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The Municipal Action Exemption to the Federal Antitrust Laws: Increased Antitrust Exposure for Wyoming Cities and Towns

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THE MUNICIPAL ACTION EXEMPTION TO THE FEDERAL ANTITRUST LAWS: INCREASED ANTITRUST EXPOSURE FOR WYOMING CITIES AND TOWNS

Congress enacted the federal antitrust laws to prohibit monopolies and unreasonable restraint of trade.[1] Since 1943, state action has been exempted from the antitrust laws.[2] Until 1978, many commentators and municipal attorneys assumed that municipalities would be entitled to immunity under the state action exemption.[3] In 1978, however, the United States Supreme Court held that municipalities were not exempt from antitrust laws unless they had acted pursuant to a state policy displacing competition.[4] Four years later, the Court held that municipalities would not be exempt unless they had acted pursuant to a clearly articulated and affirmatively expressed state policy to displace competition. This comment will discuss the application of the Court's "clearly articulated and affirmatively expressed state policy" test in the federal appellate courts. Following discussion of federal appellate decisions, the comment will discuss whether Wyoming municipalities will be able to claim exemptions from the federal antitrust law. In conclusion, the author suggests that the Wyoming Legislature enact legislation which will exempt Wyoming municipalities from the antitrust laws.

BACKGROUND

The Supreme Court first recognized a state action exemption from the antitrust laws in *Parker v. Brown.*[5] In *Parker,* a private raisin grower challenged a California regulatory program which stabilized the price of raisins. The California Legislature enacted the program to prevent overproduction by the state's raisin growers.[6] The program allowed raisin growers to establish production zones. Following the establishment of the production zone, the State Director of Agriculture selected growers to serve on a program committee. The program committee was given authority to administer the program. Generally, the program committee controlled the distribution of the raisin crop. Producers were allowed to sell 30% of their crop through ordinary commercial channels and were required to pool their remaining crops. The program committee took possession of the pooled raisins, and later distributed the raisins to commercial packers. The committee coordinated the distribution of raisins with the market demand for raisins, and the committee could not sell the raisins for less than market value.

The district court found that the program violated the Sherman Act.[7] The Supreme Court reversed, holding that the Sherman Act[8] did not apply

1. 1 E. KITNER, FEDERAL ANTITRUST LAWS § 1.1 (1980).
2. Parker v. Brown, 317 U.S. 341 (1943).
3. G. LASHUTKA & D. VANSCOY, AFTER BOULDER: ANALYZING MUNICIPAL ANTITRUST EXPOSURE (unpublished manuscript presented at the National League of Cities Conference on Local Government and the Antitrust Laws, April 30, 1983 at Houston, Texas).
4. Lafayette v. Louisiana Power and Light, 435 U.S. 389 (1978) (plurality opinion).
5. 317 U.S. 341 (1943).
6. Brown v. Parker, 39 F. Supp. 895, 901 (1941).
7. *Id.* at 901-02.
8. The Sherman Act is the cornerstone of the federal antitrust policy. 1 E. KITNER, *supra* note 1, § 4.1. The first two sections of the act prohibit monopolies, and contracts, com-

to state action.[9] The Court's holding was based primarily on the Act's legislative history, which suggested that the Act's purpose was to prevent restraints of trade by private individuals and corporations.[10] The Court carefully limited its holding to those activities which were conducted pursuant to state authority. The state, for instance, could not grant immunity by authorizing violations of the Act, or by simply declaring that unlawful actions were lawful. To be exempt from the antitrust laws, the state had to impose the challenged restraint as a governmental act.[11] The Court found that California's raisin stabilization programs was clearly a governmental act. Although private raisin growers administered the program, the state had established the procedure for organizing the production zones. The state also promulgated the regulatory provisions of the program and had placed restrictions on the exercise of the program committee's powers.

For the next thirty-two years the Court did not elaborate on the state action exemption set forth in *Parker*. In 1975, however, the Court decided the first of a series of cases which effectively limited the *Parker* decision to state agencies and private individuals acting pursuant to governmental authorization. In *Goldfarb v. State Bar of Virginia*,[12] the plaintiff challenged a mandatory fee schedule, enforced by the Virginia State Bar. The state bar claimed that the fee schedule was required by state law. In Virginia, the state legislature had authorized the supreme court to regulate the practice of law. Pursuant to their delegated power, the Virginia Supreme Court had adopted ethical codes. The state bar claimed that the adopted ethical codes required mandatory fee schedules. The Court denied the exemption, however, finding that the ethical codes did not mandate or require mandatory fee schedules.[13] Although the Court relied on *Parker* for the proposition that anticompetitive activities were not exempt unless required by

binations, or conspiracies that restrain competition among the states and foreign nations. Section one requires dual action, the plaintiff must prove the existence of a contract, combination, or conspiracy that restrains trade.

Section One provides;

> § 1. Trusts, etc., in restraint of trade illegal; penalty.
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1982).

Section Two prohibits monopolies and conspiracies or attempts to monopolize. Section Two of the Sherman Act provides:

> § 2. Monopolizing trade a felony; penalty.
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding one million dollars, if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (1982).

9. Parker v. Brown, 317 U.S. 341, 350-51 (1943).
10. *Id.* at 351.
11. *Id.* at 352.
12. 421 U.S. 773 (1975).
13. *Id.* at 790-792.

the state, it failed to acknowledge that in *Parker,* the California Legislature had not *required* producers to establish production zones. The activities were required by the state only after private raisin producers had voluntarily established the production zones. Regardless, the Court held that a private organization would not be exempt from antitrust liability unless the state had required or mandated anticompetitive conduct.[14]

The Court further refined the state action exemption in *Cantor v. Detroit Edison.*[15] In *Cantor,* a private utility company had established a free light bulb distribution program in order to increase consumer demand for electricity. Although the utility was regulated by the Michigan Public Service Commission, no state statutes or agency regulations required or even addressed the distribution of free light bulbs. The Public Service Commission, however, had approved the light bulb distribution program in a tariff order. State law required the utility to obey tariff orders issued by the Public Utilities Commission. A retail druggist who sold light bulbs brought an antitrust action claiming that the utility had violated the antitrust laws.

The Court denied the exemption, finding that the State had not compelled Detroit Edison's light bulb distribution program.[16] Although the Michigan Public Utilities Commission had participated in the decision to provide free light bulbs, Detroit Edison had primary responsibility for initiating the program. The Court reasoned that it would be fundamentally unfair to hold a private entity liable for antitrust violations unless the state had compelled or mandated the anticompetitive conduct.

In 1978, the Court applied the state action exemption to municipalities. In *Lafayette v. Louisiana Power and Light,*[17] two Louisiana municipalities which owned and operated electric utilities brought an antitrust action against an investor owned electrical company. The company counterclaimed, alleging that the municipalities had violated the antitrust laws by including anticompetitive provisions in debentures, engaging in sham litigation to prevent the construction of a nuclear power plant, and by requiring customers outside the city to purchase electricity in order to obtain gas and water. The municipalities claimed immunity based on the state action exemption set forth in *Parker.* The municipalities argued that they were agents of the state government, so the state action exemption applied equally to both the state and its municipalities.

The Court disagreed, relying in a prior decision which had interpreted the Sherman Act's legislative history.[18] In *Parker,* the Court had held that Congress had passed the Sherman Act to prevent restraints of trade by private individuals.[19] In *Lafayette,* however, the Court ignored its *Parker* interpretation of Congress' purpose in passing the Sherman Act and relied on a more recent Court decision involving antitrust violations by a private corporation, in which they had reviewed the Sherman Act's legislative

14. *Id.* at 790-791.
15. 428 U.S. 579 (1976).
16. *Id.* at 590-598.
17. 435 U.S. 389 (1978). (Plurality opinion).
18. *Id.* at 398.
19. 317 U.S. at 351.

history and concluded that Congress sought to establish economic competition as the fundamental principle governing commerce.[20] Based on its later interpretation of Congress' purpose in passing the Sherman Act, the Court concluded that exemptions would be granted only when a conflicting fundamental policy outweighed the importance of encouraging economic competition.[21]

The state action exemption set forth in *Parker* was based on notions of federalism.[22] In *Lafayette,* the Court did acknowledge that the Constitution created a governmental structure of federalism, and therefore congressional intent to nullify state governmental acts would not be lightly inferred. In the federal structure, however, there are no sovereign cities, so the court reasoned that the federalism behind the state action exemption set forth in *Parker* was not applicable to municipal governments.[23]

Although the Court found that municipalities were not entitled to the state immunity doctrine enunciated in *Parker,* the Court held that a municipality would be exempt if its actions had been authorized or directed by the state.[24] While the authorization did not have to be specific and detailed, the Court held that sufficient state authorization would be found if the legislature "contemplated the kind of action complained of."[25] The Court examined state statutes and found that the Louisiana Legislature had not authorized anticompetitive practices by municipalities.[26] In fact, one state statute expressly provided that municipalities were not immune from federal or state antitrust laws.[27]

Chief Justice Berger wrote a concurring opinion in which he argued that the Sherman Act applied only to proprietary municipal functions.[28] Municipalities which owned and operated electric utilities were not engaged in traditional governmental functions. In his view, therefore, the two Louisiana municipalities were subject to the antitrust laws.[29]

The dissenting justices argued that the majority's decision would adversely affect the allocation of power between state and municipal governments.[30] In the federal system of government, states have broad discretion to delegate governmental powers to municipalities. The dissenting justices recognized that delegation of governmental power served two important functions. First, state government are not burdened with purely local matters. Thus, state government may expend their limited resources solving state wide problems. Municipalities, furthermore, are more effec-

20. 435 U.S. at 398.
21. *Id.* at 401-02.
22. *Id.* The Court recognized a second fundamental policy: the *Noeer-Pennington* doctrine. The *Noeer-Pennington* doctrine exempts concentrated efforts to influence public officials, even if the purpose of asserting influence is to restrain competition. United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965). The *Noeer-Pennington* doctrine is based on the first amendment right to petition the government.
23. 435 U.S. at 412.
24. *Id.* at 414-15.
25. *Id.* at 415.
26. *Id.* at 414 n.44.
27. *Id.*
28. *Id.* at 418-26.
29. *Id.* at 424.
30. *Id.* at 434-40.

tive in regulating matters of local importance. The dissenting justices concluded that if municipalities were subject to antitrust liability almost every routine decision would have to be authorized by the state. State authorization of all municipal actions would increase state control over municipalities and reduce the flexibility of municipal governments to regulate local matters.[31]

The dissenting justices also argued that the majority's municipal action test was vague and unworkable.[32] The justices recognized that few states maintain an adequate legislative history. In addition, few statutes expressly authorize anticompetitive conduct. Therefore, an attempt to find legislative intent to displace competition would be simply a "creation of judicial imagination."[33]

Two years after the *Lafayette* decision, the Court reformulated the state action exemption. In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,[34] a wine wholesaler brought an antitrust action claiming that a state wine pricing system constituted a resale price maintenance system.[35] A unanimous Court set forth a two prong test, derived from previous state action cases involving state agencies and private individuals. First, the challenged restraint had to be carried out under a "clearly articulated and affirmatively expressed [ ] state policy."[36] Second, the policy must be actively supervised by the state.[37] The court found that the wine pricing system had been carried out pursuant to a clearly articulated and affirmatively expressed state policy, because the legislative policy was "forthrightly stated and clear in its purpose" to allow the resale price maintenance system.[38] The court denied an exemption, however, because the pricing system had not been actively supervised by the state.[39]

In *Community Communications Co. v. City of Boulder*,[40] the Court applied the *Midcal Aluminum* test to municipal action. In *Boulder*, a cable television franchise brought an antitrust action after Boulder passed a moratorium which prohibited further expansion of cable television service. Boulder claimed that its regulation of cable television was exempt from the antitrust laws.

First, Boulder argued that its regulation of cable television constituted the action of the state in its sovereign capacity. Boulder based its argument on the Home Rule Amendment of the Colorado Constitution.[41] As con-

31. *Id.* at 435.
32. *Id.* at 435-40.
33. *Id.* at 437.
34. 445 U.S. 97 (1980).
35. Resale price maintenance systems involve agreements between entities standing in a vertical relationship. 2 E. KITNER, *supra* note 1, §§ 10.15, 10.2. An example of a resale price restriction is an agreement between a wholesale seller and a retail buyer, requiring that the retailer sell goods at a specified price.
36. 445 U.S. at 105.
37. *Id.*
38. *Id.*
39. *Id.* at 105-06.
40. 455 U.S. 40 (1982).
41. *Id.* at 52-53.

strued by the City of Boulder, the Home Rule Amendment vested in Boulder "every power theretofore possessed by the legislature . . . in local and municipal affairs."[42] Therefore, Boulder argued that its regulation of cable television constituted the action of the State of Colorado in its sovereign capacity.[43]

The Court rejected Boulder's argument.[44] The Court emphasized that *Parker* was based on principles of federalism. Federalism, however, governs the allocation of power between federal and state governments. Regardless of a municipalities political status under state law, the court held that cities are not sovereign in our Constitutional system. Unless Boulder could prove that it had regulated cable television pursuant to a clearly articulated and affirmatively expressed state policy, it would not be exempt from the antitrust laws.[45]

The Court held that the Home Rule Amendment was not a "clearly articulated and affirmatively expressed" state policy.[46] Citing *Lafayette,* Boulder argued that the legislature had contemplated Boulder's anticompetitive conduct when it granted powers under the Home Rule Amendment. The Court responded by noting that the state's position toward anticompetitive conduct was one of mere neutrality. Under the Home Rule Amendment, a Colorado municipality could regulate cable television in an anticompetitive manner while another municipality could elect to provide free market competition. The Court concluded that the Home Rule Amendment failed to indicate legislative intent to allow the challenged anti-competitive action. Therefore, Boulder was subject to the antitrust laws.[47]

Because the Court found that Boulder had not acted pursuant to a clearly articulated and affirmatively expressed state policy, the Court did not decide whether the "active state supervision " prong of the *Midcal* test was applicable to municipalities.[48]

In *Lafayette,* the Court held that municipalities were subject to the antitrust laws unless their activities had been authorized by the state. Although the authorization did not have to be specific and detailed, the legislature must have "contemplated the kind of action complained of."[49] The clearly articulated and affirmatively expressed state policy test set forth in *Boulder* requires a clearer showing that the legislature intended to displace competition. Rather than merely contemplating the action complained of, the legislature must forthrightly state and declare that its purpose is to permit the challenged anticompetitive conduct.

42. *Id.* at 52.
43. *Id.* at 53.
44. *Id.* at 53-54.
45. *Id.* at 54.
46. *Id.* at 54-55.
47. *Id.* at 55-57.
48. *Id.* at 51 n.14.
49. 435 U.S. at 415.

FEDERAL APPELLATE DECISIONS

The "clearly articulated and affirmatively expressed state policy" test has been applied in a number of antitrust actions against municipalities. Generally, the federal courts have held that the active state supervision prong of the *Michael* test is inapplicable to municipalities.[50] The Federal Courts have liberally construed state statutes in order to find that the state legislature intended to displace competition.

Application of the Boulder Test

In *Pueblo Aircraft Service v. City of Pueblo,*[51] the Tenth Circuit held that the City of Pueblo was entitled to an antitrust exemption. In *Pueblo,* the City of Pueblo had leased portions of its municipal airport to fixed base operators. The leases required each fixed base operator to purchase its aviation fuel from Pueblo's storage facility. Pueblo Aircraft Service challenged the lease provisions after Pueblo leased the airport to another fixed base operator. The district court granted an exemption, finding that Pueblo had operated the airport pursuant to powers granted by the Home Rule Amendment of the Colorado Constitution.[52] The Tenth Circuit Court of Appeals affirmed the district court, shortly after the Supreme Court decided *Boulder.*[53] Although the Tenth Circuit relied on *Boulder,* its decision is not consistent with the Supreme Court's analysis. The Tenth Circuit relied on a Colorado statute which declared that airport operation was a governmental function.

The statute provided:

> The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment, and operation of airports and other air navigation facilities; and the exercise of any other powers granted in this part 1 to any county, city and county, city, or town are hereby declared to be public governmental functions, exercised for a public purpose, and matters of public necessity; and such lands and other property, easements, and privileges acquired and used in the manner and for the purposes enumerated in this part 1 are hereby declared to be acquired and used for public purposes and as a matter of public necessity.[54]

The statute contained no language indicating legislative intent to displace competition. The statute merely declared that the airport operation was a governmental function.[55] Specific anticompetitive conduct was

50. *See* Gold Cross Ambulance Service & Transfer v. City of Kansas City, 705 F.2d 1005, 1014 (8th Cir. 1983). *But see* Mason City Center Assoc. v. City of Mason, 468 F. Supp. 737, 742-43 (N.D. Iowa 1979).
51. 679 F.3d 805 (10th Cir. 1982).
52. 498 F. Supp 1205 (D. Colo. 1981)
53. 679 F.2d at 808-811.
54. COLO. REV. STAT. § 41-4-401 (1973).
55. There is no recorded legislative history for Colorado Revised Statute § 41-4-401 (1973). No Colorado caselaw has discussed the purpose of the statute. Therefore, any effort to determine legislative intent would be speculative. The dichotomy between governmental and private power, however, is important in a number of areas. In some states, sovereign

not authorized. One municipality could require all fixed base operators to purchase fuel from a city owned storage facility, while another municipality could allow purchases from private fuel companies. Both methods of fuel storage and distribution constitute the operation of an airport, and are public governmental functions permitted by the state. The statute therefore failed to indicate that the Colorado Legislature clearly articulated or affirmatively expressed a state policy to displace competition and the exemption should not have been granted.

In *Gold Cross & Trans. v. City of Kansas City*,[56] the Eighth Circuit Court of Appeals held that Kansas City's contract with a single ambulance company was exempt from the antitrust laws. During the 1970's, Kansas City had contracts with a number of ambulance operators. The city became dissatisfied with the system, however, because the operators tended to concentrate on answering non-emergency calls which were more profitable than emergency calls. To alleviate these problems, Kansas City contracted with a single operator who provided complete service for the entire city. To determine if Kansas City was entitled to an exemption, the court looked to two elements: (1) legislative authorization of the challenged activity; and (2) proof that the legislature authorized the activity with the intent to displace competition.[57] The most important factor in the *Gold Cross* case was a Missouri statute which empowered municipalities to contract with *"One or more operators."*[58] The Court held that this statute indicated an express authorization by the Missouri legislature to allow municipalities to enter into exclusive contracts.[59] The court also noted that the State of Missouri had

immunity is granted to municipalities when the municipality is engaged in a governmental function. 18 E. MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS, § 53.02 (1977). In 1913, Colorado first recognized the distinction between governmental powers and private powers in a tort action against the City of Denver. Versagoth v. City of Denver, 19 Colo. App. 473, 76 P. 539 (1904). The Colorado Supreme Court finally abolished the doctrine of sovereign immunity in 1971. Evans v. Board of County Comm'rs of County of El Paso, 144 Colo. 97, 482 P.2d 968 (1971). Colorado Revised Statute § 41-4-401 (1973) was promulgated in 1945, and the statute has not been amended. Therefore, it is highly probable that the legislature declared the operation of an airport to be a public governmental function in order to prevent tort liability.

56. 705 F.2d 1005, 1015 (8th Cir. 1983).

57. *Id.* at 1011.

58. *Id. See also* MO. REV. STAT. § 67.300 (1966) which provides in part:

> 1. Any county, city, town or village may provide a general ambulance service for the purpose of transporting sick or injured persons to a hospital, clinic, sanatorium or other place for treatment of the illness or injury, and for that purpose may
>
> (1) Acquire by gift or purchase one or more motor vehiclas suitable for such purpose and may supply and equip the same with such materials and facilities as are necessary for emergency treatment, and may operate, maintain, repair and replace such vehicles, supplies and equipment:
>
> (2) Contract with one or more individuals, municipalities, counties, associations or other organizations for the operation, maintenance and repair of such vehicles and for the furnishing of emergency treatment;

59. It could be argued that the Missouri statute is neutral toward anticompetitive conduct. Clearly, under Missouri Revised Statute § 67.300 (1966), one municipality could grant an exclusive contract while another could choose free market competition. The statute is different from Colorado Revised Statute § 41-4-401 (1973) because here the legislature authorized the municipality to contract with a single operator. By authorizing the municipality to contract with a single operator, the Missouri Legislature affirmatively addressed anticompetitive municipal action, and thus legislative intent to authorize anticompetitive conduct may be inferred. Once legislative intent to displace competition may be inferred, a position of state neutrality is acceptable. Neither *Lafayette* nor *Boulder* required that the state compel the anticompetitive conduct. *See supra* notes 17-25, notes 40-49 and accompanying text.

given municipalities broad regulatory powers over ambulance operators. Missouri law also provided that even if the state had granted a state ambulance operator's license, the licensed operator was prohibited from operating in a municipality absent a municipal ordinance which granted a franchise to the operator.[60] Finding that the Missouri legislature had expressly authorized the challenged activity, the court concluded the legislative intent to displace competition could be inferred from the statute authorizing municipalities to contract with one or more operators.[61]

The court went on to hold that active state supervision was not required.[62] The court distinguished *Midcal,* noting that the defendants in *Midcal* were private parties, while the defendant in the instant case was a politically accountable governmental entity. The court also expressed concern that dual city and state government regulation would be wasteful and duplicative. Also, state attempts to encourage and promote local autonomy could be frustrated.

In *Town of Hallie v. City of Eau Claire,*[63] the Seventh Circuit found that the City of Eau Claire was exempt from antitrust laws. Eau Claire had built a sewage treatment plant. Because there were no other facilities in the area, Eau Claire had a monopoly over sewerage treatment services. After the sewage treatment facility was completed, four surrounding towns sought to collect sewage from their residents and transport the sewage to Eau Claire's sewage treatment plant. Eau Claire refused to provide treatment service unless the towns agreed to be annexed. The surrounding towns brought an antitrust action claiming that Eau Claire was using a monopoly in sewage treatment to monopolize the collection and transportation of sewage.

The surrounding towns correctly argued that an exemption would not be available unless Eau Claire had monopolized sewage collection and treatment services pursuant to a clearly articulated and affirmatively expressed state policy. The court rejected the towns' argument, finding that Eau Claire would be exempt if a state policy authorized the construction and operation of Eau Claire's sewage treatment facility and further authorized Eau Claire to refuse sewage service beyond its city limits.[64]

The Seventh Circuit did not apply the *Boulder* test, instead it relied upon the *Lafayette* state authorization test.[65] The court found that two Wisconsin statutes indicated that the state lagislature had contemplated anticompetitive conduct. The first statute authorized Wisconsin municipalities to fix the area in which to provide sewage services, and expressly provided that a municipality had no obligation to extend service beyond the chosen area.[66] The second statute provided that the Wisconsin

60. 705 F.2d at 1012.
61. *Id.* at 1013.
62. *Id.* at 1014-15.
63. 700 F.2d at 376.
64. *Id.* at 381.
65. *Id.* at 381-82.
66. *Id.* at 382 n.13. WIS. STAT. ANN. § 66.069(2) (c) (1983) provides:
> Notwithstanding § 196.58(5), each village or city may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate

Department of Natural Resources could order a municipality to extend sewage services, but the order became void of the party receiving service refused to be annexed.[67] The court found that the statutes created a "clearly articulated and affirmatively expressed state policy not to burden municipalities with providing services," unless the municipality could annex the area to be served.[68] The court also found that Eau Claire's monopolization of sewage services was a foreseeable and reasonable consequence of the state policy. Therefore, the court could conclude that the Wisconsin Legislature must have contemplated the challenged anticompetitive conduct.[69]

Under the analysis set forth in the *Midcal* and *Boulder* decisions, the Seventh Circuit should have analyzed whether Wisconsin had a clearly articulated and affirmatively expressed state policy to allow the monopolization of sewage collection and treatment services. The court, however, began its analysis by finding a state policy which did not require a municipality to provide sewage services beyond its own territory. After finding the existence of this policy, the court concluded that the Wisconsin Legislature must have contemplated the monopolization of sewage collection and transportation services. The "clearly articulated and affirmatively expressed state policy" test, however, requires more than "contemplation," the state policy must be "forthrightly state[d] and clear in purpose" to allow the challenged activity.[70] The Seventh Circuit should have denied the exemption, because Eau Claire had not acted pursuant to a clearly articulated and affirmatively expressed state policy.

The court also found that active state supervision was not required.[71] As in the *Gold Cross* case, the court distinguished *Midcal* because Eau Claire was a local government unit performing a traditional municipal function. The court reasoned that where a municipality had operated pursuant to a clearly articulated and affirmatively expressed state policy supervision would be unnecessary. The court also expressed concern that active state supervision would erode the local autonomy of municipalities and waste limited resources of state governments.

In *Central Iowa Refuse Systems v. Des Moines Metro Sol. Waste,*[72] the Eighth Circuit Court of Appeals held that a solid waste disposal agency was exempt from the antitrust laws. In *Central Iowa,* fifteen Iowa municipalities entered into an intergovernmental agreement and formed

the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated. Such area may be enlarged by a subsequent ordinance. No such ordinance shall be effective to limit any obligation to serve which may have existed at the time the ordinance was adopted.

67. 700 F.2d at 382 n.14. WIS. STAT. ANN. § 144.07 (1983) provides in pertinent part: If an application for an annexation referendum under § 66.024(4) is against the annexation, the order shall be void. If an annexation proceeding is not commenced within the 90-day period, the order shall be effective.

68. *Id.* at 383.

69. *Id.*

70. California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

71. 700 F.2d at 383-84.

72. 715 F.2d 419 (1983).

the Metropolitan Solid Waste Disposal Agency. The Solid Waste Agency constructed and operated a sanitary landfill. The municipalities contracted directly with the Agency. Under the contract terms, each municipality agreed that all solid waste generated in its jurisdiction would be disposed of at the Agency's landfill. The contract provisions were placed in the agreement on the advice of the Agency's bond consultants, who believed that the Agency's bonds would be unmarketable unless the anticompetitive provisions were included in the contract.[73] The owner of a private solid waste facility brought an antitrust action against the agency alleging that the Agency had monopolized or attempted to monopolize solid waste disposal.

Similar to the Seventh Circuit's reliance in *Hallie,* the court relied on the *Lafayette* decision and readily acknowledged that the Iowa legislature had not expressly authorized the formation of monopolistic municipal waste disposal facilities.[74] The court held, however, that there was a clearly articulated and affirmatively expressed state policy to displace competition.[75] In *Central Iowa,* the Iowa legislature had required that revenue bonds issued for the construction of solid waste facilities had to be paid solely out of revenue realized from the operation of the facility.[76] The court assumed that if the municipalities had not placed the anti-competitive provisions in the contract, the solid waste disposal facility would not be self-supporting. Therefore, the Iowa legislature must have foreseen that municipalities would engage in anti-competitive conduct.[77] Thus, the anti-competitive provisions had been authorized by the Iowa legislature.

The municipal action exemption analysis involves two steps. First, the court must determine the nature of the challenged anticompetitive conduct. Secondly, the court must look to state law to determine whether the state legislature has a policy forthrightly stated and declared in purpose, to allow the challenged anticompetitive conduct.[78]

The Eighth Circuit's decision in *Gold Cross* was consistent with the *Boulder* decision. In *Gold Cross* the statute authorizing municipalities to contract with "one or more" operators constituted clearly articulated and affirmatively expressed a state policy allowing municipalities to create monopolistic ambulance service.[79] The statute forthrightly stated that monopolistic service was authorized. The *Pueblo* decision was inconsistent with both the *Boulder* and *Lafayette* decisions, however, because the Colorado legislature had not even addressed or contemplated the challenged restraint.[80] In *Hallie* and *Central Iowa,* the courts did not analyze whether the state had authorized the challenged restraint. Instead, the courts granted an exemption after finding a state policy from which it could be inferred that the legislature must have contemplated the "conduct complained of." Under the *Boulder* case, mere legislative contemplation of anti-

73. *Id.* at 422.
74. *Id.* at 426-27.
75. *Id.* at 426-28.
76. *Id.* at 427.
77. *Id.*
78. *See supra* note 38 and accompanying text.
79. *See supra* notes 56-62 and accompanying text.
80. *See supra* notes 53-55 and accompanying text.

competitive conduct was held not sufficient to exempt a municipality from the antitrust laws.[81]

THE MUNICIPAL ACTION EXEMPTION AND WYOMING CITIES AND TOWNS

In applying the municipal action exemption test the court must look to state law[82] and to determine whether the municipality has acted pursuant to a clearly articulated and affirmatively expressed state policy to displace competition. In Wyoming, there are few statutes from which it may be inferred that the legislature contemplated anticompetitive municipal practices or affirmatively expressed a clearly articulated policy to displace competition.

Ambulance Service

The Wyoming legislature has not expressly authorized municipalities to regulate or operate ambulance services. Municipalities are impliedly empowered to regulate and operate ambulance services through the Wyoming Emergency Medical Medical Services.[83] The Wyoming Emergency Medical Services Act, and regulations promulgated pursuant to the Act, however, contain no indication that the legislature intended to authorize anticompetitive conduct.[84] Although not expressly empowered by Wyoming statute, Wyoming municipalities have the power to contract with private ambulance services by virtue of the Home Rule Amendment to the Wyoming Constitution.[85] Under the Court's analysis in *Boulder,* however, the power granted to municipalities by Wyoming Home Rule Amendment is much too broad to constitute a clearly articulated and affirmatively expressed policy authorizing anticompetitive conduct.[86]

Thus, if a Wyoming municipality granted an exclusive franchise to a private ambulance service, or alternatively undertook to establish monopolisitic ambulance service, the Wyoming municipality would not be exempt from the antitrust laws.

Airport Operation

The Wyoming Legislature has empowered municipal corporations to acquire property for airport purposes, and to construct, maintain, and operate airport facilities. Section 10-5-101 of the Wyoming Statutes provides in pertinent part:

81. *See supra* note 38 and accompanying text.
82. Although statutory law will be the main source of state law, state judicial opinions and administrative regulations may also create a state policy displacing competition. *See* Bates v. State Bar of Arizona, 433 U.S. 350 (1977) where the Supreme Court held that ethical rules promulgated by the Arizona Supreme Court constituted a "clearly and affirmatively expressed" state policy to displace competition by restricting lawyer advertising. *See supra* notes 15-16 and accompanying text. In Cantor, the court held that a private corporation was not exempt, because a state regulatory commission had not compelled its lightbulb distribution program. The Court's analysis implies that an agency acting within the scope of its statutory authority may create a state policy displacing competition.
83. WYO. STAT. § 33-36-108(a) (iv) (1977).
84. *Id.*
85. WYO. CONST. art. 13, § 1.
86. *See supra* notes 40-47 and accompanying text.

> (a) Municipal corporations and counties within the state are authorized at the discretion of their governing boards, acting either singly or jointly to:
>
> (i) Acquire, by lease, purchase, or otherwise, lands and other property for airport purposes, and to construct, maintain and operate these facilities for the landing, housing, care and departure of air-borne craft;
>
> (ii) Construct, maintain and operate terminal office and traffic control buildings; warehouses, barracks; meteorology facilities, maintenance, repair and assembly shops; runways and taxiing strips; accommodations for mail, freight and express services; and all other attendant facilities;
>
> (iv) Lease or let any portion of the area, buildings or facilities *to any private person or corporation,* upon terms deemed satisfactory. Notice shall be given by publication at least once a week for two (2) consecutive weeks in a newspaper published in a town or county in which the airport is located when it is proposed that all the area and total facilities are to be leased; . . .[87]

The provisions authorizing municipalities to construct, acquire, purchase, and lease airports do not expressly or impliedly authorize monopoly service. The provision authorizing municipalities to 'lease or let any portion of the area, buildings, or facilities to any private person or corporation," however, indicates legislative intent to displace competition. The language is similar to the statute involved in the *Gold Cross* decision which provides that a municipality could contract with "one or more operators."[88] A Wyoming municipality may not be subject to an antitrust violation if it leased an entire airport facility to a single operator.

Solid Waste Collection

The Wyoming Legislature has not expressly authorized municipal solid waste collection service. Although municipalities may have the power to regulate or provide solid waste services under the Home Rule Amendment to the Wyoming Constitution,[89] the Home Rule Amendment does not address anti-competitive conduct. Therefore, there is not a clearly articulated and affirmatively expressed state policy to displace competition in solid waste collection.

Solid Waste Disposal

The Wyoming Legislature has empowered municipalities to plan, create, construct, and equip liquid and solid waste facilities. Section 15-7-101 of the Wyoming Statutes provides in pertinent part:

> (a) In addition to all other powers provided by law, any city or town may make public improvements as follows for which bonds may be issued to the contractor or be sold as provided in this Chapter to:

87. WYO. STAT. § 10-5-101 (1977).
88. *See supra* notes 56-62 and accompanying text.
89. *See supra* note 84.

> (xi) Plan, create, construct and equip liquid and solid waste facilities. To carry out this power or to prevent pollution or injury to the environment, any city or town may go beyond its corporate limits and take, hold and acquire property by purchase or otherwise, or in joint effort with cities, towns, counties or special districts. Cities or towns may enact ordinances and make all necessary rules and regulations for the government and *protection of liquid and solid waste disposal facilities,* and fix rates and provide for collection and disposal; . . .[90]

The statute does not expressly authorize anticompetitive action. Wyoming municipalities may also issue bonds for the construction of solid and liquid waste facilities.[91] In contrast to the enabling legislation in *Central Iowa,* revenue bonds do not have to be paid from revenues realized from operation of the facility.

It might be argued, however, that the legislature authorized anticompetitive practices. The statute provides that municipalities may enact ordinances and make necessary rules and regulations for the *government* and *protection* of solid waste disposal facilities.[92] A Wyoming municipality might argue that the legislature intended that "protection," include economic protection. Thus, the legislature may have authorized anticompetitive ordinances and regulations, in order to protect the financial viability of municipally constructed solid waste disposal facilities.

Sewerage Systems

The Wyoming Legislature has empowered Wyoming municipalities to construct and operate sewage systems. Section 15-7-502(a) of the Wyoming Statutes provides in pertinent part:

> Any city or town may construct, reconstruct, improve and extend, or acquire, improve, extend and operate a sewerage system, within or without its corporate limits and may apply for and accept loans or grants or any other aid from the United States of America or any agency or instrumentality thereof under any federal law to aid in the prevention and abatement of water pollution, or may borrow money from any other source. . . ."[93]

The statute does not evidence a clearly articulated and affirmatively expressed state policy to displace competition.

Revenue bonds issued for the construction of sewage treatment facilities, however, have to be paid solely from revenue derived from operation of the facility.[94] Under the authority of *Central Iowa,* a Wyoming municipality might argue that the legislature contemplated anticompetitive conduct when it imposed the revenue bond requirement.[95]

90. WYO. STAT. § 15-7-107(a) (xi) (1977).
91. WYO. STAT. § 15-7-502(a) (ii) (1977).
92. *See supra* note 90 and accompanying text.
93. WYO. STAT. § 15-7-502(a) (i) (1977).
94. WYO. STAT. § 15-7-502(a) (ii) (1977).
95. *Central Iowa,* however, is not consistent with the *Boulder* decision. *See supra* note 81 and accompanying text.

Legislative Solutions

State legislatures have the power to exempt municipalities from the federal antitrust laws. *Boulder* requires the existence of a clearly articulated and affirmatively expressed state policy to displace competition. Any state legislature, therefore, may enact legislation which creates a state policy to displace competition. Several other states have enacted legislation to exempt municipal activities. North Dakota's legislation provides:

> All immunity of the state from the provisions of the Sherman Antitrust Act [Act July 2, 1890, c.647; 26 Stat. 209; 15 U.S.C. 1 et seq.] is hereby extended to any city or city governing body acting within the scope of authority contained in sections 40-05-01, 40-05-02, and 40-05.1-06. When acting within the scope of the grants of authority contained in sections 40-05-01, 40-05-02, and 40-05.1-06, a city or city governing body shall be presumed to be acting in furtherance of state policy.[96]

Statute sections 40-05-01, 40-05-02, and 40-05.1-06 list powers delegated by the state to its municipalities. Generally, municipalities may exercise only those powers delegated by the state.[97] The general powers act simply lists powers that a municipality may exercise. North Dakota's municipal powers statutes list 103 powers. Consequently, North Dakota's antitrust exemption is very broad. Maryland's antitrust exemption statutes immunize four municipal activities, planning and zoning, housing, sewage, and solid waste disposal.[98] The solid waste disposal exemption is typical of Maryland's statutes exempting municipalities:

> It has been and shall continue to be the policy of the state that [each local governmental unit] is directed and authorized to exercise all powers regarding waste collection and disposal notwithstanding any anticompetitive effect. This subsection does not apply to any portion of a generator's waste which is directed by the generator to a specific facility for reuse, reclamation or recycling, or for disposal on its own property.[99]

The Illinois legislature has also exempted municipalities from the antitrust laws. The legislation provides:

> The General Assembly intends that the "State action exemption" to application of the federal antitrust laws be fully available

96. N.D. CENT CODE § 40-01-22 (1983).

97. City of Buffalo v. Joslyn, 527 P.2d 1106 (Wyo. 1974); 2 E. MCQUILLAN, *supra* note 55, § 4.03 (1979). In applying the municipal action exemption analysis, the court must look to state law to find the existence of a state policy displacing competition. Unless the state legislature has enacted a statute expressly allowing anticompetitive conduct, such as a blanket exemption statute, the presence of a state policy will be found in constitutional provision, statutes and caselaw governing the delegation of power from state to local governments. Although the analysis for finding an antitrust exemption differs from an analysis of a municipality's power under state law, both analyses may rely on the same constitutional provisions, statutes and caselaw.

98. ANTITRUST & TRADE RES. REPORTER (B.N.A.) No. 45 at 23, (July 7, 1983).

99. *Id.*

> to local governments to the extent their activities are either (1) expressly or by necessary implication authorized by Illinois law or (2) within traditional areas of local government activity.[100]

Although a blanket exemption statute may constitute a clearly articulated and affirmatively expressed state policy,[101] all anticompetitive municipal actions under blanket exemptions will not be exempt from the antitrust laws. In *Star Lines Ltd. v. Puerto Rico Maritime Ship. Auth.*,[102] the District Court for the Southern District of New York held that a blanket antitrust exemption was insufficient to immunize a state agency from the federal antitrust laws. The statutory exemption provided:

> —Conflicting Laws Inapplicable.—Insofar as the provisions of this act are in conflict with the provisions of any other law, or parts thereof, the provisions of this act shall prevail. Specifically, and without otherwise limiting the generality of the foregoing, it is intended by *this act that the Antitrust Laws shall not be applicable to any action of the Authority taken pursuant to the provisions here.*[103]

Decided shortly after *Lafayette,* the court concluded that the state agency was not acting pursuant to a state policy to displace competition.[104] The agency, the Puerto Rico Maritime Shipping Authority, was established to own and regulate all forms of commercial freight shipping between Puerto Rico and other nations. The Authority had contracted with a shipping company to provide freight service between Puerto Rico and the East Coast and the Persian Gulf. The court denied the exemption because the nature of the Authority's actions were not contemplated by the Puerto Rico Legislature.[105] Thus, under the court's analysis, the blanket antitrust statute was valid only so long as the governmental entity had acted within the scope of its powers as contemplated by the state legislature. Thus, if a municipality operating pursuant to a blanket exemption statute acts beyond the scope its delegated powers it will be subject to the antitrust laws.

100. 1983 ILL LAWS 5548.

101. One Commentator argues that the blanket exemption statutes do not constitute a clearly articulated and affirmatively expressed state policy, because they do not authorize specific anticompetitive practices. B. Civiletti, *The Fallout from Community Communications Co. v. City of Boulder: Prospects for a Legislative Solution,* 32 CATH. L. REV. 379, 390 (1983). The commentator's argument has some support from the *Midcal Aluminum* decision. In *Midcal,* the Court found a clearly articulated and affirmatively expressed state policy because the state had authorized the specific conduct that was challenged. The Court has never analyzed the validity of a blanket exemption statute. The Court held in *Boulder,* however, that the state action exemption was based on principles of federalism. Where a state clearly indicated that the antitrust laws should not apply to municipalities principles of federalism would require the court to find a clearly articulated and affirmatively expressed state policy to allow anticompetitive actions whether or not the statute addressed specific anticompetitive action.

102. 451 F. Supp. 157 (S.D.N.Y. 1978).

103. *Id.* at 162 (quoting Act of Puerto Rico Shipping Authority § 25 (June 10, 1974) (emphasis in original)).

104. *Id.* at 165-67.

105. *Id.* at 166-67. *See also* Westborough Mall Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982), *cert. denied,* ___ U.S. ___, 103 S.Ct. 2122 (1983), where the Eighth Circuit found that a municipality was not exempt because it had acted beyond the scope of the state policy allowing anticompetitive zoning actions.

CONCLUSION

In *Boulder,* the Court held that municipalities were subject to antitrust laws unless they had acted pursuant to a clearly articulated and affirmatively expressed state policy displacing competition. In applying the test set forth in *Boulder* decision, the federal appellate courts have liberally interpreted state statutes in order to exempt municipalities from federal antitrust law. Several federal appellate courts have granted exemptions, although there was not a clearly articulated and affirmatively expressed state policy to displace competition. Even under a similar expansive reading of the *Boulder* decision, however, a Wyoming municipality will not be entitled to an exemption for certain activities, such as ambulance service or solid waste collection.[106] The Wyoming Legislature should enact legislation clearly evidencing an intent to exempt Wyoming and municipalities from federal antitrust law, and thereby end the present uncertainty over the municipal action exemption in Wyoming.

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106. For a good discussion of methods municipalities may use to avoid antitrust actions, see Slawsky, *Can Municipalities Avoid Antitrust Liability?,* 14 THE URBAN LAWYER vii (1982). For a good discussion of litigation strategies, where an exemption is unavailable, see Vandestar, *Liability of Municipalities Under the Antitrust Laws: Litigation Strategies,* 33 CATH. U.L. REV. 395-409 (1982).