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Local Governmental Exposure to Antitrust Liability and Treble Damages Awards in the Wake of City of Lafayette and City of Boulder

Thomas S. Malciauskas* and Sandra Taliani Rasnak**

INTRODUCTION

In Parker v. Brown,1 the United States Supreme Court announced a broad state action exemption from antitrust liability, holding for the first time that a state, acting in its sovereign capacity, could not be liable for violating the federal antitrust laws. Since Parker, however, the Court has restricted the scope of the state action doctrine by ruling that units of local government, unlike states, could be held liable under the antitrust laws for enacting ordinances found to be anticompetitive. Specifically, the Court in City of Lafayette v. Louisiana Power & Light Co.2 determined that local governmental units are not immune from the operation of the federal antitrust laws unless their anticompetitive activity is in furtherance or implementation of a "clearly articulated and affirmatively expressed" state policy.3 Moreover, the Court in Community Communications Co. v. City of Boulder4 recently found that a state's delegation of home rule powers to a municipality was not sufficient to shield the city with Parker v. Brown state action immunity.

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1. 317 U.S. 341 (1943).
3. Id. at 410.
The Court's decisions in *City of Lafayette* and *City of Boulder* reflect a restrained view of federalism coupled with a strong policy preference favoring antitrust enforcement. However, the Court has left unanswered the question of what remedies may be appropriately applied to local governments found to be antitrust violators. Section 4 of the Clayton Act provides that any person injured by an antitrust violation "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." The mandatory nature of section 4 and the potential for huge damages awards raise a basic concern among those who may eventually have to pay such damages—local governmental units, their officers and officials, and ultimately, the taxpayers.

The Court's decisions have caused local governments to anticipate an aftermath of paralyzed decision-making and possible raids on municipal treasuries. This article examines the liability and treble damages exposure local governments face in light of *City of Boulder* and *City of Lafayette*. First, this article traces the development of the state action doctrine and its application to local governments. Next, it discusses the financial burden on local governments that will result if they are held liable for antitrust violations. This article then suggests a possible defense that local governments may be successful in raising in order to avoid antitrust liability, as well as examining congressional bills that have proposed limitations on liability. It then turns to the issue of local governments' exposure to antitrust treble damages and discusses whether those local governments that are held to have violated the antitrust laws can avoid the imposition of treble damages based on the legislative history of the antitrust laws and public policy. In addition, this article reviews a bill recently passed by the House of Representatives that proposes a broad-based exemption from treble damages liability for local governments. This article concludes that a judicial or legislative response is necessary which will limit local governments' antitrust liability to single damages and injunctive relief, or no liability, depending on the nature of the anticompetitive act of the local government.

DEVELOPMENT OF THE STATE ACTION DOCTRINE AND ITS APPLICATION TO LOCAL GOVERNMENTS

An examination of the scope of treble damages liability for local governments must begin by reviewing the genesis of the state action doctrine. In 1943, the Supreme Court in *Parker v. Brown* established the state action doctrine, also referred to as the *Parker* doctrine, in holding that the Federal antitrust laws do not apply to an act that can be attributed to a state in the implementation of its governmental policy. *Parker v. Brown* involved a state anticompetitive marketing program which restricted competition among raisin growers in order to maintain prices in the raisin market. A raisin producer-packer brought suit against California officials alleging that the program was a restraint of trade, and therefore invalid under the Sherman Act.

The Supreme Court held that California’s anticompetitive marketing program did not violate the Sherman Act because the

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6. The state action doctrine was formulated in *Lowenstein v. Evans*, 69 F. 908, 911 (C.D.S.C. 1895), where the court upheld a South Carolina law preventing private parties from selling distilled spirits. Since the state properly exercised its power to regulate local trade, no restraint of trade could be found from the fact that only authorized state agents could market spirits.


9. The California Agricultural Prorate Act authorized the establishment of such a program. The avowed purpose of the Act was to “conserve the agricultural wealth of the State” and to “prevent economic waste in the marketing of agricultural products” of the state. 317 U.S. at 346. The marketing program required raisin growers to pool a large percentage of their crop and allow a state program committee to control the classification and distribution of raisins. The program prevented Brown from marketing his crop and fulfilling contracts he had previously negotiated. *Id.* at 346-49.

10. 317 U.S. at 348-49. Section 1 of the Sherman Act makes unlawful “every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.” 15 U.S.C. § 1 (1982). Section 1 covers agreements between two or more persons, generally competitors, which unreasonably restrain trade. The Court also found that the state did not violate § 2 of the Sherman Act. 15 U.S.C. § 2 (1982). Section 2 makes it unlawful to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States.” *Id.* Section 2 covers unilateral business activity and forbids the monopolization or attempted monopolization of a market for a particular product or service.
antitrust laws were not intended to prohibit competitive restraints imposed by a state as an act of government.\textsuperscript{11} In the Court's view, the anticompetitive marketing program was an act of government because the state, acting through its agriculture commission, adopted and enforced the program pursuant to state governmental policy.\textsuperscript{12} The Court stated that neither the language nor the legislative history of the Sherman Act indicated that it was intended to "restrain a state or its officers or agents from activities directed by its legislature."\textsuperscript{13} In contrast, the Court found that the purpose of the Sherman Act was to prohibit private parties from engaging in anticompetitive activities.\textsuperscript{14} In support of its finding that the antitrust laws do not apply to state action, the Court concluded that under our federal system of government "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."\textsuperscript{15}

Beginning in 1975, the contours of the Parker doctrine were refined and narrowed by a series of Supreme Court decisions which addressed the application of the state action immunity to private parties, state agencies, and local governmental units claiming to be exempt from antitrust liability under the state action doctrine. In\textit{Goldfarb v. Virginia State Bar,}\textsuperscript{16} plaintiffs alleged that a minimum fee schedule for lawyers was a restraint of trade under section 1 of the Sherman Act.\textsuperscript{17} The fee schedule was published by a county bar association and enforced by the state bar association through the issuance of ethical opinions that indicated that an attorney's failure to adhere to fee schedules could result in disciplinary action being taken against him.
by the state bar. The defendants claimed that their publication
and enforcement of the minimum fee schedule were actions of
the state because the state supreme court had authorized the
state bar to issue ethical opinions and had directed lawyers to
consider published standard fee schedules.

The Court rejected the defendants’ contention that they quali-
fied for state action immunity under the antitrust laws. The
Court held that the promulgation and enforcement of the mini-
mum fee schedule did not qualify for such immunity because the
Virginia Supreme Court Rules neither required nor directed the
anticompetitive acts of the bar associations. On the contrary,
in an ethical canon, the state supreme court stated that attor-
neyes “were not to be controlled by minimum fee schedules.”

In conclusion, the Court observed that although the Virginia State
Bar was a state agency for some purposes, it was not a state
agency for all purposes. Accordingly, its status as a state
agency did not mean that all its activities were regarded as state
action, thereby entitling it to an exemption from liability for
anticompetitive practices which benefit its members.

The Court again considered the applicability of the state action
defense to the activities of a state bar association in Bates v.
State Bar of Arizona. In Bates, the Court found that the

18. 421 U.S. at 776-78. Fairfax County Bar Association, a voluntary association of
lawyers, published a minimum fee schedule. The Virginia State Bar had published
reports and ethical opinions indicating that attorneys had to comply with minimum fee
schedules. The state bar purportedly had the power to enforce adherence to the schedules
through disciplinary proceedings. Id.

19. Id. at 789-90 & n.19. The Virginia Legislature authorized the state supreme court
to regulate the practice of law. Pursuant to this authorization, the court adopted ethical
codes. One such ethical code stated that lawyers could consider fee schedules in determin-
ing the price for a particular service. The state bar argued that its action was state action
because the state had granted it power to issue ethical opinions and by issuing opinions
dealing with fee schedules, it was merely implementing the fee provisions of this ethical
code. Fairfax County Bar Association contended that, although it was not a state agency,
its publication of a fee schedule was state action because it was “prompted” to issue such
a schedule because of this ethical code and the Virginia State Bar’s ethical opinions.

20. Id. at 790. In this regard, the Court stated: “In our view that is not state action for
Sherman Act purposes. It is not enough that . . . anticompetitive conduct is ‘prompted’ by
state action; rather, anticompetitive activities must be compelled by the direction of the
State acting as sovereign.” Id. at 791.

21. Id. at 789.

22. Id. at 791.

23. Id.

defendant state bar association's enforcement of a ban on price advertising by lawyers, alleged to be a restraint of trade, was not a violation of the Sherman Act. In contrast to Goldfarb, the state bar's conduct was immune from antitrust liability under the state action doctrine because the restraint was adopted by the state supreme court, not the state bar. The Arizona Supreme Court had delegated the authority to enforce the disciplinary rule banning advertisements by lawyers to the state bar association. The Court held that because the state supreme court was charged by the state with regulating the practice of law, the restraint "was compelled by direction of the state acting as sovereign." Such anticompetitive acts by the state are exempt from antitrust liability under the Parker doctrine.

In Cantor v. Detroit Edison Co., the Supreme Court addressed the application of the state action doctrine to the activities of a private party. An electric utility company's program which provided for the distribution of free light bulbs to its customers was attacked as a restraint of trade and an attempted monopolization. In Cantor, a state regulatory commission approved rate structures submitted by private utilities. The commission approved a rate structure proposal submitted by the defendant Detroit Edison Company which had included a plan to distribute free light bulbs. The Court rejected the defendant's argument that because the state commission had approved its rate structure, the anticompetitive light bulb program was compelled by the state and therefore exempt from antitrust liability under the Parker doctrine.

The Court noted that the state did not require electric utility companies to distribute free light bulbs. In fact, the state had no regulatory policy regarding this matter. Instead, the commission had passively approved the light bulb program when it was

26. 433 U.S. at 359-60.
27. Id. at 361.
28. Id. at 360 (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975)).
31. 428 U.S. at 583.
32. Id. at 584. The Court observed that there was no Michigan statute which authorized the regulation of the light bulb business. In addition, no state agency had investigated the desirability of the light bulb distribution program, nor did any other Michigan utility company have such a program.
included as part of the overall rate proposal. Because such a program did not constitute an act of the state in the implementation of a state governmental policy, the defendant was subject to liability for antitrust violations.

Reflecting a disfavor of antitrust exemptions, the Court in Goldfarb, Bates, and Cantor narrowed the scope of the Parker doctrine. The Court observed that state action immunity would only apply where the state, acting as sovereign, has compelled the specific anticompetitive conduct. This principle was extended to the anticompetitive practices of state political subdivisions in City of Lafayette v. Louisiana Power & Light Co. In City of Lafayette, the Supreme Court addressed the issue of whether units of local government which are neither states nor private entities, but creatures of the state with broadly delegated powers and a separate governmental character, are exempt from liability under the antitrust laws.

In City of Lafayette, a privately-owned electric utility company charged that an electric utility company owned and operated by the city of Lafayette, Louisiana had violated the antitrust laws. A majority of the Court rejected at the outset the city's contention that local governments, because of their status as local governments, were not intended to be subject to the antitrust laws. The city then argued that Parker v. Brown held that all governmental entities are exempt from antitrust laws by virtue of their status as state agencies or subdivisions of a state. A plu-

33. Id. at 585.
35. Id. at 392. The city of Lafayette, Louisiana, together with the nearby city of Plaquemine, Louisiana, alleged that Louisiana Power & Light Co. conspired with others to restrain trade and monopolize the production of electrical power by preventing the construction and operation of other utility systems, by refusing to wheel power, by withholding supplies from its own market, by engaging in boycotts against the cities, and by instituting sham litigation to prevent the construction of electrical facilities beneficial to the cities. Id. at 392 n.5. The Louisiana Power & Light Co. counterclaimed alleging that the petitioners had engaged in sham litigation to prevent the construction of electrical facilities; eliminated competition by covenants in their debentures; excluded competition by using long-term supply agreements; and displaced competition by requiring the defendant's customers to purchase electricity from the petitioners in order to continue to receive water and gas service. Id. at 392 n.6.
36. Besides arguing that it was exempt under the Parker doctrine, the city also argued that Congress never intended to subject local governments to the antitrust laws. Id. at 394. In response, the Court stated that because cities, as well as states, are clearly "persons" under the statutory terms of the antitrust statutes, the city of Lafayette's conten-
rality of the Court rejected this argument and maintained that *Parker* only exempts "an action of government" by the State as "sovereign." The court cited *Goldfarb* and *Bates* as examples of the application of the *Parker* doctrine to governmental entities.

In *Goldfarb*, the Court noted, the actions of a state bar association were not held exempt from antitrust liability under the authority of *Parker* because the anticompetitive effects of a minimum fee schedule were not directed by the state. In *Bates*, however, the state bar was immunized from antitrust liability because the state bar association's enforcement of the disciplinary rule prohibiting lawyers from advertising their services was "compelled by direction of the State as sovereign." The Court reiterated the significance it attached in *Bates* to the fact that the disciplinary rule was part of a "comprehensive regulatory system" and the restraint was "clearly articulated and affirmatively expressed" by the state supreme court as the state's

tion that Congress did not intend municipalities to be held liable under the antitrust laws must be based on an overriding public policy which would negate the statutory construction of coverage. In addition, the city's argument had to be considered "in light of the presumption against implied exclusion from coverage under the antitrust laws." *Id.* at 398. The Court noted that only two policies had been held by it to be sufficiently weighty to override this presumption. *Id.* at 399. One such policy was enunciated in *Parker v. Brown*, where competition as a fundamental principle governing commerce was overriden by federalism principles. The Court in *Parker* enunciated the justification for exclusion on this basis:

> [I]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

*Parker*, 317 U.S. at 351.

The Court maintained that the city of Lafayette had not sustained its burden in showing that there were sufficiently weighty policies to overcome the presumption that municipalities were intended to be held liable under the antitrust laws. Although the likely goal of a municipally-owned utility is to confer benefits on its residents, the economic choices made by a public corporation in its business affairs are no more likely to further national economic goals than private corporations acting in the interests of their shareholders. In this regard, the Court stated:

> If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.

435 U.S. at 408 (footnote omitted).


38. *Id.*

policy maker.\textsuperscript{40} In the Court's view, these decisions required the rejection of the city of Lafayette's contention that its status as a subdivision of the state entitled it to the state action exemption from antitrust liability.\textsuperscript{41} Furthermore, the Court stated that to extend the \textit{Parker} doctrine to municipalities would be inconsistent with the principles of federalism underlying its decision in that case. In this regard, the Court stated "[c]ities are not themselves sovereign, they do not receive all the federal deference of the States that create them."\textsuperscript{42}

The Court stated that although a municipality's status as a state agent or subdivision of the state does not by itself place it within the \textit{Parker} exemption, this does not require the conclusion that all of its anticompetitive activities are subject to the antitrust laws.\textsuperscript{43} The Court maintained that actions of municipalities may reflect a state policy which will entitle them to \textit{Parker} immunity because "[m]unicipal corporations are instrumentalities of the State for the convenient administration of government within their limits."\textsuperscript{44} In other words, municipalities are exempt from antitrust liability to the same extent as a state when they act as state agencies implementing state policy.

The Court then delineated the standard by which a municipality's action would be deemed "state action." The Court stated that a municipality could avail itself of the \textit{Parker} exemption by demonstrating that it was either directed by the state to act anticompetitively in a particular area or authorized to act anticompetitively "pursuant to state policy to displace competition with regulation or monopoly public service."\textsuperscript{45} The Court stated that for a municipality to be exempt under the \textit{Parker} doctrine pursuant to state authorization, it need not point to "specific, detailed legislative authorization."\textsuperscript{46} Rather, "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

\begin{thebibliography}{9}
\bibitem{40} Id.
\bibitem{41} Id. at 411.
\bibitem{42} Id. at 412.
\bibitem{43} Id. at 413.
\bibitem{44} Id. (quoting Louisiana ex \textit{rel.} Folsom v. Mayor of New Orleans, 109 U.S. 285, 287 (1883)).
\bibitem{45} Id.
\bibitem{46} Id. at 415.
\end{thebibliography}
the legislature contemplated” the anticompetitive activity.47 The plurality dismissed the dissent’s contention that the execution of legitimate government programs would be hindered by its decision because such programs will be protected from antitrust liability when directed or authorized by the state.48

The position taken by the plurality in City of Lafayette was adopted by a majority of the Court in Community Communications Co. v. City of Boulder.49 The controversy in City of Boulder arose when the city of Boulder, Colorado, through its constitutional home rule powers,50 enacted an ordinance imposing a moratorium on geographical expansion of the one cable television company licensed to operate in a portion of the city. The ordinance was designed to encourage the entry of potential competitors while the city prepared new cable television legislation.51 The cable television company alleged that the moratorium on its expansion constituted a restraint of trade.

47. Id. (quoting Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976), aff'd, 435 U.S. 389 (1978)). This “clearly articulated” test was later followed by the Court in New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978) and California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). In New Motor Vehicle Bd., the Court reviewed the antitrust exposure of a California board charged with the responsibility of evaluating applications for opening new automobile dealerships. Midcal Aluminum, Inc. involved a California statutory scheme prohibiting wine wholesalers from selling to retailers without adopting a uniform price schedule filed with the state. Reaffirming its analysis of the “clearly articulated” test, the Court in Midcal Aluminum, Inc. added that the challenged policy itself must also be actively supervised by the state.

48. 435 U.S. at 417.

49. 455 U.S. 40 (1982).

50. The city of Boulder was organized as a home rule municipality under the Constitution of the State of Colorado. As a home rule municipality, the city had the power to exercise “the full right of self-government in both local and municipal matters.” Colo. Const. art. XX, § 6.

51. 455 U.S. at 46.
Although the state’s general grant of home rule powers to municipalities emphasized the decentralization of government, the state expressed no specific policy regarding municipal regulation of cable television.\textsuperscript{52} Consistent with the Court’s reasoning in \textit{City of Lafayette}, the Supreme Court determined that the city of Boulder could not avail itself of state action immunity from antitrust liability unless such conduct constituted either: (1) the action of the state itself in its sovereign capacity or (2) local governmental action in furtherance or implementation of a “clearly articulated and affirmatively expressed state policy.”\textsuperscript{53} With respect to the first point, the Court relied on \textit{City of Lafayette} and stated that the actions of home rule cities are not equivalent to actions of the state itself.\textsuperscript{54} Under our dual system of sovereignty, cities are not themselves sovereign. The Court stated: “We are a nation not of ‘city-states’ but of states.”\textsuperscript{55}

With respect to the second point, the Court held that “clear articulation” of a state policy to displace competition in a particular area is not satisfied by general grants of home rule authority from the state’s constitution:

Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of “clear articulation and affirmative expression” that our precedents require.\textsuperscript{56}

The Court observed that the position of the State of Colorado regarding Boulder’s anticompetitive cable television ordinance was one of “precise neutrality.”\textsuperscript{57} The state had not addressed such regulation and merely allowed its cities to do as they pleased in this area. Thus, the state could have hardly “contemplated” the anticompetitive actions for which antitrust immunity was sought.\textsuperscript{58}

In dissent, Justice Rehnquist predicted that the majority’s
decision would hinder local governments' efforts to exercise their police powers and undermine the concepts of home rule by altering the relationship between states and cities.\textsuperscript{59} However, in a separately concurring opinion, Justice Stevens admonished that the dissents' "dire predictions" for cities should "be viewed with skepticism" since holding local government actions to antitrust scrutiny would not be tantamount to finding an antitrust violation.\textsuperscript{60}

**RAMIFICATIONS OF LOCAL GOVERNMENTS' EXPOSURE TO ANTITRUST LIABILITY**

Understandably, the Court's decisions in *City of Lafayette* and *City of Boulder* have caused municipalities great concern over their potential liability for antitrust violations. This concern is heightened by the specter of treble damages liability which is imposed on those who violate the antitrust laws.\textsuperscript{61} Antitrust damages awards could result in staggering costs for municipal governments found to have violated the antitrust laws. For example, in *City of Lafayette*, the plaintiff sought $180 million as a result of only one of its antitrust claims against the city.\textsuperscript{62} Trebled, this amounts to $540 million. This award divided among the residents of the defendant city would result in a penalty that would exceed $28,000 thousand for each family of four.\textsuperscript{63} In a recent antitrust case, claimants have filed suit against a city and its officials seeking treble damages of $250 million for alleged anticompetitive zoning restrictions.\textsuperscript{64} In another recent case, a court awarded $28.5 million in treble damages in response to a city and county's anticompetitive use of their waste treatment facilities.\textsuperscript{65}

\textsuperscript{59} *Id.* at 60, 70-71 (Rehnquist, J., dissenting).
\textsuperscript{60} *Id.* at 58 (Stevens, J., concurring). Justice Stevens observed that the seven-year-old prognostications of doom for public utilities set forth by the dissent in *Cantor v. Detroit Edison Co.*, 428 U.S. at 615, had yet to come to pass. 455 U.S. at 58 n.1 (Stevens, J., concurring).
\textsuperscript{62} 435 U.S. at 440 (Stewart, J., dissenting).
\textsuperscript{63} *Id.* at 442 n.2 (Stewart, J., dissenting).
\textsuperscript{64} Richmond Hilton Assoc. v. City of Richmond, 690 F.2d 1086, 1088 (4th Cir. 1982).
\textsuperscript{65} Unity Ventures v. County of Lake, No. 81 C 2745 (N.D. Ill. Jan. 12, 1984). H.R. 6027 proposes eliminating treble damages liability for a wide range of municipal activities. H.R. 6027, 98th Cong., 2d Sess., 130 CONG. REC. H8623 (daily ed. Aug. 8, 1984). See *infra* notes 113-16 and accompanying text. The award in *Unity Ventures* was cited by
Imposing treble damages liability against local governmental units will result in financial drains on limited municipal budgets which could debilitate governmental decision-making. Furthermore, the brunt of such awards would ultimately fall on municipal taxpayers whose assessments would be increased to pay for antitrust damages. Moreover, treble damages awards may have a significant impact on the ability of local governments to finance projects through the municipal bond market. If a city must agree to enact potentially anticompetitive regulations to obtain bond financing for a public project, the mere possibility of an antitrust challenge to the regulatory scheme may result in the many congressmen as exemplifying the imperative need for a legislative limitation on local governments’ treble damages antitrust exposure. See 130 CONG. REC. H8470 (daily ed. Aug. 6, 1984) (statement of Rep. Seiberling) (“A county and township of Illinois are the subject of a $28.5 million verdict that threatens these governments with financial ruin, or their taxpayers, as the case may be.”). Representative Crane stated:

Legal fees [in the Unity Ventures litigation] are already approaching $1 million. If upheld, this will have a tremendous negative impact on the day-to-day management of government affairs and decisionmaking in Lake County.

Although Lake County is one of the wealthiest per capita counties in the United States, if this judgment is not reversed it could very well become bankrupt. The impact on the taxpayer will be severe. The judgment entered in this case is 6,000 percent of the property tax collected last year by the village of Grayslake and 150 percent of the amount collected by all of Lake County. If Lake County were to increase its taxes to the maximum legal rate and still provide necessary services to its citizens, it would take the taxpayers 70 years to pay this judgment. Even if they used all of their cash reserves of $14.8 million, payment would still require 35 years.

Id. at H8472-73. See also id. at H8473 (statement of Rep. Hyde); id. at H8475 (statement of Rep. Edwards).

66. Some argue that the Court’s decisions in City of Lafayette and City of Boulder will open the floodgates of litigation where numerous antitrust claims will be brought against local governments. See Local Government Antitrust Liability, The Boulder Decision: Hearings Before the Sen. Comm. on the Judiciary, 97th Cong., 2d Sess. 24-25 (1982) (statement of Thomas Mood, Mayor of Columbus, Ohio) [hereinafter cited as Hearings]; id. at 45-56 (statement of Janet Gray Hayes, Mayor of San Jose, Calif.); Note, The Application of Antitrust Laws to Municipal Activities, 72 COLUM. L. REV. 518 (1979). Others argue that antitrust suits will only be brought against local governments in the most egregious circumstances and that the operations of local governments will not be curtailed by antitrust liability, and potential liability. See generally McMahon, City of Boulder Revisited, National Ass’n of Attorneys General Antitrust Rep. (Oct. 1982); Note, City of Lafayette, Louisiana v. Louisiana Power & Light Co.: Will Municipal Antitrust Liability Doom Effective State-Local Government Relations?, 36 WASH. & LEE L. REV. 129 (1979). See also Hearings, supra, at 2 (statement of William F. Baxter, Assistant Attorney General, Antitrust Div., U.S. Dep’t of Justice); id. at 120 (statement of Donald R. Russell, senior vice-president, Sunco. Prods. Co.).

issuance of unfavorable opinions from bond counsel. Such opinions may discourage bond underwriters from supporting the bond issue.

The award of attorney's fees, which is specifically provided for in the Clayton Act, may be as financially devastating for municipalities as the potential payment of treble damages. Attorney's fees have not only been substantial in antitrust cases, but in some instances they have exceeded damages. In addition, regardless of whether antitrust liability is imposed against a municipality, the legal fees of outside counsel and the actual costs of antitrust litigation create additional concerns. The dissent in City of Lafayette recognized that antitrust litigation will require municipalities to pay expensive attorney's fees. The dissent noted that "legal fees to defend one current antitrust suit have been estimated as at least one-half million dollars a month."

The prospect of municipal treble damages liability is particularly troubling because local governments may be faced with antitrust lawsuits for a myriad of their activities. These activities involve land use and zoning, sewage treatment, cable television...

70. Few local governments have in-house antitrust counsel capable of preparing adequate defenses in complex antitrust litigation. See Hearings, supra note 66, at 65 (statement of William Hefty, city attorney, Richmond, Va.):
   But what I would like to emphasize is the expense of the litigation, even if the city ultimately is victorious. Antitrust litigation is new to cities, and most city attorneys' offices do not have the staff to handle such litigation.

   . . . This is expensive litigation; for example, it could easily cost the city of Richmond hundreds of thousands of dollars to successfully defend the current case. This is what cities across the country are concerned about.

Id.
71. 435 U.S. at 441 n.31 (Stewart, J., dissenting).
73. E.g., Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983), cert. granted, 52 U.S.L.W. 3891 (U.S. June 11, 1984) (No. 82-1832); Unity Ventures v. County of Lake, No. 81 C 2745 (N.D. Ill. Jan. 12, 1984); Vickery Manor Serv. Corp. v. Village of Mundelein, 1984-1 Trade Cas. (CCH) ¶ 65,790 (N.D. Ill. 1983).
sion franchising, ambulance services, airport operations and concessions, business licensing, water supplies, and parking facilities.

**LOCAL GOVERNMENTS' LIABILITY FOR ANTITRUST VIOLATIONS**

*Defense to Antitrust Liability*

Commentators have expressed concern over municipalities' potential liability for antitrust violations, especially in situations where a municipality regulates activities which are recognized as traditional government functions. Accordingly, commentators have proposed affirmative defenses that a municipality may be successful in asserting in response to antitrust claims brought against it. These commentators have seized upon a suggestion made by the Court in *City of Lafayette* and reiterated in *City of*
**Boulder** that a municipal defendant should be treated differently from a private party defendant for purposes of liability under the antitrust laws. The Court stated: “It may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government.”

The Court cited a law review article written by Paul Posner in support of this statement. On the page of the article cited by the Court, Posner asserts that a state should be able to raise a special defense to antitrust claims because of its status as a governmental body. Presumably, the Supreme Court by citing Posner’s article indicated that a municipality should be able to utilize such a defense because of its status as a governmental body.

*Lafayette* and *City of Boulder*, two commentators who viewed the *Parker* doctrine as too broad in its exemption of state anticompetitive acts suggested application of a balancing test to state activities similar to the one advocated by Brame & Feller, *supra* note 81, at 715-18, for local government. See Posner, *supra* note 8, at 707-14 (advocating balancing test which weighs benefits of regulation against economic effect); Slater, *supra* note 8, at 104-08 (advocating balancing test where regulation could be defended based on need for regulation). See also Tannenbaum, *supra* note 81, at 56-59 (“By raising a public interest defense, a municipality should be able to avoid any antitrust liability for regulation of activities that are traditional municipal functions.” *Id.* at 57).

Others, citing the dissenting opinion in *City of Boulder*, 455 U.S. at 60 (Rehnquist, J., dissenting), state that applying such a balancing test to municipal action is impermissible pursuant to certain antitrust principles. See Comment, *Alternative Approaches to Municipal Antitrust Liability*, FORDHAM URB. L.J. 51 (1983); Comment, *Antitrust: The Parker Doctrine and Home Rule Municipalities*, 22 WASHBURN L.J. 534 (1983). In particular, Justice Rehnquist writing for the dissent in *City of Boulder* noted that application of the traditional rule of reason antitrust principle only allows a court to consider the impact of the defendant’s act on competitive conditions, and not the reasonableness of the practice involved. Accordingly, a municipal ordinance “could not be defended on the basis that its benefits to the community, in terms of traditional health, safety, and public welfare concerns, outweigh its anticompetitive effects.” 455 U.S. at 66 (Rehnquist, J., dissenting). The dissent further stated: “If the Rule of Reason were ‘modified’ to permit a municipality to defend its regulation on the basis that its benefits to the community outweigh its anticompetitive effects, the courts will be called upon to review social legislation in a manner reminiscent of the *Lochner* era.” *Id.* at 67 (Rehnquist, J., dissenting). The dissent argued that analyzing municipal liability for antitrust violations as a pre-emption problem rather than an exemption analysis will avoid requiring a local government to justify every regulation it enacts in terms of its procompetitive effects, and will avoid courts reviewing social legislation as in the substantive due process era. *Id.* at 68. Under such an analysis, “the federal courts will not be required to engage in a standardless review of the reasonableness of local legislation. Rather the question simply will be whether the ordinance enacted is pre-empted by the Sherman Act.” *Id.*

83. *City of Lafayette*, 435 U.S. at 417 n.48 (citing Posner, *supra* note 8, at 705); *City of Boulder*, 455 U.S. at 57 n.20.


In this article, Posner maintains that states should not have blanket immunity from antitrust liability as the Court held in *Parker*\(^8\). Instead, he suggests a special rule of reason defense that a state could assert against antitrust claims which would justify upholding a state regulation against an antitrust attack.\(^7\) Such a rule differs from the traditional rule of reason which predicates antitrust liability on whether the challenged activity is unreasonably restrictive of competitive conditions.\(^8\)

The traditional rule of reason does not consider justifications for a challenged anticompetitive activity.\(^9\) Instead, it bases antitrust liability on whether or not an act promotes or suppresses competition. In contrast, a state rule of reason, as proposed by Posner, would consider either the economic or health and safety justifications for regulating an activity anticompetitively.\(^9\) Posner asserts that such a rule would allow a state "the opportunity of showing justification either in the sense that competition would produce undesirable results or in the sense that a reduction in competition was a necessary condition for the attainment of other benefits."\(^9\)

Posner categorizes potentially exempt regulations as either: (1) economic regulations or (2) health and safety regulations. Economic regulations should only be upheld against antitrust challenges in two situations based on principles of federalism.\(^9\) The first situation is public utility regulation of traditionally regulated industries. Posner asserts that regulation in these areas is "so hallowed by tradition" that it "would be inappropriate... to change the interpretation of the Sherman Act to mandate unfettered competition in these industries."\(^9\) The second situation is

\(^{86}\) *Id.* at 697.

\(^{87}\) *Id.* at 703-14.


\(^{89}\) See *National Soc'y of Professional Eng'rs*, 435 U.S. at 695.

\(^{90}\) Posner, *supra* note 8, at 707-08. The Court in *City of Boulder*, after citing the relevant footnote from *City of Lafayette*, 435 U.S. at 417 n.48, invited a comparison between the holdings in two prior Supreme Court cases. In *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 687-92 (1978), the Court invalidated a private agreement which imposed an anticompetitive restraint. In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978), the Court held that an anticompetitive effect is an insufficient basis to strike down a state law. Presumably, the Court invited this comparison between these two decisions because, like a state law, the fact that a municipal regulation may have an anticompetitive effect will not be a sufficient reason to strike it down.

\(^{91}\) Posner, *supra* note 8, at 708 (footnotes omitted).

\(^{92}\) *Id.* at 709.

\(^{93}\) *Id.* at 710 (footnote omitted).
state economic regulation which is expressly or implicitly supported by federal legislation outside the antitrust laws.  

The second category of permissible anticompetitive regulations, health and safety regulations, are justified, in Posner's view, when the economic effects of such regulations are incidental and the benefits of the regulations cannot be achieved in a less restrictive manner.  

It is essential that the primary purpose and effect of a regulation is health or safety objectives, otherwise health or safety reasons could be "used to justify any economic regulation so long as it can be tacked on to health and safety regulation."  

It is apparent that the Supreme Court would not wholly adopt the special rule of reason approach advocated by Posner if it extended this possible antitrust defense to municipalities. Posner's suggestion that there are permissible anticompetitive economic regulations is premised on federalism principles. However, the Supreme Court in City of Boulder expressly rejected the establishment of any municipal exception to antitrust liability based on federalism.  

The Court would also reject any defense upholding a municipal economic regulation because such a regulation "touches on the area in which antitrust policy is strongest." This consideration was important to the Court's holding in City of Lafayette that Congress intended to expose municipalities to antitrust liability. There, the Court stated:  

If municipalities were free to make economic choices counseled solely by their own parochial interest and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.  

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95. Posner, supra note 8, at 714.  
96. Id. "A mere recital that health and safety are the primary objects ought not to be enough if there are substantial effects of the economic regulation variety." Id.  
97. 455 U.S. at 54. See also Edelman v. Jordan, 415 U.S. 651, 667 n.12, reh'g denied, 416 U.S. 1000 (1974); Lincoln County v. Lunig, 133 U.S. 529 (1890).  
98. Posner, supra note 8, at 708.  
99. 435 U.S. at 408 (footnote omitted) (emphasis added). In this regard, the Court also stated:
Similarly, the *City of Boulder* Court firmly expressed that the extension of immunity to thousands of local governments, each with less than state-wide jurisdiction, would subvert the "wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws."\(^{100}\)

Thus, if the Court does recognize a special municipal rule of reason defense to anticompetitive activity, it most likely will be one predicated on Posner's second category of exempt regulations, i.e., regulations where the primary purpose of the regulation is to benefit the municipality's residents' health and safety and any incidental anticompetitive effects are outweighed by health and safety benefits. Such a weighing would properly balance the goals of the antitrust laws with the needs of a municipality to protect the health and safety of its residents. A municipality is in the best position to know what regulations are necessary to promote its residents' health and safety. A regulation which has anticompetitive effects should not be struck down in those situations where the benefits conferred on a local government's residents outweigh the national interest in unfettered competition.

### Legislative Limitations to Antitrust Liability

Recognition of a judicially created defense for municipalities has not been the only solution suggested for municipal antitrust liability. Legislation conferring local governmental immunity from the operation of the antitrust laws has been introduced at both the state\(^{101}\) and federal levels.

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1. In 1972, there were 62,437 different units of local government in this country . . . . These units may, and do, participate in and affect the economic life of this Nation in a great number and variety of ways. When these bodies act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender.

2. *Id.* at 407-08 (footnotes omitted).

3. 455 U.S. at 56 (footnote omitted).

4. The Illinois Antitrust Local Government Act, P.A. 83-929, 1983 Ill. Legis. Serv. 5548 (West), attempts to establish a sweeping grant of state action immunity for municipalities under the federal antitrust laws by amending the Illinois Municipal Code as follows:

   It is the policy of this State that all powers granted, either expressly or by
At the federal level, bills have been introduced in the House of Representatives proposing broad-based legislation creating an almost blanket exemption from the federal antitrust laws for units of local government. These bills provide that a local government is only liable under the antitrust laws for anticompetitive conduct to the same extent that a state would be liable if it engaged in such conduct. A bill containing a narrower exemption was introduced in the Senate. The Senate bill proposes exemptions for local governmental units to the same extent that a state government would be exempt from the antitrust laws, except that a local government would not be exempt for “any activity involving the sale of goods or services by the unit of government in competition with private persons.”

necessary implication, by this Code, other Illinois statutes, or the Illinois Constitution to non-home rule municipalities may be exercised by those municipalities notwithstanding effects on competition.

It is further the policy of this State that home-rule municipalities may (1) exercise any power and perform any function pertaining to their government and affairs or (2) exercise those powers within traditional areas of municipal activity, except as limited by the Illinois Constitution or a proper limiting statute, notwithstanding effects on competition.

It is the intention of the General Assembly that the “State action exemption” to the application of federal antitrust statutes be fully available to municipalities to the extent their activities are authorized by law as stated herein.

ILL. REV. STAT. ch. 24, § 1-1-10 (1983). The Illinois Antitrust Local Government Act also attempts to give the same immunity to counties, ILL. REV. STAT. ch. 34, ¶ 401 (1983); county executives, id. ¶ 716; townships, ILL. REV. STAT. ch. 139, ¶ 38 (1983); sanitary districts, ILL. REV. STAT. ch. 42, ¶ 323 (1983); regional transportation authority, ILL. REV. STAT. ch. 111 2/3, ¶ 702.22 (1983); and public school districts, ILL. REV. STAT. ch. 122, ¶ 1-4 (1983).

The Illinois Antitrust Local Government Act also amends the Illinois Antitrust Act to provide that the Illinois Antitrust Act should not be construed to restrict the local governmental exercise of powers granted expressly or by necessary implication by state statute or by the state constitution. ILL. REV. STAT. ch. 38, ¶ 60-11 (1983).

102. H.R. 2981, 98th Cong., 1st Sess. (1983). This bill provides inter alia:

That a unit of local government shall be liable under the antitrust laws for any conduct within the authority vested in such a unit by any law only to the extent that a State, if such State were authorized by any law to engage in identical conduct, would be liable under the antitrust laws for such identical conduct.

H.R. 3688, 98th Cong., 1st Sess. (1983), attempts to amend § 4 of the Clayton Act, 15 U.S.C. § 15 (1982), by stating that: “No unit of local government of a State shall be liable under subsection (a) for conduct which is an exercise of the sovereign power of the State in which the local government is located.”

103. Id.

104. Senate Bill S. 1578, introduced by Senator Thurmond, states:

The Federal antitrust laws shall not apply to any law or other action of, or official action directed by, a city, village, town, township, county, or other gen-
Both the Senate and House bills fail to properly balance the necessary considerations which any legislation on this subject should take into account. These bills do recognize that consideration must be given to the need of local governments to be able to conduct their affairs without the fear of treble damages exposure and the high costs of defending antitrust lawsuits. At the same time, however, consideration must be given to the national economic policy of free and unfettered competition in the marketplace as well as the states' interest in providing a consistent approach to the marketplace within their boundaries. Local governmental conduct is not always motivated by public health,

...
safety and welfare concerns, especially where local governments may act to increase revenues or return political favors at the expense of eliminating the benefits of private competition.107

The Senate bill does recognize the importance of national economic policy to some extent by emphasizing that local governments should not enjoy any antitrust immunity when they enter the marketplace to compete with private enterprises.108 However, even the Senate bill would allow a municipality to pass purely economic regulations which restrain trade as long as the municipality itself did not compete in that market.109 Thus, passage of this bill by Congress would enable a municipality to freely enact regulations which are designed to benefit a particular group of businesses or a certain area of the city at the expense of other businesses or other areas of the city.110 Further, such an exemption would allow local governments to economically injure other local governments and businesses by enacting regulations designed to confer advantages on their residents at the expense of their neighbors.111 This type of economic regulation by local governments inhibits competition and ultimately deprives consumers of the benefits of competition, including lower prices, higher quality goods and services, and wider choices of selection.112

In an effort to give municipalities the freedom to pass necessary legislation without the accompanying fear of antitrust treble damages exposure, these proposed bills give municipalities too much free reign without considering possible alternatives. If any of these proposed bills were passed, a businessman could not even obtain an injunction under the antitrust laws against a municipality which had passed purely economic legislation benefitting another business at the expense of his business. Such leg-

108. See supra note 104.
109. Id.
110. See, e.g., Richmond Hilton Assocs. v. City of Richmond, 690 F.2d 1086, 1087 (4th Cir. 1982) (mayor and city council blocked construction of hotel because of fear that plans for convention center hotel in another section of city would not be economically feasible if plaintiff built its hotel).
111. See supra note 99 and accompanying text.
islation goes too far in the direction of protecting municipalities and as a result fails to fairly balance a municipality’s interests against private competitors’ concerns.

A bill recently passed by the House, H.R. 6027,113 which is currently pending before the Senate, does not address municipal exemptions from antitrust liability. Rather, it prohibits a plaintiff from receiving either monetary relief or attorney’s fees from a municipal government held to have violated the antitrust laws. This bill provides that a plaintiff can obtain an injunction against the enforcement of any anticompetitive regulation of a municipality, as long as the municipality does not qualify for an exemption from antitrust liability under the Parker doctrine.

H.R. 6027 is inadequate because it fails to address those situations where a municipality’s acts should not be enjoined.114 A municipal exemption from antitrust liability seems appropriate when a municipal regulation is required for the health and safety of its residents, although such a regulation has incidental anticompetitive effects.115 Unfortunately, H.R. 6027 provides that a plaintiff could under any circumstance obtain an injunction against enforcement of such a regulation.

Unlike H. R. 6027, the municipal rule of reason defense properly allows local governments to regulate in areas where they can best serve the needs of their residents—health and safety. Moreover, the municipal rule of reason defense is not overly broad in exempting municipalities from antitrust liability as were some of the earlier bills116 introduced in Congress.

Such a defense properly balances a municipality’s need to enact health and safety regulations to protect its residents with the economic interests of private competitors. It would not exempt purely economic municipal regulations117 and even health and

114. See 130 CONG. REC. H8475 (daily ed. Aug. 6, 1984) (statement of Rep. Fish) (“Unfortunately, some felt that an immunity bill was more than the situation demanded and might have prompted years of complicated, interpretive litigation. Consequently, at this time, I am disposed to accept the so-called remedies approach as a method to address this serious national problem. Should this legislation prove to be inadequate, I intend to revisit this subject in the next Congress.”).
115. See supra text accompanying notes 100-01.
116. See supra notes 102-04.
117. The municipal rule of reason would not provide a defense to municipalities for regulations where the objective is to restrain competition to benefit its residents economi-
safety objectives would have to be accomplished in a manner which least restricts competition. Because it is uncertain, however, whether the judiciary will recognize such a defense, it is submitted that the best solution to the dilemma of municipal antitrust liability would be enactment of legislation which provides local governments with a rule of reason defense against antitrust liability.\footnote{118}

\begin{center}
\textbf{ANTITRUST TREBLE DAMAGES}
\end{center}

Having discussed those situations where municipalities should not be liable for antitrust violations, this article now addresses the issue of whether a municipality should be required to pay treble damages when it is held to have violated the antitrust laws. A discussion of treble damages liability remains pertinent even if Congress should enact legislation limiting the imposition of treble damages awards against municipalities because none of
cally. For instance, a municipality's decision to restrict commercial zoning in one area in order to promote business activity in another area is a regulation in which the purpose is to impose an economic restraint. Municipal regulations aimed at acquiring economic benefits for a group of its residents or all of its residents will most likely be held to violate the antitrust laws.

118. An example of an anticompetitive municipal act which would qualify for the municipal rule of reason defense is found in Gold Cross Ambulance v. City of Kansas City, 705 \textit{F.2d} 1005 (1983). There, the city was charged with violating the antitrust laws by contracting with a single private operator to provide all ambulance service within the city. The Court dismissed the plaintiff's claim because it found an affirmatively expressed governmental policy to displace competition in the state statute which authorized cities to contract with "one or more" operators. \textit{Id.} at 1011. Based on the language of the statute, the court held that the state contemplated that a city may contract with only one operator. \textit{Id.} at 1012-13. However, even if the state statute had not expressed such a state policy, perhaps the court could have predicated nonliability on a health and safety municipal rule of reason defense.

In \textit{Gold Cross Ambulance}, Kansas City had provided emergency ambulance service to its residents by contracting with five competing private companies for emergency ambulance service. In 1978, a controversy arose because of the ambulances' slow response to emergency calls. A study was conducted by the city which revealed that the fixed costs of providing emergency ambulance service was high, while the cost of providing nonemergency ambulance service was low. The study also showed that the fee collection rate for nonemergency service was substantially higher than the fee collection for emergency services. Thus, the private ambulance services had "a strong incentive to concentrate on providing nonemergency service rather than quick, high quality emergency care." \textit{Id.} at 1009.

In response to the problem, the city contracted with a single operator to provide all ambulance service. The single operator would possess a strong incentive to provide emergency service because it would be paid for its emergency service by the city, whether or not the city was able to collect payments from the users of the service. \textit{Id.} However, the study concluded that for such a system to be economically feasible for the ambulance service, it had to be the sole provider of such service, otherwise other private ambulance
the bills proposed by Congress exempt all anticompetitive acts of local governments from such liability.\(^{119}\)

**Mandatory Nature**

In *City of Lafayette*, the Court expressly reserved the issue of whether treble damages were recoverable against a municipality found liable for an antitrust violation.\(^{120}\) The language of section 4 of the Clayton Act indicates that the imposition of treble damages is mandatory once a defendant is held liable for a violation of the antitrust laws. Section 4 states:

[Any] person who shall be injured in his business or prop-

companies would retain the incentive to provide the high profit nonemergency calls while leaving the less profitable emergency calls to the city's service. *Id.*

Clearly, the purpose of the city’s anticompetitive activity was to protect the health and safety of its residents. The anticompetitive effects on the ambulance service industry were incidental to the benefits of the regulation. Moreover, the study conducted by the city indicated that the benefits of the regulation could not be achieved in a less restrictive manner. Therefore, based on a health and safety municipal rule of reason defense, such a regulation would not leave a city vulnerable to antitrust liability.

Perhaps, such a defense could also have been utilized by the city of Akron in *Hybud Equip. Corp. v. City of Akron*, 1983-1 Trade Cas. (CCH) ¶ 65,536, at 70,114 (N.D. Ohio 1983), where the Court premised state action antitrust immunity on an unwarranted determination that state policy authorized a municipality to displace competition in the waste disposal industry. In *Hybud*, the city was charged with violating the antitrust laws by requiring that all waste collected within the city limits would be taken to the city's disposal facilities. The city decided to construct such a facility pursuant to a study conducted to determine a long term solution to its waste disposal problem. The study concluded that existing solid waste disposal sites would be filled by 1978. Accordingly, the city decided to build a waste treatment facility to solve the problem. *Id.* at 70,116.

The city sought to issue revenue bonds to finance the project. However, underwriters refused to repurchase and resell the bonds, finding that the bonds would be unmarketable unless the disposal facility was assured of receiving a supply of waste that would be of adequate BTU content over the term of the bonds. *Id.* at 70,116-17. In order to solve the long term problem of waste disposal, the city agreed to enact an ordinance requiring that all the waste collected in the city had to be taken to the city's disposal facilities. *Id.*

In *Hybud*, the city's objective in restricting competition in the waste disposal industry was not economic regulation of the industry, but rather the protection of the health of its citizens by providing a method of disposing of the town's waste. Furthermore, it appears that the city could not achieve a less restrictive method of obtaining the benefit of adequate waste disposal. Under such circumstances, a municipality should not be held liable for antitrust violations.


120. 435 U.S. at 401-02. *See also City of Boulder*, 455 U.S. at 56-57 n.20 ("[A]s in *City of Lafayette*, . . . we do not confront the issue of remedies appropriate against municipal officials.").
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erty by reason of anything forbidden in the antitrust laws may sue therefor... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.\textsuperscript{121}

The dissent in \textit{City of Boulder}, concerned with the impact that treble damages awards would have on the decision-making processes of municipalities, noted that such damages are mandatory and stated that it would "take a considerable feat of judicial gymnastics to conclude that municipalities are not subject to treble damages."\textsuperscript{122} A district court has reached the same conclusion. In \textit{Grason Electric Co. v. Sacramento Municipal Utility District},\textsuperscript{123} the court held that treble damages were recoverable against a municipality for its antitrust violations. In doing so, the court stated: "No... room for maneuver exists with respect to the Clayton Act. Section 4 explicitly mandates the award of treble damages without respect to the status or identity of the wrongdoer. This Court is without the power to rewrite section 4 of the Clayton Act."\textsuperscript{124}

Contrary to the court's reasoning in \textit{Grason Electric} and the dissent's statement in \textit{City of Boulder}, the apparent mandatory language of section 4 does not require the imposition of treble damages in all cases. In the past, courts have interpreted the meaning of statutes contrary to what their literal reading suggests. For example, the Supreme Court in \textit{Parker v. Brown}\textsuperscript{125} held that states were exempt from antitrust liability, despite the fact that a literal reading of the antitrust statutes would indicate otherwise. One year before \textit{Parker v. Brown} was decided, the Court in \textit{Georgia v. Evans}\textsuperscript{126} stated that states could sue under the antitrust laws because they were "persons" under the Act. Thus, a literal application of the liability provisions of the antitrust laws would subject states to liability as "persons" under the Act.\textsuperscript{127} Nevertheless, the Court in \textit{Parker}, although recognizing that states were persons under the antitrust laws, ascertained

\begin{itemize}
\item \textsuperscript{121} 15 U.S.C. § 15 (1982).
\item \textsuperscript{122} 455 U.S. at 65 n.2.
\item \textsuperscript{123} 526 F. Supp. 276 (1981).
\item \textsuperscript{124} \textit{Id.} at 282.
\item \textsuperscript{125} 317 U.S. 341, 351 (1943).
\item \textsuperscript{126} 316 U.S. 159, 162 (1942).
\item \textsuperscript{127} See \textit{City of Lafayette}, 435 U.S. at 397 ("Although both \textit{Chattanooga Foundry} and \textit{Georgia v. Evans} involved the public bodies as plaintiffs, whereas petitioners in the instant case are defendants to a counterclaim, the basis of those decisions plainly pre-
that states were not liable under those laws in light of the legislative history of the antitrust laws and certain policy considerations.\textsuperscript{128} Similarly, the Court in \textit{City of Lafayette} stated that if the defendant city was to be successful in its assertion that municipalities were not liable under the antitrust laws because of their status as local governments, such a conclusion “must rest on the impact of some overriding public policy which negates the construction of coverage, and not upon a reading of ‘person’ or ‘persons’ as not including them.”\textsuperscript{129}

The Court in \textit{City of Lafayette} stated that the mandatory language of section 4 of the Clayton Act does not automatically require awarding treble damages against municipalities. In this regard, the Court stated that the imposition of antitrust liability does not “necessarily require the conclusion that remedies appropriate to redress violations by private corporations would be equally appropriate for municipalities.”\textsuperscript{130} Presumably, the Court left open the possibility that an examination of the legislative history of the antitrust laws and overriding policy considerations might negate the apparent mandatory language of section 4.

The legislative history of the antitrust laws interpreted against the backdrop of common law principles and coupled with policy considerations could provide a court with the opportunity to limit treble damages recoveries against local governments. The Court utilized this type of analysis in \textit{City of Newport v. Fact Concerts, Inc.},\textsuperscript{131} where it held that municipalities are not liable for punitive damages under section 1983 of the Civil Rights Act. The Court predicated its decision on public policy grounds and the legislative history of the Civil Rights Act. The Court, pursuant to public policy, found that neither the retributive or deterrent objectives of punitive damages are advanced by holding municipalities liable for such damages.\textsuperscript{132} Furthermore, the Court observed that common law courts refused to award punitive damages against municipalities,\textsuperscript{133} and that nothing in the legis-

\textsuperscript{128} 317 U.S. at 351-52.
\textsuperscript{129} 435 U.S. at 397 (footnote omitted) (emphasis added).
\textsuperscript{130} \textit{Id.} at 402 (emphasis added).
\textsuperscript{131} 453 U.S. 247 (1981).
\textsuperscript{132} \textit{Id.} at 266-71.
\textsuperscript{133} \textit{Id.} at 259-63.
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The legislative history of the Civil Rights Act indicated that Congress intended to abolish the doctrine of municipal immunity from punitive damages.\textsuperscript{134}

Similarly, municipalities which violate the antitrust laws may assert that public policy considerations and the legislative history of the antitrust laws support the conclusion that municipalities should not be liable for punitive damages in the nature of treble damages. Whether such an argument would be successful depends on whether treble damages assessed against municipalities are punitive or compensatory in nature; whether municipalities were exempt from punitive damages at common law at the time the antitrust laws were enacted; and whether overriding policy considerations exist that would negate applying the literal wording of the treble damages provision against municipal defendants.

**Treble Damages: Punitive or Compensatory?**

The Supreme Court in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*\textsuperscript{135} stated that the treble damages provision of the antitrust laws serves three principal functions: (1) punishing past violations of the antitrust laws; (2) deterring future antitrust violations; and (3) serving as a remedy for victims of antitrust violations. Punishment and deterrence are the principle functions of punitive damages.\textsuperscript{136} In *Texas Industries, Inc. v. Radcliff Materials, Inc.*, the Supreme Court stated that “[t]he very idea of [antitrust] treble damages reveals an intent to punish past, and to deter future, unlawful conduct.”\textsuperscript{137}

Moreover, the Supreme Court has also stated that an important reason Congress created a private right of action for an antitrust violation was to promote private enforcement of the antitrust laws and thereby deter violations. In *Reiter v. Sonotone Corp.*, the Court stated that: “Congress created the treble damages remedy . . . precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deter-

\begin{footnotesize}
134. *Id.* at 263-66.
136. *Id.* at 575.
\end{footnotesize}
Although the treble damages provision does serve the important functions of punishment and deterrence, the Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* stated that Congress created this provision primarily as a remedy for antitrust violations. The Court drew this conclusion from an examination of the legislative history of section 7 of the Sherman Act, which was the original antitrust treble damages provision, and section 4 of the Clayton Act. The Court cited statements made by members of Congress during the House and Senate debates concerning the enactment of the antitrust treble damages provisions in support of its conclusion.

The Court cited two statements made during the House debates concerning section 4 of the Clayton Act which refer to section 4 as a “remedy” and as providing “ample damages,” to support the proposition that treble damages were created primarily as a remedy. However, the Court conceded that statements made by sponsors of the bill indicate that they recognized “treble-damages suits as an important means of enforcing the law.” The Court also observed that during the Senate debates concerning section 4 there was no discussion of the enforcement value of private actions which serve to promote the public good by deterring violations. However, neither does the Court indicate that there was any discussion by the Senate regarding the compensatory value of treble damages.

The Court in *Brunswick* also referred to statements made during the Senate debates concerning the passage of section 7 of the Sherman Act, which it found to support the view that antitrust treble damages are primarily remedial. The Court quoted Senator George’s comment that the treble damages provision was created as a remedy for people as individuals. However,

140. Id. at 486 n.10.
141. Id.
142. Id.
143. Id.
144. Id.
145. Id.
146. The Court stated: “The discussions of this section on the floor of the Senate indicate that it was conceived of primarily as a remedy, for ‘[t]he people of the United States as individuals,’ especially consumers.” Id. (quoting 21 CONG. REC. 1767-68 (1890) (remarks of Sen. George)).
in that same speech, Senator George refers to the antitrust statute as “a penal statute, and nothing else.”147 The Court also quoted a statement made by Senator Sherman which indicates that the reason for including the treble damages provision was to make the remedy adequate considering the cost of maintaining a private action.148 Although the statements quoted by the Court do support the conclusion that the treble damages provision was intended to compensate, they should be examined in the context in which they were spoken.

Each of the Senators whose remarks were cited by the Court indicated that he anticipated that in most cases, consumers would be the parties injured by anticompetitive actions.149 These Senators realized that although attorney’s fees were recoverable in antitrust suits, an award of single damages would not even compensate a consumer plaintiff for the “unrecoverable” expense of his time and effort in maintaining the lawsuit.150 Therefore, the Senate supported a bill providing for treble damages so that it would be worthwhile for consumers to bring antitrust actions. Indeed, it is reasonable to assume that when a consumer sues for

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147. 21 CONG. REC. 1765 (1890) (remarks of Sen. George).
148. The Court stated that treble damages “make the remedy meaningful by counter-balancing ‘the difficulty of maintaining a private suit against a combination such as is described’ in the Act.” 429 U.S. at 486 n.10 (quoting 21 CONG. REC. 2456 (1890) (statement of Sen. Sherman)).
149. 21 CONG. REC. 1767-68 (1890) (remarks of Sen. George) (“The consumer ... is the party necessarily damnified or injured.”); id. at 2612 (remarks of Sen. Teller) (In Senator Teller’s speech which was cited by the Court he argued that the proposed $2,000 jurisdictional amount should be eliminated from the bill and stated: “[If we limit the amount there is not one man out of a hundred who are damaged who will even have an opportunity of getting redress. It may be that there will not be a case prosecuted where there is a large amount of damage.”); id. at 2612 (remarks of Sen. Reagan) (“My reason for presenting this amendment is that under the original bill persons of moderate means would not be able to go into the Federal courts and employ lawyers and take witnesses there and prosecute suits, so that, while the bill would nominally afford a remedy for the evils, it would really be no remedy at all for the great class of persons who might be injured by the sort of things we are legislating against.”); id. at 2615 (remarks of Sen. Coke).
150. Senator George in the same paragraph of his speech quoted in part by the Court to support the proposition that the treble damages provision was intended to be primarily remedial, stated: It is manifest that in nearly every instance the damage by the advanced price of each article affected by these combinations would be though in the aggregate large, indeed—so small as not to justify the expense and trouble of a suit in a distant court. The consumer claims a loss of, say, $25, on a particular article, as sugar, affected by the combination. If he succeeds he gets double damages; that is $50. He may live in Missouri, or Texas, or Kansas; he must go to New York, or Boston, or Chicago, or some distant city to bring his suit. He is poor, a
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twenty-five dollars in actual damages and recovers seventy-five dollars, the entire award is merely compensating him for his actual loss resulting from the anticompetitive acts and his time and effort in maintaining the suit. The Court, however, failed to recognize that these statements were made in the context of consumer suits.

It is reasonable to assume that the legislators who viewed the treble damages provision as a means of adequately compensating a consumer for his trouble in bringing suit for a small sum would not have considered a treble damages award in the amount of thousands or millions of dollars as primarily compensatory. When a business suffers actual damages of one million dollars as a result of an antitrust violation, it will recover three million dollars as its treble damages award. The additional two million dollars cannot be said to primarily compensate the plaintiff for his time and effort in maintaining the suit. The plaintiff can recover attorney’s fees in addition to the treble damages award. Furthermore, the plaintiff’s business expense in having its employees prepare for and attend the trial cannot justify categorizing an increased award in the millions of dollars as primarily compensatory.

Moreover, it cannot be argued that a strict burden of proof of damages makes huge treble damages awards primarily compensatory. Courts are liberal in the evidence they accept as proof of a plaintiff’s actual damages in antitrust cases. In the vast

farmer, or mechanic, or laborer. He undertakes to get damages from a powerful and rich corporation, or combination of corporations and persons. He must employ lawyers; he must hunt up and interview witnesses, many of them unwilling to communicate what they know and some interested in misleading him. He must summon them; pay their expenses. He must attend the court. If he is ready for trial the cause will be probably continued. The result will be in nearly every case that, crushed by the expense, wearied by the delays, he will abandon the suit in dispair.

I do not hesitate to say that few, if any, of such suits will ever be instituted, and not one will ever be successful.

_id. at 1768 (remarks of Sen. George). See also id. at 2610 (remarks of Sen. Morgan); id. at 2612 (remarks of Sen. Reagan).

It is interesting to note that although the Supreme Court quotes Senator George as strong support for its conclusion that treble damages are primarily remedial, Senator George stated that the antitrust statute is “a penal statute, and nothing else.” _id. at 1765 (emphasis added). Moreover, Senator George twice refers to the treble damages provision as a “penalty provision.” _id. at 1767-68.

151. See _supra_ note 150.

152. See, e.g., _Bigelow v. RKO Pictures, Inc._, 327 U.S. 251 (1946); _National Wrestling
majority of antitrust cases where a municipality is a defendant, the plaintiff will be an injured business where the treble damages awards cannot fairly be categorized as being primarily compensatory. On the contrary, it appears that in an antitrust case where a business brings suit, the combined deterrent and retributive functions of treble damages awards are of greater importance, than the remedial aspect of treble damages.

Although the Supreme Court's reasoning in *Brunswick* that the primary purpose of the antitrust treble damages provision is to compensate the plaintiff appears unpersuasive, the Court reiterated this finding in *American Society of Engineers, Inc. v. Hydrolevel Corp.* In *Hydrolevel*, the Court resolved the issue of whether a court could employ apparent authority to impose treble damages upon a principal for the anticompetitive acts of its agents. The defendants argued that treble damages were designed to punish and that under traditional agency law, a court could impose no such liability.

The Court recognized that this traditional agency principle was premised on the theory that a principal should not be punished for the unauthorized acts of its agents. However, the Court observed that punishment was only one function that antitrust treble damages were intended to serve. The Court stated that treble damages were designed to accomplish three distinct functions:

- It is true that antitrust treble damages were designed in part to punish past violations of the antitrust laws. *But* treble damages were also designed to deter future antitrust violations. Moreover, the antitrust private action was created primarily as a remedy for the victims of antitrust violations. Treble damages "make the remedy meaningful by counterbalancing 'the difficulty of maintaining a private suit'" under the antitrust laws.

The Court stated that two of the purposes underlying the treble damages provision — compensation and deterrence — would not

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Alliance v. Meyers, 325 F.2d 768 (8th Cir. 1963). See also J. VON KALINOWSKI, ANTITRUST LAWS & TRADE REGULATION § 115.01 (1983).

153. See, e.g., supra notes 72-80 and accompanying text.


155. Id. at 574-75.

156. Id. at 575-76.

157. Id. at 575.

158. Id. (quoting *Brunswick*, 429 U.S. at 486 n.10 (quoting 21 CONG. REC. 2456 (1890) (remarks of Sen. Sherman)) (other citations omitted) (emphasis added).
be furthered by exempting a principal from the unauthorized acts of its agent. First, it noted that holding a principal liable on an apparent authority basis would serve the remedial function of treble damages. Second, the Court stated that the deterrent purpose of treble damages would be furthered by holding the defendant liable. In this regard, the Court reasoned that a principal is in the best position to control its agents and prevent future violations. Accordingly, although a principal should not be punished for the unauthorized acts of its agents, the Court concluded that “[s]ince treble damages serve as a means of deterring antitrust violations and of compensating victims, it is in accord with both the purposes of the antitrust laws and principles of agency law to hold [the defendant] liable for the acts of agents committed with apparent authority.”

The decision in *Hydrolevel* shows that the compensatory and deterrent functions of treble damages outweigh the retributive value of such damages, and that when the former two purposes are served, the imposition of treble damages is justified. However, this does not preclude a determination that the combined deterrent and retributive functions outweigh the remedial component of treble damages. Because deterrence and punishment are the objectives of punitive damages, it can be argued that if these two functions of treble damages outweigh the remedial aspect of such damages, then a treble damages award could be classified as primarily punitive, and that when only the remedial

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159. *Id.* at 575-76.

160. *Id.* at 576. The Court stated:

> [I]f . . . [the defendant] is civilly liable for the antitrust violations of its agents acting with apparent authority, it is much more likely that similar antitrust violations will not occur in the future. “[P]ressure [will be] brought on [the organization] to see to it that [its] agents abide by the law.” Only [the defendant] can take systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for [the defendant] to take those steps.

*Id.* at 572 (quoting United States v. A&P Trucking Co., 358 U.S. 121, 126 (1958) (footnote omitted)). Compare infra note 211 and accompanying text.

161. 456 U.S. at 575-76. To support this conclusion, the Court cited the *Restatement (Second) of Agency* § 217, comment c, at 474 (1957), as providing that the “rule limiting principal’s liability for punitive damages does not apply to special statutes giving triple damages.” 456 U.S. at 576. However, comment c provides in full: “The rule stated in this Section does not apply to the interpretation of special statutes such as those giving triple damages, as to which no statement is made.” *Restatement (Second) of Agency* § 217, comment c, at 474 (1957) (emphasis added).

162. Although the Court has concluded that treble damages are primarily remedial, this is not the equivalent of a determination that the majority of such damages are remedial.
function of treble damages is served, imposition of such an award is not justified.

If such a determination were made, it would be in the context of a case where the Court found that neither the deterrent or retributive functions of treble damages would be served by imposing multiple damages against a defendant. Such a case is presented when an antitrust defendant is a municipality. As will be discussed, the rationale for not imposing punitive damages on a municipality for the acts of its officials is twofold. First, a municipality should not be punished for the acts of its agents. Second, unlike the normal principal-agent relationship, the deterrent function of punitive damages is not furthered by imposing such damages on a municipality.

Accordingly, the remedial component of treble damages does not necessarily preclude a municipality from successfully arguing that it is exempt from treble damages liability based on common law principles of punitive damages, the legislative history of the antitrust laws, and policy considerations. Rather, the remedial aspect of treble damages is a factor to consider when balancing policy considerations in determining whether to impose treble damages against municipalities. The analysis utilized in determining whether a municipality may be exempt from treble damages liability closely parallels the Court’s analysis in *City of Newport v. Fact Concerts, Inc.* Accordingly, this case will be discussed in detail.

*City of Newport v. Fact Concerts, Inc.*

In *City of Newport v. Fact Concerts, Inc.*, the Court held...
that local governments could not be held liable for punitive damages under section 1983 of the Civil Rights Act.\textsuperscript{167} Three years earlier, the Court in \textit{Monell v. New York City Department of Social Services},\textsuperscript{168} expanded the scope of municipal liability under the Civil Rights Act and held for the first time that local governmental units were "persons" for purposes of section 1983 actions. After the decision in \textit{Monell}, the Court in \textit{City of Newport} was faced with the issue of whether punitive damages, traditionally available in section 1983 actions, were recoverable against municipal defendants.

The \textit{City of Newport} Court utilized a two-step approach to determine whether municipalities should be subject to punitive damages. The Court assumed that when Congress enacted the Civil Rights Act of 1871, its members were familiar with common law principles such as defenses previously recognized in tort claims.\textsuperscript{169} Accordingly, the Court concluded that Congress intended common law immunity defenses to apply to the Civil Rights Act, unless there were specific provisions of the Act which indicated otherwise.\textsuperscript{170} At the same time, the Court stated that congressional intent to incorporate a particular common law immunity into the Civil Rights Act could not be determined solely by examining the language of the statute and its legislative history. To do so, in the Court's view, would negate the intent of Congress to create a new federal remedy.\textsuperscript{171} Accordingly, the Court stated it would also consider the policies that the municipal immunity serves and its compatibility with the Act.\textsuperscript{172}

Therefore, to determine whether municipalities were immune from punitive damages under section 1983, the court examined both the history of the Act and the policy reasons underlying such an immunity.

First, the Court examined the legislative history of the Civil Rights Act against the backdrop of the common law. The Court stated that in 1871, when the Civil Rights Act was enacted, courts were virtually unanimous in refusing to award punitive

\begin{itemize}
\item \textsuperscript{167} 42 U.S.C § 1983 (1982).
\item \textsuperscript{168} 436 U.S. 658 (1978).
\item \textsuperscript{169} 453 U.S. at 258.
\item \textsuperscript{170} \textit{Id}.
\item \textsuperscript{171} \textit{Id}. at 258-59.
\item \textsuperscript{172} \textit{Id} at 259.
\end{itemize}
damages against a municipal corporation. Furthermore, the Court noted that "[j]udicial disinclination to award punitive damages against a municipality has persisted to the present day

173. Id. at 259-260. The Court then cited cases that explained the rationale behind holding municipalities immune from punitive damages. For instance, in McGary v. President & Council of the City of Lafayette, 12 Rob. 668 (La. 1846), the court refused to award punitive damages against the city of Lafayette, although municipal officers had directed the demolition of the plaintiff's house despite an injunction forbidding such action. The court found that innocent taxpayers should not bear the burden of paying punitive damages because of the wrongdoing of city officials. The Court in City of Newport quoted the following portion of the McGary decision:

Those who violate the laws of their country, disregard the authority of courts of justice, and wantonly inflict injuries, certainly become thereby obnoxious to vindictive damages. These, however, can never be allowed against the innocent. Those which the plaintiff has recovered in the present case..., being evidently vindictive, cannot, in our opinion, be sanctioned by this court, as they are to be borne by widows, orphans, aged men and women, and strangers, who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff, cannot be bound beyond that amount, which will be sufficient for her indemnification.

453 U.S. at 261 (quoting McGary, 12 Rob. at 677). Another common law case the Court cited was the Missouri Supreme Court's decision in Hunt v. City of Boonville, 65 Mo. 620 (1877). In Hunt, the court held that a municipality could not be held liable for treble damages under a trespass statute, although the statute authorized damages against "any person." The Court in City of Newport quoted the following portion of the Hunt decision:

[T]he relation which the officers of a municipal corporation sustain toward the citizens thereof for whom they act, is not in all respects identical with that existing between the stockholders of a private corporation and their agents; and there is not the same reason for holding municipal corporations, engaged in the performance of acts for the public benefit, liable for the willful or malicious acts of its officers, as there is in the case of private corporations.

453 U.S. at 261-62 (quoting Hunt, 65 Mo. at 625).

Hunt is a significant decision in another respect. The Court in City of Newport stated: "The general rule today is that no punitive damages are allowed unless expressly authorized by statute." Id. at 260 n.21. This rule was derived from early common law decisions such as Hunt, which held that although a local government is a "person" under an applicable statute which authorized awarding punitive damages against "persons," the statute must specifically authorize the award of punitive damages against local governments for it to be held liable for such an award. For a discussion of these decisions, see Annot., 19 A.L.R.2d 903, § 6, at 912-13 (1950) (discussion of the effect of a statute on the recovery of punitive damages from a municipal corporation). Such decisions negate the argument that the Court's reasoning in City of Newport cannot be analogized to the imposition of antitrust treble damages awards against municipalities because 15 U.S.C. § 15 (1982) expressly authorizes treble damages while 42 U.S.C. § 1983 (1982) does not expressly authorize punitive damages.

After reviewing certain common law decisions involving a local government's liability for punitive damages, the Court in City of Newport stated that the rationale of these decisions was enunciated in numerous common law jurisdictions, where courts reasoned that punitive damages were against public policy because they burdened the same taxpayers for whose benefit such damages would be exacted. 453 U.S. at 263. While the obligation to pay compensatory damages was properly shared by the public for a city
in the vast majority of jurisdictions."174 After concluding that a municipality's immunity from punitive damages was firmly established at common law, the Court examined the legislative history of the Civil Rights Act and ascertained that there was no indication that Congress intended to abolish the doctrine of municipal immunity from punitive damages.175

Therefore, the Court proceeded to determine whether the policy considerations behind the municipal immunity were compatible with the Civil Rights Act. The Court stated that punitive damages are not designed to compensate the injured party. Rather, the primary functions of punitive damages are to punish the wrongdoer for his actions and to deter him from committing similar violations in the future.176

The Court maintained that assessing punitive damages against a municipality would punish taxpayers who were not involved in the commission of the tort.177 Furthermore, because the punishment is not intended to compensate, the issue of equitably distributing the losses resulting from misconduct by city officials is not involved.178 Rather, such damages are a windfall to the plaintiff, while they are "likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers."179

The Court also considered the deterrent function of punitive damages. The plaintiffs argued that a primary purpose of section 1983 was deterrence, and that awarding punitive damages

174. 453 U.S. at 260. The Court cited the following cases in support of its conclusion: Lauer v. Young Men's Christian Assoc., 57 Haw. 390, 557 P.2d 1334 (1976); Ranells v. City of Cleveland, 41 Ohio St. 2d 1, 321 N.E.2d 885 (1975); Smith v. District of Columbia, 336 A.2d 831 (D.C. App. 1975); Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965); Brown v. Village of Deming, 56 N.M. 302, 243 P.2d 609 (1952); Town of Newton v. Wilson, 128 Miss. 726, 91 So. 419 (1922); Willett v. Village of St Albans, 69 Vt. 330, 38 A. 72 (1897).

175. 453 U.S. at 263-66.

176. Id. at 266-67. See also 25 C.J.S. Damages § 117, at 1107-09 ("[S]uch damages are allowed not because of any special merit in the injured party's case, but are awarded by way of punishment to the offender, and as a deterrent, warning, or example to defendant and others.").

177. 453 U.S. at 267.

178. Id.

179. Id. (footnote omitted).
against a municipality for the malicious acts of its officials would cause voters to oust the responsible officials from office, thereby deterring future violations.\textsuperscript{180} The Court recognized that deterrence of future civil rights violations is an important purpose of section 1983.\textsuperscript{181} However, the Court concluded for a number of reasons that such a purpose would not be served if punitive damages were assessed against a municipality.

First, the Court stated that it is arguable that municipal officials would be deterred from wrongdoing based on their knowledge that large punitive damages awards may be assessed for civil rights violations because of the wealth of their municipality.\textsuperscript{182} In this regard, the Court noted that municipalities may not be allowed to seek indemnification against the officials responsible for the wrongdoing.\textsuperscript{183} Even if indemnification was available, the Court stated it was unlikely that such officials could pay the sizable awards.\textsuperscript{184} Second, the Court maintained that there was no reason to assume that corrective action would not be taken against wrongdoers in the absence of punitive damages. The Court stated that “the more reasonable assumption is that responsible superiors are motivated not only by concern for the public but also by concern for the Government’s intergrity.”\textsuperscript{185} The Court observed that discharge of appointed officials and public condemnation of elected officials may well occur without the imposition of punitive damages.\textsuperscript{186} Moreover, the Court noted that if additional protection against official wrongdoing is necessary, the electorate may vote such officials out of office because of the burden imposed on the taxpayers resulting from the award of compensatory damages against the municipality.\textsuperscript{187}

Third, the Court stated that the most effective means of deterring official wrongdoing remained available under the Act. The Court maintained that the best method of deterring future violations was to allow the courts to award punitive damages against a governmental official based on his own finances.\textsuperscript{188}

\textsuperscript{180} Id. at 268.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} Id. at 269 (quoting Carlson v. Green, 446 U.S. 14, 21 (1980)).
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id.
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regard, the Court noted that it had previously found that a damage remedy assessed against an individual is "more effective as a deterrent than the threat of damages against a government employer." The Court observed that the same rationale applied to the threat of damages against the citizen-taxpayer.

The Court also stated that there were other policy considerations which weighed against a finding that municipalities are liable for punitive damages resulting from section 1983 violations. The Court stated that one such reason was that potential governmental liability under the Civil Rights Act had recently been expanded. The Court maintained that to add the burden of punitive damages liability might seriously impair the financial integrity of governmental entities. The Court found that such awards may be substantial: "[W]e are sensitive to the possible strain on local treasuries and therefore on services available to the public at large." Because neither the legislative history of the Civil Rights Act nor policy reasons supported subjecting municipalities to punitive damages, the Court held that municipalities are immune from such awards under section 1983.

**Local Government Exemption from Treble Damages**

The Court in *City of Newport* resolved many of the issues that a court must address in determining whether local governments are immune from antitrust treble damages. First, a court should consider the history of the antitrust laws in light of the common law. Section 7 of the Sherman Act was enacted in 1890. Section 4 of the Clayton Act was enacted in 1914 and extended the scope of activities under which antitrust defendants could be held liable for treble damages. A court should assume that when Congress enacted these provisions, its members were familiar with common law immunity defenses, just as the Court assumed in *City of Newport* that Congress was familiar with

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189. *Id.* at 270 (citing Carlson v. Green, 446 U.S. 14, 21 (1980)).
190. *Id.*
191. *Id.*
192. *Id.* at 271.
these common law defenses when it enacted the Civil Rights Act in 1871.\textsuperscript{195}

A court would readily ascertain that the common law at the time these federal remedies were created did not impose punitive damages awards against municipalities. The Court in \textit{City of Newport} maintained that prior to 1871 and continuing to present day, a municipal immunity against awarding punitive damages has been recognized in the vast majority of jurisdictions.\textsuperscript{196} Therefore, it is presumed that such an immunity was known and recognized by Congress in 1890 and 1914 respectively.

Having established that Congress knew of the common law municipal immunity from punitive damages, a court should further assume that Congress intended this common law immunity defense to apply to the antitrust laws unless there are specific provisions to the contrary.\textsuperscript{197} Such an assumption is reasonable. The Supreme Court has expressly recognized that the rules of the common law in effect at the time the antitrust laws were passed are relevant in determining congressional intent. The Court has stated that there is a permissible inference that "Congress relied on courts' continuing to apply [common law] principles in effect at the time of enactment."\textsuperscript{198} The Court has also stated:

\begin{quote}
Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.\textsuperscript{199}
\end{quote}

The legislative history of the antitrust laws reveals that the members of Congress did not discuss whether municipalities were exposed or immune from treble damages liability. Therefore, because neither the legislative history of the Sherman Act nor the Clayton Act shows that Congress intended to abolish the municipal immunity against punitive damages, it is likely Congress

\begin{footnotes}
\item[195] See supra note 169 and accompanying text.
\item[196] See supra notes 173-74 and accompanying text.
\item[197] See supra note 170 and accompanying text.
\end{footnotes}
intended such an immunity to apply in antitrust actions against municipalities.

A court should also consider that although local governments are considered "persons" for purposes of substantive antitrust liability, it would not be anomalous for a court to hold that local governments are not within the scope of section 4 of the Clayton Act. Because local governments at common law were liable for their tortious acts, it is not unreasonable to conclude that there was no need for Congress to specifically state that local governments were subject to the antitrust laws. However, because it was well established at common law that local governments were exempt from punitive damages, it was again unnecessary for Congress to provide a specific exemption for local governments. The plain understanding of the common law coupled with the legislative history of the antitrust laws provides a court with the opportunity to limit damage recoveries against local governments.

A review of the legislative history of the antitrust laws does not end the inquiry into whether municipalities are immune from treble damages liability. Next, a court would have to consider whether the public policies such an immunity serves are compatible with the goals of the treble damages provision. A court's review of whether public policy requires the imposition of treble damages on local governments should closely track the Supreme Court's City of Newport analysis, with the exception that a court must further consider that treble damages, unlike punitive damages, serve a compensatory function.

The retributive purpose of antitrust treble damages is not served by awarding such damages against municipalities because the burden of the loss falls on the innocent taxpaying pub-

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200. See supra notes 125-27 and accompanying text. See also City of Lafayette, 435 U.S. at 395-97 & nn.10-13.
201. See City of Newport, 453 U.S. at 259 ("It was generally understood by 1871 that a municipality, like a private corporation, was to be treated as a natural person subject to suit for a wide range of tortious activity, but this understanding did not extend to the award of punitive or exemplary damages.").
203. See supra note 201.
204. See supra notes 171-72 and accompanying text.
205. See supra notes 135-65 and accompanying text.
lic. Furthermore, common law courts recognized that assessing punitive damages against local governments was contrary to public policy because they burden the same taxpayers for whose benefit such damages would be exacted. Courts at common law also recognized that taxpayers should not be punished because often they have little influence on actual city management. These courts noted that the taxpayers' relationship to the municipal corporation is unlike the relationship between a private corporation and its shareholders because citizens exercise less dominion and control over governmental employees than shareholders exercise over the employees of a private corporation.

The deterrent function of treble damages is also not furthered by imposing such awards against municipalities. The Court in City of Newport assumed that a city official who is guilty of wrongdoing would be deterred from committing future violations of a law by means other than damages assessed against the local government for his conduct. The Court believed that the governmental integrity of the wrongdoer's superiors and citizen condemnation would serve to deter him. Moreover, large damages awards, such as antitrust treble damages, would not deter


207. See City of Newport, 453 U.S. at 263 ("In general, courts viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised."). See also E. McQuILLAN, MUNICIPAL CORPORATIONS § 53.18(a), at 161-62 (3d rev. ed. 1977); 57 Am. Jur. 2d Municipal, School, and State Tort Liability § 319, at 268-69 (1971).

208. See E. McQuILLAN, supra note 207, § 53.18(a), at 161; Morris, Punitive Damages in Tort Cases, 44 HARv. L. REV. 1173 (1931). See also Costich v. City of Rochester, 68 App. Div. 623, 73 N.Y.S. 835 (1902) (stating it also unfair to punish taxpayers for the acts of municipal management because it not always a city government of their choice).

209. See supra note 173 for a discussion of Hunt v. City of Boonville, 65 Mo. 620 (1877); E. McQuILLAN, supra note 207, § 53.18(a), at 161; 57 Am. Jur. 2d Municipal, School, and State Tort Liability § 319, at 269 (1971) ("[I]t has also been pointed out that a municipality always acts through agents, whose acts are not easily subject to the control of the public, as contrasted to the situation involving a private corporation and its stockholders, and that while the agents should be considered responsible individually for such damages, the public should not, since they are merely passive wrongdoers."). See also Costich v. City of Rochester, 68 App. Div. 623, 73 N.Y.S. 835 (1902).

210. See supra notes 185-87 and accompanying text. See, e.g., Ranells v. City of Cleveland, 41 Ohio St. 2d 1, 321 N.E.2d 885 (1975). Similarly, the court in Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965), stated:

The deterence element likewise adds little justification for this type of award against a municipality. In the first place it is to be assumed that the municipal
taxpayers from allowing future antitrust violations to occur. Taxpayers have little control over city management, so they are not in a position to institute safeguards to prevent future violations of the antitrust laws.\textsuperscript{211}

Treble damages are also intended to promote the enforcement of the antitrust laws by encouraging private parties to bring suit and thereby deter violations. However, the alleged actual damages in most antitrust suits filed against municipalities are sufficiently large to promote the continuance of suits without trebling the damages. Even if actual damages alone did not suffice to encourage the filing of suits against municipalities, the purpose underlying the encouragement of private lawsuits would not be furthered by increasing the damages award. Congress hoped that treble damages would encourage the bringing of private lawsuits to aid in the enforcement of the antitrust laws for the benefit of the public.\textsuperscript{212} It would be incongruous to say that the awarding of treble damages is necessary to encourage private enforcement for the benefit of the public when the public will have to ultimately pay the treble damages awards assessed against local governments. Although a private suit against a municipality benefits the public because of the favorable effects that competition has on the price and quality of goods and services in the future, the monetary value of these benefits to the public would not be great enough to justify the awarding of treble damages as being in the economic interest of the public.

Because of the broad scope of liability under section 1983, the Court in \textit{City of Newport} was concerned that large punitive damages awards would threaten the financial integrity of local governments.\textsuperscript{213} Courts should be equally concerned with the financial disaster that could result from exposing municipalities to treble damages under the antitrust laws.\textsuperscript{214} A municipality may be faced with antitrust lawsuits for a multitude of activities, ranging from the operation of electric utility systems to the leas-

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officials will do their duty and if discipline of a wrongdo ing employee is indicated, appropriate measures will be taken without a punitive award.  
\textit{Id.} at 457. \textit{See also} E. \textsc{McQuillan}, \textit{supra} note 207, § 53.18(a), at 162.  
213. \textit{See supra} notes 191-92 and accompanying text. \textit{See also} \textit{Morris}, \textit{supra} note 208.  
214. \textit{See supra} notes 61-66 and accompanying text.
\end{flushright}
Neither the deterrent nor retributive functions of antitrust treble damages would be served by imposing such liability against municipalities. The issue remaining is whether the compensatory function of treble damages can be reconciled with not imposing treble damages against municipalities. In terms of the remedial function of treble damages, a review of antitrust cases filed against municipalities reveals that most of the plaintiffs are businesses. In most of these cases, the alleged actual damages are in the millions of dollars. Because such a plaintiff may recover attorney's fees and prejudgment interest in addition to treble damages, the bulk of the increased damages does not serve to compensate the plaintiff for its loss. In cases involving millions of dollars in actual damages, the “unrecoverable” cost of maintaining a suit constitutes only a small fraction of what a plaintiff would eventually recover. A plaintiff is adequately compensated without the use of treble damages through the courts’ liberal policy regarding proof of antitrust damages and through its recovery of attorney’s fees and, in certain circumstances, prejudgment interest.

Because the purposes behind the deterrent and retributive functions of treble damages are not served by imposing antitrust treble damages liability against local governments, and the plaintiffs in cases filed against municipalities are usually adequately compensated by actual damages, attorney’s fees and prejudgment interest, a court may conclude that the policies underlying a municipality’s immunity from punitive damages are compatible with the goals of the treble damages provision. Accordingly, public policy and the legislative history of the antitrust laws interpreted in light of common law principles, could support a finding that municipalities are exempt from antitrust treble damages liability.

**Legislative Response**

Although a court could find that the purposes underlying anti-

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215. See supra notes 72-80 and accompanying text.
216. See, e.g., supra notes 72-80 and accompanying text.
217. See supra notes 61-66 and accompanying text.
219. Id.
trust treble damages are not furthered by assessing these awards against municipal defendants, one court has already imposed such damages.\textsuperscript{221} Thus, a legislative solution may be necessary to protect local governments against treble damages liability. H.R. 6027 addresses the issue of treble damages. This bill was recently passed by the House.\textsuperscript{222} It provides that a plaintiff cannot recover monetary relief when a municipality acts anticompetitively while exercising its regulatory power.\textsuperscript{223} One of this bill's failings is that a plaintiff can always obtain an injunction against enforcement of anticompetitive municipal regulations.\textsuperscript{224} As a result, enforcement of an anticompetitive regulation can be enjoined even where the primary purpose and effect of the regu-

\begin{footnotesize}
\begin{enumerate}
\item Unity Ventures v. County of Lake, No. 81 C 2745 (N.D. Ill. Jan. 12, 1984).
\item H.R. 6027 provides:
\begin{quote}
SHORT TITLE
SECTION 1. This Act may be cited as the "Local Government Antitrust Act of 1984".
\end{quote}
\begin{quote}
DEFINITIONS
SEC. 2. For purposes of this Act—
(1) the term "local government" means a city, county, parish, town, township, village, school district, sanitary district, or any other general or special purpose political subdivision of one or more states,
(2) the term "official conduct of a local government" means any action or inaction of a local government, or its officials, employees, or agents, that such local government, officials, employees, or agents could reasonably have construed to be within the legislative, regulatory, executive, administrative, or judicial authority of such local government,
(3) the term "person" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), and
(4) the term "State" has the meaning given it in section 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).
\end{quote}
\begin{quote}
LIMITATION ON MONETARY RELIEF
SEC. 3. (a) Neither the United States nor any person or State may recover monetary relief for any claim under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, 15c) if—
(1) the claim is against a local government, or its officials, employees, or agents, and results from official conduct of a local government, or
(2) the claim is against a person and results from conduct expressly required by a local government.
(b) Subsection (a) shall not apply to and shall not be construed to affect the cost of suit, including a reasonable attorney's fee, with respect to any claim under the Clayton Act filed before July 1, 1984.
\end{quote}
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
lation serves the health and safety needs of the local government's residents. 225

H.R. 6027 also inadequately treats the damages issue because limiting a plaintiff's relief to an injunction in all circumstances fails to balance the antitrust goals that treble damages liability was intended to serve with the needs of a municipality to enact regulations without the fear of liability. Antitrust treble damages have been recognized as serving three purposes: compensating the plaintiff; deterring future violations; and punishing the defendant. H.R. 6027 does not punish municipalities for their anticompetitive acts. This is proper because taxpayers should not be punished for the wrongdoing of city officials. 226 However, the bill inadequately serves other purposes of the antitrust laws. For example, limiting a plaintiff to injunctive relief does not even attempt to compensate him for his damages. 227 Moreover, third

225. See supra notes 101-18 and accompanying text.
226. See supra notes 206-09 and accompanying text.
227. Immediately prior to the House vote on H.R. 6027, Representative Brooks, although supporting its passage, advocated that changes in the bill should be made by the Senate before it voted on the bill. Representative Brooks stated that the bill needed several changes "to restrict its scope and make it consistent with the traditional approaches of Congress to antitrust matters." 130 CONG. REC. H8622 (daily ed. Aug. 8, 1984) (statement of Rep. Brooks). One drawback of H.R. 6027, in Representative Brooks' view, is the elimination of actual damages relief:

I am also concerned with the provisions of the bill which restrict the remedy for antitrust violations to injunctive relief. I concur that the punitive remedy of treble damages specified in the antitrust laws is unwarranted when applied to local governments and their officers. The bill, however, goes beyond the elimination of treble damages to strip the right to actual damages for antitrust violations.

The elimination of actual, as well as treble, damages has two serious drawbacks. The bill, by providing for injunctive relief recognizes that there is a role for the antitrust regulation of local governments to ensure proper competition in local markets. Injunctive relief alone will not provide the incentive for individuals and small businesses, to undertake the massive and protracted litigation necessary to enforce the antitrust law and achieve our free enterprise goals. Further, the award of actual damages is a traditional remedy found throughout the Nation's civil laws. It is based upon a fundamental belief that justice requires that those who are injured by illegal activity should be allowed to recoup their loss. In this instance, those who have been the victims of anticompetitive behavior should be paid back their actual loss. The injury is the same whether it has been caused by a group of individuals acting as a corporation or through a local government.

I note that in both the Joint Research and Development Act of 1984 and the Shipping Act of 1983, the committee felt that relief from treble damages under the antitrust laws was appropriate for certain groups, but that actual damages
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parties acting anticompetitively in concert with a municipality may be immune from the payment of damages.\textsuperscript{228}

Deterring local governments from committing antitrust violations would be eliminated by the adoption of this bill. The Supreme Court in \textit{City of Newport} observed that the payment of compensatory damages may be enough to deter future wrongdoing by municipal officials.\textsuperscript{229} In addition, the Court stated that the best deterrent against municipal wrongdoing is the imposition of damages against the city officials.\textsuperscript{230} H.R. 6027 eliminates both these deterrents and also encourages municipalities and their officials to act anticompetitively. If a plaintiff can only obtain an injunction against a municipal defendant, the municipality is placed in a fail safe position in enacting any anticompetitive regulation, even a purely economic restraint.

Proponents of H.R. 6027 argue that eliminating deterrence is necessary, otherwise municipal officials will be discouraged from enacting regulations which are necessary for the well-being of local governments' residents.\textsuperscript{231} However, H.R. 6027's broad-based exemption of municipal actions from all monetary damages is unnecessary to accomplish this goal.\textsuperscript{232}

H.R. 6027 proposes municipal exemption from damages lia-

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\textsuperscript{228} were retained. This is a sensible and just approach in providing relief when warranted, but still ensures the effective application of the antitrust laws to achieve our policy goal of a free and competitive economy.


\textsuperscript{230} Id. at 269-70.

\textsuperscript{231} See, e.g., \textit{130 Cong. Rec. H8470} (daily ed. Aug. 6, 1984) (statement of Rep. Seiberling) ("We must act now to free our local government officials of the burden of antitrust damage suits so they may govern in the public interest."); id. at H8471 (statements of Rep. Moorhead); id. at H8473 (statements of Rep. Crane); id. at H8474 (statements of Rep. Rodino).

\textsuperscript{232} H.R. 6027 was voted on by the House under an expedited process, which some representatives thought may have left members of the House with insufficient time to consider possible ramifications which would result if it is enacted. \textit{See} \textit{130 Cong. Rec. H8623} (daily ed. Aug. 8, 1984):

Because this bill has been processed so rapidly from the Judiciary Committee's adoption last week, I do not believe my colleagues have had the opportunity to closely examine the bill to discover its deficiencies. Unfortunately, the bill is being considered under suspension of the rules and amendments cannot be offered to correct them. I strongly urge the Senate to carefully examine this legislation when it is reviewed there.

\textsuperscript{130 Cong. Rec. H8470} (daily ed. Aug. 6, 1984) (statement of Rep. Erlenborn) ("I . . . think that this bill coming up under these circumstances is
bility for any action which the local government reasonably con-
strues to be within its legislative or regulatory authority. This
exemption is very broad. For example, in the case of a home-rule
municipality, this authority would include any activity which a
state could regulate — in other words, any area not pre-empted
by Congress. This legislation does not distinguish between anti-
competitive regulations which are enacted for public health and
safety purposes, and thus are necessary for the well-being of a
municipality’s residents, and regulations which are enacted to
benefit a particular group of businesses or are simply intended to
raise revenue. In those situations where a regulation is enacted
for purposes other than providing for the well-being of a munici-
pality’s residents, there is no justification for not compensating
the injured party for his actual damages and attempting to deter
future violations.

Monetary damages liability under the antitrust laws was also
designed to encourage private parties to bring suit, which would
benefit the public and deter violations. However, the private
enforcement value that such damages were designed to further
would be eliminated if H.R. 6027 becomes law. This bill not only
precludes the recovery of actual damages, it also precludes re-
covery of attorney’s fees. Few businesses could afford to bring
antitrust suits against municipalities under these circumstances.
The economic value of possibly obtaining an injunction may not
be worth the heavy cost of maintaining an antitrust suit. Al-
though the public interest would not be economically served
by imposing treble damages against a municipality and ulti-
mately the public, the long term effects of lower prices and
improved quality of goods or services could economically justify
allowing recovery of some lesser award such as single damages
and reasonable attorney’s fees to encourage the bringing of pri-
ivate lawsuits for the public’s benefit.233

233. The House Committee on the Judiciary noted the beneficial effects of lawsuits
brought against municipalities for antitrust violations:

Others view the “public interest” as being equally at risk when a municipal
action has the effect of diminishing the availability of products and services,
lifting prices, or favoring some business interests over others. It is asserted that
immunizing local government units under the antitrust laws would create very
strong incentives for the establishment of additional local boards and com-
missions to set fees, prices, or rates and to establish location, customer or other
restrictions in various professions and industries. With substantial segments of
For these reasons, legislation dealing with municipal antitrust liability should provide that actual damages and reasonable attorney's fees are recoverable when a municipality cannot show that the primary purpose of its anticompetitive regulation is to protect the health and safety of its residents. This legislation would promote the goals of the antitrust laws by properly compensating a plaintiff for his actual damages and deterring future antitrust violations, while at the same time eliminating the potential crippling effects local governments would suffer by paying treble damages awards. Such legislation should further provide that when a municipal regulation’s primary purpose is health or safety, neither actual damages nor injunctive relief are available to the plaintiff.

the economy thus immune from antitrust scrutiny, consumers would be deprived of the benefits of competition.

COMM. REPORT, supra note 119, at 347.

234. The House Subcommittee considered allowing the recovery of actual damages, but rejected this approach because of the “conceptual difficulties” in determining when a local government can avail itself of the state action doctrine:

The Subcommittee considered permitting actual damage recovery by private persons injured by local governmental actions. Allowing actual damage recovery would accomplish the purpose of compensation for injury suffered. Reduction of damage exposure to actual damages might also remove the fundamental pressure for complete municipal antitrust immunity at this time. Certainly, if a municipality has gained financially by an antitrust violation, then it should have the funds to make restitution to the injured party. If those funds have been disbursed by the municipality for the benefit of its constituents, then it may not be unjust to require additional taxes in the future to provide compensation owed the victim.

The Subcommittee was persuaded, however, that the most balanced legislative response at this time would be to restrict private remedies to injunctive relief. Certainly, such an approach avoids the conceptual difficulties of the state action doctrine in determining whether a damage remedy is available. This type of legislation should therefore not increase antitrust litigation for local governments.

COMM. REPORT, supra note 119, at 350.

235. Proposals were made at the House Subcommittee Hearings to consider a legislative municipal rule of reason defense which would balance the local government's interests with private competitors' concerns. See COMM. REPORT, supra note 119, at 349. Professor Thomas Campbell testifying at the hearings advocated such a test:

When a court is presented with a restriction on competition, the Court would engage in a less restrictive alternative analysis . . . [which would] simply require the court to ask, could the unit of local government have achieved its safety, its health, its public welfare objective in a way less restrictive of the Federal interest in competition, less harmful to the consumer.

Id. at 349-50. Local officials conceded such a rule would be an improvement over existing law, but expressed reservations whether such a rule would be enough to return “certainty to local planning and decisionmaking.” Id. The House Committee on the Judiciary also
CONCLUSION

Although the Supreme Court may accept a special antitrust defense for municipalities and may limit awards against municipalities to actual damages, municipalities rightfully remain uncertain about their antitrust liability, given recent lower court decisions. Amendments to the antitrust laws are needed which

noted that H.R. 5992 provided a similar local government exemption to the antitrust laws because the laws would not apply to official conduct of a local government "reasonably undertaken to protect or provide for the public health, safety, or welfare." Id. This bill was criticized because "it is unclear as to what kind of evidentiary showing would be required by courts in sustaining a local government's action as being reasonably undertaken." Id. Because the municipal rule of reason test runs the risk of "uncertain application by the courts," the remedy approach enunciated in H.R. 6027 was advocated. Id.

236. Because of the potentially devastating consequences of awarding antitrust treble damages against municipalities, some courts appear to have avoided imposing antitrust liability on municipalities by exempting them under the Parker doctrine where such exemptions were unwarranted in light of the test articulated in City of Lafayette and City of Boulder.

In Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Area Solid Waste Agency, 715 F.2d 419 (8th Cir. 1983), pursuant to state law, a municipal consortium constructed and operated a solid waste disposal site and issued revenue bonds to fund its construction. In the bond contract, however, the consortium agreed to require that participating municipalities refuse to grant any licenses to competing waste disposal facilities. This exclusivity privilege was alleged to be a violation of the antitrust laws.

The Court of Appeals for the Eighth Circuit admitted that the state statute authorizing the creation of waste disposal facilities did not expressly indicate that the legislature contemplated the displacement of competition in the waste disposal industry. Id. at 426. Nevertheless, the court stated that such contemplation by the state legislature could be inferred from the presence of three factors. First, the court noted that government agencies engaged in the disposal of solid waste was a "high priority" of the state and accordingly the state legislature authorized those activities that were necessary to insure the waste disposal's success. Id. Second, the court stated that the legislature affirmatively addressed the subject of waste disposal by authorizing the issuance of revenue bonds for the purpose of constructing waste disposal facilities. The court maintained that the state's treatment of the issue was greater than the Colorado legislature's neutral stance regarding the anticompetitive franchising of cable television found in City of Boulder. Id. at 426-27. Third, the court stated that because the legislature authorized the issuance of revenue bonds, it must have intended that the bonds restrict competition if that was necessary to insures their sale. Id. at 427. Accordingly, the court held that such anticompetitive activity was immune under the antitrust laws.

The court broadly interpreted the requirement that the state must contemplate the anticompetitive activities of a municipality in order for it to qualify for immunity under the Parker doctrine. First, whether or not an activity is a high priority of the state legislature has no relationship to whether or not the legislature contemplated that such activity would be conducted anticompetitively. Second, the state legislature's broad addressing of the subject matter of waste disposal facilities does not reflect a clear articulation and affirmative expression of the legislature's intent to displace competition in that area. Such a broad addressing of the subject matter by the state more likely indicates that the
would exempt municipalities from liability when they act primarily to benefit the public's health, safety and welfare. In addition, legislation should limit damages awards against municipalities to actual damages because this would properly serve the goals of the antitrust laws without unnecessarily burdening innocent taxpayers.

Until such legislation or judicial action is taken, counsel for local governments can help avoid potential lawsuits and bolster antitrust compliance by becoming familiar with the antitrust laws. Further, local governments can band together to provide self-insurance or purchase insurance against antitrust liability, attorney's fees, and the cost of hiring private counsel to defend legislature's stance on anticompetitive activities in this area was neutral. Third, the state legislature's authorization of the issuance of revenue bonds does not indicate that the legislature contemplated anticompetitive restrictions on such an issuance to insure successful sale of the bonds.

Finding an exemption under these circumstances is a misapplication of the test articulated in City of Lafayette and City of Boulder to determine whether a municipality is immune from liability under the Parker doctrine. City of Lafayette and City of Boulder require that the state not only authorize a municipality to act in a particular area, but that it also contemplate the anticompetitive acts undertaken by the municipality. Similarly, in Hybud Equipment Corp. v. City of Akron, 1983-1 Trade Cas. (CCH) ¶ 65,536, at 70,114 (N.D. Ohio 1983) the court held that a city was immune from antitrust liability under the state action doctrine even though there was no indication that the legislature contemplated anticompetitive acts by a municipality in an area in which the state authorized it to act.

In Hybud, the plaintiffs sought relief from an ordinance enacted by the city of Akron that required all solid waste collected within the city limits to be brought to the city's own disposal and recycling plant. The court observed that Ohio had established a state development agency with broad authority to finance waste facilities and to enter into cooperative agreements with municipalities “with a view to effective cooperative action and safeguarding of the respective interests of the parties.” Id. at 70,122 (quoting OHIO REV. CODE ANN. § 6123.13 (Page Supp. 1981)). In addition, the statute empowered the agency to do all acts necessary or proper to carry out its express powers. Id. From this broad grant of authority, the court concluded that the legislature must have contemplated the use of anticompetitive acts by the state agency and municipalities. In so concluding, the court failed to note the distinction between a municipality's power to enact a law and a municipality's authority to use that power anticompetitively.

In Pueblo Aircraft Service, Inc. v. City of Pueblo, 679 F.2d 805 (10th Cir. 1982), the Court of Appeals for the Tenth Circuit found that a municipality was immune from antitrust liability for anticompetitive activities under the prong of the City of Lafayette and City of Boulder test which exempts anticompetitive activities engaged in by a municipality as a result of a direction by the state to so act. In Pueblo, the city operated a municipal airport and granted leases to “fixed based operators” who operated their businesses on specific portions of airport land. The lease agreements required the fixed based operators to purchase all their aviation fuel from the city. A fixed based operator charged that this agreement violated the antitrust laws.
their antitrust litigation. Under appropriate circumstances, a local government may be able to contract with and authorize a state attorney general's office to undertake the defense of the litigation. In addition, local governments may enter into indemnification agreements with parties selected as winning bidders in the provision of city services and supplies. The winning bidders would agree to indemnify the local government from any lawsuits or claims resulting from the rejection of other bidders. Finally, municipalities should encourage their state legislatures to pass legislation which would qualify the municipalities for an exemption under the *Parker* doctrine for those areas which constitute traditional governmental functions.

The Tenth Circuit disagreed with the plaintiff's contention. It based its decision on a state statute that authorized the city to operate a municipal airport and stated that such operation was a governmental function, exercised for a public purpose. *Id.* at 808. The court viewed this statute as granting the city some of the powers of the state to operate the airport “as an arm of the state for the public good on behalf of the state rather than itself.”*Id.* at 810. Accordingly, the court held that the municipality's actions were immune from antitrust liability. The court failed to address whether the anticompetitive fuel-tying arrangement was directed or authorized by the state. Had it done so, the court would have found that a state's broad grant of authority to a municipality to operate an airport, did not reflect a state policy to displace competition in the purchase of aviation fuel.

The foregoing decisions may reflect a reticence on the part of some members of the judiciary to expose municipalities to antitrust liability because of the financially devastating consequences that may result by imposing treble damages liability on these governmental units. Because of this concern, courts may continue to find a state action exemption for municipalities where no such exemption would exist if these courts properly applied the state action doctrine. If this is the case, then perhaps plaintiffs, as well as the purposes of the antitrust laws, would be better served by a judicial rule or federal legislation which would provide that if a local government violates the antitrust laws, a plaintiff can obtain either single damages and an injunction or no relief if the regulation promotes the health and safety of a local government's residents.