ANTITRUST COMES TO CITY HALL

Joe Sims

NOT TOO LONG AGO, the city of Lafayette, Louisiana, was charged with violating federal antitrust law because of the way it operated a municipal electric company. The city argued that, as a creature of the state of Louisiana, it was immune from federal antitrust prosecution. But the Supreme Court disagreed, and sent the case back to the district court for trial. This may be one of the most significant antitrust decisions of recent years.

City of Lafayette v. *Louisiana Power and Light* (1978) substantially expands the potential financial exposure of municipalities and other local government and quasi-governmental entities. Already the decision has generated an increase in antitrust challenges to acts of local governmental units. It will not be long before an antitrust count is just as automatic in suits challenging a municipal action as it is today in tender offer fights. Antitrust has indeed come to city hall.

Background

How did we get to this point? The Sherman Act—the first and most basic antitrust law—was passed in 1890, and even a cursory reading of its legislative history leads one to the conclusion that the Congress had no better idea of what it would produce than Congress has today on similarly complicated pieces of legislation. There was considerable confusion about the scope of the proposed law and substantial rewriting. Certainly, the whole question of anticompetitive conduct by municipalities was simply not an issue at the time. In fact, given the narrow view of interstate commerce and the strong notion that states were free to regulate commerce within their own borders, to talk of antitrust liability for municipalities would have been considered insane—and probably un-American.

But that was 1890, and this is 1979, and we have come a long way in between. Without arguing the merits of the change, there is no doubt that notions of the reach of the federal government's power under the commerce clause are far different today from what they were in 1890—or even in 1930. Now, even intrastate matters which affect interstate commerce are subject to federal power. And there can be no doubt that many actions by municipalities have effects far beyond their borders. New York City is the easiest example.

As Justice Brennan pointed out in his opinion for the Court in *City of Lafayette*, there are an extraordinary number of local government units in this country (some 62,437 in 1972), and any of them might, out of parochial economic self-interest, attempt to act to the detri-

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ment of private competitors. To permit them to do so without the constraining influence of the antitrust laws would, said Justice Brennan, create a "serious chink in the armor of antitrust protection. . . ."

The city of Lafayette argued, however, that it was a political subdivision of the state of Louisiana, drawing all its power and indeed its existence from the state, and thus was immune from federal antitrust prosecution just as if it were the state. The city invoked the so-called state action exemption, first enunciated by the Supreme Court in *Parker* v. *Brown* in 1943. There, in the first case dealing with the vulnerability of state regulation to antitrust prosecution, the Court (relying heavily on principles of federalism) concluded that state activities were not subject to attack as violations of the Sherman Act.

The Court was obviously concerned, however, that mere state involvement might be used to shield private conduct, and so it distinguished direct action by a state from the mere authorization by the state of a private restraint. In the case of a such a private restraint, the Court said that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it or by declaring that their action is lawful." Thus, the nature of the state's activity determines the scope of the state action exemption.

Over the years, however, most courts did not scrutinize the actual nature of the state involvement, and the state action exemption gradually became a governmental involvement exemption. Practically any level of involvement by any kind of governmental unit would suffice to defeat a Sherman Act attack. In fact, one appellate court held that if a state agency had the opportunity to disapprove the challenged conduct and did not do so, the conduct was immunized from antitrust attack—even if it had never actually been reviewed by the agency (the "silence is golden" rule). Understandably, municipalities and other state or local governmental units paid little attention to antitrust issues. Under the state of the law at the time the *City of Lafayette* litigation began, it was not surprising that the city defended its conduct, not on the merits, but on the ground that it simply was not subject to the law.

Obviously, local governmental entities carry out a wide range of activities that can conceivably raise antitrust issues, from commercial activities like selling water and electricity to regulatory activities like zoning. But as long as state action had been deemed to be outside the antitrust laws, it had appeared that cities or airport authorities or state regulatory agencies must also be exempt, and almost all courts had held that they were.

Unfortunately for Lafayette, Louisiana, its timing was bad. In 1975, for only the second time in the eighty-five years since the passage of the Sherman Act, the Supreme Court looked again at the state action area, and this time the result was far different from what it had been before. Moreover, beginning in 1975, the Court became addicted to the topic, issuing at least one opinion in this area every year. The fourth in that series was *City of Lafayette*.

The first opinion (and in many ways the most important) was *Goldfarb* v. *Virginia State Bar*, in 1975. In *Goldfarb*, the conduct challenged was the publication of a minimum fee schedule by a county bar association and its enforcement by the Virginia State Bar. The Court rejected the attempted state action defense and, in so doing, set forth a new—and dramatically different—rule of law: "It is not enough that . . . anti-competitive conduct is prompted by state action; rather, anti-competitive activity must be compelled by action of the state acting as sovereign."

The *Goldfarb* decision and the Court's obvious concern that *Parker* v. *Brown* had been carried too far represented an abrupt change in course. Where courts had before looked for state involvement, they were now required to look for state compulsion. Where it had once been enough that a state agency could have disapproved conduct but did not, it was now necessary to find a state command requiring the conduct. The state bar eventually paid damages of $200,000, funded by assessments on its members—all the lawyers practicing in the state of Virginia.

Having picked up this ball that it had not touched for over three decades, the Court obviously wanted to run with it. In 1976, in *Cantor* v. *Detroit Edison*, it decided that even though a state utility commission had approved a utility company's tariff, the tariff was not exempt from attack under the Sherman Act, since the motivation for the practice came from the utility and not the state and since the state had no policy supporting the challenged conduct. While the *Cantor* decision was confusing, it did clearly reject the "silence is golden" rule. In 1977, the Court further complicated things by holding—in *Bates* v. *State Bar of Arizona*—that a rule prohibiting lawyer advertising, promulgated by the Arizona Supreme Court and subject to continuing evaluation by it, was indeed state action and thus exempt from antitrust attack. By this time, analysts were arguing over the significance of footnotes and commas, in a manner strongly reminiscent of arguments over constitutional law opinions.

No Municipal Action Exemptions

While the precise state of the law was difficult to determine, the trend was clear—the state action exemption was becoming narrower. *Goldfarb* and *Cantor* clearly put new limits on the use of the doctrine; and, while *Bates* seemed to go the other way, the state itself (through the co-equal judicial branch) is much more directly involved in regulating the conduct of lawyers than is the case with any other group. (In fact, in many states, *only* the judiciary can regulate lawyers, consistent with the state constitution.) But if "state action" was to be more narrowly defined for purposes of antitrust immunity, what about other governmental entities?

The Supreme Court's opinion in *City of Lafayette* echoes the reasoning of *Parker*, *Goldfarb*, and *Cantor*. But this case is significantly different. At issue here was not whether some state scheme of regulation was sufficient to cloak a private actor with the mantle of state action immunity, but whether a political subdivision of a state could, just because it was a political subdivision, claim immunity from the federal antitrust laws. The Court's answer was clear: there is no municipal action exemption from the antitrust laws. Any immunity that might exist is totally derivative, flowing from the nature of the state's involvement in the activity challenged. Only if the action can be said to be state action will immunity apply.

The Court's answer was clear: there is no municipal action exemption from the antitrust laws.

The Court pointed out that the mere fact that municipalities are political subdivisions of the state, drawing their power from the state, does not mean that all their actions are state actions. The very fact that a city typically has a range of policy options available to it demonstrates that its decision may represent its own preference, not the state's. Indeed, the Court said it could imagine situations where municipal action could be inconsistent with state policy. To grant antitrust immunity in such circumstances "would be a perversion of federalism."

The Court's treatment of one argument made by the city of Lafayette is an important key to understanding just how far this decision may take us. The city argued that antitrust protection was unnecessary since government is subject to political control—meaning that the people can take their complaints to the local or state legislatures. The Supreme Court found that argument "without merit":

> Mulcted consumers and unfairly displaced competitors may always seek redress through the political process. In enacting the Sherman Act, however, Congress mandated competition as the polestar by which all must be guided in ordering their business affairs. It did not leave this fundamental national policy to the vagaries of the political process, but established a broad policy, to be administered by neutral courts, which would guarantee every enterprise the right to exercise "whatever economic muscle it can muster," without regard to the amount of influence it might have with local or state legislatures.

Thus, the Court concluded that the *Parker* doctrine only exempts anticompetitive conduct "engaged in as an act of government by the state as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." As Justice Brennan summarized it:

> Our decision will render a State no less able to allocate governmental power between itself and its political subdivisions. It means only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivi-

sions in exercising their delegated power must obey the antitrust laws.

Especially in the context of the other recent state action decisions, *Lafayette* opens up a myriad of decisions made by state or local governmental units to antitrust attack. These include (1) any regulatory activity, including occupational licensing, (2) the operation of sports arenas or convention centers, (3) the provision of water, electric, and other utility services, (4) garbage collection, (5) transit systems, including taxis, (6) public health services, (7) operation of airports, (8) operation of parking lots, (9) procurement practices generally, and, certainly not least, (10) zoning. Not all of these activities will in fact result in antitrust liability in every case, and some may never. But they all involve situations in which individuals or companies could reasonably say that actions by a state or local governmental unit have injured them unfairly, either because of the anticompetitive conduct of the governmental unit itself or because of collusion between the governmental unit and another private party.

Already, there have been a number of cases involving sports arenas and zoning laws. For example, the District of Columbia agency that operates RFK Stadium has an exclusive lease with the Washington Redskins; that arrangement was challenged by a promoter who wanted to set up another Washington professional football team. The agency defended on the state action issue and lost; the case is still pending (*Pro-Football Inc.* v. *Hecht,* 1977). Also, the various municipal corporations that operate the Pittsburgh Civic Arena, the Three Rivers Stadium, and the Greater Pittsburgh International Airport have been sued, along with an Allegheny County commissioner, for an alleged boycott of a particular brand of malt beverages in these municipal facilities. The complaint alleged a conspiracy to boycott among the municipal corporations, the county commission, and several private corporations that owned concession rights at the arenas and airport (*Duke & Co.* v. *Foerster*, 1975).

Another situation where a municipality or other local governmental unit might find itself involved in an antitrust problem is illustrated by *Kurek* v. *Pleasure Driveway and Park District of Peoria* (1977). There, five former golf shop concessionaires sued the Peoria Park District, accusing it of conspiring with another golf concessionaire to raise and fix prices at five district-operated golf courses. The district said it was immune from the antitrust laws because it was a state agency established by state statute, and the district court agreed. The Court of Appeals for the Seventh Circuit reversed the district court, saying that it could find nothing in the Illinois statutes on park districts "even remotely" suggesting that the state had "authorized, let alone compelled, park districts to attempt to enrich themselves by coercing horizontal retail competitors operating under concession licenses to fix retail prices in what would otherwise be plain violation of the Sherman Act."

The case of *City of Impact* v. *Whitworth* (1977) presents even more colorful facts. Impact, Texas, is a forty-seven-acre plot of former marsh land incorporated as a municipality in 1961 by a man named Dallas Perkins. At that time, almost all of the surrounding counties, as well as the largest local city, Abilene, were dry (Texas being a local option state). After incorporation, Impact voted 27–0 to go wet, and thereupon enacted a number of zoning and other ordinances which totally restricted the sale of alcoholic beverages to certain areas within the incorporated city. According to the complaint, all those areas were owned by Mr. Perkins and his co-defendants.

Impact has no public buildings, churches, or schools, and only five commercial buildings, four of them involved in the sale of liquor (the other is a grocery store). The five-member city council includes Mr. Perkins, his wife, his father, and two employees of the liquor stores. The town clerk is Mrs. Perkins. At the time this litigation began, the nearest place selling alcoholic beverages at retail was thirty-eight miles away.

When Mr. Whitworth bought property and applied for a liquor license, he was told that he could not have one because his property was zoned residential. Subsequently, he filed an antitrust suit, alleging that the zoning ordinances were the outcome of a conspiracy among the city incorporators and the liquor license holders to restrict competition in retail liquor sales.

The city argued that its action was a legitimate exercise of zoning authority and that, as a municipal arm of the state exercising governmental powers, it was immune from antitrust attack. The Fifth Circuit Court of Appeals said no: "The mere presence of the zoning ordinance does not necessarily insulate the defendants from antitrust liability where, as here, the plaintiff asserts that the enactment of the ordinance was itself a part of the alleged conspiracy to restrain trade." The court was careful to point out it was not passing on the merits of the alleged conspiracy; it was holding only that the allegations must be dealt with on their merits and could not be avoided by the interposition of the state action doctrine. Still, if a zoning decision can be challenged as an antitrust violation, a whole new subspecialty in real estate law may have been created—along with a great deal of confusion.

Likely Future Developments

City of Lafayette. This decision and the lower court opinions it is already spawning foreshadow a substantial increase in antitrust litigation involving decisions by municipalities—litigation that will increasingly have to be faced on the merits, without the shield of the state action exemption or any other immunity. To some extent, this litigation will be generated by federal and state antitrust enforcement authorities, as they seek to use this new opening to roll back anticompetitive municipal regulations. But probably more common—and certainly more important from a pocketbook perspective—will be litigation generated by private parties objecting to a local regulatory scheme or decision. The opportunity to use the automatic treble damages provision of the antitrust law against local governments will be difficult for many to resist.

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It is very difficult to predict the likely outcome of these future cases because there are simply too many unanswered questions. For example, how will *City of Lafayette* be harmonized with *National League of Cities* v. *Usery* (1976)? In *Usery*, the Supreme Court held that Congress could *not* extend the coverage of the Fair Labor Standard Act's minimum wage and maximum hour provisions to employees of the states and their political subdivisions. Although the Court conceded that the federal government could ordinarily regulate to the full extent of the Constitution's commerce clause authority, it also declared that Congress was barred by the Tenth Amendment from exercising its power "in a fashion that impairs the states' integrity or their ability to function effectively in a federal system." Reasoning that the Fair Labor Standards Act "will significantly alter or displace the states' ability to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation," the Court held that application of the act to the states was barred by the Tenth Amendment.

The Court also implied that *Usery* had no application to state proprietary functions, stating:

> The holding of *United States* v. *California* [state operated non-profit railroad subject to the commerce clause based Safety Appliance Act] . . . is quite consistent with our holding today. There California's activity to which the congressional command was directed was not in an area that the states have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in "common carriage by rail in interstate commerce" . . . .

Although *Usery* speaks of impermissible regulation of "states as States," its holding clearly protects municipalities as well. It thus appears that municipalities may be able to claim Tenth Amendment protection from application of the antitrust laws to their conduct *if* the laws interfere with "traditional aspects of state sovereignty," "essential governmental decisions," or "integral governmental functions." Although the exact meaning of these terms is unclear, it may be that proprietary functions do not fall within their scope.

This would certainly be consistent with Chief Justice Burger's concurrence in *City of Lafayette.* The chief justice thought the issue was much simpler than the plurality opinion would have it: the city was engaged in a proprietary, not a governmental, activity, and thus the antitrust laws were fully applicable. In fact, Chief Justice Burger cited *Usery* for the proposition that a "proprietary enterprise" was not an "integral operation in the area of traditional government functions." And since *Usery*, the Court of Appeals for the Second Circuit has held that a Tenth Amendment issue may arise even when the state disavows the conduct. Thus, even where the *Parker* state action doctrine is inapplicable, the *Usery* "integral government function" notion may mean that nonproprietary activities, like zoning, are free from antitrust attack. At least one district court has already reached that conclusion, citing the *Usery* decision.

Another fascinating issue is the extent to which the automatic treble damages provisions of the antitrust laws will be applied to actions by municipalities. Mr. Justice Stewart, in his dissent in *City of Lafayette*, called the decision an "extraordinary intrusion into the operation of state and local government in this country" that will "impose staggering costs on . . . municipal governments." Of course, that dire prediction assumes both that a high volume of municipal activity would be found to violate the antitrust laws and that the standard treble damages would apply in these cases. The first, if true, is troubling in itself; the second may not come to pass. In fact, the plurality opinion in *City of Lafayette* expressly reserved the question of appropriate remedies, saying that past cases "do not necessarily require the conclusion that remedies appropriate to redress violations by private corporations would be equally appropriate for municipalities."

Like Justice Stewart, I find it a little difficult to figure out how the Court might add meat to those bones without simply ignoring the language of section 4 of the Clayton Act, which provides that anyone injured by a violation of the antitrust laws *shall* recover "threefold" damages. But, of course, the answer may be just that—the Court might simply ignore the language of the statute, just as it has done in interpreting section 1983 of the U.S. Code—the basic civil rights statute.

Section 1983. This section provides that any person who, under color of state law, deprives a citizen or inhabitant of the United States of his rights under the laws or constitution of the United States *shall* be liable for the damages he has caused. Although the language of the statute is mandatory, courts have nevertheless granted qualified immunity to state prison officials (*Procunier* v. *Navarette*, 1978), state hospital superintendents (*O'Connor* v. *Donaldson*, 1975), local school board members (*Wood* v. *Strickland*, 1975), state governors, presidents of state universities, officers and members of state national guards (*Scheuer* v. *Rhodes*, 1974), and city policemen (*Pierson* v. *Ray*, 1967).

Courts grant such immunity because they fear two basic evils—a point explained by the Court in *Scheuer* v. *Rhodes* (the Kent State national guard case): (1) the inequity of opening up to liability the good faith actions of someone who must, because of the nature of his job, exercise discretion; and (2) the fact that allowing such liability might well result in an unwillingness to make the kinds of decisions required for the public good. As the Court explained in *Procunier* v. *Navarette* (on state prison officials):

> The official cannot be expected to predict the future course of constitutional law, . . . but he will not be shielded from liability if he acts "with such disregard of the plaintiff's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."

In another 1978 decision (*Monell* v. *New York City Department of Social Services*), the Supreme Court held that the municipalities could be sued for damages under section 1983. Since that opinion, various lower federal courts have extended the qualified privilege, previously granted public officials, to municipalities. They reasoned that the legislative history of section 1983 as interpreted by *Monell* and strong policy reasons supported extension of the privilege.

In one of these recent cases (*Ohland* v. *City of Montpelier*, 1979), the district court concluded that Congress intended to impose liability under section 1983 only when the defendant acted wrongfully and only when liability could reasonably and justly be expected to deter that wrongful conduct. The court also noted the questionable deterrent effect of liability in a situation where the entity, by definition, reasonably believed it had acted lawfully.

The court believed the privilege was necessary as a matter of policy because its absence "would paralyze decision-making with continual reference to advisory prognostications, the imposition of unnecessary procedural protections, and the avoidance of politically controversial issues. . . ." The court was also hesitant to "needlessly expand recovery at the expense of already overburdened taxpayers"—noting that

> taxpayers are not private investors willingly accepting the risks of doing business in return for anticipated profits. Moreover, governments, unlike businesses, cannot choose to avoid acting in areas of greater risk. . . . The losses that some persons may be forced to bear because [of the privilege] . . . are not fundamentally different from the losses that many individuals bear as in the areas of health and safety and economic regulation. . . . In all these cases, absent an explicit legislative determination that these losses will be shared, they should be considered part of the accepted risk attending governmental decision-making in a complex society.

Finally, the court rejected the argument that section 1983's mandatory liability language leaves no room to create a qualified privilege, concluding that the act's legislative history and public policy justify disregarding the act's language.

Several factors in these cases support the creation of a qualified privilege to municipal treble damage liability under the Sherman Act. First, as in constitutional law, it is difficult to predict the course of the Court's antitrust decisions. Moreover, in light of the inconsistencies between *Goldfarb* and *Bates*, and in light of the somewhat ambiguous nuances of *Cantor* and *City of Lafayette*, it is extremely difficult for a municipality to tell when the state has sufficiently compelled or contemplated its conduct to bring the municipality within the *Parker* exemption. In such cases, the twin evils described in the Kent State case are surely present, and it might be argued that municipalities should be relieved of treble damage liability if they reasonably and in good faith believe that their conduct is protected by *Parker*, or does not violate the Sherman Act for other reasons.

Indeed, municipal decision-making could be affected to a much greater degree by potential antitrust liability than it would be under section 1983, because the antitrust laws authorize treble damages while section 1983 authorizes only actual damages. Municipalities, unlike private parties, cannot reduce their exposure by failing to act, especially when state law requires them to act without compelling the actual result. Given the language in *City of Lafayette* indicating the Court's willingness to consider creating some sort of municipal defense to treble damage liability, it is certainly possible that Mr. Justice Stewart's dark vision of the future will not come to pass.

The issue is far from clear, however. The municipalities' privilege under section 1983 was created by drawing upon cases recognizing a qualified immunity for public officials under section 1983, but no similar privilege for public officials exists under the Sherman Act without a showing of state compulsion. With such a showing, no privilege is necessary because the state action exemption would come into play and no liability could exist. In addition, courts *created* the section 1983 privilege, despite the section's mandatory language, partly because it is consistent with congressional intent (as evidenced by the act's legislative history) to provide damages only for *wrongful* deprivations of constitutional rights. The antitrust laws, however, are not designed solely to bar wrongdoing but also to deter practices that have an anti-competitive effect upon commerce. To create a rule for municipalities different from that applied to all others accused of violating the antitrust laws would be a large step indeed.

Still, the Court has hinted in other contexts that it might move away from the mandatory treble damage rule. There is language in the *Cantor* opinion indicating that under certain circumstances the punitive impact of treble damages might be inappropriate. Similarly, Justice Blackmun, in his concurring opinion in *Cantor*, indicated that it might be a defense to damage liability to show that imposition of treble damages would be "unfair." Indeed, the Court has indicated a willingness in earlier cases to provide for the prospective application of damage liability when effecting a significant change in law (*Simpson* v. *Union Oil Co.*, 1964).

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