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The Application of the Federal Antitrust Laws to Municipal Taxicab Regulation

**Final Report
December 1983**

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16. Abstract

This report analyzes the application of Federal antitrust laws to municipal regulation of the taxicab industry. Spurred by two recent Supreme Court decisions involving the electric utility and cable television industries, municipalities have become concerned that their regulatory practices vis-à-vis the taxi industry may be in violation of Federal antitrust laws. This report first describes the two part Supreme Court test for municipalities to secure exemption from these laws and then analyzes municipal taxi regulation's compliance with this test.

States are generally exempt from antitrust laws. Recent court cases suggest that municipalities are exempt only under specific circumstances. Municipalities come under the umbrella of state exemption if local regulation is authorized by state law "clearly articulating" and "affirmatively expressing as state policy" the regulation in question and if municipalities undertake "active supervision" of the regulated industry. The report states that in only nine states are municipalities fully under this umbrella, while they are partially sheltered in several more.

The report concludes that with regard to their exposure to charges of antitrust violations in connection with taxi regulation, municipalities can make one of three choices. They may do nothing and await clarification from the courts, they may deregulate their taxi industries, or they may persuade their state legislatures to pass laws bringing them under the protection of state exemption.

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PREFACE

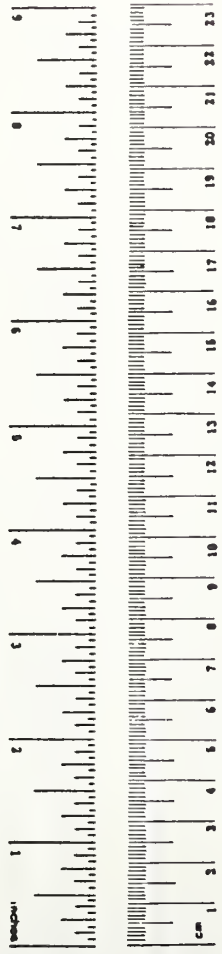
This research was performed under the auspices of the Urban Mass Transportation Administration's Service and Management Demonstration (SMD) Program. This program, established in 1974, develops, tests, evaluates, and disseminates innovative urban transportation services and management strategies. Over the past few years, the SMD Program has been conducting evaluations of taxi regulatory revisions (typically involving relaxation of entry and fare restrictions) in several cities including Seattle and San Diego. In addition, the program has sponsored numerous demonstrations involving innovative uses of taxis in urban transportation, such as shared-ride taxi and taxi feeder services. Given the program's extensive interest in regulatory issues surrounding the provision of taxi services, it was felt that an examination of municipal antitrust liability would be timely not only to future SMD demonstration activities but also to municipal deliberations nationwide.

Grateful acknowledgment is made of the comments concerning this report by Alfred Lagasse III and Sig Zilber of the International Taxicab Association, Stephen Chapple of the United States Conference of Mayors, Peter Maier of the National Institute of Municipal Law Officers, Gorman Gilbert of Paratransit Services, Pat Gelb of DeLeuw, Cather & Co., Keith Forstall of Multisystems, Jim Bautz of the Urban Mass Transportation Administration, and Carla Heaton, Joel Freilich and David Glater of the Transportation Systems Center.

METRIC CONVERSION FACTORS

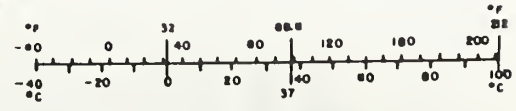
Approximate Conversions to Metric Measures

Symbol	When You Know	Multiply by	To Find	Symbol
	LENGTH			
in	inches	2.5	centimeters	cm
ft	feet	30	centimeters	cm
yd	yards	0.9	meters	m
mi	miles	1.6	kilometers	km
	AREA			
in^2	square inches	6.5	square centimeters	cm^2
ft^2	square feet	0.09	square meters	m^2
yd^2	square yards	0.8	square meters	m^2
mi^2	square miles	2.6	square kilometers	km^2
	acres	0.4	hectares	ha
	MASS (weight)			
oz	ounces	28	grams	g
lb	pounds	0.45	kilograms	kg
	short tons (2000 lb)	0.9	tonnes	t
	VOLUME			
tsp	teaspoons	5	milliliters	ml
Tbsp	tablespoons	15	milliliters	ml
fl oz	fluid ounces	30	milliliters	ml
c	cups	0.24	liters	l
pt	pints	0.47	liters	l
qt	quarts	0.96	liters	l
gal	gallons	3.8	liters	l
ft^3	cubic feet	0.03	cubic meters	m^3
yd^3	cubic yards	0.76	cubic meters	m^3
	TEMPERATURE (exact)			
°F	Fahrenheit temperature	5/9 (after subtracting 32)	Celsius temperature	°C



Approximate Conversions from Metric Measures

Symbol	When You Know	Multiply by	To Find	Symbol
	LENGTH			
mm	millimeters	0.04	inches	in
cm	centimeters	0.4	inches	in
m	meters	3.3	feet	ft
m	meters	1.1	yards	yd
km	kilometers	0.6	miles	mi
	AREA			
cm^2	square centimeters	0.16	square inches	in^2
m^2	square meters	1.2	square yards	yd^2
km^2	square kilometers	0.4	square miles	mi^2
ha	hectares (10,000 m^2)	2.5	acres	
	MASS (weight)			
g	grams	0.035	ounces	oz
kg	kilograms	2.2	pounds	lb
t	tonnes (1000 kg)	1.1	short tons	
	VOLUME			
ml	milliliters	0.03	fluid ounces	fl oz
l	liters	2.1	pints	pt
l	liters	1.06	quarts	qt
l	liters	0.26	gallons	gal
m^3	cubic meters	35	cubic feet	ft^3
m^3	cubic meters	1.3	cubic yards	yd^3
	TEMPERATURE (exact)			
°C	Celsius temperature	9/5 (then add 32)	Fahrenheit temperature	°F



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EXECUTIVE SUMMARY

The Supreme Court in City of Lafayette, Louisiana v. Louisiana Power & Light, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978) and Community Communications Co. v. City of Boulder, Colorado, 455 U.S. 40, S.Ct. 835, L.Ed.2d _____ (1982) held that municipalities can violate the Federal antitrust laws. Potentially any municipal activity or regulation that interferes with competition may be the subject of a lawsuit including municipal-owned utilities, regulation of cable television, zoning or licensing. This report analyzes the likelihood that municipal taxicab regulation may be in violation of the Federal antitrust laws. Any municipality concerned with the risk of liability in taxicab regulation or any other activity or regulation should consult legal counsel.

The report focuses solely on municipal taxicab regulation. It does not address state or county taxicab regulation, nor the potential liability of private parties such as taxicab owners or operators. Part II (B) of this report describes taxicab regulation in several particular municipalities. Virtually all municipalities were selected solely because they had been the subject of a recent published report.

I. THE STANDARD OF LAW

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

Section 1 of the Sherman Act, 15 U.S.C. Section 7, provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is hereby declared to be illegal..." Among other contracts, combinations or conspiracies in restraint of trade, Section 1 holds per se illegal: (1) price-fixing, that is, agreements concerning prices to be charged by competitors; (2) division of territories or customers by competitors; and (3) agreements to boycott or group refusals to deal with a particular firm or association. To state that a restraint of trade is per se illegal means there is no defense. Once a court has determined that a restraint properly has been characterized in a per se category, a finding of violation automatically follows.

Several aspects of municipal taxicab regulation may be subject to these per se rules. For example, if private business corporations fixed fare rates or limited the number of taxicabs operating in a city, they clearly would violate existing per se rules. Whether or not a municipality also would be held in violation of these per se rules primarily turns on whether the municipality's taxicab regulation is exempt from the Federal antitrust laws.

Until 1975, cases decided by the Supreme Court suggested that the regulatory activities of states and municipalities generally were exempt from the Federal antitrust laws, under the so-called "state action" exemption, associated with Parker v. Brown, 317, U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). Beginning in 1975, the Supreme Court decided seven cases in the next eight years concerning the state action exemption. Two of these decisions, City of Lafayette, Louisiana v. Louisiana Power & Light, 98 S.Ct. 1123, and Community Communications Co. v. City of Boulder, Colorado, 102 S.Ct. 835, expressly held that municipalities, like states, would have to present evidence to demonstrate their right to the state action exemption.

Specifically, the Supreme Court has held that for a municipality to qualify for the state action exemption:

- First, the municipality must prove that a state statute "clearly articulated and affirmatively expressed" a state policy that the municipality engage in conduct that would violate the Federal antitrust laws; and

- Second, the Supreme Court has not yet resolved whether a municipality, like a state, must also prove that it "actively supervised" the area of alleged restraint of trade.

B. The Requirement that the Alleged Restraint of Trade Be "Clearly Articulated and Affirmatively Expressed as State Policy"

Several Supreme Court decisions have described the first requirement for state action exemption, that the alleged restraint be "one clearly articulated and affirmatively expressed as state policy."

Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed. 2d 572 (1975) underlined that a state could not claim exemption unless it could identify a state statute requiring or compelling the alleged restraint of trade. At the least, the state statute must refer to the alleged restraint of trade. The City of Boulder decision held that a general delegation of "home rule" power will not satisfy that requirement of "clear articulation and affirmative expression" since the state's position then is one of mere neutrality regarding the challenged action.

However, according to the City of Lafayette case, a municipality need not point "to a specific, detailed legislative authorization" before it may secure a state action exemption. "(A)n adequate state mandate for anticompetitive activities of cities ... exists when it is 'found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'"

The vast majority of state statutes apparently do not "clearly articulate and affirmatively express" a policy to allow municipalities to violate Federal antitrust laws by both setting taxicab fares and limiting the number of taxicabs. In seven states, this creates no apparent risk for municipalities of antitrust violation, for regulation of taxicabs is reserved either to a state commission or to a county government, or the state has ended rate and entry regulation. Two other states "clearly articulate" and "affirmatively express" an intention to allow municipalities both to fix fares and to limit the number of taxicabs.

In forty-one states, there appears to be a real risk of antitrust violation. In twelve of these states, no statute delegates authority to municipalities to regulate taxicabs. These states clearly do not satisfy the test for a state action exemption.

In seventeen states, municipalities are delegated power to regulate the taxicab business but without any clear indication that this regulation may include conduct violative of the antitrust laws. The statutes in these states

are ambiguous as to whether or not the municipalities are delegated the authority to adopt anti-competitive rules or to regulate consistent with the pro-competitive principles of the antitrust laws. Presumably these statutes also would fail to satisfy the test for state action exemption.

Ten states, in contrast, do "clearly articulate" and "affirmatively express" an intention to allow municipalities to fix fares. These states would be able to satisfy the state action test with respect to fixed rates. These states, however, may not be able to satisfy the state action test for exemption with respect to other aspects of taxicab regulation since these other aspects are not described or necessarily implied by their statutes.

Two states "clearly articulate" and "affirmatively express" an intention to allow municipalities to limit the number of taxicabs operating in their municipalities.

C. The Requirement that there Must Be "Active Supervision" by the Municipality

Only two Supreme Court decisions have analyzed, at any length, the requirement that a state "actively supervise" the area of alleged antitrust violation. In New Motor Vehicle Board of California v. Orrin W. Fox, 99 S.Ct. 403, 412, the Court held that the requirement was satisfied by the existence of a state board which employed on-going notice and hearing procedures. In California Retail Liquor Dealers Association v. Midcal, 100 S.Ct. 937, 943, inadequate supervision was found when the state authorized price-setting by private parties without any review of the reasonableness of the fixed prices.

The important unsettled question concerning the active supervision requirement is whether it will be required of municipalities as it currently is required of states. A few lower court decisions have held that active supervision will not be required. The last Supreme Court decision on point, City of Boulder, 102 S.Ct. 835, 841, n. 14, explicitly stated it did not resolve the question whether a municipal ordinance "must ... satisfy the

'active state supervision' test...." Given the application of the active supervision requirement to states, it is probable, though not certain, that municipalities also will be required to satisfy the active supervision test.

This report studied the application of the active supervision requirement in the three areas of municipal taxicab regulation most likely to lead to antitrust litigation: (1) entry limitations; (2) fare regulation; and (3) limitations on which taxicab firms may serve municipal airports.

1. Entry Limitations

The case law reviewed suggests that the active supervision requirement will be satisfied by a municipal regulator employing on-going notice and hearing procedures before changing entry limitations. Inadequate supervision will be found if the municipality allows private parties, such as the taxicab owners, to set limitations on entry and does not review their determinations. Apparently compliance with the notice and hearing requirement occurs frequently.

2. Fare Regulation

It is unlikely that the imprecision of fare-setting standards or the taxicab operators' monopoly over relevant data would be given much weight in an antitrust challenge to taxicab fare regulation. The decisive consideration is whether the city "actively supervises" changes in fare levels. If the city employs notice and hearing procedures and reviews whatever factual data are submitted, its fare-setting decisions should satisfy this element of the state action exemption test.

3. Exclusive Access to Airports

The area of municipal regulation of taxicabs that thus far has resulted in the most litigation has been the granting of exclusive or limited access to an airport to one or some of a municipality's taxicab firms. To date, the case law is sharply divided with two recent decisions holding that an

exemption for taxicab regulation could not be granted and one decision holding, on similar facts, that an exemption could be granted.

The most recent decision, Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., Civ. No. 79-0383 (D. Hawaii, 1983), involved the state regulated airport in Honolulu, Hawaii, but applied the same law concerning the state action exemption that would be applicable to a municipality. The dispute revolved around the grant in 1978 by the State of Hawaii to SIDA, an association of independent taxicab owner-operators, of the exclusive right for a period of fifteen years to provide metered taxicab service to deplaning passengers at both the international and inter-island terminals of Honolulu International Airport.

The court could not find a clearly articulated state policy to displace competition in the provision of taxicab service to the airport in the relevant statute. Nor, on the record before it, could the court "find that the state is an active supervisor," stating: "The evidence shows that it is SIDA cabbies and dispatchers who enforce the exclusivity of their contract; SIDA personnel intervene to prevent non-SIDA cabbies from accepting fares at HIA. The Director of defendant DOT admitted that his department 'has little control, if any, on SIDA's management of their service.'" Similar findings were made by a Federal district court in Woolen v. Surtran Taxicabs, Inc., 461 F.Supp. 1025 (N.D. Tex. 1978).

By contrast, in All American Cab Company v. Metropolitan Knoxville Airport Authority, 547 F.Supp. 509 (E.D. Tenn. 1982), a Federal district court reached a near opposite result on similar facts. All American involved a challenge by rival cab companies to a contract between Knoxville's airport authority and a private firm, Creative International Management. Relevant Tennessee statutes were ambiguous as to whether the airport authority possessed the authority to displace competition with monopoly at the airport. The court, however, concluded that the airport authority "is operated for the benefit of the general public and not for the particular advantage of Knoxville residents" and therefore "exempt from antitrust scrutiny."

D. Unsettled Legal Issues Concerning Municipal Antitrust Liability

The Supreme Court also has not ruled on two other important questions relevant to determination of a municipality's potential liability for violation of the antitrust laws.

1. Will a municipality be liable for treble damages, or will it be subject only to injunctive remedies?

Under the Federal antitrust laws, "any person injured in his business or property by reason of anything forbidden in the antitrust laws may sue ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Whether or not this treble damages provision will be applied when municipalities are found to have violated the antitrust laws and do not have an effective exemption is the most important unsettled question in the state action area. If cities can be liable, their potential monetary exposure is enormous - e.g., when trebled the claim against the defendant cities in City of LaFayette amounted to $540 million.

To date, the Supreme Court has not addressed the issue of remedy for a municipal antitrust violation held not to be exempt under the state action exemption, but has reserved the issue for future decision.

The commentators consistently have urged that municipalities should not be held liable for monetary damages. These commentators stress several arguments to justify not assessing treble damages against municipalities for antitrust violations. First, enjoining future violation of the antitrust laws is an available alternative remedy and normally will be sufficient to deter future misconduct. Second, it is difficult to believe that Congress intended to transfer treble damages from the tax-paying citizens of a municipality to business enterprises claiming injury as a result of the municipality's economic policies. Third, the risk of bankrupting a municipality by imposition of a treble damages award also suggests that such an award might be barred by the Constitution and its grant to the states of sovereignty.

2. Will the same substantive antitrust rules be applied to municipalities as are applied to private parties or will new standards be created to apply to municipalities?

A second major issue unresolved to date is whether the Supreme Court will apply the same substantive antitrust rules to municipalities as it does to private parties. City of Boulder explicitly deferred consideration of the issue. The commentators are divided concerning whether all municipal antitrust violations should be judged under a modified standard permitting municipalities to introduce evidence that would be excluded in a case involving private parties.

II. CONCLUSION: THE CHOICES AVAILABLE TO MUNICIPALITIES

Municipalities may make one of three possible responses to the risk of antitrust liability posed by the Lafayette and Boulder decisions.

One choice is simply to do nothing. As one practicing attorney put it, "The best advice is to wait for the law to clarify - and hope it is clarified with someone else's lawsuit." The risk of an antitrust lawsuit is small. Only four state action decisions since 1978 have involved taxicab regulation. Three concerned exclusive or limited access to an airport. If a municipality does not own or operate an airport, the likelihood of a lawsuit appears to be very small.

A second choice would be to deregulate the taxicab industry. It is worth emphasizing that deregulation is not necessary to ensure exemption from antitrust liability. Deregulation, however, is one available means to ensure exemption. A few municipalities, including Berkeley, Oakland, Portland, San Diego and Seattle in recent years have ended entry limitations and/or fare regulation. It should be noted, however, that San Diego more recently suspended its issuance of new taxi permits for one year amid reports of problems in its deregulation program.

The third choice a municipality could make is to take steps to ensure compliance with the Supreme Court's "state action" test for exemption from the Federal antitrust laws. Municipalities making this choice should attempt to persuade their state legislatures to enact a law "clearly articulating and affirmatively expressing as state policy" regulated rather than competitive municipal taxicab service. A model state bill to ensure antitrust exemption, for municipalities may be found in the appendix.

Beyond securing enactment of a state statute clearly articulating a policy to exempt municipal taxicab regulation from the Federal antitrust laws, municipalities may also have to comply with the "active supervision" requirement of the state action test. Many municipalities assumedly already are in compliance with this requirement. To ensure compliance, a municipality should: (1) periodically review entry limitations, fare regulation and other aspects of its taxicab regulation which can violate the Federal antitrust laws; (2) provide adequate notice of hearings concerning entry limitations, fare regulation, etc.; (3) allow all parties some opportunity to be heard; and (4) base policy changes on a consideration of all evidence presented.

I. INTRODUCTION

Since the Supreme Court's decisions in City of Lafayette, Louisiana v. Louisiana Power & Light, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978) and Community Communications Co. v. City of Boulder, Colorado, 455 U.S. 40, 102 S.Ct. 835, ___ L.Ed.2d ___ (1982), municipalities have been on notice that their regulation of various industries or municipal-owned services can violate the federal antitrust laws.

Antitrust liability potentially may be found in a wide range of activities including municipally-run gas, electric, water or waste facilities, municipally-owned or regulated airports, golf courses, public parks or stadiums, municipal regulation of cable television, zoning or transportation industries, as well as several other municipal regulatory or ownership functions.

This report solely analyzes the likelihood that municipal taxicab regulation may be in violation of the Federal antitrust laws. This report does not address the potential antitrust liability of state or county governments for taxicab regulation, nor does it address the potential antitrust liability of private parties such as taxicab owners or operators.

Part I of this report describes the two-part test the Supreme Court has adumbrated for municipalites to secure exemption from the federal antitrust laws. Under this test, a municipality first must be able to identify legislation that "clearly articulates and affirmatively expresses" a state policy to exempt aspects of the municipality's regulation that violate the Federal antitrust laws from prosecution under these laws. Second, the Supreme Court also may require proof that the municipality "actively supervises" the exempt activity. Many important legal issues concerning this two-part test have not yet been settled by Supreme Court decisions. The key unsettled questions include: (1) Need a municipality prove "active supervision," or will identification of a state statute "clearly articulating" a policy to exempt the municipality from the Federal antitrust laws be sufficient? (2) If a municipality is found in violation of the Federal antitrust laws, will it,

like corporate offenders, be held liable for treble monetary damages, or will it merely be subject to an injunction ordering compliance? (3) Will the municipality, if it cannot obtain exemption, be subject to the same substantive antitrust rules as private parties, or will new antitrust standards be created by case law to regulate municipalities?

Part II of this report analyzes municipal taxicab regulation's compliance with the Supreme Court's test for exemption from the federal antitrust laws. This part identifies a major cause for concern: the overwhelming majority of states have not adopted statutes "clearly articulating" a policy to exempt municipal taxicab regulation. However, if the "active supervision" requirement is applicable to municipalities, many municipalities appear to satisfy this requirement.

The concluding part of this report analyzes the three choices available to municipalities in light of the City of Lafayette and City of Boulder decisions. First, municipalities can do nothing in response, primarily on the assumption that the risk of a lawsuit appears to be very small. Second, municipalities can "deregulate" entry limitations or fare-setting and in that way avoid the risk of liability under the federal antitrust laws. Third, the municipality can secure enactment of a state statute "clearly articulating" a policy to exempt municipal taxicab regulation from the federal antitrust laws and adopt by ordinance sufficient procedures to ensure satisfaction of the "active supervision" requirement. A model state statute is included as an appendix to this report.

II. THE STANDARD OF LAW

City of Lafayette, Louisiana v. Louisiana Power and Light, 98 S. Ct. 1123,[1] and Community Communications Co. v. City of Boulder, Colorado, 102 S.Ct. 835,[2] held that a municipality can violate the Federal antitrust laws. For a municipality today to claim the "state action" exemption from the antitrust laws the alleged restraint of trade first, must be "one clearly articulated and affirmatively expressed as state policy" and second, may also require that the restraint be "actively supervised" by the municipality. California Retail Liquor Dealers Association v. Midcal Aluminum Inc., 445 U.S. 97, 105; 100 S. Ct. 937, 943; 63 L.Ed.2d 233 (1980); and Community Communications Co. v. City of Boulder, Colorado, 102 S.Ct. at 841, n. 14.

1. Lafayette has been the subject of several law review articles, comments and notes. See, e.g., Areeda, "Antitrust Immunity for 'State Action' after Lafayette," 95 Harvard Law Review 435 (1981); Kennedy, "Of Lawyers, Lightbulbs and Raisins: An Analysis of the State Action Doctrine Under the Antitrust Laws," 74 Northwestern Law Review 31 (1979); Melton, "The State Action Antitrust Defense for Local Government: A State Authorization Approach," 12 Urban Lawyer 315 (1980); Curtin, "Antitrust Comes to the Cities - Analysis of City of Lafayette v. Louisiana Power & Light Co and its Effect on Municipal Antitrust Liability," 5 Univ. of Dayton Law Review 7 (1980); Rose, "Municipal Activities and the Antitrust Laws After City of Lafayette," 57 University of Detroit Journal of Urban Law 483 (1980); Rose, "Municipal Antitrust Liability After City of Lafayette," 42B Municipal Law Rev. 203 (1979); Thomas, "City of Lafayette's State Action Test Reformulated: A Meaningful Standard of Antitrust Immunity for Cities," 1980 Arizona State Law Journal 345; Taurman "Reflections on City of Lafayette: Applying the Antitrust 'State Action' Exemption to Local Governments," 13 Urban Lawyer 159 (1981); Bern, "The Noerr-Pennington Immunity for Petitioning in Light of City of Lafayette's Restrictions on the State Action Immunity," 1980 Arizona State Law J. 279; Comments published in 16 Houston Law Rev. 903 (1979); 25 South Dak. Law Rev. 314 (1980); and 11 Urban Lawyer vii (1979); and Notes published in 1979 Wisc. Law Rev. 570; 1979 Det. Coll. Law Rev. 299; 31 Baylor Law Rev. 563 (1979); 14 Cal. West Law Rev. 325 (1978); 28 Drake Law Rev. 513 (1978); 49 Miss. Law J. 725 (1978); 15 Wake Forest Law Rev. 89 (1979); 18 Washburn Law Rev. 129 (1978); 28 Kansas Law Rev. 166 (1979); 18 Urban Law Ann. 265 (1980); 36 Wash. & Lee Law Rev. 129 (1979); and 59 Wash. Univ. Law Quart. 485 (1981). See, also, 1 P. AREEDA and D. TURNER, ANTITRUST LAW 66-119 (1978); AREEDA, ANTITRUST LAW: 1982 SUPPLEMENT 46-75 (1982); and Bathe, Annotation, "What Constitutes 'State Action' under Rule Exempting State and Local Governmental Action from Antitrust Laws - Federal Cases," 70 L.Ed.2d 973 (1983).

2. See, J. SIENA (Ed.), ANTITRUST & LOCAL GOVERNMENT: PERSPECTIVES ON THE BOULDER DECISION (1982); Vanderstar, "Liability of Municipalities under the Antitrust Laws: Litigation Strategies," 32 Catholic Univ. Law Review 395 (1983); Hoskins, "The 'Boulder Revolution' in Municipal Antitrust Law," 70 ILL. Bar. J. 684 (1982); and Notes Published in 12 Seton Hall Law Rev. 835 (1982); and 35 Vand. Law Rev. 1041 (1982).

This Part begins by analyzing the origins of the "state action" exemption for municipalities. This section describes the Supreme Court decisions that create potential antitrust liability for municipalities. Next, the requirement that the alleged restraint of trade be "clearly articulated and affirmatively expressed as state policy" is addressed. The Supreme Court has held that both states and municipalities seeking exemption for activities that otherwise would violate the Federal antitrust laws must be able to show authorization for the alleged restraint in a state statute. This section explains what the state statute must provide by reviewing Supreme Court and lower Federal court decisions.

The third section of this Part considers the requirement that there be "active supervision" by the municipalities. The Supreme Court had held for a state to claim the "state action" exemption it must be able to show it "actively supervises" the alleged restraint of trade. The Supreme Court has not yet indicated whether municipalities also must satisfy this requirement. This section describes Supreme Court and lower Federal court case law which has applied the "active supervision" requirement to states. If the Supreme Court ultimately does hold that municipalities also must satisfy the "active supervision" requirement, assumedly, the same rules for satisfying the "active supervision" requirement will apply to municipalities as currently apply to states.

The final section in this Part, "unsettled legal issues concerning municipal antitrust liability," addresses two other issues on which the Supreme Court has not yet ruled: (1) Will a municipality be liable for treble damages or will it be subject only to injunctive relief; and (2) Will the same antitrust rules be applied to municipalities as are applied to private parties, or will new standards be created to apply to municipalities?

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

Section 1 of the Sherman Act, 15 U.S.C. Section 7, provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is hereby declared to be illegal ... " Among other contracts,

combinations or conspiracies in restraint of trade, Section 1 holds per se illegal: (1) price-fixing, that is, agreements concerning prices to be charged by competitors, see, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940); (2) division of territories or customers by competitors, see, United States v. Topco Associates, Inc., 405 U.S. 596, 92 S. Ct. 1126, 31 L.Ed. 2d 515 (1972); and (3) agreements to boycott or group refusals to deal with a particular firm or association. See, Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 79 S. Ct. 705, 31 L.Ed.2d 741 (1959). To state that a restraint of trade is "per se" illegal means there is no defense. Once a court has determined that a restraint properly has been characterized in a per se category, a finding of violation automatically follows. United States v. Northern Pacific Ry., 356 U.S. 1, 5, 78 S. Ct. 514, 518, 21 L.Ed.2d 545, 549-550 (1958).

Several aspects of municipal taxicab regulation might be judged under these per se rules if they were not held to be exempt from the Federal antitrust laws. For example, fixing uniform fare rates may be a violation of the per se rule against price-fixing. Similarly, limiting the number of taxicabs that operate in a municipality may be a violation of the per se rules.

Until 1975, cases decided by the Supreme Court suggested that the regulatory activities of states and of municipalities generally were exempt from the Sherman Act. The leading decision was the Court's 1943 opinion in Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).[3]

3. Three earlier Federal court decisions also are of note. The first case to address the exemption for state activity from the Sherman Act was Lowenstein v. Evans, 69 F. 908 (D. S.Car. 1895). Lowenstein dismissed an action brought against the South Carolina Board of Control which regulated a monopoly in the purchase and sale of alcoholic liquors in that state on the ground that the state was neither a corporation nor a person as those terms were used in the Sherman Act, and therefore the Act was inapplicable to a state agency. Similarly, in Olsen v. Smith, 195 U.S. 332, 25 S.Ct. 52, 49 L.Ed.224 (1904), the Supreme Court held that a Texas statute limiting the number of sailing pilots in the port of Galveston could not be challenged under the Sherman Act because of the state's authority to regulate. 195 U.S. at 344-345. By contrast, in Northern Securities Co. v. United States, 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed.679 (1904), the Court held that a state incorporation act could not permit corporations engaged in interstate or international commerce to merge in violation of the Sherman Act. Northern Securities implied that state regulation of purely intrastate commerce permissibly could conflict with the Sherman Act, but held that once a corporation created by a state engaged in

Parker involved a challenge by a California raisin producer to California's system of prorating the production of raisins. Among other things, the California Agriculture Prorate Act authorized the establishment of state boards to limit the production of agricultural commodities and thus maintain higher prices than would exist absent the production limitations. Raisin prices were maintained at higher levels than would have occurred absent the program by permitting raisin producers to sell only 30 percent of their total production in ordinary commerce. Of the remaining 70 percent of each crop, 20 percent was placed in a "surplus pool" and used only for by-products; 50 percent was placed in a "stabilization pool" and sold to the extent prevailing market prices could be maintained. 317 U.S. at 347-348.

The Supreme Court assumed "that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate." Nonetheless, the Court held that the prorate program did not violate the Sherman Act because:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by

in interstate activity, the Supremacy clause of the Constitution required compliance with national, not state, law. See 193 U.S. at 350.

Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed.1035 (1951), is consistent with Northern Securities. The fixing of the price by a manufacturer at which wholesalers or retailers resell the manufacturer's goods is per se illegal. Dr. Miles Medical Co. v. John Park & Sons Co., 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed.502 (1911). In 1950, the Miller-Tydings Act, a Federal statute, permitted a state to enact a law allowing manufacturers to enter contracts with their distributors fixing resale prices. Louisiana had such a statute. It, however, went beyond the Miller-Tydings Act, in permitting a manufacturer to fix resale prices with non-signers of a contract once a single Louisiana distributor had signed the resale price agreement. The Supreme Court refused to enforce the Louisiana law against liquor retailers who had not signed agreements with two interstate liquor distributors. As in Northern Securities, the Court held that the state's claim of exemption must be denied because it purported to reach interstate commerce subject to the Sherman Act. 341 U.S. at 387-389.

> its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress. 317 U.S. at 350-351.

Parker strongly suggested that virtually all state regulation would be exempt from the Sherman Act, by emphasizing, "There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations'." 317 U.S. at 351. Only one type of state or municipal activity was identified as violating the Act, that, where, "the state or its municipality (becomes) a participant in a private agreement or combination by others for restraint of trade..." 317 U.S. at 351-352. But where, as in California's proration program, the state by statute created a regulatory program and prescribed the conditions of its application, the Sherman Act was inapplicable. As the Court concluded: "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." 317 U.S. at 352.

For thirty-two years, Parker endured as the Supreme Court's last word concerning the state action exemption from the Sherman Act. Then, beginning in 1975, the Court decided seven cases in the next eight years.

Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L.Ed 2d 572 (1975), the first of these decisions, narrowed the availability of the state action exemption. The fact that the State Bar of Virginia was a state agency did not vest the Bar with an exemption from the Sherman Act and allow it to enforce price-fixing through the publication by local county Bars of minimum fee schedules. The Court held that the price-fixing was condemned by the antitrust laws because the activity was not required by the state acting as sovereign:

> Here we need not inquire further into the state-action question because it cannot fairly be said that the State

> of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondents' activities. Although the State Bar apparently has been granted the power to issue ethical opinions, there is no indication in this record that the Virginia Supreme Court approves the opinions. Respondents' arguments, at most, constitute the contention that their activities complemented the objective of the eithical codes. In our view that is not state action for Sherman Act purposes. It is not enough that, as the County Bar puts it, anticompetitive conduct is "prompted" by state action; rather anticompetitive activities must be compelled by direction of the State acting as a sovereign. 95 S.Ct. at 2015.

Subsequent cases amplified the requirement that the conduct allegedly exempt because of state action be "clearly articulated and affirmatively expressed as state policy." In Cantor v. Detroit Edison Company, 428 U.S. 579, 96 S. Ct. 3110, 49 L.Ed.2d 1141 (1976), a private utility corporation had secured approval from the Michigan Public Service Commission of a tariff under which it provided consumers light bulbs and then billed consumers for the use of electricity without a separate charge for the light bulbs. The Michigan Public Service Commission was granted express powers by statute "to regulate all rates, fares, fees, charges, services, rules, conditions of service," etc., but its enabling law "contains no direct reference to light bulbs. Nor, as far as [the Supreme Court has] been advised, does any other Michigan statute authorize the regulation of that business. Neither the Michigan Legislature, nor the Commission, has ever made any specific investigation of the desirability of a lamp-exchange program or of its possible effect on competition in the light bulb market." Since, the Commission's approval of Detroit Edison's light bulb program "does not, therefore, implement any statewide policy relating to light bulbs," Detroit Edison could be sued under the antitrust laws and could not claim exemption for obedience to a valid state policy. 96 S. Ct. at 3114-3115.

In contrast was the decision in Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L.Ed 2d 810 (1977). In Bates, a rule of the Arizona Supreme Court expressly prohibited a lawyer to "publicize himself ... through newspaper or magazine advertisements". This justified exemption from the Sherman Act because "That court is the ultimate body wielding the State's power over the practice of law, ... and, thus, the restraint is 'compelled by direction of the state acting as a sovereign.'" 97 S. Ct. at 2697. A similar approach was taken in New Motor Vehicle Board of California v. Orrin W. Fox, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978). New Motor Vehicle Board involved a California statute clearly requiring an automobile manufacturer to notify existing franchisees before establishing a new dealership within 10 miles and to submit to a hearing before the Board upon a protest by the franchisee to determine whether there was good cause for refusing to permit the establishment of the dealership. 99 S. Ct. at 408-409 and 412.

New Motor Vehicle Board also emphasized that the State of California had satisfied the second requirement for exemption by providing "ongoing regulatory supervision" through notice and hearing procedures. 99 S.Ct. at 412. On the other hand, adequate supervision was not provided in California Retail Liquor Dealers Association v. Midcal Aluminum, 445 U.S. 97, 100 S. Ct. 937, 63 L.Ed 2d 233 (1980). There, a California statute required wine producers, wholesalers and rectifiers to file a fair trade contract or price schedule specifying the prices at which wine may be sold to retailers or consumers. A failure to comply with the resale price on file would subject a wholesaler to fines, license suspension or license revocation proceedings initiated by the state. The Supreme Court held that the California wine pricing system satisfied the requirement that the "challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy' ... The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance." The Court, however, held that the policy was not "actively supervised" by the state and therefore did "not meet the second requirement for Parker immunity":

> The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State

> does not monitor market conditions or engage in any 'pointed reexamination' of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As Parker teaches "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful ..." 100 S.Ct. at 943.

The application to municipalities of the test for exemption from the Federal antitrust laws began with the Supreme Court's decision in City of Lafayette, Louisiana v. Louisiana Power & Light, 98 S.Ct. 1123 (1978). There, Lafayette, Louisiana had been granted power by the State of Louisiana to own and operate electric utility systems both within and outside its city limits. Lafayette sued Louisiana Power & Light for alleged antitrust violations. Louisiana Power & Light filed a counter-claim seeking damages from the City of Lafayette for the City's alleged antitrust violations which the private utility claimed had injured its business. The City of Lafayette sought dismissal of this counter-claim, urging that under the "state action" doctrine of Parker v. Brown, the Federal antitrust laws could not be applied to it. 98 S.Ct., at 1125-1126 and 1132. A 5-4 majority of the Supreme Court held that the City of Lafayette's electric utility activities were not exempt from the federal antitrust laws. The five Justice majority, however, disagreed among themselves as to why the City of Lafayette could be sued under the federal antitrust laws. Four justices agreed with an opinion written by Justice Brennan that began with the premise that municipalities were not granted a blanket exemption simply because of their status as municipalities. Instead, Brennan held "municipalities are 'exempt' from antitrust enforcement when acting as state agencies implementing state policy to the same extent as the state itself ..." 98 S.Ct. at 1136, n. 42. But the municipality must be able to identify evidence "that the State authorized or directed a given municipality to act as it did" in order to claim exemption. 98 S.Ct. at 1137.

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

> for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." 98 S.Ct. at 1138.

The fifth Justice in the majority, Chief Justice Burger, analyzed the case in a strikingly different way. He urged that the City of Lafayette's management of an electric utility was a proprietary activity that should be as much subject to the antitrust laws as the business activities of any private firm. At the same time, he suggested that a municipality's traditional governmental functions should be accorded a comprehensive exemption.[4] 98 S.Ct. at 1139-1143.

Community Communications Company, Inc. v. City of Boulder, Colorado, 102 S.Ct. 835 (1982), was the other Supreme Court decision extending the "state action" test for exemption from the antitrust laws to municipalities. By a 5-3 vote, the Supreme Court held that the granting of "home rule" powers to the City of Boulder, Colorado, including the delegation of "every power theretofore possessed by the legislature in local and municipal powers," would not satisfy the "clear articulation and affirmative expression" requirement.

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4. Burger explicitly relied on National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) as support for his distinction between municipal proprietary and governmental activities. National League held that the Federal Fair Labor Standards Act could not be applied to the states and their subdivisions, stating:

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that matter ....
>
> One undoubted attribute of state sovereignty is the states' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions ... The question we must resolve here, then, is whether these determinations are 'functions essential to separate and independent existence' ... 96 S.Ct. at 2471.

Stewart, dissenting in City of Lafayette, criticized Burger's proprietary-governmental distinction as "virtually impossible to determine. The distinction between 'proprietary' and 'governmental' activities has aptly been described as a 'quagmire'." 98 S.Ct. at 1147. Accord, 1 AREEDA and TURNER, supra note 1, at 90-91.

The Court explained:

> (P)lainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. 102 S.Ct. at 843.

The Court rejected suggestions that its decisions would adversely affect state-municipal relations, stating: "(J)udicial enforcement of Congress' will regarding the state action exemption renders a State no less able to allocate governmental power between itself and its political subdivisions. It means only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws." 102 S.Ct. at 843-844.

The recent Supreme Court decisions make it clear that a municipal action or regulation in restraint of trade may claim the "state action" exemption from the antitrust laws only if "clearly articulated and affirmatively expressed as state policy."[5]

B. The Requirement that the Alleged Restraint of Trade Be "Clearly Articulated and Affirmatively Expressed as State Policy"

Several Supreme Court decisions have described the initial requirement for state action exemption, that, the alleged restraint be "one clearly articulated and affirmatively expressed as state policy."

5. A somewhat different formulation of the test for exemption appears in Sound, Inc. v. American Telephone and Telegraph Company, 631 F.2d 1324, 1334 (8th Cir. 1980) where the Eighth Circuit stated:

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

The Supreme Court's affirmation of its two-part test for exemption in Boulder, 102 S.Ct. at 841, n. 14, makes clear that to the degree the test in Sound conflicts with the Supreme Court test, the standard in Sound is not the law.

Goldfarb underlined that a state could not claim exemption unless it could identify a state statute requiring or compelling the alleged restraint of trade. 95 S.Ct. at 2015. At the least, the state statute must refer to the alleged restraint of trade. 95 S.Ct. at 2015; and Cantor v. Detroit Edison Co., 96 S.Ct. at 3114-3115. A general delegation of "home rule" power will not satisfy the requirement of "clear articulation and affirmative expression" since the state's position then is one of mere neutrality regarding the action challenged as anticompetitive. Boulder, 102 S.Ct. at 843. In ascertaining the significance of a reference in a state statute to an alleged restraint of trade, legislative history, including an investigation of the alleged restraint and its effect on competition, will be accorded some weight. Cantor, 96 S.Ct. at 3114-3115.

However, a municipality need not point "to a specific, detailed legislative authorization" before it may secure a state action exemption. "(A)n adequate state mandate for anticompetitive activities of cities ... exists when it is 'found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'" City of Lafayette, 98 S.Ct. at 1138. Express language in a state statute directing an anti-competitive approach will satisfy the "clear articulation and affirmative expression" requirement. Bates, 97 S.Ct. 2691, New Motor Vehicle Board, 99 S.Ct. 403; and Midcal, 100 S.Ct. 937.

The precise contours of the clear articulation and affirmative expression requirement remain somewhat unclear. Regarding taxicab regulation, the Supreme Court decisions make clear that a state statute requiring or compelling a municipality to fix rates or limit the number of taxis in a municipality would satisfy this requirement. At the other extreme, a municipality which fixed taxicab rates or limited entry without any state legislation concerning regulation of taxicabs would not be exempt from antitrust challenge.

But what of the cases between these two extremes? Harvard Law School Professor Phillip Areeda, relying on language in Lafayette, has urged that a municipality's regulatory actions, as distinguished from the conduct of

private parties, need not be "compelled" by a state statute; it is sufficient that a state statute granted the municipality "authority ... to operate in a particular area" or "contemplated the kind of action complained of ..." Conceding that the state legislative history often is lacking and state statutes are often ambiguous, Areeda ultimately suggests that courts will "assume that the legislature intends the 'reasonable,' but require more specific language or legislative history to justify the 'exceptional'." Areeda, supra note 1, at 445-448; and AREEDA, ANTITRUST LAW 53-55 and 59-62 (1982 Supp.). See somewhat different analysis of the requirement in Thomas, supra note 1, at 361-366.

Areeda would hold that a state statute granting a municipality the authority to "regulate taxicabs" would satisfy the initial requirement if a court found that rate regulation or limits on the number of taxicabs were "reasonable" or "ordinary." By contrast, if a court concluded that the displacement of the antitrust laws with regulated taxicab rates or limits on the numbers of cabs was "extraordinary," it would require either (1) more specific language in the statute - e.g., a municipality need be granted authority to regulate taxicabs including the authority to fix rates or limit the number of competitors; or (2) a legislative history indicating that the state legislature contemplated rate regulation or limits on the number of taxicabs when it enacted the statute empowering the municipality to "regulate taxicabs."

Only one reported court decision has focused on whether the state action exemption is available to a municipality for denying a taxicab company a license to operate in the municipality, Golden State Transit Corp. v. City of Los Angeles, CCH Trade Reports Paragraph 65,448 (D. Calif. 1983). In Golden State Transit, the Los Angeles City Council failed to renew a cab corporation's operating franchise. The Federal district court dismissed the cab corporation's subsequent antitrust lawsuit, in part, because "the State of California has clearly articulated and affirmatively expressed a policy of displacing competition with regulation in the taxicab industry." Id., at 70, 557. In fact, however, what California had done was assert:

> (T)he power to control taxicab operations through enactment of Chapter 8 of the Public Utilities Code. Pub. Util. Code Section 5351 et seq. Specifically, Chapter 8 applies to any "charter-party carrier of passengers," which includes "every person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage, over any public highway in this State." Id., Section 5360. Plaintiff's taxicab operations clearly fall within this definition of utilities subject to state regulation of fares and other conditions of operation. The Public Utility Code provides, however, that taxicabs are not subject to state regulation if a municipal subdivision licenses and regulates such operations. Id., Section 5353(g). In short, the Public Utilities Code delegates to the City of Los Angeles the power to license and regulate taxicab operations within its boundaries. If the City fails to exercise its regulatory power, the Public Utilities Commission is obligated to act in the City's place. See People v. City and County of San Francisco (1979-2 TRADE CASES Para. 62,747), 92 Cal. App. 3d 913, 921-25, 155 Cal. Rptr. 319, 324-26. (1979).

The language of the California Public Utility Code excluding municipal taxicab transportation from regulation by that code states: "The provisions of this chapter do not apply to ... (g) taxicab transportation service licensed and regulated by a city or county, by ordinance or resolution, rendered in vehicles designed for carrying not more than eight persons excluding the driver ..." Section 5353(g) of the California Public Utilities Code. Thus, this district court decision may be reversed, if appealed, because the language of the code does not "affirmatively express" a policy permitting a municipality to limit entry. Alternatively, the case may be affirmed, if appealed, because the exclusionary language appears in a chapter of the Public Utilities Code.

The case well illustrates that lower Federal courts do not always precisely follow the holdings of the United States Supreme Court. When, however, all of the relevant lower Federal court decisions are reviewed, a pattern, generally consistent with the Supreme Court's decision does emerge.

(1) Cases consistently hold that a statute compelling a regulatory agency to impose an allegedly anti-competitive restraint satisfies the "clear articulation and affirmative expression" requirement. See, e.g., Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612, 619 (6th Cir.

1982); Morgan v. Division of Liquor Control, 664 F.2d 353 (2d Cir. 1981); Star Lines v. Puerto Rico Maritime Shipping Authority, 451 F.Supp. 157, 166 (S.D.N.Y. 1978); Schiessle v. Stephens, 525 F. Supp. 763, 776-777 (N.D. Ill. 1981); and Kartell v. Blue Shield of Massachusetts, 542 F. Supp. 782, 786-790 (D. Mass. 1982). See, also, Bally Mfg. Corp. v. New Jersey Casino Control Commission, 426 A.2d 1000, 1006 (Sup. Ct. N.J. 1981), appeal dismissed, 102 S.Ct. 77 (1981).

(2) The cases consistently hold that a municipality or other government entity need not be expressly compelled by state legislation to impose an allegedly anticompetitive restraint. See, e.g., United States v. Southern Motor Carriers Rate Conference, 672 F.2d 469, 473 (5th Cir. 1982); Pueblo Aircraft Service v. City of Pueblo, Colorado 679 F.2d 805 (10th Cir. 1982); and Highfield Water Company v. Public Service Commission, 488 F.Supp 1176, 1190 (D. Mary. 1980).

(3) The cases hold that specific restraints of trade normally must be articulated in the state legislation; the power to restrain trade usually will not be inferred from a more general state statute. See, e.g., Ronwin v. State Bar of Arizona, 686 F.2d 692, 696-697 (9th Cir. 1982) (State rule delegating to committee of bar examiners a general authority to examine applicants will not justify a grading procedure that admits a predetermined number of applicants without regard to their competence); Phonetele v. American Telephone and Telegraph Co., 664 F.2d 716, 736 (9th Cir. 1982) ("(I)mmunity from the antitrust laws will not be implied."); Hahn v. Oregon Physicians' Service, 508 F.Supp. 970, 976 (D. Ore. 1981), reversed on other grounds, 689 F.2d 840 (9th Cir. 1982) ("To be entitled to state action immunity, the state's anticompetitive policy must be affirmative, not passive or inferential."); Grason Elec. Co. v. Sacramento Municipal Utility, 526 F.Supp. 276, 278-280 (E.D. Cal. 1981); Mason City Center Associates v. City of Mason, Iowa, 468 F.Supp. 737 (N.D. Iowa 1979), aff'd, 671 F.2d 1146 (8th Cir. 1982). But see, Euster v. Eagle Downs Racing Association, 677 F.2d 992, 994-995 (3rd Cir. 1982) (A state horse racing commission entitled to promulgate jockey fees given its broad supervisory powers over thoroughbred racing); and Gold Cross Ambulance

v. City of Kansas, 538 F.Supp. 956 (W.D. Mo. 1982) where a municipality was allowed to designate a single ambulance service on the basis of comprehensive state statute for licensing and regulating ambulance companies which did not address the issue of monopolistic versus competitive ambulance systems.

(4) If the state legislature considered the type of alleged antitrust restraint challenged before adopting the relevant statute, satisfaction of the "clear articulation" requirement is more likely to be found with an ambiguous statute than it would be absent the legislative history. See, e.g., Euster v. Eagle Downs Racing Association, 677 F.2d 992, 995 (3d Cir. 1982).

C. The Requirement that there Must Be "Active Supervision" by the Municipality

Only two Supreme Court decisions have analyzed, at any length, the requirement that a state "actively supervise" the area of alleged antitrust violation. In New Motor Vehicle Board of California v. Orrin W. Fox, 99 S.Ct. 403, 412, the Court held that the requirement was satisfied by the existence of a state board which employed on-going notice and hearing procedures. In California Retail Liquor Dealers Association v. Midcal, 100 S.Ct. 937, 943, inadequate supervision was found when the state authorized price-setting by private parties without any review of the reasonableness of the fixed prices. See, also, Bates v. State Bar of Arizona, 97 S.Ct. at 2697-2698; and 1 AREEDA and TURNER, supra note 1, at 73-79.

The lower Federal courts have not had great difficulty construing the active supervision requirement.

(1) In those cases where no state or municipal supervision exists, the requirement clearly is not satisfied. See, e.g., Corey v. Look 641 F.2d 32, 37 (1st Cir. 1981).

(2) The active supervision requirement consistently has been held to be satisfied in those instances where the state or municipality has a means to investigate, see, e.g., Turf Paradise, Inc. v. Arizona Downs,

670 F.2d 813, 825 (9th Cir. 1982); and First American Title Co. of South Dakota v. South Dakota Land Title Association, 541 F.Supp. 1147, 1163 (D. S. Dak 1982); consider rate changes, see, e.g., Morgan v. Division of Liquor Control, 664 F.2d 353, 356 (2d Cir. 1981); hold hearings before license revocation or suspension, see, e.g., Gold Cross Ambulance v. City of Kansas City, 538 F.Supp. 956, 966-967 (W.D. Mo. 1982); and Hinshaw et al. v. Montana State Dept. of Business Regulation, et al., 1980-1981 CCH Trade Cases Paragraph 63,584, at 77,121 (1980); or enforce the statutory scheme, see, e.g., Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612, 620 (6th Cir. 1982).

(3) In many cases, a key consideration has been whether the alleged antitrust violation has been initiated by private parties and enforced by the state without review of its reasonableness or whether the alleged antitrust violation was initiated by a state or municipal agency. Where prices are merely filed by private parties at a state agency and not subject to state review, "active" supervision has been held not to exist. See, Miller v. Oregon Liquor Control Commission, 688 F.2d 1222, 1226-1227 (9th Cir. 1982). But when the alleged restraint emanates directly from a state statute, see, Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612, 620 (6th Cir. 1982); and Morgan v. Division of Liquor Control, 664 F.2d 353, 356 (2d Cir. 1981); or state commission, see, Euster v. Eagle Downs Racing Assn., 677 F.2d 992, 995-996 (3d Cir. 1982); or city council, Golden State Transit Corp. v. City of Los Angeles, CCH Trade Regulation Reports Paragraph 65,448 (D. Cal. 1983); the active supervision requirement has been satisfied.

The courts do not seem to require rigorous supervision so long as state control of the alleged antitrust restraint seems to exist. In Horsemen's Benevolent and Protective Assn. v. Pennsylvania Horse Racing Commission, 530 F.Supp. 1098 (E.D. Pa. 1982), the approval by a state commission of fees to be paid to jockeys was upheld as meeting the active supervision requirement in spite of the fact that the fee schedule earlier had been suggested by the Jockeys' Guild. In so ruling the court noted, "The Commission gave the plaintiffs and other interested parties an opportunity to object to the proposed increase in jockey fees and, after consideration of these objections,

voted to adopt the proposed increase submitted by the Jockeys' Guild." 530 F.Supp. at 1108.

The important unsettled question concerning the active supervision requirement is whether it will be required of municipalities as it currently is required of the state and state agencies. A few lower court decisions have held, Town of Hallie v. City of Eau Claire, 51 USLW 2529 (7th Cir. 1983); or speculated, Gold Cross Ambulance v. City of Kansas City, 538 F.Supp. 956, 966 (W.D. Mo. 1982), that active supervision will not be required. The last Supreme Court decision on point, City of Boulder, 102 S.Ct. 835, 841, n. 14, explicitly stated it did not reach the question whether a municipal ordinance "must ... satisfy the 'active state supervision' test...." Given the application of the active supervision requirement to states, it is probable, though not certain, that municipalities also will be required to satisfy the active supervision test. See, McMahon, "Recent Significant Developments in 'State Action' and Noerr-Pennington Exemptions: From Boulder to the 'Sham Exception' 12-15 (forthcoming law review article).

Thus, at this time, for a municipality to secure the "state action" exemption from the Federal antitrust laws clearly does require that regulation of the alleged restraint of trade be "clearly articulated and affirmatively expressed as state policy." The state action exemption will not be available unless the state has enacted a statute specifically addressing the area of alleged restraint. If the state has passed a statute addressing a specific area of potential antitrust restraint, the municipality may satisfy this part of the test for exemption even if the legislation is not precise or detailed.

It is unclear whether the municipality also must show that it actively supervises the area of alleged antitrust violation. If the municipality must do so, the Supreme Court and lower Federal court case law makes reasonably clear that active supervision may be proven if the municipality has on-going notice and hearing procedures.

D. Unsettled Legal Issues Concerning Municipal Antitrust Liability

It must be emphasized that the Supreme Court has not ruled on several questions relevant to determination of a municipality's potential liability

for violation of the antitrust laws. These questions may determine what efforts a municipality would have to take to comply with the Federal antitrust laws. This section analyzes the two most important unsettled questions: 1. Will a municipality be liable for treble damage monetary relief, or will it be subject only to injunctive remedies? and 2. Will the same substantive antitrust rules be applied to municipalities as to private parties, or will new standards be created to apply to municipalities?

1. Will a municipality be liable for treble damages, or will it be subject only to injunctive remedies?

Under the Federal antitrust laws, "any person injured in his business or property by reason of anything forbidden in the antitrust laws may sue ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. Section 15.

Whether or not this treble damages provision will be applied when municipalities are found to have violated the antitrust laws and do not have an effective exemption is the most important unsettled question in the state action area. If cities can be liable, their potential monetary exposure is enormous - e.g., when trebled the claim against the defendant cities in City of Lafayette amounted to $540 million. 98 S.Ct. at 1151 (Stewart, J. dissenting). Nonetheless, it is probable, but not certain, that federal courts will not award treble damages for municipal antitrust violations in the regulation of taxicabs.

To date, the Supreme Court has not addressed the issue of remedy for a municipal antitrust violation held not to be exempt under the state action exemption, but has reserved the issue for future decision.[6]

6. In City of Boulder, 102 S.Ct. at 843, n. 20, and in City of Lafayette, 98 S.Ct. at 1130-1131, the Supreme Court stated "[W]e do not confront the issue of remedies appropriate against municipal officials." In a survey of damages actions brought against municipalities, apparently complete through March 1983, the National Institute of Municipal Law Officers reported that no damages award has been sustained by a court against a municipality. But see Affiliated Capital v. City of Houston, 700 F.2d 226 (5th Cir. 1983) where the Mayor of Houston, but not the City of Houston, was held liable with other private parties for damages of $6.3 million.

Several commentators have urged that municipalities should not be held liable for monetary damages. See, e.g., 1 AREEDA and TURNER, supra note 1, at 101-108; AREEDA, ANTITRUST LAW 48-49 (1982. Supp.); Note, "Antitrust Treble Damages as Applied to Local Government Entities: Does the Punishment Fit the Defendant," 1980 ARIZ. St. L. J. 411; Melton, supra note 1, at 371-375; and Hoskins, supra note 2, at 686-687.

These commentators stress several arguments to justify not assessing treble damages against municipalities for antitrust violations.

First, enjoining future violation of the antitrust laws is an available alternative remedy and normally will be sufficient to deter future misconduct.[7] See, e.g., 1 AREEDA and TURNER, supra note 1, at 102. The compensatory and incentive rationales for treble damages normally can be satisfied by permitting plaintiffs to recover treble damages from the private parties involved with the local government in the antitrust violation. See, Melton, 12 supra note 1, at 372.

Second, it is difficult to believe that Congress intended to transfer treble damages from the tax-paying citizens of a municipality to business enterprises claiming injury as a result of the municipality's economic policies. An antitrust damages award might bankrupt a city, See, e.g., Blackmun notation in City of Lafayette that the damages sought by Louisiana Power & Light amounted to $28,000 for each family of four who were citizens of the defendant cities. 98 S.Ct. at 1152, n. 1. Inevitably, an antitrust damages award will be borne by taxpayers who, as a practical matter, are innocent of any wrong-doing in the matter. Unlike shareholders in a business corporation, they did not knowingly assume the risk of antitrust violation in return for the opportunity to profit from a business corporation. See, Note, "Antitrust Treble Damages as Applied to Local Government Entities ..." 1980

7. It is possible that the Supreme Court could hold that treble damages should not be awarded, but that a municipality's bad faith in complying with a prospective injunction will justify a criminal contempt prosecution which could result in a jail term for the responsible municipal official or a fine; a civil contempt prosecution which also could result in a remedial fine; or an award of attorney's fees. See, Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1979).

ARIZ. St. L.J. at 413-417. Absent a clearer expression of congressional intent to subject municipalities to treble damages awards, the possibility of municipal bankruptcy or damages being borne by essentially innocent parties should dissuade a court from a damages award. See Melton, supra note 1, at 372.

Third, the risk of bankrupting a municipality by imposition of a treble damages award also suggests that such an award might be barred by the Constitution and its grant to the states of sovereignty. In National League of Cities v. Usery, 96 S.Ct. at 2476, n. 20, the Court urged: "Interference with integral governmental services provided by such subordinate arms (that is, local governments) of a state government is therefore beyond the reach of congressional power under the Commerce Clause just as if such services were provided by the State itself." Municipal bankruptcy clearly would involve such an "interference with integral governmental services." While the Supreme Court has approved damages awards against municipalities, see, Monell v. Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) and Hutto v. Finney, 98 S.Ct. 2565, it is worth underlining that the substantive basis of these awards was the Fourteenth Amendment. "The antitrust laws, by contrast, were enacted pursuant to the Commerce clause, which was the Congressional power singled out for limitation in National League of Cities," Melton, supra note 1, at 374.[8]

Finally, even if a court held that a municipality can be sued for treble damages under the antitrust laws, it is possible that in the first Supreme

8. One Federal court of appeal decision, State of New Mexico v. American Petrofina, 501 F.2d 363, 366-367 (9th Cir. 1974), suggested that the Eleventh Amendment also might bar antitrust legal actions against a state. That amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any Foreign State."

There has been no discussion by the Supreme Court to date of the relationship between the Eleventh Amendment and the antitrust laws. However, in Hutto v. Finney, 98 S.Ct. at 2574, n. 18, the Court did state, "Although the Eleventh Amendment does not prohibit attorney's fees awards for bad faith, it may counsel moderation in determining the size of the award or in giving the State time to adjust its budget before paying the full amount of the fee." Assumedly, such considerations would also have to be taken into account when making a treble damages award under the federal antitrust laws.

Usually a state may not be sued under Federal law for retrospective relief unless there is a clear statement of Congressional intent to authorize such relief. See, Melton, supra note 1, at 372 n. 198.

Court case to so hold only prospective relief would be ordered, reserving retrospective relief (that is, damages) to subsequent decisions. See, Klitzke, "Antitrust Liability of Municipal Corporations: The Per Se Rule vs. The Rule of Reason - A Reasonable Compromise," 1980 ARIZ. ST. L.J. 253, 274-275.

2. Will the same substantive antitrust rules be applied to municipalities as are applied to private parties, or will new standards be created to apply to municipalities?

A second major issue unresolved to date is whether the Supreme Court will apply the same substantive antitrust rules to municipalities as it does to private parties. City of Boulder explicitly deferred consideration of the issue. See 102 S.Ct. at 843, n. 20. The commentators are divided concerning whether all municipal antitrust violations should be judged under a modified standard permitting municipalities to introduce evidence that would be excluded in a case involving private parties. Klitzke for one example, believes that the differences between a municipality and private firm in terms of purpose, function and method of operation justifies a modification of traditional antitrust rules. See, "Antitrust Liability of Municipal Corporations ...," 1980 ARIZ. St. L. J. 253. Areeda and Turner disagree, urging that "the weighing of a wide assortment of economic and non-economic factors in order to determine the 'public interest' is essentially political

If a different set of standards were applicable to municipalities, assumedly these standards would permit municipalities to present defenses in per se cases where private parties usually would not be permitted to present defenses. The new standards would not prevent finding a municipality liable for antitrust law violations, but they would reduce the likelihood of such a finding. For example, a municipality that violated the per se rules against price-fixing by setting taxicab fares might be able to defend itself on such grounds as the necessity of price-fixing in this area. This creates the possibility that a municipality might be held non-exempt from the antitrust laws, but still held not in violation of these laws in such practices as fixing fares or entry limitations. Absent further Supreme Court guidance, however, whether modified standards will be adopted or what new defenses might be available is a matter of pure speculation.

III. APPLICATION OF THE LAW TO MUNICIPAL TAXICAB REGULATION

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

Section (B) of this Part focuses on the "active supervision" requirement. The Supreme Court has not ruled yet whether municipalities also must satisfy this requirement. This section considers the three areas of municipal taxicab regulation most likely to lead to antitrust litigation. These areas are: (1) entry limitations; (2) fare regulation; and (3) limitations on the taxicab firms serving municipal airports.

A. The "Clearly Articulated and Affirmatively Expressed" Requirement

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

In seven states[9], the absence of a state statute "clearly articulating and affirmatively expressing" a policy to allow municipalities to violate Federal Antitrust laws in taxicab regulation creates no risk of antitrust violation, for regulation of taxicabs is reserved either to a state commission or to a county government, or the state has "deregulated" the taxicab industry.

In forty-one states, there appears to be a real risk of antitrust violation. In twelve of these states, no statute delegates authority to municipalities to regulate taxicabs.[10] These states clearly do not satisfy the two-part test for a state action exemption.

In seventeen states, municipalities are delegated power to regulate the taxicab business but without any clear indication that this regulation may include conduct violative of the antitrust laws.[11] Typical of the statutes in these states is the law in Alabama which provides in relevant part:

> Any city or town shall have the power to regulate and license the use of carts, drays, wagons, coaches, omnibuses and every description of carriages and vehicles kept for hire ...

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9. Conn. Gen. Stat. Sec. 136-95 et seq. (1983) (regulation by state commission); Florida 11.125.012 (regulation by county); Nev. Rev. Stat. 706.166 and 706.881 et seq. (1981) regulation by state or county); Pennsylvania Stat. Ann. Public Utility Code 1103 (C) (Purdon Supp. 1982); Rhode Island Gen. Laws 39-14-1 et seq. (Supp. 1982) (regulation by state division of public utilities) and West Virginia Code, 17-6-3 et seq. (1974) (regulation by state road commissioner). In 1982, Arizona ended its state-wide rate regulation and limitations on the number of licenses.

10. These states are: Alaska, Colorado, Delaware, Georgia, Hawaii, Idaho, Kansas, Montana, Nebraska, New Mexico, Texas, and Wyoming. Regarding Wyoming, See, Wyoming Statutes, Section 37-8-104 (1977) which may implicitly grant municipalities power to regulate "motor carriers".

11. Alabama Code 11-51-101 (1978); California Vehicle Code 16501 (West 1971); Iowa Code Ann. 321.236 (West Supp. 1983); Louisiana R.S. Ann. 45:200.1 et seq. (West 1982); Maryland Code Ann. Transportation 25-101.1 (d)(1)(1982); Massachusetts Gen. Law. Ann. Ch. 40:22 (West Supp. 1983); Minnesota Stat. Ann. 412.221 (Subd. 20) (West Supp. 1983); New Hampshire Rev. Stat. Ann. 31:40 (1981 Supp.); New Jersey Stat. Ann. 48:16-2 (West Supp. 1983); North Dakota Cent. Code 40-05-01 (27) (Supp. 1981); Ohio Rev. Code Ann. 715.22 (Page Supp. 1982); Oregon Rev. Stat. 767.025(4) (1981); South Carolina Code Ann. 58-23-1210, but see, 58-23-1510 (Law Co-op 1977); South Dakota Codified Laws Ann. 9-34-10 (1981); Tennessee Code Ann. 65-15-102(i) and 65-15-103 (1982 Supp.); Utah Code Ann. 10-8-39 (1981 Supp.); and Wisconsin Stat. Ann. 349.24 (West, Supp. 1983).

This type of statute does not clearly indicate whether municipalities are delegated the authority to adopt anti-competitive rules. Assumedly these statutes also would fail to satisfy the two-part test for state action exemption.[12]

Ten states, in contrast, do "clearly articulate" and "affirmatively express" an intention to allow municipalities to fix fares.[13] These states would be able to satisfy the first part of the two-part state action test with respect to fixed rates. These states, however, may not be able to satisfy the state action test for exemption with respect to other aspects of taxicab regulation since these other aspects are not described or necessarily implied by their statutes.

Two states "clearly articulate" and "affirmatively express" an intention to allow municipalities to limit the number of taxicabs operating in their municipalities.[14]

Two other states "clearly articulate" and "affirmatively express" an intention to allow municipalities both to fix fares and to limit the number of taxicabs. North Carolina[15] provides in the course of its relevant statute that municipalities by ordinance may "establish rates that may be charged by taxicab operators, may limit the number of taxis that may operate in the city and may grant franchises to taxicab operators on any terms that the council may deem advisable." Oklahoma[16] limits municipal regulation to prescription

12. But, see contrary result in Golden State Transit Corp. v. City of Los Angeles, CCH Trade Reports, Paragraph 65,448 (D. Cal. 1983) discussed supra at pp. 14-15.

13. Arkansas Stat. Ann 19-3513 (1980); Illinois Ann. Stat. Chapter 24, Section 11-42-6 (Smith-Hurd Supp. 1983); Indiana Code 18-4-2-15 (1976); Maine Rev. Stat. Ann. 30:2151(3)(B) (1964); Michigan Comp. Laws 67.1 (Sixteenth) (1983 Supp.); Mississippi Code Ann. 21-27-121 (1982 Supp.); Missouri Ann. Stat. 74.127(10) (Vernon 1952); Vermont Stat. Ann. 24:2031 (1975); Virginia Code 56-291.3:1 (1981); and Washington Rev. Code Ann. 35-23 440(7) (1964).

14. Kentucky Rev. Stat. 281.635(4) (1982 Supp.); and New York Gen. Mun. Law 181 (Consul. 1982).

15. North Carolina Gen. Stat. 160A-304 (1982).

16. Oklahoma Stat. Ann. Title 11: Section 22-118 (West 1978).

of minimum insurance, mechanical condition, "restriction of the loading of taxicabs to specified zones or localities ... and the making of such other rules governing the manner of operation of taxicabs as the public safety may require," rate-setting, and the power to require that a certificate of convenience and necessity be issued before a taxicab may be operated. These two statutes appear to be the most comprehensive delegations of power to municipalities to regulate the taxicab industry currently in force.

STATUTES EXPRESSING STATE POLICY CONCERNING MUNICIPAL TAXICAB REGULATION

State	Regulation by State or County or State-wide "Deregulation"	No Authority Delegated to Municipalities	Authority Delegated to Municipality Not clearly exempt	Authority Delegated to Municipality Municipalities may fix fares	Authority Delegated to Municipality Municipalities may limit number of taxicabs	Authority Delegated to Municipality Municipalities both may fix fares and limit numbers of taxicabs
Alaska		X				
Alabama			X			
Arizona	X*					
Arkansas				X		
California			X**			
Colorado		X				
Connecticut	X					
Delaware		X				
Florida	X					
Georgia		X				
Hawaii		X				
Idaho		X				
Illinois				X		
Indiana				X		
Iowa			X			
Kansas		X				
Kentucky					X	
Louisiana			X			
Maine				X		
Maryland			X			
Massachusetts			X			
Michigan				X		
Minnesota			X			
Mississippi				X		
Missouri				X		
Montana		X				
Nebraska		X				
Nevada	X					

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

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

** A Federal district court in Golden State Transit Corp. v. City of Los Angeles, CCH Trade Regulation Report, Paragraph 65,448 (1983), held that the California statute does exempt municipal taxicab regulation. See discussion of this case on pp. 14-15.

B. The "Active Supervision" Requirement

In this section, the three areas of municipal taxicab regulation most likely to lead to antitrust litigation are studied. These areas are: (1) entry limitations; (2) fare regulation; and (3) limitations on the number of taxicab firms which may serve municipal airports. Several other areas of municipal supervision of taxicabs also could give rise to antitrust litigation; for example, limitations on the taxicab firms able to use particular cab stands or use of safety or insurance requirements to restrict the number of taxicabs in a municipality. Satisfying the "active supervision" requirement in these areas essentially would involve the same type of evidence as satisfying the requirement in the three areas to be analyzed.

To research this subsection ordinances, reports and secondary literature were studied concerning a number of major cities including Atlanta[17], Boston[18], Chicago[19], Cleveland[20], Los Angeles[21], New York[22], San Francisco[23] and Washington D.C.[24]. In addition, recent reports concerning the removal of

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17. Atlanta Ordinance No. 14-8020-8085 and 12-5021-5023 (1981).

18. Mayor's Office of Transportation, Boston Taxi Study: Final Report (May 1978); Rules and Regulations for Hackney Carriages (1980); and Greenbaum, et al., "Implementation and Preliminary Impacts of a Shared-Ride Service for Boston Logan International Airport," paper presented at the 57th Annual Meeting of the Transportation Research Board, Washington, D.C. (1978).

19. Kitch, Issacson and Kasper, "The Regulation of Taxicabs in Chicago," 14 J. LAW & ECON. 285 (1971).

20. Cleveland Ord. 127.37-.38 and 443.01-.36 (1976).

21. Multisystems, Inc., Los Angeles Taxi Study, 6 volumes, prepared for the Los Angeles County Transportation Commission.

22. Mayor's Committee on Taxi Regulatory Issues, New York City: Recommendations (1982). See, also, Rogoff, "Regulation of the New York City Taxicab Industry," City Almanac (August 1980); and Verkuil, "The Economic Regulation of Taxicabs," 24 Rutgers Law Rev. 672 (1970).

23. Von Dioszeghy and Rothmeyer, "The Regulation of the Taxi Industry in San Francisco," paper for Regulated Industries course, Professor William Baxter, Stanford Law School (1970).

24. "Taxicab Regulation," Staff Report for the Comm. on the District of Columbia, House of Rep., Comm. Print, 94th Cong., 2d Sess. (1976).

entry or fare regulations in Berkeley[25], Oakland[26], Portland[27], San Diego[28] and Seattle[29] were studied. To contrast the problems of smaller cities, the ordinances of 100 randomly selected cities in New Jersey were studied.[30]

1. Entry Limitations

The number of taxicabs serving American municipalities varies tremendously. One study of taxicab licenses issued by major cities in 1970, for example, published data concerning thirty cities with populations of 325,000 or more. This study reported that the number of licenses per 1,000 persons varied from 0.2 in Phoenix to 11.3 in Washington, D.C. The number of licenses per square mile similarly varied from 0.4 per square mile in Phoenix and Jacksonville to 139.3 in Washington D.C.[31].

In some cities, there are no significant limitations on entry.[32] Most large cities, however, do impose entry limitations typically by flatly

25. Crain & Associates, "Taxicab Regulatory Revision in Oakland and Berkeley, California: Two Case Studies", UMTA-CA-06-0127-83-2, (1982).

26. Ibid.

27. DeLeuw, Cather & Company, "Taxicab Regulatory Revisions in Portland, Oregon: Background and Implementation", UMTA-MA-06-0049-80-18, (Interim Report 1980); and "Taxicab Regulatory Revision in Portland, Oregon: A Case Study", UMTA-MA-06-0049-82-7, (Final Report 1982).

28. DeLeuw, Cather & Company, "Taxicab Regulatory Revision in San Diego, California: Background and Implementation", UMTA-MA-06-0049-80-16, (Interim Report 1981); and "Effects of Taxi Regulatory Revisions in San Diego, California", UMTA-CA-06-0127-83-1, (Final Report 1982).

29. DeLeuw, Cather & Company, "Taxi Regulatory Revision in Seattle, Washington: Background and Implementation", UMTA-MA-06-0049-80-17, (Interim Report 1980); and "Effects of Taxi Regulatory Revisions in Seattle, Washington", UMTA-MA-06-0019-83-1, (Final Report 1983).

30. These ordinances were gathered and provided by Multisystems, Inc., a Cambridge, Massachusetts consulting firm, which earlier had employed the ordinances in preparing, with the Institute of Public Administration, a three-volume study entitled, "New Jersey Taxicab Regulations, Services and Issues," (1981).

31. Utterback, "A Summary of Recent Taxicab Studies," 12 (City of Milwaukee, Legislative Reference Bureau, 1975).

32. A few large cities have no significant entry requirements including Atlanta, Ord. No. 14-8073; Oakland, see Crain & Associates, supra note 25; San

limiting the number of taxicabs that may be licensed to a specific number per thousand persons; or by empowering the city council or other regulatory body to increase or decrease the number of taxicabs according to "public necessity and convenience" or other specified criteria.[33] Whether or not entry limitations are wise or necessary has stimulated a considerable debate. Proponents of entry limitations have urged that they are necessary to ensure taxicab operators a satisfactory income; ensure the financial responsiblity of taxicab owners; prevent traffic congestion; protect mass transit systems or avoid "wars" among taxicab owners and operators. See, e.g., Kitch, Isaacson and Kasper, supra note 19, at 321-325. Opponents of entry limitations have urged that these limitations contribute to increases in taxicab fares; unfairly limit competition; raise city regulatory costs and have resulted in bribery of regulatory officials. See, e.g., "Taxicab Regulation," supra note 24; DeLeuw, Cather & Company, supra note 27; and DeLeuw, Cather & Company, supra note 28. While this debate is vital to a municipality choosing how it desires to regulate the taxicab industry, it is not relevant to satisfying the "active supervision" requirement of the state action exemption.

The case law reviewed, supra, in Subsection I(C) holds that this requirement will be satisfied by a municipal regulator employing on-going

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Diego, see DeLeuw, Cather & Company, supra note 28; Seattle, see DeLeuw, Cather & Company, supra note 29; and Washington D.C. see "Taxicab Regulation", supra note 24; and Verkuil, supra note 22, at 681-682. In addition, a considerable number of smaller cities have no significant entry limitations. For example, 41 percent of municipalities in New Jersey with populations between 2,500 and 10,000 apparently have no ordinance regulating taxicabs. See, 1 Multisystems, supra note 30, at 2. It was not clear, however, how many of these cities had taxicabs operating in their jurisdictions.

33. Verkuil, supra note 22, at 691-692, reported that Chicago had specified 14 percent of gross receipts over operating expenses exclusive of Federal income taxes as an acceptable rate of return. When the rate of return exceeds that figure, additional medallions may be issued. Portland grants its city council discretion to grant additional licenses but requires the council to take into account:

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

DeLeuw, Cather & Company, supra note 27, Interim Report at 51-52.

notice and hearing procedures before changing entry limitations. Inadequate supervision will be found if the municipality allows private parties, such as the taxicab owners, to set limitations on entry and does not review their determinations. Notably, the case law does not require that entry limitations be determined after economic or other study of the taxicab industry in a particular municipality. Instead, it focuses on whether there exist procedures informing interested parties that a hearing will be held and allowing interested parties to testify for or against changes in entry limitation rules.

Apparently compliance with the notice and hearing requirement occurs frequently.[34] Several of the ordinances promulgated by New Jersey cities seem to be in compliance. The ordinance of the Borough of Avalon is a useful example because it appears to be clearly in compliance with the active supervision requirement. The ordinance provides that before a person may be licensed to operate a taxicab an application must be made to the board of commissioners. The board of commissioners sets a date for a hearing, notifies the applicant and publishes a general notice in a newspaper circulated in the Borough. Before the hearing the chief of police or other officer determines whether or not the facts contained in the application are true and evaluates the applicant in light of published criteria. These criteria focus on the applicant's character, business and financial responsibility and the need for additional taxicabs. At the hearing, any resident or taxpayer may appear in person or submit a written statement in support of or in opposition to the license. The applicant and any person affected by the grant or denial of the license has the right to be represented by an attorney, to cross-examine opposing witnesses and, at his own expense to have a stenographic record made of the proceedings. A copy of the relevant language in Avalon's ordinance is set out in the accompanying footnote.[35]

34. See, e.g., 1 Multisystems, Inc., supra note 30, at 55-59; Kitch, Issacson and Kasper, supra note 19, at 338-339; 1 Multisystems, Inc., supra note 21, at 3-4 and Van Dioszeghy and Rothmeyer, supra note 23, at 6-17.

35. Avalon Ord. 10-2 to 10-4 (1969) provides in relevant part:
10-2 License Required

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

2. Fare Regulation

As with entry limitations, there is considerable variation in the methods by which taxicab fares are regulated. Some cities do not regulate fares at all. Others merely require that fares be displayed conspicuously in the

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10-4 Licensing of Taxicab Owners

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

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

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

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

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

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

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

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

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

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

10-4.3 Investigation. The chief of police or a police officer designated by him shall institute an investigation of the facts stated in the application and shall evaluate the application in the light of the criteria set forth in subsection 10-4.5. A report containing the results of the investigation and evaluation, a recommendation by the chief of police that the license be granted or denied, and the reasons for his

taxicab and/or filed with a municipal official. Others specify uniform fares or maximum fares. Some municipalities require the use of a taximeter, while other employ zone systems.[36]

Two primary criticisms have been made of cities that specify fares. First, these cities frequently do not employ a formula that is economically

recommendation shall be forwarded to the board of commissioners at least three days before the date set for the hearing. A copy of the report shall also be sent to the applicant.

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

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

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

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

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

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

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

36. Examples of each of these types of fares appear in Boston Taxi Study, supra note 18, at 28-30, C2, E3, and 62. See also, 1 Multisystems, Inc., supra note 21, at 22.

defensible. Instead fare increases periodically occur as a result of political pressures. This criticism has prompted a few cities to adopt more rigorous methods of regulating fares.[37] Second, the underlying data necessary to determine an appropriate level of fares often are available only to taxicab owners anxious to justify fare increases. According to one report, the Seattle City Council considered the alleged failure of taxicab operators to provide accurate data needed to evaluate fare increases a factor in its 1979 decision to adopt open fare setting.[38]

Nonetheless, it is unlikely that the imprecision of fare-setting standards or the taxicab operators' monopoly over relevant data would be given much weight in an antitrust challenge to taxicab fare regulation. The decisive consideration is whether the city "actively supervises" changes in fare levels. If the city employs notice and hearing procedures like those described supra in subsection II(B)(1) and reviews whatever factual data are submitted, its fare-setting decisions should satisfy this element of the state action exemption test.

3. Exclusive Access to Airports

The area of municipal regulation of taxicabs that thus far has resulted in the most litigation has been the granting of exclusive or limited access to an airport to one or some of a municipality's taxicab firms.[39] To date, the case law is sharply divided with two recent decisions holding that an exemption for taxicab regulation could not be granted and one decision holding, on similar facts, that an exemption could be granted.

The most recent decision, Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., Civ. No. 79-0383 (D. Hawaii, 1983), involved the state regulated

37. See, e.g., Mayor's Committee, supra note 22, at 8-13. On the economics of taxicab fare regulation, see generally, Verkuil, supra note 22, at 698-703 and "Taxicab Regulation", supra note 24, at 14-16.

38. DeLeuw, Cather & Company, Interim Report, supra note 29, at 68-70. See similar complain about rate-setting in Chicago, Kitch, Issacson and Kasper, supra note 19 at 343-346.

39. See, generally, Hermann, "Airports and the Applicability of the Antitrust Laws," 45 ALBANY LAW REV. 353 (1981); and 70 L.Ed.2d supra note 1, at 997-999.

airport in Honolulu, Hawaii, but applied the same law concerning the state action exemption that would be applicable to a municipality. The dispute revolved around the grant in 1978 by the State of Hawaii to SIDA, an association of independent taxicab owner-operators, of the exclusive right for a period of fifteen years to provide metered taxicab service to deplaning passengers at both the international and inter-island terminals of Honolulu International Airport. In this opinion, a Federal district court judge denied a summary judgment motion made by two state defendants, the State of Hawaii and the State Department of Transportation, to dismiss the claims against them on the basis of the state action doctrine.

First, the court could not find a clearly articulated state policy to displace competition in the provision of taxicab service to the airport in the relevant statute, chapter 261 of the Hawaii Revised Statutes. The court explained at 11-12:

> The statutory scheme of chapter 261 allows the Department of Transportation to establish, operate and maintain the airport system "out of appropriations and other moneys available or made available for such purposes" Section 261-4(a). In so doing the department "may enter into contracts, leases, licenses, and other arrangements with any person ... [c]onferring the privilege of supplying goods, commodities, things, services, or facilities at the airport ..." Section 261-7 (a)(2). Other than the requirement, in Section 261-5(a), that all revenues generated from such leases and contracts be paid into the statutorily created airport revenue fund, the statute sets no limits on how, with whom and for what price the department may contract for provision of airport services. The department is free to establish the terms and conditions of the contract as it sees fit and may fix the charges or rentals, limited only by the requirement that such charges be "reasonable and uniform for the same class of privilege, service, or thing". Section 261-7(a). Finally, defendants point to Section 261-11 which makes the operation of Hawaii's airports a "public and governmental function".
>
> These sections read as a whole do not evince a clear legislative intent to displace competition with state regulation in the provision of airport taxi services. Rather they show state acquiescence in how the DOT Director and his Airport Chief decide to run things. In deposition both officials, and those who had formerly

> held the DOT directorship, admitted that the granting of exclusive concession contracts was a department and staff preference rather than a state policy.

Nor, on the record before it, could the court "find that the state is an active supervisor," stating at 14-15:

> The state, through its Department of Transportation, signed a contract with SIDA and collects from SIDA the agreed monthly fee. However, it does nothing further to ensure adequacy of the provision of taxi service, and in fact has no control over the SIDA taxi drivers. SIDA is an association of independent owner-operators, which itself exercises no control over the activities of individual drivers. No individual driver can be ordered to the airport to pick up deplaning passengers to meet airport needs; each driver is an independent entrepreneur. SIDA runs its own dispatch service, and no one from the state monitors this. SIDA's base yard is located off HIA grounds, and no state supervision is conducted there. The rates SIDA may charge its passengers are set, like those of all Honolulu licensed taxi operators, by city ordinance and not by state regulation. Complaints about taxi drivers are routed to SIDA for action rather than being dealt with by the state. The evidence shows that it is SIDA cabbies and dispatchers who enforce the exclusivity of their contract; SIDA personnel intervene to prevent non-SIDA cabbies from accepting fares at HIA. In a letter to Hawaii's Governor Ariyoshi, the Director of defendant DOT, Dr. Ryokichi Higashionna, admitted that his department "has little control, if any, on SIDA's management of their service."

Similar findings were made by a Federal district court in Woolen v. Surtran Taxicabs, Inc., 461 F.Supp. 1025 (N.D. Tex. 1978). In Woolen, the cities of Dallas and Fort Worth granted exclusive rights to pick up passengers at the airport they jointly owned to Surtran Taxicabs, Inc. Rival cab firms sued Surtran for antitrust law violations. A Federal district court refused to hold that ordinances of the two cities established the right of Surtran to an exemption from the antitrust laws. The court first noted that the Lafayette case stood for two rules:

> First, municipalities are not exempt from the antitrust laws solely by virtue of their status as governmental entities. Second, the activities of municipalities and others are exempt from the antitrust laws only if

> undertaken pursuant to acts of the state 'as sovereign' that evince a state policy "to displace competition with regulation or monopoly public service." 461 F.Supp. at 1029.

The court then examined the state enabling act which permitted Dallas and Fort Worth to own and operate an airport. That act stated in relevant part:

> (a) In operating an airport ... such municipality may ... enter into contracts ... and other arrangements for a term not exceeding forty (40) years with any persons:... (2) conferring the privilege of supplying goods, commodities, things, services or facilities at such airport ... In each case the municipality may establish the terms and conditions and fix the charges, rentals, or fees for the privileges or services. 461 F.Supp. at 1031.

Read in isolation, the court concluded that this statute was ambiguous as far as statutory intent was concerned. "It is possible to conclude that the legislature intended by this law to displace competition at municipality operated airports." 461 F.Supp. at 1031. But the court refused to so conclude in light of other language in the enabling act providing that no municipal ordinance "shall be inconsistent with ... any Act of the Congress of the United States ..." 461 F.Supp. at 1031.

By contrast, in All American Cab Company v. Metropolitan Knoxville Airport Authority, 547 F.Supp. 509 (E.D. Tenn. 1982), a Federal district court reached a near opposite result on similar facts. All American involved a challenge by rival cab companies to a contract between Knoxville's airport authority and a private firm, Creative International Management. The contract granted Creative the exclusive right to operate a limousine service at the McGhee-Tyson Airport. The contract also designated Creative as the exclusive dispatcher of limousines and taxicabs. Relevant Tennessee statutes were ambiguous as to whether the airport authority possessed the authority to displace competition with monopoly at the airport. The enabling act declared the authority's purposes in the following language:

> It is hereby declared that airport authorities created pursuant to this chapter shall be public and governmental bodies acting as agencies and instrumentalities of the creating and participating municipalities; and that the acquisition, operating and

> financing of airports and related facilities by such airport authorities is hereby declared to be for a public and governmental purpose and a matter of public necessity. The property and revenues of the authority or any interest therein shall be exempt from all state, county and municipal taxation. 547 F.Supp. at 511.

The purpose of the authority was stated to be: "To contract with persons or corporations to provide goods and services for the use of employees and passengers of the carriers, ... necessary and incidental to the operation of the airport; ..." 547 F.Supp. at 511.

The court then concluded that the airport authority "is operated for the benefit of the general public and not for the particular advantage of Knoxville residents" and is therefore "exempt from antitrust scrutiny." 547 F.Supp. at 511.

The rationale of the All American decision can be criticized for finding an exemption because of the "governmental" rather than "proprietary" character of the airport, a distinction recognized by only one of the nine Supreme Court justices. If the court had focused on whether the enabling act "clearly articulated and affirmatively expressed" a state policy in favor of monopoly, it would have been forced to analyze the same type of "ambiguous" act present in Woolen v. Surtran. Assuming there was no relevant legislative history and no other relevant statutury language, this type of act presents both a common and a difficult problem for analysis. On the one hand, the act does grant the municipality or municipal agency "authority to operate in a particular area." On the other hand, there is no clear indication that the legislature "contemplated the kind of action complained of..." In these circumstances, no commentator can predict with certainty how the Supreme Court (or lower Federal courts) will rule. What is clear is that any municipality relying on similar language to claim an antitrust exemption runs some risk of being held in violation of the Federal antitrust laws. It is equally clear that the risk can be reduced by adoption of a new state enabling statute unambiguously granting the municipality the power to violate the Federal antitrust laws in its regulation of taxicabs.

IV. CONCLUSION: THE CHOICES AVAILABLE TO MUNICIPALITIES

The Supreme Court in City of Lafayette, Louisiana v. Louisiana Power & Light, 98 S. Ct. 1123, and Community Communications Co. v. City of Boulder, Colorado, 102 S. Ct. 835, held that a municipality can violate the Federal antitrust laws. For a municipality to secure the "state action" exemption from the Federal antitrust laws, the alleged restraint of trade must be "one clearly articulated and affirmatively expressed as state policy" in a state statute. Case law underlines that a municipality may not claim exemption by reference to a "home rule" statute. Case law strongly suggests that an exemption would not be appropriate if the statute merely mentions an area of municipal regulation such as taxicabs but does not expressly authorize the municipality to engage in anti-competitive regulation such as fixing fares. However, the state enabling statute need not describe in detail how the anti-competitive regulation should be conducted.

The Supreme Court has held that when a state claims the "state action" exemption, the state also must prove that it "actively supervises" the area of alleged antitrust violation. The Court has not ruled yet whether a municipality also must prove "active supervision." If a municipality must do so, the Supreme Court's decisions concerning states strongly suggest that a municipality will satisfy this requirement if it has on-going notice and hearing procedures which allow each interested party some opportunity to be heard.

Application of the test for state action exemption to municipal taxicab regulation produces equivocal results. In forty-one states, municipalities are not afforded a statute that "clearly articulates and affirmatively expresses" a policy to allow municipalities both to set fares and to limit the number of taxicabs. Indeed, in twelve states, no statute delegates authority to municipalities to regulate taxicabs. Municipalities, however, apparently frequently do satisfy the "active supervision" requirement in setting fares or limiting entry. The one area where the active supervision requirement may not consistently be satisfied is in granting exclusive access to municipal airports.

Municipalities may make one of three possible responses to the risk of antitrust liability posed by the Lafayette and Boulder decisions.

The first choice is simply to do nothing. As one practicing attorney put it, "The best advice is to wait for the law to clarify - and hope it is clarified with someone else's lawsuit." Barnett, "Suggestions from Outside Counsel," in J. SIENA, supra note 2, at 43, 49. Inaction can be justified on two grounds. The risk of an antitrust lawsuit is small. One commentator has calculated in the four years between the Lafayette and Boulder decisions, approximately 6,000 Federal antitrust suits were filed nationwide. During that same period, written decisions in only nineteen reported Federal cases involved the issue of state action exemption for local government entities being sued as defendants under the Federal antitrust laws. McMahon, "Recent Significant Developments in 'State Action' and Noerr-Pennington Exemptions: from Boulder to the 'Sham' Exception," 20 (forthcoming law review article). To be more precise, only four state action decisions since 1978 have involved taxicab regulation. Three concerned exclusive or limited access to an airport. If a municipality does not own or operate an airport, the likelihood of a lawsuit appears to be very small.

"Doing nothing" also may be justified on a different ground. In June 1983, Senator Strom Thurmond, chairman of the Senate Judiciary Committee, and eight co-sponsors introduced legislation to secure an antitrust exemption for most local government regulation implicitly including all local taxicab regulation.[40]

40. The bill is S.1578. Its text earlier was printed in 39 Federal Contracts Reports 1007 (1983). The text of the proposed statute reads:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Local Government Antitrust Act of 1983."
>
> Sec. 2. The Federal antitrust laws shall not apply to any law or other action of, or official action directed by, a city, village, town, township, county, or other general function unit of local government in the exercise of its regulatory powers, including but not limited to zoning, franchising, licensing, and the establishment of monopoly public service, but excluding any activity involving the sale of goods or services by the unit of local government in competition with private persons, where such law or action is valid under State law, except to the extent that the Federal antitrust laws would apply to a similar law or

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

The third choice a municipality could make is to take steps to ensure compliance with the Supreme Court's "state action" test for exemption from the Federal antitrust laws. Municipalities making this choice should attempt to persuade their state legislatures to enact a law "clearly articulating and affirmatively expressing as state policy" regulated rather than competitive municipal taxicab service. See, Orland, "The Requirement for Antitrust Immunity," in J. SIENA, supra note 2, at 73-89. One bill to ensure antitrust exemption for municipal taxicab regulation recently has been introduced in the California legislature.[41]

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action of, or official action directed by, a State. For purposes of this section, the term "Federal antitrust laws" means the antitrust laws, as such term is defined in the first section of the Clayton Act (15 U.S.C. 12), and section 5 of the Federal Trade Commission Act (15 U.S.C. 45)."

Congressmen Hyde and Fish have introduced similar bills in the House, H.R. 2981 and H.R. 3361.

41. Senate Bill No. 944, introduced by Senator Foran, March 3, 1983. It reads in toto:

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

SECTION 1. The Legislature finds and declares the following:

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

(b) Privately operated taxicab transportation service provides vital transportation links within the state and between the state and the people and economic systems of the nation and the world. Taxicab transportation service operated in the cities and counties enables the state to provide the benefits of privately operated demand-responsive transportation services to its people and to persons who travel to California for business or tourist purposes.

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

This bill provides a useful model for ensuring antitrust exemption for municipal taxicab regulation. In two ways, however, it can be improved. First, it more explicitly could indicate a purpose to displace competition with a regulated system. Second, it could provide a more comprehensive list of types of taxicab regulation to be exempt from the Federal antitrust laws. The Appendix contains a proposed model bill to ensure antitrust exemption that takes these additional considerations into account.

Beyond securing enactment of a state statute clearly articulating a policy to exempt municipal taxicab regulation from the Federal antitrust laws, municipalities may also have to comply with the "active supervision" requirement of the state action test. Many municipalities assumedly already are in compliance with this requirement. To ensure compliance, a municipality

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

SECTION 2. Section 53075 is added to the Government Code, to read:
53075 (a) Notwithstanding Chapter 8 (commencing with Section 5351) of Division 2 of the Public Utilities Code, every city or county shall protect the public health, safety, and welfare by licensing, controlling, and regulating, by ordinance or resolution, taxicab transportation service rendered in vehicles designed for carrying not more than eight persons, excluding the driver, which is operated within the jurisdiction of the city or county.
(b) Each city or county shall provide for, but is not limited to providing for, the following:
(1) The regulation of entry into business of providing taxicab transportation service. The regulation shall include, but is not limited to, a determination of the need for that service within the city or county.
(2) The establishment of rates for the provision of taxicab transportation service.

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

should: (1) periodically review entry limitations, fare regulation and other aspects of its taxicab regulation which may violate the Federal antitrust laws; (2) provide adequate notice of hearings concerning entry limitations, fare regulation, etc.; (3) allow all parties some opportunity to be heard; and (4) base policy changes on a consideration of all evidence presented. In addition, it would be wise, but is not essential, for changes in entry limitations, fare regulation and so on to be recorded in writing. If a state adopts legislation to secure exemption of municipal taxicab regulation, that legislation should be noted in the written record. The procedures employed by the Borough of Avalon, set out in note 35, appear to satisfy the "active supervision" requirement.

APPENDIX

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

SECTION 1. The Legislature finds and declares the following:

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

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

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

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

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

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

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

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

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

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

(e) The establishment of safety and insurance requirements even if they reduce the number of taxicabs that otherwise would operate within the jurisdiction of the municipality; and

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

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