

THE APPLICATION OF THE FEDERAL ANTITRUST LAWS TO MUNICIPAL TAXICAB REGULATION

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I. INTRODUCTION

The Supreme Court's decisions in *City of Lafayette v. Louisiana Power & Light Co.*¹ and *Community Communications Co. v. City of Boulder*,² have put municipalities on notice that their regulation of various industries or municipally owned services may violate the federal antitrust laws. Antitrust liability may potentially arise in a wide range of activities, including: municipally run gas, electric, water or waste facilities; municipally owned or regulated airports, golf courses, public parks or stadiums; municipally regulated cable television, zoning or transportation industries; as well as several other municipally regulated or owned functions. This article analyzes the likelihood that municipal taxicab regulation may violate federal antitrust laws. This article does not address the potential antitrust liability of state or county governments for taxicab regulation, nor does it address the potential antitrust liability of private parties such as taxicab owners or operators.

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1. 435 U.S. 389 (1978).
2. 455 U.S. 40 (1982).

Part II of this article describes the two-part test the Supreme Court has adumbrated for determining whether municipalities are exempt from the federal antitrust laws. Under this test, a municipality must first identify legislation that “clearly articulates and affirmatively express[es]”³ a state policy to exempt from the federal antitrust laws the aspects of the municipality’s regulation that violate these laws. Second, the Supreme Court’s test also may require proof that the municipality “actively supervis[es]”⁴ the exempt activity. The Supreme Court has not yet settled many important legal issues concerning this two-part test, including:

- 1) Must a municipality prove “active supervision,” or will identification of a state statute “clearly articulating” a policy to exempt the municipality from the federal antitrust law satisfy the test?
- 2) If a municipality is liable for violating the federal antitrust laws, will it, like corporate offenders, be liable for treble monetary damages or will it merely be subject to an injunction ordering compliance?
- 3) If the municipality cannot obtain exemption, will the courts subject it to the same substantive antitrust rules as it does for private parties, or will the courts create new antitrust standards to regulate municipalities?

Part III of this article analyzes municipal taxicab regulators’ compliance with the Supreme Court’s test for exemption from the federal antitrust laws. This part identifies as a major cause for concern the failure of the overwhelming majority of states to adopt statutes “clearly articulating” a policy to exempt municipal taxicab regulation. If, however, the “active supervision” requirement applies to municipalities, many municipalities appear to satisfy this requirement.

The concluding part of this article analyzes the three choices available to municipalities in light of the *Lafayette* and *Boulder* decisions. First, municipalities can choose not to respond, primarily on the assumption that the risk of a lawsuit appears very small. Second, municipalities can “deregulate” entry limitations or fare-setting and, in that way, avoid the risk of liability under the federal antitrust laws. Third, municipalities can secure enactment of a state statute “clearly

3. *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

4. *Community Communications Co. v. City of Boulder*, 445 U.S. 40, 51 n.14 (1982).

articulating" a policy to exempt municipal taxicab regulation from the federal antitrust laws and adopt by ordinance sufficient procedures to insure satisfaction of the "active supervision" requirement. A model state statute appears as the appendix to this article.

II. THE STANDARD OF LAW

*City of Lafayette v. Louisiana Power and Light Co.*⁵ and *Community*

5. 435 U.S. 389 (1978). The *Lafayette* decision is the subject of several law review articles, notes and comments. See, e.g., Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. L. REV. 435 (1981); Bangasser, *Exposure of Municipal Corporations to Liability for Violations of the Antitrust Laws: Antitrust Immunity After the City of Lafayette Decision*, 11 URB. LAW. vii (1979); Bern, *The Noerr-Pennington Immunity for Petitioning in Light of City of Lafayette's Restrictions on the State Action Immunity*, 1980 ARIZ. ST. L.J. 279 (1980); Curtin, *Antitrust Comes to the Cities—Analysis of City of Lafayette v. Louisiana Power & Light Co. and its Effect on Municipal Antitrust Liability*, 5 U. DAYTON L. REV. 7 (1980); Kennedy, *Of Lawyers, Lightbulbs and Raisins: An Analysis of the State Action Doctrine Under the Antitrust Laws*, 74 NW. U.L. REV. 31 (1979); Melton, *The State Action Antitrust Defense for Local Government: A State Authorization Approach*, 12 URB. LAW. 315 (1980); Rose, *Municipal Activities and the Antitrust Laws After City of Lafayette*, 57 U. DET. J. URB. L. 483 (1980); Rose, *Municipal Antitrust Liability After City of Lafayette*, 42B MUN. L. REV. 203 (1979); Taurman, *Reflections on City of Lafayette: Applying the Antitrust "State Action" Exemption to Local Governments*, 13 URB. LAW. 159 (1981); Note, *Lafayette v. Louisiana Power & Light Co.—The State Action Doctrine and Municipalities*, 1979 DET. C. L. REV. 299 (1979); Note, *Antitrust—Municipalities are Exempt from Antitrust Statutes only when their Respective State Legislatures Authorize or Contemplate that they Engage in the Anticompetitive Conduct Pursuant to a State Policy to Displace Competition—City of Lafayette v. Louisiana Power & Light Co.*, 28 DRAKE L. REV. 513 (1978); Note, *Antitrust—Municipalities Subject to Suit—City of Lafayette v. Louisiana Power & Light Co.*, 28 U. KAN. L. REV. 166 (1979); Note, *Antitrust—Whither Municipal Antitrust Liability After Lafayette?*, 15 WAKE FOREST L. REV. 89 (1979); Note, *Post Lafayette Municipal Liability for Refusing to Zone Outlying Development*, 59 WASH. U. L. Q. 485 (1981); Note, *Antitrust Law—Municipal Immunity—Application of State Action Doctrine to Municipalities*, 1979 WIS. L. REV. 570 (1979); Comment, *Municipal Antitrust Liability—Applying City of Lafayette v. Louisiana Power & Light Co.*, 31 BAYLOR L. REV. 563 (1979); Comment, *The Airport Car Rental Concessions—The Role of City of Lafayette v. Louisiana Power & Light Co. in Restricting Threats to Free Competition*, 14 CAL. W.L. REV. 325 (1978); Comment, *Applicability of Federal Antitrust to State and Municipal Action: A Case Against the Current Approach*, 16 HOUS. L. REV. 903 (1979); Comment, *Antitrust Laws, Zoning, and Agreements to Zone: Delegation of Police Power After Lafayette v. Louisiana Power & Light Co.*, 25 S.D.L. REV. 314 (1980); Comment, *Municipal Antitrust Liability: City of Lafayette v. Louisiana Power & Light Co.*, 18 URBAN L. ANN. 265 (1980); Comment, *Antitrust: Municipal Anticompetitive Activity*, 18 WASHBURN L.J. 129 (1978); Comment, *City of Lafayette v. Louisiana Power & Light Co.: Will Municipal Antitrust Liability Doom Effective State-Local Government Relations?*, 36 WASH. & LEE L. REV. 129 (1979); Recent Decision, *Antitrust—Sherman Act—Parker Doctrine Exemption Available to*

*Communications Co. v. City of Boulder*⁶ both held that a municipality may violate the federal antitrust laws. For a municipality today to claim the "state action" exemption⁷ from the antitrust laws, the municipality first must establish that the state clearly articulated and affirmatively expressed as state policy the intent to exempt the restraint, and, second, prove that it actively supervised the restraint.

Section A under Part II begins by analyzing the origins of the state action exemption for municipalities. It discusses the Supreme Court decisions that create potential antitrust liability for municipalities. Section B addresses the requirement that the state clearly articulate and affirmatively express as state policy the intent to exempt the alleged restraint of trade from antitrust liability. The Supreme Court has held that both states and municipalities seeking exemption for activities that otherwise would violate the federal antitrust laws must show state statutory authorization for the alleged restraint. Section B also explains what the state statute must provide by reviewing Supreme Court and lower federal court decisions.

Section C of Part II considers the requirement that the municipalities actively supervise the restraint. The Supreme Court has held that for a state to claim the state action exemption, the state must show it actively supervises the alleged restraint of trade. The Supreme Court has not yet indicated whether municipalities also must satisfy this requirement. Section C describes Supreme Court and lower federal court applications of the active supervision requirement to states. If the Supreme Court should ultimately hold that municipalities also must satisfy the active supervision requirement, assumedly the same rules for satisfying the active supervision requirement currently applicable to states also will apply to municipalities.

Political Subdivision Only When Subdivision is Acting Within the Ambit of State Legislative Intent, 49 MISS. L.J. 725 (1978).

See also I. AREEDA & D. TURNER, ANTITRUST LAW 66-119 (1978); I. AREEDA, ANTITRUST LAW: 1982 SUPPLEMENT 46-75 (1982).

6. 455 U.S. 40 (1982). See ANTITRUST & LOCAL GOVERNMENT: PERSPECTIVES ON THE *Boulder* DECISION (J. Siena ed. 1982); Hoskins, *The "Boulder Revolution" in Municipal Antitrust Law*, 90 ILL. B.J. 684 (1982); Vanderstar, *Liability of Municipalities under the Antitrust Laws: Litigation Strategies*, 32 CATH. U.L. REV. 395 (1983); Note, *Antitrust—State Action—Home Rule Municipality's Ordinances Not Exempt from Sherman Act—Community Communications Co. v. City of Boulder*, 12 SETON HALL L. REV. 835 (1982); Recent Development, *Municipalities and the Antitrust Laws: Home Rule Authority is Insufficient to Ensure State Action Immunity*, 35 VAND. L. REV. 1041 (1982).

7. *Parker v. Brown*, 317 U.S. 341, 352 (1943).

The final section in Part II, entitled "Unsettled Legal Issues Concerning Municipal Antitrust Liability," addresses two other issues on which the Supreme Court has not yet ruled: 1) should a municipality be liable for treble damages or should it be subject only to injunctive relief? and 2) will the same antitrust rules applicable to private parties also apply to municipalities, or will the courts create new standards to apply to municipalities?

A. *The Origins of the State Action Exemption for Municipalities*

The Sherman Act⁸ condemns every contract or combination which restrains interstate trade or commerce.⁹ The Supreme Court has determined that the following contracts, combinations or conspiracies in restraint of trade, among others, are per se violations of section 1 of the Sherman Act: 1) Price-fixing agreements between or among competitors;¹⁰ 2) division of territories or customers by competitors;¹¹ and 3) agreements to boycott or group refusals to deal with a particular firm or association.¹² If a restraint of trade is per se illegal, no defense exists for the restraint. Once a court properly characterizes a restraint in a per se category, a finding of violation automatically follows.¹³

Without exemption from the federal antitrust laws, several aspects of municipal taxicab regulation might be subject to these per se rules. For example, fixing uniform fare rates might violate the per se rule against price-fixing. Similarly, limiting the number of taxicabs that operate in a municipality might also violate the per se rules.

Until 1975, Supreme Court decisions suggested that the regulatory activities of states and of municipalities generally were exempt from the Sherman Act. The 1943 *Parker v. Brown*¹⁴ opinion was the

8 15 U.S.C. §§ 1-7 (1982).

9. Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." *Id.*

10. *See* *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

11. *See* *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972).

12. *See* *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

13. *See* *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

14. 317 U.S. 341 (1943). The first federal court case to address the state action exemption from the Sherman Act was *Lowenstein v. Evans*, 69 F. 908 (D.S.C. 1895). *Lowenstein* dismissed an action against the South Carolina Board of Control which regulated a monopoly in the purchase and sale of alcoholic liquors in that state on the ground that the state was neither a corporation nor a person under the Sherman Act

Supreme Court's leading state action decision. *Parker* involved a California raisin producer's challenge to the state's system of prorating the production of raisins. The California Agriculture Prorate Act¹⁵ authorized *inter alia* the establishment of state boards which limited the production of agricultural commodities. The state boards maintained higher raisin prices than would exist absent the program by permitting raisin producers to sell in ordinary commerce only 30 percent of their total production. Of the remaining 70 percent of each crop, the program required that the producer place 20 percent into a "surplus pool" and 50 percent into a "stabilization pool." The committee would use the surplus pool only for by-products, and would sell from the stabilization pool only to the extent that the sales would not affect the prevailing market prices.¹⁶

The Supreme Court assumed that if the prorate program had been organized and effectuated solely by virtue of contract, combination or conspiracy by private parties, the program would violate the Sherman Act.¹⁷ The Court, however, held that the prorate program did not violate the Sherman Act because it could find no language in the

and therefore the Act did not apply to the state agency. Similarly, in *Olsen v. Smith*, 195 U.S. 332, 344-45 (1904), the Supreme Court held that a Texas statute limiting the number of sailing pilots in the port of Galveston was valid under the Sherman Act because the state had authority to regulate in the absence of Congressional regulation. By contrast, in *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904), the Court held that a state incorporation act could not permit corporations engaged in interstate commerce to merge in violation of the Sherman Act. *Northern Securities* implied that state regulation of purely intrastate commerce permissibly could conflict with the Sherman Act, but held that once a state-created corporation engaged in interstate activity, the supremacy clause of the Constitution required compliance with national, not state, law. *Id.* at 350.

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) is consistent with *Northern Securities*. The fixing of the price by a manufacturer at which wholesalers or retailers resell the manufacturer's goods is per se illegal. *Dr. Miles Medical Co. v. John Park & Sons Co.*, 220 U.S. 373 (1911). In 1950, the Miller-Tydings Act, a federal statute, permitted a state to enact a law allowing manufacturers to enter contracts with their distributors fixing resale prices. Louisiana had such a statute. It, however, went beyond the Miller-Tydings Act by permitting a manufacturer to fix resale prices with non-signers of a contract once a single Louisiana distributor had signed the resale price agreement. The Supreme Court refused to enforce the Louisiana law against liquor retailers who had not signed agreements with two interstate liquor distributors. As in *Northern Securities*, the Court denied the state's claim of exemption because it purported to reach interstate commerce subject to the Sherman Act. 341 U.S. at 387-89.

15. 317 U.S. at 344 (citation and description of Act).

16. 317 U.S. at 347-48.

17. *Id.* at 350.

Act or its history which indicated any purpose to restrain the state, its officers or agents from acting in accordance with the state legislature. The Court further stated that it would not attribute lightly to Congress an unexpressed intent to nullify a state's authority over its officers and agents.¹⁸

The *Parker* decision strongly suggested exemption from the Sherman Act for virtually all state regulation because the Act's legislative history did not even imply a purpose to restrain state action.¹⁹ The Court identified only one type of state or municipal activity as a violation of the Sherman Act: state or municipal participation in a private agreement or combination in restraint of trade.²⁰ The Sherman Act, however, did not apply where, as in California's proration program, the state statutorily created a regulatory program and prescribed the conditions of its application. The Court concluded that the state entered no contract or conspiracy in restraint of trade but imposed the program as an act of a sovereign state government. The Sherman Act did not prohibit this activity.²¹

For thirty-two years, *Parker* endured as the Supreme Court's last word concerning the state action exemption from the Sherman Act. Then, between 1975 and 1982, the court decided seven more cases concerning the state action exemption. In the first of these decisions, *Goldfarb v. Virginia State Bar*,²² the Court narrowed the availability of the state action exemption. The state agency status of the State Bar of Virginia did not exempt it from the Sherman Act. The State Bar, therefore, could not enforce price-fixing through the publication by the local county bars of minimum fee schedules. The Court held that the price-fixing violated the antitrust laws because the activity did not constitute state action.²³ The Court stated that it was not

18. *Id.* at 351.

19. *Id.* The Supreme Court noted further that the sponsor of the bill which became the Sherman Act declared "that it prevented only 'business combinations.'" *Id.*

20. *Id.* at 351-52.

21. *Id.* at 352.

22. 421 U.S. 773 (1975).

23. *Id.* at 790-91. The Court stated that:

Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor

enough that the state "prompted" anti-competitive activities; for the activity to fall under the state action exemption, the state, acting as sovereign, must have "compelled" the activity.²⁴

Subsequent cases amplified the requirement that the state clearly articulate and affirmatively express as state policy the intent to exempt the alleged restraint from antitrust liability. In *Cantor v. Detroit Edison*,²⁵ a private utility corporation had secured approval from the Michigan Public Service Commission of a tariff under which it provided light bulbs to consumers and then billed them for the use of electricity without a separate charge for the light bulbs. A Michigan statute²⁶ granted the Michigan Public Service Commission express powers "to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities."²⁷ The Court stated that the statute contained no direct reference to light bulbs, nor did any other Michigan statute authorize the regulation of that business.²⁸ The Court further stated that neither the Michigan Legislature nor the Michigan Public Service Commission had ever made an investigation into the desirability of a light bulb exchange program or its potential effect on competition in the light bulb market.²⁹ Since the Commission's approval of Detroit Edison's light bulb program failed to implement any statewide policy regarding light bulbs,³⁰ the Court held that Detroit Edison could not claim an exemption from the antitrust laws absent a clear state policy. In contrast, was the Supreme Court decision in *Bates v. State Bar of Arizona*.³¹ In *Bates*, an Arizona Supreme Court rule expressly prohibited a lawyer from publicizing himself by newspaper or magazine advertisements.³² The United States Supreme Court found that the application of the disci-

which arose from respondents' activities. . . . Respondents' arguments, at most, constitute the contention that their activities complemented the objective of the ethical codes. In our view that is not state action for Sherman Act purposes.

Id.

24. *Id.*

25. 428 U.S. 579 (1976).

26. MICH. COMP. LAWS § 460.6 (1970).

27. 428 U.S. at 584.

28. *Id.*

29. *Id.*

30. *Id.* at 585.

31. 433 U.S. 350 (1977).

32. *Id.* at 355.

plinary rule justified exemption from the Sherman Act because the state supreme court "is the ultimate body wielding the State's power over the practice of law, . . . and, thus, the restraint is 'compelled by direction of the state acting as a sovereign.'"³³

The Court's analysis in *New Motor Vehicle Board v. Orrin W. Fox Co.*³⁴ was similar to that of *Bates*. *New Motor Vehicle Board* involved a California statute that clearly required an automobile manufacturer to notify existing franchisees before establishing a new dealership within ten miles. Under the franchisee's protest, the manufacturer was required to submit to a hearing before the Board to determine whether good cause existed for the manufacturer's refusal to permit the establishment of the dealership.³⁵ The Court found that the Automobile Franchise Act "clearly articulated and affirmatively expressed" a regulatory scheme; and, the Act had a purpose "designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships."³⁶ The Court consequently held that the state action doctrine exempted the regulation from the antitrust laws.³⁷

The *New Motor Vehicle Board* decision also emphasized that the State of California satisfied a second requirement for exemption by providing "ongoing regulatory supervision" through notice and hearing procedures.³⁸ The Court, however, found in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,³⁹ that the state did not provide adequate supervision for its wine pricing program. In *Midcal Aluminum*, a California statute required wine producers, wholesalers and rectifiers to file a fair trade contract or price schedule specifying the prices at which they sold wine to retailers or consumers. The state could subject a wholesaler to fines, license suspension or license revocation proceedings if the wholesaler failed to comply with the resale price on file. The Supreme Court held that although the California wine pricing system satisfied the clear articulation and

33. *Id.* at 360.

34. 439 U.S. 96 (1978).

35. *Id.* at 103.

36. *Id.* at 109.

37. *Id.*

38. *Id.* at 110.

39. 445 U.S. 97 (1980).

affirmative expression requirement,⁴⁰ the policy did not meet the second requirement articulated in *Parker* because the state did not actively supervise the program.⁴¹

The application to municipalities of the state action test for exemption from the federal antitrust laws began with the Supreme Court's decision in *City of Lafayette v. Louisiana Power & Light Co.*⁴² The State of Louisiana granted to the City of Lafayette the power to own and operate electric utility systems both within and outside its city limits. Lafayette sued Louisiana Power & Light Company for alleged antitrust violations. Louisiana Power & Light Company filed a counter-claim seeking damages from the City of Lafayette for the City's alleged antitrust violations which the private utility claimed had injured its business. The City of Lafayette sought dismissal of this counter-claim, urging that the *Parker* state action doctrine exempted the city from the federal antitrust laws.⁴³ A 5-4 majority of the Supreme Court held that the City of Lafayette's electric utility activities were not exempt from the federal antitrust laws. The five-Justice majority, however, disagreed among themselves as to why the federal antitrust laws applied to the City of Lafayette. Four Justices agreed with Justice Brennan's opinion that began with the premise that mere municipality status did not mandate a blanket exemption from the antitrust laws. Brennan's opinion stated that "municipalities are 'exempt' from antitrust enforcement when acting as state agencies implementing state policy to the same extent as the State itself. . . ."⁴⁴ The municipality must, however, identify evidence "that the State authorized or directed a given municipality to act as it

40. *Id.* at 105. The Court further stated that: "The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance." *Id.*

41. The Court stated:

The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program. 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. As *Parker* teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ."

Id. at 105-06.

42. 435 U.S. 389 (1978).

43. *Id.* at 391-92.

44. *Id.* at 413 n.42.

did" if it seeks to claim exemption.⁴⁵

The fifth Justice in the majority, Chief Justice Burger, analyzed the case in a strikingly different way. He urged that the City of Lafayette's management of an electric utility was a proprietary activity that should be as much subject to the antitrust laws as the business activities of any private firm. At the same time, he suggested that a municipality's traditional governmental functions should receive a comprehensive exemption.⁴⁶

*Community Communications Co. v. City of Boulder*⁴⁷ was the other Supreme Court decision that extended to municipalities the state action test for exemption from the antitrust laws. By a 5-3 vote, the Supreme Court held that the granting of "home rule" powers to the City of Boulder, Colorado, including the delegation of all powers that the legislature possessed concerning local and municipal matters,

45. *Id.* at 414. Justice Brennan qualified the requisite showing that the municipality must have made to assert a *Parker* defense. Justice Brennan stated that:

This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit. While a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals 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."

Id. at 415 (quoting *Lafayette*, 532 F.2d at 434).

46. *Id.* at 418-26. Burger explicitly relied on *National League of Cities v. Usery*, 426 U.S. 833 (1976) as support for his distinction between municipal proprietary and governmental activities. The *National League of Cities* Court did not apply the Federal Fair Labor Standards Act to the States and their subdivisions, stating:

We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. . . .

One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions. . . . The question we must resolve here, then, is whether these determinations are "functions essential to separate and independent existence". . . .

Id. at 845.

Stewart, dissenting in *Lafayette*, criticized Burger's proprietary-governmental distinction as "virtually impossible to determine." The distinction between 'proprietary' and 'governmental' activities has aptly been described as a 'quagmire.'" 435 U.S. at 433. *Accord*, 1 I. AREEDA & D. TURNER, *supra* note 5, at 90-91.

47. 455 U.S. 40 (1982).

would not satisfy the clear articulation and affirmative expression requirement.⁴⁸ The Court also rejected suggestions that its decisions would adversely affect state-municipal relations.⁴⁹

The recent Supreme Court decisions clearly establish that a municipal action or regulation in restraint of trade may come under the state action exemption from the antitrust laws only if the action or regulation satisfies the clear articulation and affirmative expression as state policy requirement.⁵⁰

B. The Requirement that the State Clearly Articulate and Affirmatively Express as State Policy the Intent to Exempt the Alleged Restraint of Trade

Several Supreme Court decisions have described as the initial requirement for state action exemption that the state clearly articulate and affirmatively express as state policy the intent to exempt the alleged restraint of trade. The *Goldfarb* decision confirmed that a state could not claim exemption unless it could identify a state statute re-

48. *Id.* at 52. The Court explained:

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

Id.

49. *Id.* at 56. The Court stated:

[J]udicial enforcement of Congress’ will regarding the state-action exemption renders a State “no less able to allocate governmental power between itself and its political subdivisions. It means only that when the State itself has not directed or authorized an anticompetitive practice, the State’s subdivisions in exercising their delegated power must obey the antitrust laws.”

Id. at 56-57 (quoting *Lafayette*, 435 U.S. at 416).

50. A somewhat different formulation of the test for exemption appeared in *Sound, Inc. v. American Tel. and Tel. Co.*, 631 F.2d 1324 (8th Cir. 1980) where the court stated:

We are convinced, however, that the following factors are relevant to our determination: the existence and nature of any relevant statutorily expressed policy; the nature of the regulatory agency’s interpretation and application of its enabling statute, including the accommodation of competition by the regulator; the fairness of subjecting a regulated private defendant to the mandates of antitrust law; and the nature and extent of the state’s interest in the specific subject matter of the challenged activity.

Id. at 1334. The Supreme Court’s affirmation of its two-part test for exemption in *Boulder* makes clear that to the degree the test in *Sound* conflicts with the Supreme Court test, the standard in *Sound* is not the law. 455 U.S. at 51.

quiring or compelling the alleged restraint of trade.⁵¹ The state statute must at least refer to the alleged restraint of trade.⁵² A general delegation of "home rule" power will not satisfy the clear articulation and affirmative expression requirement since the state then assumes merely a neutral position regarding the action challenged as anticompetitive.⁵³ In ascertaining the significance of a statutory reference to an alleged restraint of trade, courts will accord some weight to the legislative history, including an investigation of the alleged restraint and its effect on competition.⁵⁴ A municipality, however, need not point "to a specific, detailed legislative authorization" before it may secure a state action exemption.⁵⁵ Express language in a state statute directing an anticompetitive approach will satisfy the clear articulation and affirmative expression requirement.⁵⁶

The precise contours of the clear articulation and affirmative expression requirement remain somewhat unclear. The Supreme Court decisions make clear that a state statute requiring or compelling a municipality to regulate the rates or limit the number of taxis in a municipality would satisfy this requirement. No antitrust exemption, however, would exist for a municipality which fixed taxicab rates or limited entry without state legislation concerning regulation of taxicabs. Regarding cases between the two extremes, Harvard law School Professor Phillip Areeda relies on language in *Lafayette* to urge that it is not mandatory for a state statute to compel a municipality's regulatory actions, as distinguished from a party's actions; it is sufficient that a state statute granted the municipality "authority . . . to operate in a particular area" or "contemplated the kind of action complained of. . . ." Conceding that the state legislative history often is lacking and state statutes often are ambiguous, Areeda suggests that courts will "assume that the legislature intends the 'reasonable,' but require more specific language or legislative history to

51. 421 U.S. at 790.

52. *Id.*; *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 584 (1976).

53. *Boulder*, 455 U.S. at 55.

54. *Cantor*, 428 U.S. at 584-85.

55. *Lafayette*, 435 U.S. at 415. "[A]n adequate state mandate for anticompetitive activities of cities . . . exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'" *Id.*

56. *Bates*, 433 U.S. at 359-63; *New Motor Vehicle Board*, 439 U.S. at 109-11; *Midcal*, 445 U.S. at 104-05.

justify the 'exceptional.'⁵⁷

Areeda's approach means that a state statute granting to a municipality the authority to regulate taxicabs would satisfy the initial requirement if a court found that rate regulation or limits on the number of taxicabs were "reasonable" or "ordinary." By contrast, if a court concluded that the displacement of the antitrust laws which regulated taxicab rates or limits on the numbers of taxicabs were "extraordinary," it would require either: 1) more specific language in the statute—for example, a statutory grant of authority to a municipality to regulate taxicabs including the authority to fix rates or limit the number of competitors; or 2) a legislative history indicating that the state legislature contemplated rate regulation or limits on the number of taxicabs when it enacted the statute empowering the municipality to regulate taxicabs.⁵⁸

Only one reported court decision, *Golden State Transit Corp. v. City of Los Angeles*,⁵⁹ has focused on whether the state action exemption is available to a municipality for denying a taxicab company a license to operate in the municipality. In *Golden State Transit*, the Los Angeles City Council failed to renew a taxicab corporation's operating franchise. The federal district court dismissed the cab corporation's subsequent antitrust lawsuit, in part, on grounds that the State of California "clearly articulated and affirmatively expressed" a policy which displaced competition by taxicab regulation.⁶⁰ The State asserted the power to control taxicab operations through enactment of Chapter 8 of the Public Utilities Code.⁶¹ The court recognized that the Public Utilities Code delegated to the City of Los Angeles licens-

57. Areeda, *supra* note 5, at 445-48; I. AREEDA, ANTITRUST LAW: 1982 SUPPLEMENT 53-55, 59-62 (1982). Cf. Thomas, *supra* note 5, at 361-66 (a somewhat different analysis of the requirement).

58. Areeda, *supra* note 5, at 447.

59. 1983-1 Trade Cas. (CCH) ¶ 65,448 (D. Cal. Apr. 29, 1983).

60. *Id.*

61. *Id.* See CAL. PUB. UTIL. CODE §§ 5351-60 (Deering 1951 & Supp. 1984). Specifically, Chapter 8 applies to any "charter-party carrier of passengers," which includes "every person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage over any public highway in this State." . . . Plaintiff's taxicab operations clearly fall within this definition of utilities subject to state regulation of fares and other conditions of operation. The Public Utility Code provides, however, that taxicabs are not subject to state regulation if a municipal subdivision licenses and regulates such operations. . . .

Golden State Transit, 1983-1 Trade Cas. (CCH) ¶ 65,448, at 70,557.

ing and regulatory power over taxicab operations within the City's boundaries. The court then stated that if the City failed to exercise this regulatory power, the Commission would act in the City's place.⁶²

The California Public Utilities Code, however, also contains language which excludes taxicab transportation from regulation by that Code. Section 5353 of the Code states that the provisions of Chapter 8 do not apply to, among other things, taxicab service⁶³ licensed and regulated by a city or county, by ordinance or resolution.⁶⁴ If the parties choose to appeal this case, the court of appeals may either reverse the district court decision on grounds that the language of the code does not affirmatively express a policy permitting a municipality to limit entry, or alternatively, the court of appeals may affirm the decision because the exclusionary language appears in a chapter of the Public Utilities Code.

The *Golden State Transit* case well illustrates that lower federal courts do not always precisely follow the holdings of the United States Supreme Court. A review of the relevant lower federal court decisions, however, reveals a pattern generally consistent with the Supreme Court's decisions. The lower federal courts consistently hold that a statute compelling a regulatory agency to impose an allegedly anti-competitive restraint satisfies the clear articulation and affirmative expression requirement.⁶⁵ The courts also consistently hold that it is not necessary for state legislation to expressly compel a municipality or other government entity to impose an allegedly anticompetitive restraint.⁶⁶ The case law further indicates that state

62. *Id.*

63. The Code specifies that the taxicab service covered under this exclusion is transportation service "rendered in vehicles designed for carrying not more than eight persons excluding the driver." CAL. PUB. UTIL. CODE § 5353(g) (Deering 1951 & Supp. 1984).

64. *Id.*

65. See *Gambrel v. Kentucky Bd. of Dentistry*, 689 F.2d 612, 619 (6th Cir. 1982); *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981); *Star Lines, Ltd. v. Puerto Rico Maritime Shipping Auth.*, 451 F. Supp. 157, 166 (S.D.N.Y. 1978); *Schiessle v. Stephens*, 525 F. Supp. 763, 776-77 (N.D. Ill. 1981); *Kartell v. Blue Shield of Mass.*, 542 F. Supp. 782, 786-90 (D. Mass. 1982); *Bally Mfg. Corp. v. New Jersey Casino Control Comm'n*, 85 N.J. 325, 335-36, 426 A.2d 1000, 1006 (1981), *appeal dismissed*, 454 U.S. 804 (1981).

66. See *United States v. Southern Motor Carriers Rate Conf.*, 672 F.2d 469, 473 (5th Cir. 1982); *Pueblo Aircraft Serv. v. City of Pueblo*, 679 F.2d 805 (10th Cir. 1982); *Highfield Water Co. v. Public Serv. Comm'n*, 488 F. Supp. 1176, 1190 (D. Md. 1980).

legislation normally must articulate specific restraints of trade, and courts will not usually infer the power to restrain trade from a general state statute.⁶⁷ If, however, the state legislature considered the type of alleged antitrust restraint challenged before adopting the relevant statute, a court is more likely to find satisfaction of the clear articulation requirement by an ambiguous statute than it would be absent the legislative history.⁶⁸

C. The Requirement that the Municipality Must Actively Supervise the Alleged Restraints

Only two Supreme Court decisions have analyzed, at any length, the requirement that a state actively supervise the area of alleged antitrust violation. In *New Motor Vehicle Board v. Orrin W. Fox Co.*,⁶⁹ the Court held that the existence of a state board which employed ongoing notice and hearing procedures satisfied the active supervision requirement.⁷⁰ In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,⁷¹ the Court found inadequate supervision where the state authorized price-setting by private parties without any review of the reasonableness of the fixed prices.⁷²

The lower federal courts have not had great difficulty construing

67. See, e.g., *Phonetele v. American Tel. and Tel. Co.*, 664 F.2d 716, 736 (9th Cir. 1982) (“[I]mmunity from the antitrust laws will not be implied.”); *Hahn v. Oregon Physicians’ Serv.*, 508 F. Supp. 970, 976 (D. Or. 1981) (“To be entitled to state action immunity, the state’s anticompetitive policy must be affirmative, not passive or inferential.”), *rev’d on other grounds*, 689 F.2d 840 (9th Cir. 1982); *Grason Elec. Co. v. Sacramento Mun. Util.*, 526 F. Supp. 276, 278-80 (E.D. Cal. 1981) (pervasive municipal regulation of utility nevertheless lacked express policy for electrical distribution installation monopoly); *Mason City Center Ass’n v. City of Mason*, 468 F. Supp. 737, 442-43 (N.D. Iowa 1979) (Iowa zoning statute did not clearly displace competition in favor of monopoly by shopping center), *aff’d*, 671 F.2d 1146 (8th Cir. 1982).

But see *Euster v. Eagle Downs Racing Ass’n*, 677 F.2d 992, 994-95 (3rd Cir. 1982) (a state horse racing commission entitled to promulgate jockey fees given its broad supervisory powers over thoroughbred racing); *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956 (W.D. Mo. 1982) (municipality designated a single ambulance service on the basis of a comprehensive state statute for licensing and regulating ambulance companies which did not address the issue of monopolistic versus competitive ambulance systems).

68. See, e.g., *Euster*, 677 F.2d at 995.

69. 439 U.S. 96 (1978).

70. *Id.* at 109-10.

71. 445 U.S. 97 (1980).

72. *Id.* at 105-06. See *Bates*, 433 U.S. at 361-62; 1 I. AREEDA & D. TURNER, *supra* note 5, at 73-79.

the active supervision requirement. Those cases which lack any state or municipal supervision clearly do not satisfy the requirement.⁷³ Where the state or municipality has the means to investigate compliance with a regulation scheme, courts consistently hold that this satisfies the active supervision requirement.⁷⁴ Similarly, where states or municipalities possess the means to consider rate changes,⁷⁵ hold hearings prior to license revocation or suspension,⁷⁶ or possess the power to enforce the statutory scheme,⁷⁷ courts consistently find satisfaction of the active supervision requirement. In many cases, primary considerations of the courts are whether private parties initiated the alleged antitrust violation, and whether the state enforced the alleged violation without review of the reasonableness of such actions. Where private parties merely file prices at a state agency and the filings are not subject to state review, courts do not find active supervision.⁷⁸ Where, however, the alleged restraint emanates directly from a state statute,⁷⁹ state commission,⁸⁰ or city council,⁸¹ courts often find satisfaction of the active supervision requirement.

The courts do not appear to require rigorous supervision as long as state control of the alleged antitrust restraint seems to exist. In *Horsemen's Benevolent and Protective Ass'n v. Pennsylvania Horse Racing Comm'n*,⁸² the Court held that a state commission's approval of fees paid to jockeys met the active supervision requirement even though the Jockeys' Guild had suggested the fee schedule. The court noted that the Commission had given the interested parties the opportunity to object to the proposed increase in jockey fees; after considering the

73. See, e.g., *Corey v. Look*, 641 F.2d 32, 37 (1st Cir. 1981).

74. See, e.g., *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 825 (9th Cir. 1982); *First Am. Title Co. v. South Dakota Land Title Ass'n*, 541 F. Supp. 1147, 1163 (D.S.D. 1982).

75. See, e.g., *Morgan v. Division of Liquor Control*, 664 F.2d 353, 356 (2d Cir. 1981).

76. See, e.g., *Gold Cross Ambulance*, 538 F. Supp. at 966-67; *Hinshaw v. Beatrice Foods, Inc.*, 1980-81 Trade Cas. (CCH) ¶ 63,584 (D. Mont. Aug. 29, 1980).

77. See, e.g., *Gambrel*, 689 F.2d at 620.

78. See, e.g., *Miller v. Oregon Liquor Control Comm'n*, 688 F.2d 1222, 1226 (9th Cir. 1982).

79. See, e.g., *Gambrel*, 689 F.2d at 620; *Morgan*, 664 F.2d at 356.

80. See, e.g., *Euster*, 667 F.2d at 995-96.

81. See, e.g., *Golden State Transit Corp. v. City of Los Angeles*, 1983-1 Trade Cas. (CCH) ¶ 65,448 (D. Cal. Apr. 29, 1983).

82. 530 F. Supp. 1098 (E.D. Pa. 1982).

objections, the Commission had voted to adopt the Jockeys' Guild's proposed fee increase.⁸³

The important unsettled question concerning the active supervision requirement is whether municipalities must satisfy the requirement, as must states and state agencies. A few lower court decisions have held⁸⁴ or speculated⁸⁵ that municipalities need not satisfy the active supervision requirement. The most recent relevant Supreme Court decision, *Boulder*,⁸⁶ explicitly stated that the Court did not address the question of whether a municipal ordinance must satisfy the active supervision test.⁸⁷ Given the application to states of the active supervision requirement, it is probable, though not certain, that courts will also require municipalities to satisfy the active supervision test.⁸⁸

Thus, at this time, for a municipality to secure the state action exemption from the federal antitrust laws, state legislation must clearly articulate and affirmatively express as state policy the intent to exempt the alleged restraint. The state action exemption is not available unless the state has enacted a statute specifically addressing the area of alleged restraint. If the state has passed a statute addressing a specific area of potential antitrust restraint, the municipality may satisfy this part of the test for exemption even if the legislation is not precise or detailed.

It is, however, unclear whether the municipality also must show that it actively supervises the area of alleged antitrust violation. If the municipality must do so, the Supreme Court and lower federal court case law are reasonably clear that the municipality may prove active supervision by showing that it has ongoing notice and hearing procedures.

D. *Unsettled Legal Issues Concerning Municipal Antitrust Liability*

The Supreme Court has not ruled on several questions relevant to determination of a municipality's potential liability for violation of the antitrust laws. These questions may determine what efforts a mu-

83. *Id.* at 1108.

84. *See* *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983).

85. *See Gold Cross Ambulance*, 538 F. Supp. at 966.

86. 455 U.S. 40 (1982).

87. *Id.* at 51 n.14.

88. *See* McMahon, *Recent Significant Developments in "State Action" and Noerr-Pennington Exemptions: From Boulder to the "Sham Exception,"* 14 U. TOL. L. REV. 531, 531-56 (1983).

nicipality will take to comply with the federal antitrust laws. This section analyzes two critical, unsettled questions regarding a municipality's potential liability and the relevant substantive antitrust rules.

1. Will a Municipality Be Liable for Treble Monetary Damages, or Will It Be Subject Only to Injunctive Remedies?

Under the federal antitrust laws, injured parties may recover treble damages, court costs and attorneys' fees from the antitrust law violators perpetrating the injury.⁸⁹ Whether or not courts will apply this treble damages provision to municipalities which violate the antitrust laws without an effective exemption is an unsettled question of great import in the state action area. If cities can be liable, their potential monetary exposure is enormous—for example, when trebled, the claim against the defendant cities in *Lafayette* amounted to \$540 million.⁹⁰ It is probable, but not certain, that federal courts will not award treble damages for municipal antitrust violations in the regulation of taxicabs. The Supreme Court has not yet addressed the issue of remedy for a municipal antitrust violation that fails to come under state action exemption, but has reserved the issue for future decision.⁹¹

Several commentators urge that municipalities should not be liable for monetary damages.⁹² These commentators stress several arguments to justify not assessing treble damages against municipalities for antitrust violations. First, enjoining future violations of the antitrust laws is an available alternative remedy and normally will suffice

89. 15 U.S.C. § 15 (1982). "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *Id.*

90. 435 U.S. at 440 (Stewart, J., dissenting).

91. See *Lafayette*, 435 U.S. at 400-02; *Boulder*, 455 U.S. at 56 n.20 ("[W]e do not confront the issue of remedies appropriate against municipal officials."). In a survey of damages brought against municipalities, apparently complete through March 1983, the National Institute of Municipal Law Officers reported that no court has sustained a damages award against a municipality. *But see* *Affiliated Capital v. City of Houston*, 700 F.2d 226 (5th Cir. 1983) (Mayor of Houston, but not the City of Houston, held liable with other private parties for damages of \$6.3 million).

92. See, e.g., I I. AREEDA & D. TURNER, *supra* note 5, at 101-08; I. AREEDA, *supra* note 5, at 48-49; Note, *Antitrust Treble Damages as Applied to Local Government Entities: Does the Punishment Fit the Defendant*, 1980 ARIZ. ST. L.J. 411, 413-28 (1980); Melton, *supra* note 5, at 371-75; Hoskins, *supra* note 6, at 686-87.

to deter future misconduct.⁹³ Permitting plaintiffs to recover treble damages from the private parties involved with the local government in the antitrust violation can satisfy the compensatory and incentive rationales for treble damages.⁹⁴

Second, it is difficult to believe that Congress intended to transfer treble damages from the tax-paying citizens of a municipality to business enterprises claiming injury as a result of the municipality's economic policies. An antitrust damages award might bankrupt a city.⁹⁵ Inevitably, taxpayers will bear the burden of an antitrust damages award. As a practical matter, taxpayers are innocent of any wrongdoing in such cases. Unlike shareholders in a business corporation, taxpayers did not knowingly assume the risk of antitrust violation in return for the opportunity to profit from a business corporation.⁹⁶ Absent a clearer expression of congressional intent to subject municipalities to treble damages awards, the possibility of municipal bankruptcy and the burden of damages falling upon essentially innocent parties should dissuade courts from making damages awards.⁹⁷

Third, the risk of bankrupting a municipality by imposition of a treble damages award also suggests that the Constitution's grant of state sovereignty might bar such an award. In *National League of Cities v. Usery*,⁹⁸ the Court urged that the integral governmental services of local governments, as subordinate arms of state government, should be beyond congressional reach under the commerce clause, just as if the state had provided the services.⁹⁹ Municipal bankruptcy clearly would involve such an "interference with integral governmental services." While the Supreme Court has approved

93. See, e.g., I I. AREEDA & D. TURNER, *supra* note 5, at 102. It is possible that the Supreme Court could hold that treble damages should not be awarded, but that a municipality's bad faith in complying with a prospective injunction will justify a criminal contempt prosecution which could result in a jail term for the responsible municipal official or a fine, a civil contempt prosecution which also could result in a remedial fine, or an award of attorney's fees. See *Hutto v. Finney*, 437 U.S. 678 (1978).

94. Melton, *supra* note 5, at 372.

95. See Blackmun's notation in *Lafayette* that the damages sought by Louisiana Power & Light amounted to \$28,000 for each family of four who were citizens of the defendant cities. 435 U.S. at 442 n.1 (Blackmun, J., dissenting).

96. See Note, *supra* note 92, at 413-17.

97. Melton, *supra* note 5, at 372.

98. 426 U.S. 833 (1976).

99. *Id.* at 855-56 n.20.

damages awards against municipalities, it is significant to note that the fourteenth amendment was the substantive basis of these awards.¹⁰⁰ By contrast, the *National League of Cities* Court found that the congressional power singled out for limitation was the commerce power and that the antitrust laws were enacted pursuant to the commerce clause.¹⁰¹

Finally, even if a court held that parties can sue a municipality for treble damages under the antitrust laws, it is possible that in the first Supreme Court case to so hold, the Court would order only prospective relief, reserving retrospective relief, such as damages, for subsequent decisions.¹⁰²

2. Will the Court Apply the Same Substantive Antitrust Rules to Municipalities as It Applied to Private Parties, or Will the Court Create New Standards to Apply to Municipalities?

A second major issue unresolved to date is whether the Supreme Court will apply the same substantive antitrust rules to municipalities as it does to private parties. *Boulder* explicitly deferred consideration of this issue.¹⁰³ The commentators are divided concerning whether

100. See *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Hutto v. Finney*, 437 U.S. 678 (1978).

101. 426 U.S. at 841-52; Melton, *supra* note 5, at 374.

One federal court of appeals decision, *New Mexico v. American Petrofina*, 501 F.2d 363, 366-67 (9th Cir. 1974), suggested that the eleventh amendment also might bar antitrust legal actions against a state. That amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any Foreign State." U.S. CONST. amend. XI.

To date, the Supreme Court has not discussed the relationship between the eleventh amendment and the antitrust laws. In *Hutto*, however, the Court did state, "Although the eleventh amendment does not prohibit attorney's fees awards for bad faith, it may counsel moderation in determining the size of the award or in giving the State time to adjust its budget before paying the full amount of the fee." 437 U.S. at 692 n.1. Assumedly, courts would have to take into account such considerations when making a treble damages award under the federal antitrust laws.

Under federal laws, parties may not usually sue a state for retrospective relief unless there is a clear statement of congressional intent to authorize such relief. See Melton, *supra* note 5, at 372 n.198.

102. See Klitzke, *Antitrust Liability of Municipal Corporations: The Per Se Rule vs. The Rule of Reason—A Reasonable Compromise*, 1980 ARIZ. ST. L.J. 253, 274-75 (1980).

103. See *supra* note 91.

courts should judge all municipal antitrust violations under a modified standard permitting municipalities to introduce evidence that courts would exclude in a case involving private parties. Klitzke, for one example, believes that the differences between a municipality and private firm in terms of purpose, function and method of operation justify a modification of traditional antitrust rules.¹⁰⁴

If courts applied a different set of standards to municipalities, assumedly these standards would permit municipalities to present defenses in *per se* cases where courts usually would not permit private parties to present defenses. The new standards would not prevent finding a municipality liable for antitrust law violations, but they would reduce the likelihood of such findings. For example, a municipality that violated the *per se* rules against price-fixing by setting taxicab fares might defend itself on such grounds as the necessity of price-fixing in this area. This creates the possibility that a municipality might be nonexempt from the antitrust laws, but still might not violate these laws in such practices as fixing fares or entry limitations. Absent further Supreme Court guidance, however, the modification of standards or the availability of new defenses is a matter of pure speculation.

III. APPLICATION OF THE LAW TO MUNICIPAL TAXICAB REGULATION

Part III of this article applies the Supreme Court's test for state action exemption to municipal taxicab regulation. Absent exemption, aspects of municipal taxicab regulation such as setting uniform rates of fare or limiting the number of taxicabs in a municipality may be illegal *per se*. Section A analyzes whether statutes clearly articulate and affirmatively express a policy to allow municipalities to engage in practices that otherwise would violate the federal antitrust laws. The relevant Supreme Court decisions make plain that municipalities are not entitled to an exemption unless a state statute authorizes the alleged restraint of trade.

Section B focuses on the active supervision requirement. The Supreme Court has not yet ruled whether municipalities also must satisfy this requirement. This section considers the three areas of municipal taxicab regulation most likely to lead to antitrust litigation.

104. Klitzke, *supra* note 102.

These areas are: 1) Entry limitations; 2) fare regulation; and 3) limitations on the taxicab firms serving municipal airports.

A. *The Clearly Articulated and Affirmatively Expressed Requirement*

The overwhelming majority of state statutes apparently do not clearly articulate and affirmatively express a policy to allow municipalities to violate federal antitrust laws by both setting taxicab fares and by limiting entry into the taxicab industry. While no one can predict with total certainty how a court will read a statute, the following discussion is consistent with the seven recent Supreme Court decisions that have considered the state action exemption.

In seven states,¹⁰⁵ the absence of a state statute clearly articulating and affirmatively expressing a policy to allow municipalities to violate federal antitrust laws in taxicab regulation creates no risk of antitrust violation. In these instances, either state statutes reserve to a state commission or to a local government the power to regulate taxicabs, or the state has "deregulated" the taxicab industry.

Forty-one states face a real risk of antitrust violation. In eleven of these states, no statute delegates to municipalities the authority to regulate taxicabs.¹⁰⁶ These states clearly do not satisfy the two-part test for a state action exemption.

Eighteen states delegate to municipalities the power to regulate the taxicab business but without any clear indication that this regulation may include conduct violative of the antitrust laws.¹⁰⁷ Typical of the

105. CONN. GEN. STAT. § 13b-95 to 13b-100 (1983) (regulation by state commission); FLA. STAT. ANN. § 125.012(17) (West 1972) (regulation by county); NEV. REV. STAT. §§ 706.166 and 706.881-885 (1981) (regulation by state or county); 66 PA. STAT. ANN. § 1103(C) (Purdon Supp. 1982); R. I. GEN. LAWS 39-14-1 to 39-14-12 (1977 & Supp. 1982) (regulation by state division of public utilities); W. VA. CODE, §§ 17-6-3 to 17-6-4 (1974) (regulation by state road commissioner). In 1982, Arizona ended its statewide rate regulation and limitations on the number of licenses.

106. These states are: Alaska, Colorado, Delaware, Georgia, Hawaii, Idaho, Kansas, Montana, Nebraska, New Mexico, and Wyoming. Regarding Wyoming, see WYO. STAT. § 37-8-104 (1977) which may implicitly grant municipalities power to regulate "motor carriers."

107. ALA. CODE § 11-51-101 (1975); CAL. VEH. CODE § 16501 (West 1971); IOWA CODE ANN. § 321.236 (West Supp. 1983); LA. REV. STAT. ANN. §§ 45:200.1-200.17 (West 1982); MD. TRANSP. CODE ANN. § 25-101.1(d)(1) (1982); MASS. GEN. LAWS ANN. ch. 40, § 22 (West 1983); MINN. STAT. ANN. § 412.221 (Subd. 20) (West Supp. 1983); N. H. REV. STAT. ANN. § 31:40 (Supp. 1983); N. J. STAT. ANN. § 48:16-2 (West Supp. 1983); N. D. CENT. CODE § 40-05-01(27) (1983); OHIO REV. CODE ANN.

statutes in these states is the Alabama statute which provides, in relevant part: "any city or town shall have the power to regulate and license the use of carts, drays, wagons, coaches, omnibuses and every description of carriages and vehicles kept for hire. . . ."¹⁰⁸ This type of statute does not clearly indicate whether the states delegate to the municipalities the authority to adopt anticompetitive rules. Assumedly these statutes also would fail to satisfy the two-part test for state action exemption.¹⁰⁹

Ten states, in contrast, clearly articulate and affirmatively express an intention to allow municipalities to fix fares.¹¹⁰ These states might satisfy the first part of the two-part state action test with respect to fixed rates. These states, however, might not satisfy the state action test for exemption with respect to other aspects of taxicab regulation since the states' statutes do not describe or necessarily imply these other aspects.

Two states clearly articulate and affirmatively express an intention to allow municipalities to limit the number of taxicabs operating in their municipalities.¹¹¹ Two other states clearly articulate and affirmatively express an intention to allow municipalities both to fix fares and to limit the number of taxicabs. North Carolina¹¹² provides in the course of its relevant statute that municipalities by ordinance may "establish rates that may be charged by taxicab operators, may limit the number of taxis that may operate in the city and may grant franchises to taxicab operators on any terms that the council may

§ 715.22 (Page 1976); OR. REV. STAT. § 767.025(4) (Supp. 1983); S. C. CODE ANN. §§ 58-23-1210 to 58-23-1510 (Law. Co-op 1976); S. D. CODIFIED LAWS ANN. § 9-34-10 (1981); TENN. CODE ANN. §§ 65-15-102(i), 103; 1982 Texas Constitution Article II-75 (16), (20), (21) and (23) (Vernon Civil Statutes); UTAH CODE ANN. § 10-8-39 (Supp. 1981); WIS. STAT. ANN. § 349.24 (West Supp. 1983).

108. ALA. CODE § 11-51-101 (1975).

109. *But see* Golden State Transit Corp. v. City of Los Angeles, 563 F. Supp. 169 (C.D. Cal. 1983).

110. ARK. STAT. ANN. § 19-3513 (1980); ILL. ANN. STAT. ch. 24, § 11-42-6 (Smith-Hurd Supp. 1983); IND. CODE § 18-4-2-15 (1976); ME. REV. STAT. ANN. tit. 30, § 2151(3)(b) (1978); MICH. COMP. LAWS § 67.1 (1983 Supp.); MISS. CODE ANN. § 21-27-121 (1982 Supp.); MO. ANN. STAT. § 74.127(10) (Vernon 1952); VT. STAT. ANN. tit. 24, § 2031 (1975); VA. CODE § 56-291.3:1 (1981); WASH. REV. CODE ANN. § 35-23 440(7) (1964).

111. KY. REV. STAT. § 281.635(4) (Supp. 1982); N. Y. GEN. MUN. LAW § 181 (Consol. 1982).

112. N. C. GEN. STAT. § 160A-304 (1982).

deem advisable." Oklahoma¹¹³ limits municipal regulation to prescription of minimum insurance, mechanical condition, "restriction of the loading of taxicabs to specified zones or localities . . . and the making of such other rules governing the manner of operation of taxicabs as the public safety may require," rate-setting, and the power to require issuance of a certificate of convenience and necessity before taxicab operation.¹¹⁴ Currently, these two statutes appear to be the most comprehensive delegation to municipalities of the power to regulate the taxicab industry.

B. *The Active Supervision Requirement*

This section of the article examines the three areas of municipal taxicab regulation most likely to lead to antitrust litigation. These areas are: 1) Entry limitations; 2) fare regulation; and 3) limitations on the taxicab firms serving municipal airports. Several other areas of municipal supervision of taxicabs also could lead to antitrust litigation; for example, antitrust litigation could spring from limitations on the taxicab firms ability to use particular taxicab stands, or the use of safety or insurance requirements to restrict the number of taxicabs in a municipality. Satisfying the active supervision requirement in these areas essentially would involve the same type of evidence as satisfying the requirement in the three areas examined in this section of the article.

The study of ordinances, reports and secondary literature concerning a number of major cities including Atlanta,¹¹⁵ Boston,¹¹⁶ Chicago,¹¹⁷ Cleveland,¹¹⁸ Los Angeles,¹¹⁹ New York,¹²⁰ San Fran-

113. OKLA. STAT. ANN. tit. 11, § 22-118 (West 1978).

114. *Id.*

115. ATLANTA, GA., ORDINANCES §§ 14-8020 to 8085 and 12-5021 to 5023 (1981).

116. MAYOR'S OFFICE OF TRANSPORTATION, BOSTON TAXI STUDY: FINAL REPORT (May 1978) [hereinafter cited as BOSTON TAXI STUDY]; Rules and Regulations for Hackney Carriages (1980); Greenbaum, Implementation and Preliminary Impacts of a Shared-Ride Service for Boston Logan International Airport, 1978 (paper presented at the 57th Meeting of the Transportation Research Board, Washington, D.C.).

117. Kitch, Isaacson and Kasper, *The Regulation of Taxicabs in Chicago*, 14 J. LAW & ECON. 285 (1971).

118. CLEVELAND, OHIO, ORDINANCES §§ 127.37-.38 and 443.01-.36 (1976).

119. MULTISYSTEMS, INC., LOS ANGELES TAXI STUDY (6 volumes, prepared for the Los Angeles County Transportation Commission).

120. MAYOR'S COMMITTEE ON TAXI REGULATORY ISSUES, NEW YORK CITY:

cisco,¹²¹ and Washington, D.C.,¹²² constitute part of the research for this subsection of the article. In addition, recent reports concerning the removal of entry or fare regulations in Berkeley,¹²³ Oakland,¹²⁴ Portland,¹²⁵ San Diego,¹²⁶ and Seattle¹²⁷ also comprise part of the research in this subsection. Research of the ordinances of 100 randomly selected cities in New Jersey contrasts the problems of smaller cities.¹²⁸

RECOMMENDATIONS [hereinafter cited as MAYOR'S COMMITTEE]. See also Rogoff, *Regulation of the New York City Taxicab Industry*, CITY ALMANAC (August 1980); Verkuil, *The Economic Regulation of Taxicabs*, 24 RUTGERS LAW REV. 672 (1970).

121. Von Dioszeghy & Rothmeyer, *The Regulation of the Taxi Industry in San Francisco* (1970) (unpublished paper for regulated industries course, Professor William Baxter, Stanford Law School).

122. STAFF OF H. R. COMM. ON THE DISTRICT OF COLUMBIA, 94TH CONG., 2D SESS., TAXICAB REGULATION (Comm. Print 1976) [hereinafter cited as TAXICAB REGULATION].

123. CRAIN & ASSOCIATES, TAXICAB REGULATORY REVISION IN OAKLAND AND BERKELEY, CALIFORNIA: TWO CASE STUDIES, UMTA-CA-06-0127-83-2, (1982).

124. *Id.*

125. DELEUW, CATHER & COMPANY, TAXICAB REGULATORY REVISION IN PORTLAND, OREGON: A CASE STUDY, UMTA-MA-06-0049-82-7 (Final Report 1982).

126. DELEUW, CATHER & COMPANY, TAXICAB REGULATORY REVISION IN SAN DIEGO, CALIFORNIA: BACKGROUND AND IMPLEMENTATION, UMTA-MA-05-0049-80-16 (Interim Report 1981); DELEUW, CATHER & COMPANY, EFFECTS OF TAXI REGULATORY REVISIONS IN SAN DIEGO, CALIFORNIA, UMTA-CA-06-0127-83-1 (Final Report 1982).

127. DELEUW, CATHER & COMPANY, TAXI REGULATORY REVISION IN SEATTLE, WASHINGTON, BACKGROUND AND IMPLEMENTATION, UMTA-MA-06-0049-80-17 (Interim Report 1980); 2 DELEUW, CATHER & COMPANY, EFFECTS OF TAXI REGULATORY REVISIONS IN SEATTLE, WASHINGTON, UMTA-MA-06-0019-83-1 (Final Report 1983).

128. Multisystems, Inc., a Cambridge, Mass. consulting firm, which earlier had employed the ordinances in preparing, with the Institute of Public Administration, a three-volume study entitled NEW JERSEY TAXICAB REGULATIONS, SERVICES AND ISSUES (1981), gathered and provided these ordinances.

TABLE
STATUTES EXPRESSING STATE POLICY CONCERNING MUNICIPAL TAXICAB REGULATION

State	Regulation by State or County or State-wide "Deregulation"	No Authority Delegated to Municipalities	Authority Delegated to Municipality Not clearly exempt	Authority Delegated to Municipality may fix fares	Authority Delegated to Municipality may limit number of taxicabs	Authority Delegated to Municipality both may fix fares and limit numbers of taxicabs
Alaska		X				
Alabama			X			
Arizona	X*					
Arkansas				X		
California			X**			
Colorado		X				
Connecticut	X					
Delaware	X	X				
Florida						
Georgia		X				
Hawaii		X				
Idaho		X				
Illinois						X
Indiana						X
Iowa						
Kansas		X				

State	Regulation by State or County or State-wide "Deregulation"	No Authority Delegated to Municipalities	Authority Delegated to Municipality Not clearly exempt	Authority Delegated to Municipalities may fix fares	Authority Delegated to Municipality may limit number of taxicabs	Authority Delegated to Municipality both may fix fares and limit numbers of taxicabs
Kentucky					X	
Louisiana			X			
Maine				X		
Maryland			X			
Massachusetts			X			
Michigan				X		
Minnesota			X			
Mississippi				X		
Missouri				X		
Montana		X				
Nebraska		X				
Nevada	X					
New Hampshire						
New Jersey			X			
New Mexico			X			
New York		X			X	
North Carolina						X
North Dakota			X			
Ohio			X			
Oklahoma			X			
Oregon			X			X
Pennsylvania	X					

State	Regulation by State or County or State-wide "Deregulation"	No Authority Delegated to Municipalities	Authority Delegated to Municipality Not clearly exempt	Authority Delegated to Municipality may fix fares	Authority Delegated to Municipality may limit number of taxicabs	Authority Delegated to Municipality both may fix fares and limit numbers of taxicabs
Rhode Island	X					
South Carolina			X			
South Dakota			X			
Tennessee			X			
Texas			X			
Utah			X			
Vermont						
Virginia					X	
Washington (State)					X	
West Virginia					X	
Wisconsin	X					
Wyoming						

* Arizona has ended its state-wide rate and entry limitations.

** A federal district court in Golden State Transit Corp. v. City of Los Angeles, 563 F. Supp. 169 (C.D. Cal. 1983), held that the California statute does not exempt municipal taxicab regulation.

1. Entry Limitations

The number of taxicabs serving American municipalities varies tremendously. One study of taxicab licenses issued by major cities in 1970, for example, published data concerning thirty cities with populations of 325,000 or more. This study reported that the number of licenses per 1,000 persons varied from 0.2 in Phoenix to 11.3 in Washington, D.C. The number of licenses per square mile similarly varied from 0.4 per square mile in Phoenix and Jacksonville to 139.3 in Washington, D.C.¹²⁹

In some cities, there are no significant limitations on entry.¹³⁰ Most large cities, however, do impose entry limitations, typically by flatly limiting the number of taxicabs licensed to a specific number per thousand persons, or by empowering the city council or other regulatory body to increase or decrease the number of taxicabs according to "public necessity and convenience" or other specified criteria.¹³¹ Whether entry limitations are wise or necessary has stimulated considerable debate. Proponents of entry limitations urge that limitations are necessary to provide taxicab operators a satisfactory income, ensure the financial responsibility of taxicab owners, prevent traffic congestion, protect mass transit systems and avoid

129. UTTERBACK, A SUMMARY OF RECENT TAXICAB STUDIES 12 (City of Milwaukee, Legislative Reference Bureau, 1975).

130. A few large cities have no significant entry requirements. Examples include: ATLANTA, GA., ORDINANCE § 14-8073; Oakland, *see* CRAIN & ASSOCIATES, *supra* note 123; San Diego, *see* DELEUW, CATHER & COMPANY (1982), *supra* note 126; Seattle, *see* DELEUW, CATHER & COMPANY (1983), *supra* note 127; and Washington, D.C., *see* TAXICAB REGULATION, *supra* note 122. In addition, a considerable number of smaller cities have no significant entry limitations. For example, 41% of New Jersey municipalities with populations between 2,500 and 10,000 apparently have no ordinance regulating taxicabs. *See* 1 MULTISYSTEMS, *supra* note 128, at 2. It was not clear, however, how many of these cities had taxicabs operating in their jurisdictions.

131. Verkuil, *supra* note 120, at 691-92, reported that Chicago had specified 14% of gross receipts over operating expenses exclusive of federal income taxes as an acceptable rate of return. When the rate of return exceeds that figure, additional medals may be used. Portland grants its city council discretion to grant additional licenses but require the council to take into account:

1. adequacy of the local transportation system;
2. the applicant's demonstration of the need for additional taxi service;
3. the ratio of taxi licenses to population;
4. the utilization problem of current taxis; and
5. the local commitment of the applicant.

DELEUW, CATHER & COMPANY (1980), *supra* note 125, at 51-52.

“wars” among taxicab owners and operators.¹³² Opponents of entry limitations urge that these limitations contribute to increases in taxicab fares, unfairly limit competition, raise city regulatory costs and lead to bribery of regulatory officials.¹³³ While this debate is vital to a municipality choosing how it desires to regulate the taxicab industry, it is not relevant to satisfying the active supervision requirement of the state action exemption.

The case law reviewed in subsection C of Part II holds that a municipal regulator employing ongoing notice and hearing procedures before changing entry limitations satisfies the active supervision requirement. Courts will find inadequate supervision if the municipality allows private parties, such as the taxicab owners, to set limitations on entry and does not review their determinations. Notably, the case law does not require determination of entry limitations after economic or other study of the taxicab industry in a particular municipality. Instead, the case law focuses on whether the municipality provides adequate notice and hearing procedures which would allow interested parties to testify for or against changes in entry limitation rules.

Apparently, compliance with the notice and hearing requirement occurs frequently.¹³⁴ Several of the ordinances promulgated by New Jersey cities seem to comply. The ordinance of the Borough of Avalon¹³⁵ is a useful example because it clearly appears to comply with the active supervision requirement. The ordinance provides that a person must apply to the board of commissioners before receiving a license to operate a taxicab. The board of commissioners sets a date for a hearing, notifies the applicant and publishes a general notice in a newspaper circulated in the Borough. Before the hearing, the chief of police or other officer determines whether the facts contained in the application are true and evaluates the applicant in light of published criteria. These criteria focus on the applicant's character, business and financial responsibility, and the need for additional taxicabs. At the hearing, any resident or taxpayer may appear in per-

132. See, e.g., Kitch, Isaacson and Casper, *supra* note 117, at 321-25.

133. See, e.g., TAXICAB REGULATION, *supra* note 122; DELEUW, CATHER & COMPANY, *supra* note 125; DELEUW, CATHER & COMPANY, *supra* note 126.

134. See, e.g., 1 MULTISYSTEMS, INC., *supra* note 128, at 55-59; Kitch, Isaacson & Kasper, *supra* note 117, at 338-39; 1 MULTISYSTEMS, INC., *supra* note 119, at 3-4; VAN DIOSZEGHY & ROTHMEYER, *supra* note 121, at 6-17.

135. AVALON, N.J., ORDINANCES §§ 10-2 to 10-5.5 (1969).

son or submit a written statement in support of or in opposition to the license. The applicant and any person affected by the grant or denial of the license has the right to have an attorney present, to cross-examine opposing witnesses, and, at his own expense, to have made a stenographic record of the proceedings.¹³⁶

136. The ordinance provides in relevant part:

10-2 License Required

No person shall operate a taxicab within the borough unless both the owner and the driver of the taxicab are licensed under this chapter

10-4 Licensing of Taxicab Owners

10-4.1 Application Information. Application for a taxicab owner's license shall be made to the board of commissioners upon forms provided by the board and shall contain the following information:

a. The name and address of the applicant. If the applicant is a corporation, its name, the address of its principal place of business, and the name and address of its registered agent.

b. A statement as to whether the applicant has ever been convicted of violating any criminal or quasi-criminal statute, including traffic laws and municipal ordinances. If the applicant has been convicted, a statement as to the date and place of conviction, the nature of the offense, and the punishment imposed.

c. The number of vehicles to be operated or controlled by the applicant and the location of any proposed depots or terminals.

d. The previous experience of the applicant in the transportation of passengers for hire, including the name of any other state or municipality where the applicant has ever been licensed to operate a taxicab, whether his license was ever suspended or revoked, or his application for the issuance or renewal of a license denied, and the reasons for the denial, suspension or revocation.

e. Appropriate evidence as to the applicant's good character and business and financial responsibility so that an investigator will be able to properly evaluate it.

f. Any other facts that the applicant believes tend to show why he should be granted a license.

g. A full color sketch showing the color scheme of the taxicabs to be operated by the applicant, and another full color sketch of any insignia or design which the applicant intends to use to identify his taxicabs.

h. Any other appropriate information which the board of commissioners may by resolution require. . . .

10-4.2 Notice of Hearing. The board of commissioners shall set a date for a hearing on the application and shall notify the applicant. The date set shall be within a reasonable time after the filing of the application. The applicant shall cause a notice of the time and place of hearing to be published once in a newspaper circulating in the borough at least three days before the date set for the hearing.

10-4.3 Investigation. The chief of police or a police officer designated by him shall institute an investigation and evaluation, a recommendation by the chief of police that the license be granted or denied, and the reasons for his recommendation shall be forwarded to the board of commissioners at least three days before

2. Fare Regulation

As with entry limitations, methods of taxicab fare regulation vary considerably. Some cities do not regulate fares at all. Other cities merely require that taxicabs either conspicuously display fares in the taxicabs or file the fares with a municipal official or both. Others specify uniform fares or maximum fares. Still other municipalities employ zone systems.¹³⁷

There are two primary criticisms of cities that specify fares. First, these cities frequently do not employ an economically defensible

the date set for the hearing. A copy of the report shall also be sent to the applicant.

10-4.4 Conduct of Hearing. At the hearing any person who is a resident or taxpayer of the borough may appear in person and make a brief statement or submit a written statement in support of or opposition to the granting of a license. In addition, the applicant and any other person who will be affected by the grant or denial of the license, other than as a borough resident or taxpayer, shall have the right to be represented by an attorney, to testify himself or to present witnesses in support of his position, to cross-examine opposing witnesses and, at his own expense, to have a stenographic record made of the proceedings. This subsection shall not prevent the board of commissioners from imposing reasonable limits on the number of witnesses appearing in favor of or against the granting of the license, the time allowed for each side to present its case, or for the examination or cross-examination of any witness, or from imposing any other restriction which is necessary to insure that the hearing is conducted in an orderly, fair and expeditious manner.

10-5.5 Factors Considered. In determining whether to grant or deny the application, the board of commissioners shall take into consideration the following factors:

a. The character, business and financial responsibility and experience of the applicant, and the probability that if granted a license, the applicant will operate his taxicab in accordance with the provisions of this chapter.

b. The number of taxicabs already in operation, the need of the public for additional service, and any increased convenience that would result to the public if more taxicabs were placed in operation.

c. Whether any increase in the number of taxicabs operating in the borough would produce or substantially increase traffic congestion, including congestion in the vicinity of railroad stations or other areas where taxicabs would frequently pick up or discharge passengers, or would otherwise inconvenience the public.

d. Any other factors directly related to the grant or denial of the application which would substantially affect the public safety or convenience.

e. No license shall be granted to any person under the age of 18 years. Each applicant must submit sufficient proof of his age that he or she is above the age of 18 years.

Id

137. Examples of each of these types of fares appear in BOSTON TAXI STUDY, *supra* note 116, at 28-30, C2, E3, and 62. See also 1 MULTISYSTEMS, INC., *supra* note 119, at 22.

formula; instead, fare increases periodically occur as a result of political pressures. This criticism has prompted a few cities to adopt more rigorous methods of regulating fares.¹³⁸ Second, the underlying data necessary to determine an appropriate level of fares often are available only to taxicab owners anxious to justify fare increases. According to one report, the Seattle City Council considered the alleged failure of taxicab operators to provide accurate data needed to evaluate fare increases a factor in its 1979 decision to adopt open fare setting.¹³⁹

Nonetheless, the imprecision of fare-setting standards or the taxicab operators' monopoly over relevant data probably would carry little weight in an antitrust challenge to taxicab fare regulation. The decisive consideration is whether the city actively supervises changes in fare levels. If the city employs notice and hearing procedures like those described in subsection II.B.1 and reviews the factual data submitted, its fare-setting decision should satisfy the active supervision element of the state action exemption test.

3. Exclusive Access to Airports

The granting of exclusive or limited access to an airport to one or some of a municipality's taxicab firms is the area of municipal taxicab regulation that has thus far resulted in the most litigation.¹⁴⁰ To date, the case law is sharply divided with two recent decisions denying the exemption for taxicab regulation,¹⁴¹ and one decision, on similar facts, granting the exemption.¹⁴²

The most recent decision, *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*,¹⁴³ involved the state regulated airport in Honolulu, Hawaii, but applied the same law concerning the state action exemption that would apply to a municipality. The dispute revolved around the State of Hawaii's 1978 grant to SIDA, an association of

138. See, e.g., MAYOR'S COMMITTEE, *supra* note 120, at 8-13. On the economics of taxicab fare regulation, see generally Verkuil, *supra* note 120, at 698-703 and TAXICAB REGULATION, *supra* note 121, at 14-16.

139. DELEUW, CATHER & COMPANY (1980), *supra* note 127, at 68-70. For a similar complaint about rate-setting in Chicago, see Kitch, Isaacson & Kasper, *supra* note 117, at 343-46.

140. See generally Hermann, *Airports and the Applicability of the Antitrust Laws*, 45 ALBANY L. REV. 353 (1981); Annot., *supra* note 5, at 997-99.

141. See *infra* notes 139-49 and accompanying text.

142. See *infra* notes 150-53 and accompanying text.

143. Civ. No. 79-0383 (D. Hawaii 1983).

independent taxicab owner-operators, of the exclusive right for a period of fifteen years to provide metered taxicab service to deplaning passengers at both the international and inter-island terminals of Honolulu International Airport. The State of Hawaii and the State Department of Transportation summarily moved to dismiss the claims against them on the basis of the state action doctrine; the federal district court judge denied the motion.

First, the court could not find in the relevant statute a clearly articulated state policy to displace competition in the provision of taxicab service to the airport. The court found that the statute read as a whole did not reveal clear legislative intent to displace competition by state regulation in the provision of airport taxicab service.¹⁴⁴ The court explained that the statute merely showed state acquiescence to the Department of Transportation Director and his Airport Chief's decisions on how to run operations.¹⁴⁵ The court further found that exclusive concession contracts were a department and staff preference and not a state policy.¹⁴⁶ Furthermore, from the record before it, the court could not find that the state was an "active supervisor."¹⁴⁷ The court did find, however, that the state had no actual control over the individual taxicab drivers.¹⁴⁸

144. *Id.* at 11-12.

The statutory scheme of chapter 261 allows the Department of Transportation to establish, operate and maintain the airport system "out of appropriations and other monies available or made available for such purposes." § 261-4(a). In so doing the department "may enter into contracts, leases, licenses, and other arrangements with any person . . . [c]onferring the privilege of supplying goods, commodities, things, services, or facilities at the airport. . . ." § 261-7(a)(2). Other than the requirement, in § 261-5(a), that all revenues generated from such leases and contracts be paid into the statutorily created airport revenue fund, the statute sets no limits on how, with whom and for what price the department may contract for provision of airport services. The department is free to establish the terms and conditions of the contract as it sees fit and may fix the charges or rentals, limited only by the requirement that such charges be "reasonable and uniform for the same class of privilege, service, or thing." § 261-7(a). Finally, defendants point to § 261-11 which makes the operation of Hawaii's airports "public and governmental functions."

Id.

145. *Id.*

146. *Id.* at 12.

147. *Id.* at 14-15.

148. The court stated:

The state, through its Department of Transportation, signed a contract with SIDA and collects from SIDA the agreed monthly fee. However, it does nothing further to ensure adequacy of the provision of taxi service, and in fact has no

A federal district court in Texas made similar findings in *Woolen v. Surtran Taxicabs, Inc.*¹⁴⁹ In *Woolen*, the cities of Dallas and Fort Worth granted to Surtran Taxicabs, Inc. the exclusive rights to pick up passengers at the cities' jointly-owned airport. Rival cab firms sued Surtran for antitrust law violations. The federal district court refused to hold that ordinances of the two cities established the right of Surtran to an exemption from the antitrust laws. The court first noted that the *Lafayette* case stood for the two rules that: 1) Antitrust laws do not exempt municipalities solely by virtue of their status as governmental entities; and 2) antitrust laws exempt the activities of municipalities only if the municipalities act pursuant to sovereign state acts that reveal a state policy to regulate competition or monopolize public service.¹⁵⁰

The court then examined the state enabling act which permitted Dallas and Fort Worth to jointly own and operate an airport.¹⁵¹ Read in isolation, the court concluded that this statute was ambiguous regarding the statutory intent. The court recognized the possibil-

control over the SIDA taxi drivers. SIDA is an association of independent owner-operators, which itself exercises no control over the activities of individual drivers. No individual driver can be ordered to the airport to pick up deplaning passengers to meet airport needs; each driver is an independent entrepreneur. SIDA runs its own dispatch service, and no one from the state monitors this. SIDA's base yard is located off HIA grounds, and no state supervision is conducted there. The rates SIDA may charge its passengers are set, like those of all Honolulu licensed taxi operators, by city ordinance and not by state regulation. Complaints about taxi drivers are routed to SIDA for action rather than being dealt with by the state. The evidence shows that it is SIDA cabbies and dispatchers who enforce the exclusivity of their contract; SIDA personnel intervene to prevent non-SIDA cabbies from accepting fares at HIA. In a letter to Hawaii's Governor Ariyoshi, the Director of defendant DOT, Dr. Ryokichi Higashionna, admitted that his department "has little control, if any, on SIDA's management of their service."

Id.

149. 461 F. Supp. 1025 (N.D. Tex. 1978).

150. *Id.* at 1026.

151. That act stated, in relevant part:

"a) In operating an airport . . . such municipality may . . . enter into contracts . . . and other arrangements for a term not exceeding forty (40) years with any persons:

.
 (2) conferring the privilege of supplying goods, commodities, things, 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. . . ."

Id. at 1031 (quoting Municipal Airport Act, TEX. STAT. ANN. § 46d-4 (Vernon 1969)).

ity that the legislature may have intended to displace competition at municipally operated airports.¹⁵² The court, however, refused to so conclude in light of other language in the enabling act providing that no municipal ordinance shall conflict with any act of the United States Congress.¹⁵³

By contrast, in *All American Cab Co. v. Metropolitan Knoxville Airport Authority*,¹⁵⁴ a federal district court in Tennessee reached an opposing result on similar facts. *All American* involved a challenge by rival cab companies to a contract between Knoxville's Metropolitan Airport Authority and a private firm, Creative International Management. The contract granted Creative the exclusive right to operate a limousine service at the McGhee-Tyson Airport. The contract also designated Creative as the exclusive dispatcher of limousines and taxicabs. Relevant Tennessee statutes were ambiguous regarding whether the Airport Authority possessed the authority to displace competition with monopoly at the airport. The enabling act identified the Authority's purposes.¹⁵⁵ The court stated that the purpose of the Authority was: "To contract with persons or corporations to provide goods and services for the use of the employees and passengers of the carriers . . . necessary and incidental to the operation of the airport. . . ." ¹⁵⁶ The court then concluded that the Airport Authority "is operated for the benefit of the general public and not for the particular advantage of Knoxville residents" and is therefore "exempt from antitrust scrutiny."¹⁵⁷

The *All American* decision warrants criticism for finding an exemption for the "governmental" rather than "proprietary" character of the airport; only one of the nine Supreme Court Justices has recog-

152. *Id.* at 1031.

153. *Id.*

154. 547 F. Supp. 509 (E.D. Tenn. 1982).

155. The enabling act declared the Authority's purposes in the following language:

It is hereby declared that airport authorities created pursuant to this chapter shall be public and governmental bodies acting as agencies and instrumentalities of the creating and participating municipalities; and that the acquisition, operating and financing of airports and related facilities by such airport authorities is hereby declared to be for a public and governmental purpose and a matter of public necessity. The property and revenues of the authority or any interest therein shall be exempt from all state, county and municipal taxation.

Id. at 511, quoting TENN. CODE ANN. § 42-4-102.

156. 547 F. Supp. at 511, quoting TENN. CODE ANN. § 42-4-107(16).

157. *Id.*

nized this distinction. If the court focused on whether the enabling act clearly articulated and affirmatively expressed a state policy in favor of monopoly, it necessarily would have analyzed the same type of "ambiguous" act present in *Woolen*. Assuming the absence of any relevant legislative history and other relevant statutory language, this type of act presents both a common and a difficult problem for analysis. On the one hand, the act does grant the municipality or municipal agency "authority to operate in a particular area." On the other hand, there is no clear indication that the legislature "contemplated the kind of action complained of" In these circumstances, no commentator can predict with certainty how the Supreme Court, or lower federal courts, will rule. What is clear is that any municipality relying on similar language to claim an antitrust exemption runs some risk of violating the federal antitrust laws. It is equally clear that adoption of a new state enabling statute unambiguously granting the municipality the power to violate the federal antitrust laws in its regulation of taxicabs can reduce the risk of antitrust liability.

IV. CONCLUSION: THE CHOICES AVAILABLE TO MUNICIPALITIES

In *City of Lafayette v. Louisiana Power & Light Co.*,¹⁵⁸ and *Community Communications Co. v. City of Boulder*,¹⁵⁹ the Supreme Court held that a municipality may violate the federal antitrust laws. For a municipality to secure the state action exemption from the federal antitrust laws, a state statute must clearly articulate and affirmatively express as state policy the intent to exempt the alleged restraint of trade. Case law underlines that a municipality may not claim exemption by relying on a "home rule" statute. Case law strongly suggests that an exemption would not be appropriate if the statute merely mentions an area of municipal regulation, such as taxicabs, but does not expressly authorize the municipality to engage in anticompetitive regulation such as fixing fares. The state enabling statute, however, need not describe in detail how to conduct the anticompetitive regulation.

The Supreme Court has held that when a state claims the state action exemption, the state also must prove that it actively supervises the area of alleged antitrust violation. The Court has not yet ruled whether a municipality also must prove active supervision. If a mu-

158. 435 U.S. 389 (1978).

159. 455 U.S. 40 (1982).

nicipality must do so, the Supreme Court's decisions concerning states strongly suggest that a municipality will satisfy this requirement if it has ongoing notice and hearing procedures which allow each interested party some opportunity to be heard.

Application of the test for state action exemption to municipal taxicab regulation produces equivocal results. Forty-one states lack statutes that clearly articulate and affirmatively express a policy to allow municipalities both to set fares and to limit the number of taxicabs. Indeed, in eleven states, no statute delegates authority to municipalities to regulate taxicabs. Municipalities, however, apparently frequently do satisfy the active supervision requirement in setting fares or limiting entry. The granting of exclusive access to municipal airports is one area in which satisfaction of the active supervision requirement may not consistently be seen.

Municipalities may make one of three possible responses to the risk of antitrust liability raised in the *Lafayette* and *Boulder* decisions. The first choice is simply to do nothing. As one practicing attorney put it, "The best advice is to wait for the law to clarify—and hope it is clarified with someone else's lawsuit."¹⁶⁰ Inaction is justifiable on two grounds. First, the risk of an antitrust lawsuit is small.¹⁶¹ Only four state action decisions since 1978 have involved taxicab regulation. Three of these decisions concerned exclusive or limited access to an airport. If a municipality does not own or operate an airport, the likelihood of a lawsuit appears very small. Second, "doing nothing" also may be justifiable on a different ground. In June 1983, Senator Strom Thurmond, chairman of the Senate Judiciary Committee, and eight co-sponsors introduced legislation to secure an antitrust exemption for most local government regulation implicitly including all local taxicab regulation.¹⁶²

160. Barnett, *Suggestions from Outside Counsel*, in J. SIENA, *supra* note 6, at 43, 49

161. One commentator has calculated that, in the four years between the *Lafayette* and *Boulder* decisions, approximately 6,000 litigants filed federal antitrust suits nationwide. During that same period, written decisions in only nineteen reported federal cases involved the issue of state action exemption for local government entities defending suits under the federal antitrust laws. McMahon, *supra* note 88, at 548.

162. The bill is S.1578. S 1578. 129 CONG. REC. S9484 (daily ed. June 29, 1983). The text of the proposed statute reads:

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

Sec. 2. The Federal antitrust laws shall not apply to any law or other action

A second possible response to the risk of antitrust liability is the "deregulation" or termination of fare and entry limitations on the taxicab industry. It is worth emphasizing that deregulation is not necessary to ensure exemption from antitrust liability. Deregulation, however, is one available means to ensure exemption. In recent years, a few municipalities, including Berkeley, Oakland, Portland, San Diego and Seattle have either ended entry limitations or fare regulation or both. More recently, San Diego suspended the issuance of new taxicab permits for one year amid reports of problems in its deregulation program.

A municipality's third possible response to the risk of antitrust liability is to take steps to ensure compliance with the Supreme Court's state action test for exemption from the federal antitrust laws. Municipalities making this choice should attempt to persuade their state legislatures to enact a law clearly articulating and affirmatively expressing as state policy regulated rather than competitive municipal taxicab service.¹⁶³ California State Senator Foran has introduced a bill to the California Legislature to ensure antitrust exemption for municipal taxicab regulation.¹⁶⁴ This bill provides a useful model for

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

Id. Congressmen Hyde and Fish have introduced similar bills in the House, H.R. 2981 and H.R. 3361. H.R. 2981, 129 CONG. REC. E2176 (daily ed. May 11, 1983); H.R. 3361, 129 CONG. REC. H4130 (daily ed. June 20, 1983).

163. See Orland, *The Requirements for Antitrust Immunity*, in J. SIENA, *supra* note 6, at 73-89.

164. Senate Bill No. 944, introduced by Senator Foran, reads *in toto*:

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares the following:

- a) The orderly regulation of vehicular traffic on the street and highways of California is essential to the welfare of the state and its people.
- b) Privately operated taxicab transportation service provides vital transportation links within the state and between the state and the people and economic system of the nation and the world. Taxicab transportation service operated in the cities and counties enables the state to provide the benefits of privately oper-

ensuring antitrust exemption for municipal taxicab regulation. There are, however, two ways to improve the bill. First, it could more explicitly indicate a purpose to displace competition with a regulated system. Second, it could provide a more comprehensive list of types of taxicab regulation to be exempt from the federal antitrust laws. The Appendix to this article contains a proposed model bill to ensure antitrust exemption that incorporates these additional considerations.

Beyond securing enactment of a state statute clearly articulating a policy to exempt municipal taxicab regulation from the federal antitrust laws, municipalities may also have to comply with the active supervision requirement of the state action test. Many municipalities assumedly already are in compliance with this requirement. To ensure compliance, a municipality should: 1) Periodically review entry limitations, fare regulation and other aspects of its taxicab regulation which may violate the federal antitrust laws; 2) provide adequate notice of hearings concerning entry limitations, fare regulation, and other such matters; 3) allow all interested parties some opportunity to

ated demand-responsive transportation services to its people and to persons who travel to California for business or tourist purposes.

c) The economic viability and stability of privately operated taxicab transportation service is consequently a matter of statewide importance.

d) The policy of this state is to promote safe and reliable privately operated taxicab transportation service in order to provide the benefits of that service. In furtherance of this policy, the Legislature recognizes and affirms that the regulation of privately operated taxicab transportation service is an essential governmental function.

SECTION 2. Section 53075 is added to the Government Code, to read:

53075 a) Notwithstanding Chapter 8 (commencing with Section 5351) of Division 2 of the Public Utilities Code, every city or county shall protect the public health, safety, and welfare by licensing, controlling, and regulating, by ordinance or resolution, taxicab transportation service rendered in vehicles designed for carrying not more than eight persons, excluding the driver, which is operated within the jurisdiction of the city or county.

b) Each city or county shall provide for, but is not limited to providing for, the following:

1) The regulation of entry into business of providing taxicab transportation service. The regulation shall include, but is not limited to, a determination of the need for that service within the city or county.

2) The establishment of rates for the provision of taxicab transportation service

SECTION 3 No appropriation is made and no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution or Section 2231 or 2234 of the Revenue and Taxation Code because the local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act.

be heard; and 4) base policy changes on a consideration of all evidence presented. In addition, it would be wise, but not essential, to record in written records the hearings concerning changes in entry limitations, fare regulation and other such matters.¹⁶⁵

165. The procedures employed by the Borough of Avalon, set out *supra* in note 136, appear to satisfy the "active supervision" requirement.

APPENDIX
MODEL STATE LEGISLATION TO SECURE
EXEMPTION FROM FEDERAL
ANTITRUST LAWS FOR
MUNICIPAL TAXICAB REGULATION

SECTION 1. The Legislature finds and declares the following:

a) The orderly regulation of vehicular traffic on the streets and highways is essential to the welfare of the state and its people.

b) Privately-operated taxicab transportation service provides vital transportation links within the state. Taxicab transportation service operated in the municipalities enables the state to provide the benefits of privately-operated demand-responsive transportation services to its people and to persons who travel to this state for business or tourist purposes.

c) The economic viability and stability of privately-operated taxicab transportation service is consequently a matter of state-wide importance.

d) The policy of this state is to promote safe and reliable privately-operated taxicab transportation service in order to provide the benefits of that service. In furtherance of this policy, the Legislature recognizes and affirms that the regulation of privately-operated taxicab transportation service is an essential governmental function.

e) The policy of this state is to require that municipalities regulate privately-operated taxicab transportation service and not subject municipalities or municipal officers to liability under the federal anti-trust laws.

SECTION 2. Every municipality shall protect the public health, safety and welfare by licensing, controlling and regulating by ordinance or resolution, taxicab transportation service operated within the jurisdiction of the municipality. Every municipality is empowered to regulate:

a) Entry into the business of providing taxicab transportation service within the jurisdiction of that municipality;

b) The rates charged for the provision of taxicab transportation service;

c) The establishment of stands to be employed by one or a limited number of taxicab firms;

d) Limited or exclusive access to the municipality's airport;

e) The establishment of safety and insurance requirements even

if they reduce the number of taxicabs that otherwise would operate within the jurisdiction of the municipality; and

f) Any other requirement adopted to ensure safe and reliable taxicab service even if it is anticompetitive in effect.

NOTE

