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KEITH C. HETRICK

I. INTRODUCTION

In 1978, the United States Supreme Court quashed the longstanding presumption of local governmental immunity from federal antitrust laws.\(^1\) Municipalities became even more vulnerable to antitrust suits in 1982 when the Court held, in *Community Communications Co. v. City of Boulder*,\(^2\) that local government actions under home rule powers were not state actions and, therefore, not protected by the antitrust immunity specifically vested in the states. Florida’s municipalities, like those of Colorado, operate under home rule powers. In *Boulder*, the Court found that state immunity did not extend to local government action unless the activity was “in furtherance or implementation of clearly articulated and affirmatively expressed state policy.”\(^3\)

At the time of the *Boulder* decision, approximately thirty suits were pending, but no monetary judgement had ever been assessed against a municipality.\(^4\) Since *Boulder*, hundreds of antitrust actions have been filed against local governments across the country with damage claims reaching into the billions of dollars.\(^5\) One startling antitrust verdict against a small Chicago suburb resulted in a $9.5 million award, which was trebled to $28.5 million.\(^6\)

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3. *Id.* at 52.
During the 1983 session of the Florida legislature, the House Committee on Community Affairs resolved to investigate the effect of increasing antitrust vulnerability on Florida's local governments. The magnitude of risk to which local governments were being exposed in the performance of their traditional governmental functions was largely unknown. State courts and lower federal courts were in conflict as to which of two major interests should control their decisions. The courts could give effect to a national policy, as mandated by the antitrust laws, which seeks to further the public interest by promoting competition. Alternatively, the courts could endorse the conflicting interest of the municipality, a nonprofit public institution that seeks to provide more efficient health, welfare, and safety services by displacing competition with regulation. Concern that treble damage suits might interfere with Florida's local governmental officials in the performance of their jobs prompted the House Committee on Community Affairs, in conjunction with the Florida League of Cities and the State Association of County Commissioners, to survey Florida's municipalities. The survey was conducted to assess the effect that vulnerability to antitrust scrutiny was having on the actions of Florida's municipalities.

At the federal level, lobbying by local governments prompted Congress to address this increasingly serious problem. The House Judiciary Committee, identifying the treble damage remedy available under the Clayton Act as a major incentive underlying civil suits against local governments, drafted remedial legislation. On October 24, 1984, President Reagan signed into law the Local Government Antitrust Act of 1984 (the Act), which prohibited awards of money damages against local governments in civil antitrust actions.

The survey's impact has been diminished by the passage of the federal Act. However, since the Florida Antitrust Act of 1980 closely tracks the federal Act in providing treble damages and in-

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junctive relief in suits filed in state courts, the survey remains relevant and provides valuable insight into concerns of local governmental officials over their increasing exposure to antitrust suits.

This Comment summarizes the evolution of local governmental antitrust liability which led to the enactment of the federal Act. It then discusses a survey of antitrust concerns of Florida's local governmental officials. Finally, the Comment discusses the recent federal Act and concludes with a discussion of the recent amendments to the Florida Antitrust Act of 1980 and the need for other states to consider amending their state antitrust laws to protect local governments from antitrust liability.

II. THE COMMON LAW EVOLUTION OF LOCAL GOVERNMENTAL ANTITRUST LIABILITY

The federal antitrust statutes which have been of primary significance to local governments are the Sherman Act and the Clayton Act. Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy in restraint of trade . . . ." Since all contracts can be said to restrain trade, the courts read into the statute the word "unreasonable" after the word "every." Section 1 has been read to prohibit tying arrangements in services, intangibles, and real property. Section 2 does not outlaw monopolies as such, but does prohibit monopolizations, combinations, conspiracies or attempts to monopolize in interstate or foreign commerce. The offense of monopolization under section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in a relevant market, and (2) a deliberate act to acquire or maintain that power. Monopoly power is the power to control prices and exclude competitors in the "relevant market." The relevant

8. Fla. HB 369 (1985) (amending Fla. Stat. § 542.17 (1983), creating Fla. Stat. § 542.235). The survey portion of this report was initially promulgated in 1984 by the Florida House of Representatives, House Committee on Community Affairs, Sidney Martin, Chairman. The author expresses his gratitude to the Committee on Community Affairs, the Florida League of Cities, and the State Association of County Commissioners for their permission to use the survey data in this Comment.

market is defined by both the geographic area in which competitors engage in business and the specificity of consumer demand for a particular product. For example, the granting of an exclusive cable television franchise by a city may be attacked as a section 2 violation. An antitrust violation can result in severe penalties, including criminal sanctions, injunctions, payments of treble damages, payment of the plaintiff's attorneys' fees, and payment of the cost of the lawsuit.

The Clayton Act applies to persons engaged in commerce. It prohibits specific acts, including price discrimination, tying arrangements in commodities, exclusive dealing arrangements, requirements contracts, and mergers, that substantially foreclose competition. Price discrimination refers to the sale of goods at different prices to similarly situated buyers. In a tying arrangement, the availability of one product or service is conditioned on the purchase of another. For example, a buyer may be required by the seller to purchase product B, which he may not want, in order to obtain product A, which he does want. Exclusive dealing contracts are arrangements in which the retailer agrees to stop dealing with the manufacturer's competitors, depriving consumers of the opportunity to purchase the competitor's goods.

The concept of governmental antitrust immunity is a product of judicial evolution. Neither the Sherman Act, enacted in 1890, nor the Clayton Act of 1914 expressly applies to state or local governments. It was generally presumed by the courts that the "purpose of the federal antitrust laws was to prevent anticompetitive conduct by and among private parties," and that state governments "were not subject to those laws." The presumption of state immunity was tested in the landmark case of Parker v. Brown. Parker involved a suit by a raisin producer against the State of California and its Director of Agriculture for alleged Sherman Act violations. The state legislature, through the California Agriculture Prorate Act of 1933, had au-

20. Id. at 349.
FLORIDA ANTITRUST LAW

Authorized the establishment of agricultural marketing programs to conserve the agricultural wealth of the state. The Director was authorized to establish a seasonal proration marketing program for raisins in order to reduce competition and stabilize prices. The United States Supreme Court held that regulation of the handling, disposition, and pricing of raisins by a state was not within the intended scope of the Sherman Act and not a violation thereof. Chief Justice Stone, writing for the majority, stated:

The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

The Court in *Parker* reasoned that, under our dual system of government, the power to regulate interstate commerce has been delegated to the Congress. Therefore, any state regulation of commerce may be preempted by congressional intent to regulate. Further, the court found that the Sherman Act makes no mention of the states as such, and gives no hint that it was intended to restrain state action or official action directed by a state. "The Act is applicable to 'persons' including corporations . . . ." The *Parker* decision was the genesis of the "state action" exemption.

The state action exemption was narrowed in *Goldfarb v. Virginia State Bar* with the establishment of a "compulsion" test. *Goldfarb* involved a county bar association that had established a base fee schedule for attorneys' charges to clients. The fee schedule was enforced by the state bar association. The United States Supreme Court found that the association was not accorded *Parker* state action immunity from the Sherman Act because its actions were not compelled by the state supreme court or by the state itself. Under the rule of *Goldfarb*, shelter from the purview of antitrust laws is granted only in the face of affirmative state action or in local activity that is mandated by the state. Notably, this case involved a quasi-state agency acting in a private competitive scheme.

21. *Id.* at 344-348.
22. *Id.* at 350.
23. *Id.* at 352 (citations omitted).
26. *Id.* at 791.
Two years after Goldfarb, the Supreme Court reaffirmed the compulsion test in Bates v. State Bar of Arizona.27 Distinguishing Goldfarb on its facts, the Court in Bates found that the state bar association, in prohibiting the plaintiff's advertisement of legal services, acted pursuant to an Arizona Supreme Court disciplinary rule.28 The majority held that the state supreme court's disciplinary rule reflected a "clear[ly] articulat[ed] . . . and affirmatively expressed" state policy that regulated professional behavior.29 The Court in Bates thus announced the standard under which the state action exemption is currently evaluated.

The next major development in the common law evolved in response to the question whether state subdivisions were also subject to federal antitrust laws. In City of Lafayette v. Louisiana Power & Light Co.,30 the Court reviewed practices of utility companies owned by several municipalities and operated in competition with private utility companies. The municipalities conditioned the provision of gas and water services to customers outside their city limits on the purchase of electricity from the cities. The private utilities claimed that this was an illegal tying arrangement. The city, as a subdivision of the state, claimed state immunity under the Parker doctrine. In holding that city-owned utilities did not enjoy "state action" immunity from the antitrust laws, the Supreme Court stated that in order for a city to claim the state immunity, it must act pursuant to a "clearly articulated and affirmatively expressed" state policy.31

Three observations can be drawn from the Lafayette decision. First, a "clearly articulated and affirmatively expressed" state pol-

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28. Id. at 359.
29. Id. at 362. The notion of active state supervision was also mentioned in this case, but it generally did not become an issue for local governments until the Court’s decision in California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).
30. 435 U.S. 389 (1978). The Lafayette litigation ironically was commenced in federal district court by several Louisiana municipalities which alleged that Louisiana Power & Light Co. and others had engaged in predatory practices and had in other ways violated the federal antitrust laws. Louisiana Power & Light Co. counterclaimed, alleging that the plaintiff municipalities had engaged in antitrust violations. The counterclaim was dismissed on motion by the plaintiffs. On appeal, the counterclaim dismissal was reversed by the Fifth Circuit. 532 F.2d 431 (1976). The key question presented to the Supreme Court was whether Louisiana Power & Light Co.'s counterclaim had been properly dismissed. In affirming the Fifth Circuit's holding and resurrecting Louisiana Power & Light Co.'s counterclaim, a plurality of the Court (Brennan, Marshall, Powell, and Stevens, JJ.) took the view that the federal antitrust laws were applicable to local governments unless "the state authorized or directed a given municipality to act as it did." 435 U.S. at 414.
31. 435 U.S. at 410.
icy allows a municipality to act as an instrument of the state; thus, not all municipal anticompetitive activities are subject to antitrust restraint. 32 Second, a plurality of the Court determined that the expression "clearly articulated and affirmatively expressed" state policy does not require specific, detailed legislative authority; rather, "an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found . . . that the legislature contemplated the kind of action complained of." 33 Third, in a separate concurrence, Chief Justice Burger drew a distinction between local governmental activities which are by their nature proprietary (i.e., characteristic of a business), and those which are traditionally governmental. He characterized the generation of electrical energy by local government operated utility companies in competition with private utilities as a proprietary or profit making venture, rather than a traditional governmental function. 34 Chief Justice Burger's distinction between traditional and proprietary activities 35 was later abandoned by the Court in Boulder. The issues litigated today in the area of local governmental antitrust liability arise from the different interpretations given the "clearly articulated and affirmatively expressed" state policy standard. In California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 36 the Supreme Court further refined the "clearly articulated and affirmatively expressed" standard by requiring that the state be involved in active supervision of the anticompetitive program. 37 The Court reviewed a California statute that required wine producers and wholesalers to submit price schedules to a state agency. The statute also prohibited sales to retailers at prices other than those set in the price schedules. In refusing to apply state action immunity to the state agency, the Court found that the statute merely authorized price setting and enforced the prices established by private parties, and did not establish prices, review the reasonableness of the price schedules, or regulate the terms of fair trade contracts. 38 Midcal teaches that a state does not confer antitrust immunity to those who violate the

32. Id. at 413.
33. Id. at 415 (footnote omitted) (quoting City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976)).
34. Id. at 424 (Burger, C.J., concurring in part, concurring in the judgment).
35. Id. at 422-24.
37. Id. at 105.
38. Id. at 103.
Sherman Act when it merely authorizes an activity by statute or declares the activity to be lawful. It should be noted that the challenged practice of regulating wine pricing was characterized by the Court as "essentially a private price-fixing arrangement." The *Midcal* opinion implies that the "active supervision" test may be necessary only when dealing with private parties to an anticompetitive scheme. An examination of lower court decisions concerning local governmental antitrust liability reveals that active state supervision has not been a prerequisite to a finding of state action immunity.

In 1982, the Supreme Court decided *Community Communications Co. v. City of Boulder.* Plaintiff cable television operator had informed the city that it was planning to expand its business into other areas of the city. The city, after having received an offer from another company newly formed to provide cable service, and after having reviewed its cable television policy, adopted an ordinance which prohibited Community Communications Company from expanding its business into other areas of the city for a period of three months. The City Council's purpose for the moratorium was to allow itself the time necessary to draft a cable television ordinance which would provide new businesses the opportunity to enter the Boulder market before Community Communication Company preempted potential competitors. The existing cable television franchisee sued the city, claiming violation of section 1 of the Sherman Act.

Since the City of Boulder operated under a state constitutional grant of "home rule" authority, the question presented to the Supreme Court was whether the city's home rule powers, under which

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39. *Id. at 106.*
42. Home rule is the power vested in a local unit of government to manage its own affairs. Under home rule, which is required or permitted by a state constitution or granted by a state legislative body without specific constitutional authorization, the voters may choose a commission to draft a charter (which broadly defines the local government's powers), which is approved or rejected by the voters. This ability of voters to control the charter process is contrasted with the granting of charters by the legislature under special acts, general laws, or option plans. Home rule limits legislative interference in local affairs by granting localities control over their own problems and by eliminating the need for localities to continually revisit the legislature about local policy changes, provided the local governments do not violate the constitution or general laws of the state.
the moratorium ordinance was justified, were sufficient to constitute "state action" and thereby qualify the City Council's action for exemption from Sherman Act liability. The Supreme Court, reaffirming the test of *Lafayette*, announced that in order for a city to claim the state immunity, the municipal action must be "in furtherance or implementation of clearly articulated and affirmatively expressed state policy . . . ." The Court reasoned that despite its constitutional home rule power, the city was not itself a sovereign entity entitled to antitrust immunity. The grant of home rule authority to local governments was neutral with respect to conduct of a city and, therefore, was not sufficient to extend the state action immunity to Colorado's municipalities. The Court said that the state must have at least "contemplated" the specific action the municipality intended to take. The Court stated that the general grant of power by a state to a local government to enact ordinances does not necessarily imply state authority to enact specific anticompetitive ordinances. The decision suggests that the nature of the municipality's challenged conduct, whether governmental or proprietary, does not affect antitrust immunity, contrary to what the Court had suggested in *Lafayette*, just four years earlier. The question of how much state supervision of municipal activities is necessary to protect municipalities from antitrust attack was left unanswered.

Prior to the Seventh Circuit's holding in *Town of Hallie v. City

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43. *Boulder*, 455 U.S. at 52.
44. Id. at 55.
45. Id.
46. Id. at n.18.
47. In explaining its standard of "clearly articulated and affirmatively expressed" state policy, the Court in *Boulder* noted that the state's position must not be one of mere neutrality with respect to municipal actions. While a state need not compel the anticompetitive practice, the state must have authorized or at least contemplated the conduct. 455 U.S. at 55. Lower courts have increasingly demonstrated a willingness to liberally infer state supervision or authorization. The most forceful articulation of this position by lower courts was presented in *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 381 (7th Cir. 1983), aff'd, 105 S. Ct. 1713 (1985), where the inquiry was not whether the municipal anticompetitive activity was contemplated by the legislature, but whether that activity was a reasonably foreseeable consequence of an authorized activity. *See also* Pueblo Aircraft Service, Inc. v. City of Pueblo, 679 F.2d 805 (10th Cir. 1982) (where the court inferred immunity from a state statute), *cert. denied*, 459 U.S. 1126 (1983). Other jurisdictions also have liberally construed the term "contemplated." *See, e.g.*, Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005, 1013 (8th Cir. 1983), *cert. denied*, 105 S. Ct. 1864 (1985); Golden State Transit Corp. v. City of Los Angeles, 563 F. Supp. 169 (C.D. Cal. 1983); Jonnet Dev. Corp. v. Caliguri, 558 F. Supp. 952 (W.D. Pa. 1983); Capital Tel. Co. v. City of Schenectady, 560 F. Supp. 207 (N.D.N.Y. 1983); Hopkinsville Cable TV, Inc. v. Pennroyal Cablevision, Inc., 562 F. Supp. 543 (W.D. Ky. 1982).
of Eau Claire, the Tenth Circuit's decision in Pueblo Aircraft Service, Inc. v. City of Pueblo was perhaps the most liberal interpretation of the "clearly articulated and affirmatively expressed" state policy standard. The city owned certain facilities and land on which an airport was constructed. For many years the city had granted leases to "fixed-based operators" who carried on businesses on specific portions of leased airport lands and performed specific services which were monitored by the city. Several months prior to the expiration of Pueblo Aircraft's lease, the city decided to require public bidding for new leases. There were two bidders, Pueblo Aircraft and the Pan-Ark Corporation. Pan-Ark was the successful bidder. Pueblo Aircraft subsequently filed suit against the city and Pan-Ark alleging violation of section 1 of the Sherman Act and section 14 of the Clayton Act. Pueblo Aircraft argued that the city's grant of an exclusive franchise with operating rights had the effect of restraining trade, substantially lessening competition, and creating a monopoly in the line of commerce. Upholding the district court's finding of state action exemption, the Tenth Circuit cited a state statute that authorized the city to acquire lands and to regulate the privileges associated with airport operations. The Court of Appeals noted that, after the Supreme Court's decision in Lafayette,

"[I]n order to find that a subordinate state governmental body is exempt from the operation of federal antitrust laws it must be found that the state legislature contemplated certain type of anticompetitive restraint in authorizing the subordinate body to perform and engage in certain activity. . . . [I]t is not necessary to point to express statutory mandate for each act that is alleged to violate the antitrust laws. . . . [I]t will suffice if the activity and issue is found to be clearly within legislative intent." 

The state statute in Pueblo arguably is not specific and is as neutral with respect to authorizing anticompetitive conduct as the

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49. 679 F.2d 805 (10th Cir. 1982), cert. denied, 459 U.S. 1126 (1983).
50. Id. at 806. A fixed base operation is one that requires the operator who enters into a lease agreement with the local government to provide specific facilities, services, equipment, and personnel to meet the requirements for certain operations of an airport used by aircraft, passengers, crews, and freight shippers. In most cases, the leases include those portions of the airport premises with hangars and other improvements thereon where the services are performed and the supplies stored.
51. Id. at 805 nn. 1-2.
52. Id. at 809 (emphasis added).
constitutional grant of "home rule" authority relied upon by the City of Boulder in displacing competition. In addition, the court in Pueblo, interpreting the 1978 Lafayette decision, seemed to give little weight to the "active state supervision" requirement enunciated in the 1980 Midcal decision. The United States Supreme Court, in denying certiorari in Pueblo, let pass the opportunity to clarify its standard of "clearly articulated and affirmatively expressed" state policy and left unresolved the question whether and to what extent active state supervision would be required of state legislation designed to immunize local governments from federal antitrust liability.

At issue in Town of Hallie v. City of Eau Claire was how explicitly a state policy must be articulated under the state action exemption doctrine, and whether active state supervision is in fact necessary. In affirming the Seventh Circuit, the Supreme Court resolved that active state supervision is not required for a finding of municipal antitrust immunity. The Hallie decision supports the growing trend among lower courts to infer state action immunity for municipalities based upon state legislation that implicitly condones the anticompetitive conduct.

The dispute in Hallie arose when townships adjacent to the City of Eau Claire sought access to the city-operated sewage treatment facility. The city, which operated the area's only treatment facility, would not accept sewage collected and transported by the towns. The city provided combined collection, transportation, and treatment services for sewage to outlying landowners who agreed to annexation by the city. The townships brought suit, claiming that the city was using its monopoly over sewage treatment to gain a monopoly in sewage collection and transportation, and that the conditioning of treatment upon collection and trans-

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54. Hallie, 105 S. Ct. at 1717.
55. Id. at 1720.
56. Carlisle, supra note 7, at 843-45.
57. Hallie, 700 F.2d at 378. "The city used federal funds to build a sewage treatment facility within the city limits, and this sewage treatment facility is the only such facility in the market available to the Towns." Id. This resulted in a monopoly for the city in the market for sewage treatment.
58. "The disposal of sewage is a three-step process. Sewage must be collected from the user, transported to the treatment facility, and treated and disposed of by the treatment facility. The City's monopoly in this case extends only to the third step." Id. at n.1.
59. Id.
portation constituted an illegal tying arrangement.60

The Seventh Circuit affirmed the district court and rejected the plaintiffs townships' interpretation of Boulder.61 The townships argued that the city's anticompetitive conduct could derive state action immunity only if authorized by specific state legislation. Referring to Wisconsin statutes that allowed cities to fix the areas in which to extend sewage services and to condition the extension of a sewage system on annexation,62 the Seventh Circuit stated: "If the state authorizes certain conduct, we can infer that it condones the anticompetitive effect that is a reasonable or foreseeable consequence of engaging in the authorized activity."63 Judge Wisdom, writing for a unanimous panel, also concluded that a municipality's immunity under Parker is not contingent upon state compulsion of the anticompetitive activity required by Goldfarb. He emphasized that Boulder and Lafayette required only that a state authorize the municipality's activity. This could be done by any state policy which "evidences an intent of the legislature to displace competition with regulation—whether compelled, directed, authorized, or in the form of a prohibition..."64 Finally, the Seventh Circuit held that the Midcal requirement of active state supervision was limited to private parties and did not apply to a city in its performance of a traditional governmental function such as sewage treatment.65

The Supreme Court affirmed the holding and reasoning of the Seventh Circuit.66 The Court distinguished Boulder in that Colorado's Home Rule Amendment conveyed only the most general authority to municipalities to govern local affairs rather than specific authority to displace competition in areas such as cable television.67 The Supreme Court justified distinguishing a municipality from a private party by establishing presumptions that private

60. Id.
61. Id. at 381.
62. Id. at 382 & nn. 13-14.
63. 700 F.2d. at 381.
64. Id.
65. Id. at 384. The Seventh Circuit expressly reserved the question "[w]hether a municipality undertaking anticompetitive activity that falls outside the scope of a traditional governmental function must be actively supervised by the state to receive Parker v. Brown immunity." Id. at n.18. See also Halie, 105 S. Ct. 1713, 1720 (Court held that no requirement of active state supervision is imposed on municipalities); Garcia v. San Antonio Metro. Transit Auth., 105 S. Ct. 1005 (1985) (Court eliminated distinction between traditional and other governmental functions in the context of the commerce clause).
66. Halie, 105 S. Ct. at 1716.
67. Id. at 1720.
parties act in their own behalf, whereas municipalities, as creatures of the states, act in the interest of the public. The Court also found that the requirement of state compulsion or direct state involvement is not necessary to a finding that a municipality acted pursuant to a clearly articulated state policy. The Court concluded that active state supervision is not necessary to achieve municipal immunity, but may be used as evidence of a clear articulation of state policy. Although the Court distinguished municipalities from private parties, it seemed to disregard any distinction between traditional and proprietary governmental functions.

Summary

The recent passage of federal legislation which eliminates the remedy of damages for antitrust violations by local governments under the federal antitrust laws leaves intact the threat of injunctions, expensive antitrust litigation, and the potential for invalidation of governmental acts. But the Hallie decision may make it easier for local governments to avoid injunctive remedies. A local government may be able to demonstrate that the anticompetitive effect of a certain activity, authorized by state statute, is a reasonable or foreseeable consequence of a local government's engaging in that activity. The activity is thus supported by a clear articulation and affirmative expression of state policy, and is exempt from the federal antitrust laws. At the very least, the clarification of standards and the reasoning provided by the Supreme Court in Hallie indicate a retreat from Boulder, and make the Hallie decision the most important Supreme Court interpretation of local governmen-

68. *Id.*
69. *Id.*
70. *Id.* at 1720-21.
71. See also Garcia v. San Antonio Metro. Transit Auth., 105 S. Ct. 1005 (1985). This decision, concerning the applicability of federal minimum wage and hour laws to a metropolitan transit authority, overruled National League of Cities v. Usury, 426 U.S. 833 (1976). The Court in National League of Cities had held that the Commerce Clause does not empower Congress to enforce such requirements against the states "in areas of traditional governmental functions." *Id.* at 852. In overruling National League of Cities, the Supreme Court held that "the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is inconsistent with established principles of federalism and, indeed, with those very federalism principles on which National League of Cities purported to rest." Garcia, 105 S. Ct. at 1007. Thus, the Supreme Court will no longer rely on a distinction between traditional and proprietary activities of a local government.
tal antitrust liability since Boulder.

The current test for local governmental immunity from federal antitrust liability is whether action by the local government or its officials is conducted pursuant to a "clearly articulated and affirmatively expressed" state policy favoring substitution of anticompetitive conduct for free competition. Such a policy need only be evinced by a state statute that authorizes the provision of services and implicitly anticipates that anticompetitive conduct is a foreseeable result of the local government's action. Active state supervision is not necessary. This test applies to traditional governmental as well as proprietary functions.

Prior to the Hallie decision, the lower federal courts issued diverse interpretations of the Boulder standard. In Hallie, the Supreme Court clarified its position on municipal antitrust liability. Perhaps the passage of the recent federal Act impressed upon the Court that there was indeed a viable federal interest in protecting local governments' ability to govern in the public interest. Whether the states themselves will make adjustments in state antitrust laws in order to protect local governments remains to be seen.

III. Survey of Florida's Local Governments

A. Introduction

In January, 1984, the Florida House Committee on Community Affairs sent local governments an antitrust questionnaire. The Committee sought to identify problems and to discover the perceptions of antitrust liability shared by attorneys and managers of Florida's local governments. The issue has been a major topic of discussion among many local governmental interest groups and state legislators around the country since 1982. It must be remembered that the survey was issued, and the results recorded, prior to the October 1984 enactment of the federal Act and prior to the May 1985 amendments to the Florida Antitrust Act of 1980.

B. County and Municipal Responses


73. Id. at 52 & n.14.
Of Florida’s 391 charter municipalities, 125, or 32%, responded to the survey. Of Florida’s 67 counties, 25, or 37%, responded to the survey. Although not statistically significant, this response rate is above average for municipalities and provides a fair indication of local government opinion. Responses to the survey came from a geographic cross section of Florida local governments, representing local governments with populations ranging from less than 10,000 to greater than 150,000. All responses are considered valuable because any jurisdiction, regardless of size, is capable of violating the antitrust laws. The original survey data is on file with the Florida House of Representatives, House Committee on Community Affairs. This Comment does not cite to the survey itself, for it is intended that this report should serve as the primary source for presentation of the survey questions and response data.

The survey was directed to Florida’s city and county administrators and attorneys. For convenience, responses are attributed to the local governmental entity and not to the particular local official who responded to the survey.

2. What problems, if any, has Boulder created in terms of legal advice given to elected officials, or to what extent has Boulder had an effect on the decision making process?

This question was designed to discover what effects the increasing exposure to antitrust liability was having on day-to-day advice given by city managers and city attorneys to elected officials regarding the provision of services. Of the counties responding to the survey, 68% replied that no problems had arisen because of Boulder. The Boulder decision seemed to signal local officials that they needed to consider the potential for antitrust law violations. The responses from the minority of eight counties are discussed below.

Broward County stated that the Boulder decision had an impact on legal advice given with respect to exclusive taxi and limousine franchises at the Broward County operated airport. Charlotte County mentioned that, on the advice of counsel, the Board of County Commissioners postponed extending exclusive garbage hauling franchises. Desoto County reported that, because of Boulder, grants of solid waste disposal and cable television franchises

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75. For counties, 20% of the responses came from county managers or administrators, 55% came from county attorneys, and 25% came from other persons. For cities, 50% of the responses came from city managers, 30% came from city attorneys, 20% came from other persons.
had been delayed for extensive review. Hillsborough County noted that Boulder and other related decisions were specifically considered in developing the resource recovery project of Hillsborough County in 1983. In accordance with Boulder the Florida legislature enacted special legislation which established a solid waste disposal and resource recovery system within the territorial boundaries of Hillsborough County. Lee County replied that Boulder had inspired a continuing review and update of the bidding process and franchise agreements. Volusia County observed problems caused by Boulder in the area of cable television and non-emergency need transportation services. Leon County noted that Boulder has caused exclusive franchises to be granted with caution.

St. Lucie County informed the House Community Affairs Committee that provision of centralized water and sewer services had been delayed due to a perceived need for special legislation that would eliminate antitrust problems by specifically authorizing the county to take certain action. For example, the county had requested special state legislation providing for the creation of water and sewer districts and authorizing mandatory line connections. St. Lucie County viewed mandatory connections as necessary to establish the new system's financial feasibility and saw special state legislation as a vehicle to avoid antitrust liability. The county also mentioned that it is reviewing its purchasing guidelines.

Of the 125 municipalities that responded, 70% reported that the Boulder decision had had no adverse impact on the local decision making process. Five cities identified some adverse impact on the decision making process regarding grants of exclusive cable television franchises. Three cities indicated some problems regarding grants of exclusive franchises in the areas of solid waste disposal and garbage collection franchises. Cocoa Beach stated that it no longer uses exclusive franchises. Prior to Boulder, Cocoa Beach had permitted only two taxi businesses. After Boulder, the city abandoned the limit. The City of Gulf Port also expressed hesitancy to grant exclusive franchises in light of the Boulder decision.

Eighteen municipalities indicated other areas in which the Boulder decision had impinged upon the local decision making process. Daytona Beach, for example, related that it was forced to bid out a stadium concession agreement that had traditionally been reserved to a band parent association. The city also revealed that it had

awarded bench contracts exclusively to the Jaycees against the advice of counsel. The city noted that antitrust litigation exposure adversely affects the local governmental decision making process. The antitrust laws should not apply to local governments. Unlike the private sector, a corporate entity can take into consideration its potential profit in evaluating the antitrust laws. Local governments, on the other hand, do not base their decisions on potential profit.

Finally, nine municipalities indicated adverse impacts of Boulder on the local decision making process in more than one area, including grants of cable television and solid waste disposal franchises. Of all the cities that indicated problems in the decision making process, six cities had recently retained outside antitrust counsel and nine cities anticipated a need to retain outside antitrust counsel.

3. What types of services or decision areas do you see as most likely to expose your city or county to antitrust litigation?

The survey format, reproduced below, permitted local governments to select, without ranking, one or more categories from a list of services, with all responses given equal weight. The data provided below compiles the responses of 25 counties and 125 municipalities.

Counties

(1) Cable television (56%)
(2) Solid waste and disposal franchises (56%)
(3) Utility operations (20%)
(4) Land use and zoning (52%)
(5) Hospital ambulance services (52%)
(6) Construction of water and sewer systems (12%)
(7) Airport services and concessions (16%)
(8) Mass transit and public transportation (8%)
(9) Awards of contracts (20%)
(10) Other (0%)

Municipalities

(1) Cable television (64%)

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77. Cape Canaveral, Clearwater, Daytona Beach Shores, Fort Pierce, Gulf Breeze, Margate, North Miami Beach, Winter Haven, and Winter Park.
78. Dade City, Eustis, Margate, Panama City Beach, Pensacola, and Temple Terrace.
79. Dade City, Daytona Beach, Delray Beach, Fort Meyers, Gainesville, North Miami Beach, Palm Bay, Pensacola, and Temple Terrace.
(2) Solid waste and disposal franchises (52%)
(3) Utility operations (35%)
(4) Land use and zoning (49%)
(5) Hospital ambulance services (5%)
(6) Construction of water and sewer systems (28%)
(7) Airport services and concessions (8%)
(8) Mass transit and public transportation (5%)
(9) Awards of contracts (38%)
(10) Other (8%)

The responses of counties and municipalities were similar. Local regulation of cable television, solid waste and disposal, and land use and zoning were perceived as the service areas most vulnerable to antitrust litigation. This is perhaps because actions taken in these service areas characteristically involve exclusive contracts or regulations restricting competition.

4. What services to citizens, if any, have been avoided to escape potential litigation that antitrust lawsuits bring?

All but two counties responding to the survey indicated that no services had been avoided due to fear of potential antitrust litigation. Lee County reported that awards and regulation of exclusive cable television franchises had been avoided as a result of potential antitrust litigation. St. Lucie County reported that efforts to provide centralized sewer and water services had been slowed significantly to avoid potential antitrust litigation.

Although a majority of municipalities reported no avoidance of services attributable to potential antitrust litigation, eight cities responded otherwise. Cocoa Beach no longer grants exclusive taxi cab franchises. Daytona Beach Shores avoids city-controlled garbage collection. Daytona Beach mentioned that, in many instances, it felt compelled to award to the low bidder over a preferred competitor. Deland refused to award an exclusive franchise to a fixed-base operator at the Deland airport. The City of Eustis had considered building and operating its own cable vision system, patterned after that of Valparaiso, Florida, but the possibility of antitrust actions resulted in a decision to award a non-exclusive franchise to a private firm. Ft. Pierce has delayed action pertaining to the delivery of unspecified services while studying possible antitrust problems. North Miami has avoided exclusive commercial garbage collection franchises. Likewise, in Palm Beach, efforts to pursue a change in a franchise agreement with Southern Bell have been
hindered.

5. Does your city or county engage in any of the following practices: (1) award exclusive franchises; (2) set rates; (3) engage in territorial or market allocation (for example, when a city or county is divided among several cable operators with each given exclusive rights to an area); (4) maintain any agreements which permit a franchisee to condition the availability of one product on the purchase of another (for example, an agreement between a city and a cable company to condition the availability of premium services such as HBO on the purchase of basic services)?

It is useful here to review the types of antitrust challenges that municipalities or counties may face. If a locality awards exclusive franchises, it may be accused of conspiring to monopolize. A locality that sets rates may be accused of price fixing, which is considered a per se illegal restraint of trade. If a locality engages in territorial or market allocation, it may be accused of dividing markets. If the availability of one product or service is conditioned on the purchase of another, an illegal tying arrangement may be alleged. If a municipality decides to run its own services and exclude competitors, it may also be accused of monopolizing. Seventy percent of the 25 counties and 83% of the 125 municipalities that responded indicated they may be susceptible to some form of antitrust challenge.

80. See ANTITRUST AND LOCAL GOVERNMENT, supra note 7, at 10, 28.

81. The following is a statistical report of those localities which engage in the indicated practices. A locality may have checked more than one response.

Counties
(1) Award exclusive franchises (48%)
(2) Set rates (52%)
(3) Territorial or market allocation (28%)
(4) Conditional franchise agreements (24%)

Of the 25 counties that responded, 8 did not engage in any of the above practices. Nearly 60% of those 17 counties that engaged in the above practices participated in two or more of the above practices, and nearly 30% engaged in all of the above practices.

Municipalities
(1) Award exclusive franchises (62%)
(2) Set rates (62%)
(3) Territorial or market allocation (9%)
(4) Conditional franchise agreements (29%)

Of the 125 municipalities that responded, 21 engaged in none of the indicated practices, and 68 engaged in two or more of the indicated practices. Only one city engaged in all of the above practices.
6. Is outside antitrust counsel presently retained; has antitrust counsel recently been retained; is outside antitrust counsel expected to be retained in the future?

Of the cities responding to the survey, 5% reported a recent retainer of antitrust counsel and 10% anticipated retaining outside counsel in the near future. Nearly 85% of all counties responding to the survey denied any involvement with outside antitrust counsel. Only Broward County reported a recent retainer. Charlotte County anticipated having to retain outside antitrust counsel in the near future.

Broward County was involved in a suit that had been filed by an off-airport car rental company that wanted to install direct telephone lines in the airport terminal. The county's denial of the request was based primarily upon its concession agreements with four on-airport car rental companies. The county reported a one time defense cost of $10,000.

Charlotte County anticipated having to retain outside antitrust counsel at an estimated annual cost of $10,000 to defend the county's mandatory garbage disposal system. In 1975 the county was faced with a garbage problem when an area about forty miles from the county's single sanitary landfill became littered with garbage illegally dumped in roadside ditches and along public ways. In an attempt to remedy the problem, the county established, by ordinance, a sanitation district. The ordinance required all residential unit owners to subscribe to garbage collection services exclusively controlled by Charlotte County through a franchised disposal company. Garbage fees were assessed to residential home owners in the form of a flat rate special assessment and were included on the unit owner's property tax bill. The county mentioned that certain mobile home park associations and seasonal home owners would prefer to dump their own refuse in the county.

82. The cities include Dade City, Eustis, Margate (water and wastewater expansion), Panama City (exclusive provisions of a marina release agreement for retail fish market, handled by city attorney), Pensacola (airport car rental concession), and Tallahassee (water and sewer expansion).

83. Bay Harbor Islands, Dade City, Daytona Beach (water and sewer expansion), Deland, Delray Beach (cable television), Fort Myers, Gainesville (utility services, refusal to provide to certain developments outside the city), North Miami Beach, Palm Bay (relations with Southern Bell), Palm Beach Gardens (cable television and waste collection), Pensacola, Surfside, and Valparaiso (all franchises, especially cable).

84. Charlotte County v. Fiske, 350 So. 2d 578, 579 (Fla. 2d DCA 1977).

85. This practice is currently authorized by Fla. Stat. § 197.0126(1) (1983).
landfill and thus avoid the tax. These individuals could claim monopsonization by the county in the business of garbage collection. The county maintained that its ordinance was designed to protect the public health, safety, and welfare, as well as to preserve the aesthetic quality of the environment.\textsuperscript{66} Recall from question two that Charlotte County, as of March 1984, had postponed action to extend its exclusive garbage hauling franchises.

7. Has your city or county attorney’s office developed any antitrust preventive programs?

This question was designed to assess local governmental attempts to minimize exposure to antitrust liability since Boulder.\textsuperscript{67} Of the 25 counties that responded to the survey, Indian River County, Jackson County, and St. Lucie County presently maintain antitrust preventive programs. Escambia, Hillsborough, Lee, Martin, and Volusia Counties reported other antitrust preventive measures. Ten of the 125 responding municipalities have existing antitrust preventive programs.\textsuperscript{68} Ten other cities observed some other form of preventive measure.\textsuperscript{69}

8. Would your city or county prefer state legislation to alleviate the antitrust threat to local governments, even at the expense of home rule?

This question elicited the views of local officials on whether the

\textsuperscript{66} The Charlotte County garbage ordinance was challenged in Charlotte County v. Fiske, 350 So. 2d 578. There, the plaintiffs did not allege antitrust violations, but rather, that the mandatory garbage collection ordinance was unconstitutional. The Second District reversed the lower court and upheld the county’s ordinance, stating that “it certainly cannot be said that the legislative finding of the distinction between residential units and commercial units based upon recognition of widely varying production of garbage among commercial units is without reason,” id. at 580, and that “the entire cost of the services to the residential units is equally distributed among such units.” Id. at 581 (emphasis in original). It should be noted that to allow the exceptions to the mandatory garbage collection ordinance to residential owners would not only be potentially discriminatory, but would also undercut the revenue base of the company’s existence. This would in turn jeopardize the county’s most effective method of dealing with the garbage problem.

\textsuperscript{67} See Antitrust and Local Government, supra note 7, at 63-66. The question did not define “antitrust preventive program.” Thus, some cities responded that they had a program which consisted of advice by a city or county attorney on antitrust implications when required. This is not an “antitrust preventive program.”

\textsuperscript{68} Bay Harbor Islands, Eustis, Gainesville, Longboat Key, Margate, Minneola, Okeechobee, Orlando, St. Petersburg, and Tallahassee.

\textsuperscript{69} Cape Canaveral, Clearwater, Cocoa Beach, Daytona Beach, Deerfield Beach, Delray Beach, Ft. Myers, Okeechobee, Sanibel, and West Palm Beach.
impact of Boulder was perceived to be great enough to warrant legislative reform of state antitrust laws. The question did not ask how this reform might be accomplished, but did leave space for comments.

Of the 25 counties responding to the survey, 16 favored state legislative action even at the expense of home rule, 5 favored no active state involvement in the area which would adversely impact home rule, 3 abstained, and 1 county maintained that the question could not be answered in the abstract.

Of the 125 municipalities that responded to the question, 58 favored some form of state legislative action that would exempt counties from antitrust liability; 44 favored no active state involvement that would adversely affect home rule; 14 responded otherwise, and 9 abstained. Interestingly, many cities and counties that favored some form of state legislation which would exempt local governments from antitrust liability reported few problems raised by antitrust in relation to other questions in the survey.

C. Survey Analysis

Hundreds of antitrust suits have been filed throughout the country since Boulder. Most of these were filed by private plaintiffs seeking monetary damages. Four of the 25 counties and 6 of the 125 cities responding to the Florida survey indicated that they have already retained outside antitrust counsel. Thirteen cities anticipated having to retain outside counsel in the near future. The survey discovered, however, that few local governmental antitrust cases were actually pending in Florida. While relatively few antitrust problems were identified by local government managers and attorneys, many respondents emphasized a need for some kind of state legislation to immunize local governments from antitrust liability.

The principal arguments in favor of local governmental antitrust liability portray cities as not acting as legislative bodies but as pro-

90. Forty-two percent of 57 city managers who responded to the survey favored some form of state legislative action, even at the expense of home rule; 44% favored no active state involvement; 14% gave some other response. Sixty percent of 41 city attorneys responding to the survey favored some form of state legislative response; 24% favored no active state involvement; 16% gave some other response. Fifty percent of 27 others responding to the survey favored some form of state legislative response; 40% favored no active state involvement; 10% gave some other response.
91. See Brief, supra note 5.
92. See supra note 83.
prietors when exercising the regulatory powers that adversely impact a commercial enterprise. They urge that cities have gone too far in regulating the commercial sector.93 Today, however, there is very little that government does that does not affect business or property.94

One argument advanced against local governmental liability is that cities or counties act in the interest of the private citizen even though they may regulate the private sector. The maintenance of order, provision of services, and redistribution of wealth are public regulatory functions to be exercised by elected officials in their official capacities as representatives of the people, and in the interest of the public health, safety, and welfare. The conflict between public regulatory interests and private interests is evident in the area of cable television.95 Cities often intensively regulate the provision of cable services and choose to deal with only one or a few cable companies, or to build their own systems, thereby excluding competitors. Cities argue that their cable ordinances may resemble contracts because cable is a "natural" monopoly in that (1) the greater the number of subscribers, the lower the cost; (2) the cable industry is capital intensive; (3) the assets are fixed in place and used only for that one function; and (4) duplication of service is impractical. Consequently, a competitor is dissuaded by market forces from entering the market place once the first system is established. A city must, therefore, anticipate this market characteristic by writing an ordinance that guarantees uniform accessibility of services to the public. In the absence of a fair-access cable ordinance, a cable company is likely to service only the wealthy areas of town. Moreover, because of the high capital cost of cable television systems, a city generally must give a franchise a long-term contract which will naturally discourage or prevent competition. Disappointed potential competitors, however, dispute these natural monopolistic tendencies and claim a right to build systems.96

A second argument advanced against local governmental antitrust liability is that "[t]he costs of antitrust liability must be borne by municipal citizens who, unlike corporate shareholders, have not voluntarily made an investment in the hope of receiving

93. Goodrich, The Limits of Municipal Power: The cities look on anxiously as their regulatory powers are challenged under antitrust law, W. Crrv, June 1984, at 18.
94. Id.
95. Id. at 17-18.
96. Id.
profits." A third argument against liability is that municipal antitrust suits undermine the political process. Officials may avoid actions rather than face the threat of an antitrust law suit. Since judges may be reluctant to dismiss suits which allege conspiracy or corruption, a city may undergo years of expensive litigation.

The federal Act functions independently of state antitrust laws. Florida's local governments, prior to the 1985 Florida amendments, remained subject to all remedies available under the Florida Antitrust Act of 1980. The amendments to the Florida antitrust laws recognize local governmental regulatory powers, but still retain penalties for abuse of power. The Florida Legislature achieved a proper regulatory balance by amending the Florida Antitrust Act to exempt local governments from damages and injunctions where the benefit to public health, safety, and welfare from the anticompetitive conduct outweighs the detriment to competition. The Florida legislation did not attempt to distinguish between traditional local governmental activities and proprietary activities. Each case is to be evaluated on its facts. The amendments, which attempt to balance public and private interests, should be persuasive authority in federal court when a local government's compliance with a "clearly articulated and affirmatively expressed" state policy is questioned.

IV. THE LOCAL GOVERNMENT ANTITRUST ACT OF 1984

The $9.5 million dollar jury verdict (trebled to $28.5 million dollars) rendered in January 1984, against a Chicago suburb in Unity Ventures v. County of Lake provided a major impetus for Congress to seek a solution to the increasing exposure of local governments to antitrust liability. The problem was further exacerbated by complaints filed in the spring of 1984 by the Federal Trade Commission (FTC) against Minneapolis and New Orleans.


98. Goodrich, supra note 93, at 15.

99. Unity Ventures v. County of Lake, No. 81 C-2745, (N.D. Ill. Jan. 12, 1984) (post-trial motions are pending in the trial court); see also Unity Ventures, 1984-1 Trade Cas. (CCH) ¶ 65,883 (N.D. Ill. 1983) (court adopts magistrate's report and recommendations on defendant's motion to dismiss counts alleging violations of §§ 1 and 2 of the Sherman Act). The Village of Grayslake and Lake County had denied the plaintiff access to a new sanitary sewer system, thereby prohibiting him from developing his farmland.

challenging their regulation of taxicab rates and entry into the market. In response to complaints by local governments that the FTC was meddling in local governmental affairs, Congress enacted legislation banning FTC antitrust actions against cities.\textsuperscript{101} Shortly thereafter, this legislation was repealed by section 5 of the Local Government Antitrust Act of 1984 in a measure of compromise to promote the passage of the Act. Nevertheless, the primary provision of the Act is section 3(a), which eliminates all money damages under sections 4 (treble damage claims by "persons"), 4A (single damage claims by the United States), and 4C (treble damage claims by states) of the Clayton Act brought against a local government, official or employee thereof acting in an official capacity, and in any claim against a person based on any official action directed by a local government.\textsuperscript{102} The term "local government" is defined broadly in section 2(1) of the Act to include both special purpose and general function units of local government.

The Act does not affect antitrust suits brought by private parties against localities for injunctive relief.\textsuperscript{103} Although injunctive relief is still available under the Act, if the courts properly administer

\begin{footnotesize}
\begin{enumerate}
\item 102. Sections 1-2 of the Act provide title and definitions; §§ 3-6 are reproduced below:

\textbf{SEC. 3.} (a) No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

(b) Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) shall not apply.

\textbf{SEC. 4.} (a) No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

(b) Subsection (a) shall not apply with respect to cases commenced before the effective date of this Act.

\textbf{SEC. 5.} Section 510 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1985 (Public Law 98-411), is \textit{repealed}.

\textbf{SEC. 6.} This Act shall take effect thirty days before the date of the enactment of this Act.


\item 103. 15 U.S.C. § 26 (1982); \textit{see} Pols, supra note 100, at 5, cols. 2, 3.
\end{enumerate}
\end{footnotesize}
the bonding provisions of the existing injunctive law, frivolous claims for injunctive relief against localities will be avoided.\textsuperscript{104}

Section 4 prohibits damages against private parties (e.g., franchisees, licensees, and permit holders) who take action on the basis of city regulatory policies or other official policies if those actions are “directed” by a city or a city official. According to the Statement of Managers in the conference report,\textsuperscript{105} the conferees, in referring to the conduct of parties acting under the direction of a local government, borrowed the phrase “official action directed by” a local government directly from \textit{Parker v. Brown}.\textsuperscript{106} The conferees intended that local governments should be guided by the body of case law springing from \textit{Parker}.\textsuperscript{107} This anti-damages provision is intended to “ensure that the implementation of city policies will not be effectively thwarted by [the allowance of] claims for damages against regulated entities.”\textsuperscript{108} One author has noted that “[i]n many cases, antitrust claims are brought against these private parties as well as the city.”\textsuperscript{109} A compelling counterargument to such a provision is that the protection of regulated entities may lead to arrangements between commercial enterprises and municipalities which are intentionally designed to limit or prevent competition.

The final and perhaps the most complex portion of the Act is section 3(b), which concerns pending cases. Pending cases will not receive the damage exemption provided by the Act if filed prior to September 24, 1984 (30 days prior to the date on which President Reagan signed the bill). Thus, local governments which are defendants in cases commenced prior to that date may yet be liable for damages provided under the federal antitrust laws. However, section 3(b) provides an equitable exception. A court may exempt a defendant local government from damages in a case filed prior to September 24, 1984, if the defendant establishes, and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief, that it would be inequitable not to apply the provision which exempts localities from damages under the antitrust laws.\textsuperscript{110}

\textsuperscript{104} Pols, supra note 100, at 5, col. 3.
\textsuperscript{105} H.R. REP. No. 1158, 98th Cong. 2d Sess., 130 CONG. REC. H11,850 (daily ed. Oct. 10, 1984) [hereinafter cited as CONFERENCE REPORT].
\textsuperscript{106} 317 U.S. 341, 351 (1943).
\textsuperscript{107} See CONFERENCE REPORT, supra note 105, at H11,850.
\textsuperscript{108} Id.
\textsuperscript{109} Pols, supra note 100, at 5, col. 3.
\textsuperscript{110} The Act does not define the standard “in light of all the circumstances,” nor does it state how this standard is to be applied. As one commentator has noted, “[p]laintiffs will
Whether the Act will retard post-\textit{Boulder} litigation remains to be seen. Certainly the elimination of money damages against local governments eliminates a major incentive for many federal actions. Proper administration of bonding provisions with regard to injunctive relief can also be used to ensure that antitrust laws are not used to bring frivolous claims for injunctive relief against local governments. Plaintiffs may, however, seek relief in state courts under state antitrust statutes that mirror the federal antitrust laws, but which have not yet incorporated the exemption from damages provided by the Act.

V. \textbf{Local Governmental Antitrust Liability Under the Florida Antitrust Act of 1980}

The Florida Antitrust Act of 1980\textsuperscript{111} resembles the Sherman Act and provides for civil and criminal penalties, including treble damages.\textsuperscript{112} The Florida Act applies broadly to all persons including any “governmental entity, including the State of Florida, its departments, agencies, political subdivisions, and units of government.”\textsuperscript{113} The Florida Act generally prohibits unreasonable\textsuperscript{114} restraints of trade, monopolization, attempts to monopolize, and conspiracies to monopolize.\textsuperscript{115} The Florida Act states that “[t]he legislature declares it to be the purpose of this Act to complement the body of federal law prohibiting restraints of trade . . .”\textsuperscript{116} and provides that “[a]ny activity or conduct exempt under Florida statutory or common law or exempt from the provisions of the antitrust laws of the United States is exempt from the provisions of

\begin{itemize}
\item [\textsuperscript{111}] A\&T\textit{STAT.} ch. 542 (1983).
\item [\textsuperscript{112}] \textit{Id.} §§ 542.21-.22.
\item [\textsuperscript{113}] \textit{Id.} § 542.17(3).
\item [\textsuperscript{114}] Outdoor Resorts of Am., Inc. v. Outdoor Resorts, Inc., 379 So. 2d 471 (Fla. 4th DCA 1980).
\item [\textsuperscript{115}] A\&T\textit{STAT.} §§ 542.18-.19 (1983).
\item [\textsuperscript{116}] \textit{Id.} § 542.16.
\end{itemize}
this chapter.”¹¹⁷

Despite the statutory references to the incorporation of federal law, the phrase “any activity or conduct” is distinct from damages; thus, the damages exemption under the new federal Act is not incorporated by the Florida Act. An even more fundamental problem with the Florida Act is that any argument that the Florida Act does incorporate the more recent federal Act will itself be subject to attack under the nondelegation doctrine of the Florida Constitution.¹¹⁸ Thus, prior to the 1985 amendments, Florida’s localities still appeared to be subject to full antitrust liability under the Florida Act.

Not only did the possibility of local governmental antitrust liability under the Florida Act in state courts remain for actions brought in state court, it was possible for state antitrust damage actions to be brought into federal courts pendent to federal antitrust injunction actions or other federal claims.¹¹⁹ In Dunn v. New

¹¹⁷. Id. § 542.20.
¹¹⁸. See Fl. Stat. Ann. const. art. 3, § 1 (West 1983); Dep't of Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1976). For an excellent discussion on the nondelegation doctrine as applied to the Rogers case and with reference to statutes which are similar to Fl. Stat. § 542.20, see Note, Delegation of Power: Judicial Fetters Loosened?, 28 U. Fla. L. Rev. 1043 (1976). The Department of Legal Affairs (DLA) charged Rogers with conducting an unfair or deceptive trade practice in violation of Fl. Stat. § 501.204. Upon Rogers’ request for a trial on the issues, the circuit court ruled that § 501.204 was unconstitutionally vague and that § 501.205 was an unconstitutional delegation of legislative authority. On direct appeal, the Florida Supreme Court reversed the trial court and held that the key provisions of Florida’s “little FTC act” are neither vague nor an unconstitutional delegation of legislative authority. Nevertheless, the supreme court held that § 501.204, which proscribes unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce, and which provides that due consideration and great weight shall be given to interpretations of the Federal Trade Commission and federal courts relating to the Federal Trade Act, is intended only to incorporate Federal Trade Commission and federal court decisions made prior to the enactment of the “little FTC act.” The court stated, “[t]o preserve the constitutional validity of the act, we would have to say that the legislative enactment intended only decisions made prior to its enactment.” Rogers, 329 So. 2d at 267. If this principle is applied to Fl. Stat. § 542.20, then the provision that “[a]ny activity or conduct exempt . . . from the provisions of the antitrust laws of the United States is also exempt from the provisions of this chapter” would appear to incorporate only such law as was in existence prior to the enactment of ch. 542 in 1980. In addition, § 542.20 does not even contain the limited standards provided by § 501.205. Thus, § 542.20, and specifically the language of “activity or conduct,” may be susceptible to a vagueness challenge premised on the argument that there are no standards for or limitations on the delegated power fixed in the statute.

York State Department of Labor, a federal district court held that "where . . . [a] plaintiff couples substantial constitutional claims with claims that do not involve a constitutional deprivation [the court] may consider the latter as 'pendent' to the constitutional claims and therefore within [the court's] jurisdiction." Since federal courts are bound to apply state law to a state claim, it was possible for a plaintiff to obtain a federal forum for an antitrust action that sought damages under state law. For these reasons, Florida amended its antitrust act to provide immunity to its localities.

VI. THE 1985 AMENDMENTS TO THE FLORIDA ANTITRUST ACT

The Florida legislature recently addressed the matter of local governmental antitrust immunity. Other states' legislatures that have not addressed local government antitrust liability may look to the experiences of both Florida and other states that have already enacted or considered legislation designed to protect local governments from federal antitrust scrutiny under Boulder. The language of other state statutes, however, has been drawn to comport with a conservative interpretation by state legislators of the "clearly articulated and affirmatively expressed" state policy standard announced by the Court in Boulder. The legislation in those states generally authorizes local governments to displace competition in specific areas. The most extensive of these statutes was enacted in Maryland. The Maryland statute specifically addressed concessions and franchises, zoning and land use, transportation, water and sewage systems, port regulation and construction, solid waste disposal, and alcoholic beverage regulation. Other states that have recently considered but not enacted such state legislation in

121. Id. at 274.
123. See Ill. Rev. Stat. ch. 24, § 1-1-10; id. ch. 139, ¶ 38, § 4-2 (Supp. 1984); La. Rev.
1986); Miss. HB 1110 (1984); Cal. AB 3695 (1984). The Colorado, Mississippi, and California
bills died.
Antitrust Committee to the Membership of the National Institute of Municipal Law Officers
(on file, Florida State University Law Review).
specific areas include California, Mississippi, Colorado, and New Jersey.\textsuperscript{127} Illinois and North Dakota have passed legislation which attempts to grant a very broad immunity.\textsuperscript{128} State antitrust legislation subsequent to enactment of the federal Act will likely feature a shift in focus from immunization of specific local governmental activities under \textit{Boulder}, to limitations on the liabilities of local governments for antitrust violations under state laws.

The 1985 amendments to the Florida Antitrust Act contain provisions similar to the federal Act.\textsuperscript{129} The amendments eliminate re-

\textsuperscript{127} See supra note 124.

Section 1. Subsection (8) is added to section 542.17, Florida Statutes, to read:

542.17 Definitions.—Unless a different meaning is clearly indicated by the context, for the purposes of this chapter, the terms defined in this section have the following meanings ascribed to them:

(8) "Local government" means a municipality, county, school district, or any other general or special function governmental unit established by the laws of the state.

Section 2. Section 542.235, Florida Statutes, is created to read:

542.235 Limitations of actions and penalties against local governments and their officials and employees.—

(1) No criminal action shall be brought pursuant to s. 542.21(2) against any local government.

(2) No civil penalties, damages, interest on damages, costs or attorneys' fees shall be recovered under s. 542.21(1) or s. 542.22 from any local government.

(3) No injunctive or other equitable relief pursuant to s. 542.23 shall be granted against a local government, its officials or employees, acting within the scope of their lawful authority, if the official conduct which forms the basis of the suit bears a reasonable relationship to the health, safety, or welfare of the citizens of the local government unless the court finds that the actual or potential anticompetitive effects outweigh the public benefits of the challenged action.

(4) No criminal action shall be maintained pursuant to s. 542.21(2), and no civil penalties, damages, interest on damages, costs or attorneys' fees shall be recovered pursuant to s. 542.21(1) or s. 542.22, against any local government official or employee for official conduct within the scope of their lawful authority, unless the official or employee has violated the provisions of this chapter for the purpose of deriving personal financial or professional gain or for the professional or financial gain of his immediate family or of any principal by whom the official is retained.

Section 3. Sections 542.235(2) and (4), Florida Statutes, shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that sections 542.235(2) and (4), Florida Statutes, shall not apply.

Section 4. This act shall take effect upon becoming a law.
covery of criminal or civil penalties, including all forms of damages against any local government or a local official or employee thereof who acts within the scope of his lawful authority. The amendments define "local government" as a municipality, county, school district, or any other general or special function governmental unit established under Florida law. This language closely follows the definition of "local government" set forth in the federal Act. The amendments also provide for retroactive application of the amendments to pending cases. The language is essentially identical to the pending cases language in the federal Act.

The Florida amendments differ from the federal Act in several respects. The most significant departure from federal law is the elimination of injunctive relief where the public interest outweighs the private interest. This may be especially significant to local governments in such areas as land use, cable television, and the construction of central water and sewer systems. For example, in order to satisfy bonding requirements in public financing of water and sewer construction, an ordinance that stipulates central solid waste processing may be necessary. While such an arrangement has characteristics of a monopoly, the local government may be assured that it can proceed without fear of a prolonged injunction. While injunctive relief is permissible under the federal Act, the Florida amendments may lead to disallowance of injunctive relief for pendent state antitrust claims in federal court, particularly in light of the recent Hallie decision.

Unlike the federal Act, the Florida antitrust amendments do not provide derivative governmental immunity to private persons whose actions are directed by a local government. Such a provision might encourage abuse by private parties who could violate the antitrust laws with impunity. In the absence of such a provision, however, local governments may find city policies thwarted if certain private entities choose not to deal with a locality because of fear of potential antitrust liability. The intent of the Florida amendments is, nevertheless, to provide immunity only to local governments and local officials acting within the bounds of their lawful authority. Absent acts of bad faith or conflicts of interest,

130. Fla. HB 369 sec. 3 (1985)
131. See supra text accompanying note 110.
133. See the response of St. Lucie County to survey question no. 2.
134. See supra note 53.
conduct by local officials is protected. However, conduct of private individuals acting under the direction of local governments will not be protected.

Under the Florida amendments, official misconduct by a local official, or conduct involving a conflict of interest, is subject to liability. The purpose of this provision, perhaps influenced by the notion of criminal liability under the Sherman Act, is to declare that under state law, officials who act in bad faith or conspire for personal gain will remain liable for such unlawful acts. The provision also appears to codify the holding in Bankers Life & Casualty Co. v. Larson, where the court stated that "there is no authority, statutory or otherwise, authorizing the insurance commissioners of Georgia or Florida to conspire with persons to restrain commerce or exempting them from suit if they do so . . . ."

Summary

The amendments to Florida's Local Government Antitrust Act are comprehensive and carefully tailored pieces of legislation. The amendments will permit greater latitude for legitimate local governmental actions to displace competitive activity. State damage claims pendent to federal injunctive actions also appear to be foreclosed. In contrast to the federal Act, which leaves intact injunctive relief, the Florida amendments eliminate injunctive relief under state law in circumstances where public interests outweigh private interests. The amendments reflect an innovative approach to state antitrust legislation which balances the interests of local governments as public institutions against the national policy of unrestrained competition in commerce.

VII. Conclusion

When the Supreme Court in Boulder declared that local governments and their officials were subject to both criminal and civil
liabilities under the federal antitrust laws, courts had to choose be-
tween accommodating a national policy favoring unrestrained com-
petition, or giving effect to local government policies which, in the
public interest, often displace competition. Before the decision in
Hallie, the Supreme Court's lack of guidance for the application of
the state action exemption doctrine to local governments resulted
in a divergence of opinion among lower federal courts. The concern
that "Boulder 'may have seriously undermined the viability of
home rule in America by withdrawing from home rule municipali-
ties the 'state action' exemption to the Sherman [and Clayton] An-
titrust Act[s]"\(^\text{140}\) not only accounted for the willingness among
some federal courts to liberally construe the "clearly articulated
and affirmatively expressed" state action exemption,\(^\text{141}\) but ulti-
mately prompted the Supreme Court in Hallie to revisit the state
action exemption doctrine.

The new federal Act alleviates civil monetary damage liability
of local governments for antitrust violations. The Hallie decision
further specifies what type of state legislation is necessary to exempt
local governments from antitrust liability under federal law. States
that wish to avoid local governmental antitrust liability under state
law must amend their antitrust statutes. Since Florida's antitrust
statute tracks the language of the federal antitrust provisions and
allows treble damages, the Florida legislature decided there was a
special need to amend the Florida Act at least to the extent of
eliminating money damage liability. The Florida amendments ac-
complish this by eliminating all monetary damages and, under cer-
tain circumstances, injunctive relief.

In considering the appropriateness of Florida's antitrust amend-
ments, one might find it useful to review the three types of reme-
dial approaches considered by the United States House of Repre-
sentatives and Senate:

(1) elimination of private [suits] by restricting antitrust actions
against municipalities and their officials to those brought by the
federal antitrust agencies or by State attorneys general; (2) re-
stricting private damage relief against municipalities and their of-

\(^{140}\) Freilich, Donovan & Rawls, supra note 7, at 718 (quoting Freilich & Carlisle, The
Community Communications Case: A Return to the Dark Ages Before Home Rule, 14 Urb.
Law. v, v (Spring 1982)). See also Gold Cross Ambulance & Transfer v. City of Kansas City,
705 F.2d 1005, 1014-15 (8th Cir. 1983) (court stated that requiring active state supervision
"could erode the local autonomy that the state has sought to encourage"), cert. denied, 105

\(^{141}\) See Legislative History, supra note 4, at 4608.
ficials to actual damages; (3) restricting private relief against munici-
palities and their officials to injunctive relief.\textsuperscript{142}

The first approach was rejected by Congress because there were no assurances that the potential anticompetitive actions of local governments and their officials were always in the public interest. In addition, the role of the "private attorneys general" remains central to the scheme of antitrust enforcement.\textsuperscript{143} The second approach, while limiting the potential for exorbitant damages which the trebling provision of the federal antitrust laws has created, does not entirely eliminate the damage liability of localities. Such damages remained a concern of all local governments, especially smaller units of government. Thus, Congress favored the third option, the restriction of private remedies to injunctive relief.\textsuperscript{144}

The Florida amendments, while constructed along the lines of the third option in regard to the elimination of damages, go even farther to protect local governments by eliminating injunctive relief. This provision, however, is not absolute. Private injunctive relief is permitted in situations where the public health, safety, and welfare are not justifiably served. In this manner, the interests of the local government and the private or commercial entity are balanced. This balancing of interests has permitted the Florida legislature to follow the policies behind the federal Act and the decision of the United States Supreme Court in \textit{Hallie}. Other states having statutes that track the federal antitrust laws and provide for local government antitrust liability should consider the Florida amendments and the need to protect local governments from antitrust challenges under state law without undue interference with fair competition.

\textsuperscript{142.} \textit{Id.} at 4619.

\textsuperscript{143.} \textit{Id.}

\textsuperscript{144.} \textit{Id.}