City of Boulder* suggested a federalism approach to deal with the question of sanctions on municipalities for violations of the antitrust laws. Justice Rehnquist contended that the state action doctrine is a preemption doctrine founded on the principles of federalism and the Supremacy Clause.\(^ {258}\) In support of his deviation from the generally accepted view that state action is an exemption doctrine, Justice Rehnquist stated:

\[\text{[Parker v. Brown] is clearly the language of federal preemption under the Supremacy Clause . . . . There was no language of "exemption" either express or implied, nor the usual incantation that "repeals by implication are disfavored." Instead, the Court held that state regulation of the economy is not necessarily preempted by the antitrust laws even if the same acts by purely private parties would constitute a violation of the Sherman Act.}\(^ {259}\)

Justice Rehnquist contended that the majority misconstrued the *Parker* doctrine as an exemption from the Sherman Act. He further stated that the issue in state action is not whether the anticompetitive municipal ordinance is exempt from the Sherman Act but "whether [the] statutes, ordinances, and regulations enacted as an act of government are preempted by the Sherman Act under the operation of the Supremacy Clause."\(^ {260}\)

The benefit derived by using the preemption analysis is that a state statute or municipal ordinance in conflict with the Sherman Act will be deemed preempted under the Supremacy Clause.\(^ {261}\) On the other hand, an exemption analysis runs into problems of whether a municipality may be

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\(^{255}\) 102 S. Ct. at 847.

\(^{256}\) Id. at 845 (emphasis added).

\(^{257}\) Id. at 846-47.
liable under the per se rule and whether a municipality is liable for treble damages for enacting anticompetitive ordinances not exempted by the Parker doctrine. Justice Rehnquist concluded that "since a municipality does not violate the antitrust laws when it enacts legislation preempted by the Sherman Act, there will be no problems with the remedy. Preempted state or local legislation is simply invalid and unenforceable." 

VI. CONCLUSION

Prior to City of Lafayette, operators of municipal airports enjoyed blanket immunity from antitrust scrutiny predicated on a finding of a governmental cloak for the challenged anticompetitive activity. After the Court in City of Lafayette refused to grant automatic immunity to municipalities by virtue of their status as governmental entities, courts routinely denied antitrust immunity to airport operators. The general airport enabling acts were held to be an insufficient legislative mandate to conduct the challenged anticompetitive practices. The rationale in Pueblo Aircraft, however, may be a new source of broad antitrust immunity for airport operators so long as the state legislation specifies that airport operations are governmental functions for a public purpose and in the public necessity. Also, the anticompetitive activity challenged must be central to necessary airport operations since the immunity granted is only to the minimum extent necessary.

The threshold question of antitrust immunity must be kept in perspective. The mere fact that some municipal activity fails to qualify for state action immunity does not necessarily mean that its conduct is in violation of the antitrust laws. After the threshold immunity question, the substantive issue of whether the municipality did in fact violate the antitrust laws must be determined before antitrust sanctions are imposed. Moreover, to assess a substantive antitrust violation,

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262 See supra notes 231-241 and accompanying text.
263 See supra notes 250-257 and accompanying text.
264 Community Communications Co. v. City of Boulder, 102 S. Ct. at 848.
265 Id. at 848 n.4.
the courts should only apply the rule of reason to the municipal defendant. If antitrust liability is found to be appropriate, the sanction imposed on municipalities should be limited to an injunction of future anticompetitive actions. This equitable remedy should be imposed to the exclusion of criminal and monetary sanctions which will unduly burden the municipal defendant. Finally, adoption of the federal preemption analysis in place of the exemption analysis would alleviate many problems in applying the antitrust laws to municipalities.