STATE ACTION IMMUNITY STATEMENT

ANTITRUST MODERNIZATION COMMISSION

Carlton Varner
Sheppard, Mullin, Richter & Hampton LLP
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STATEMENT OF CARLTON VARNER FOR
THE ANTITRUST MODERNIZATION COMMISSION
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SUMMARY OF STATEMENT

1. Due to the national policy in favor of competition as reflected in the antitrust laws, exemptions and immunities to such laws should be narrowly construed and justified only when some non-competition value overrides national competition policy. State action immunity is based on principles of federalism and state sovereignty found in the Constitution. Where the state itself through legislation has decided to displace competition, federalism and state sovereignty justify the immunity. Thus state action immunity has a rational basis and should be continued.

2. The FTC Staff Report on state action immunity issued in September 2003 is an excellent and thorough analysis of the case law relating to state action immunity. It contains several recommendations as to how to strengthen the requirements for state action immunity. I agree with some of those recommendations, and disagree with others.

3. It follows logically from principles of federalism that the underlying basis for state action immunity is a deliberate decision by the state to displace competition. As discussed in the FTC Report, some courts have departed from this requirement, and inferred immunity from a general grant of authority to act in a particular area. This expands state action immunity beyond the federalism justification. Immunity should be limited to situations where the state itself, as opposed to a subordinate government entity, has consciously decided to displace competition with respect to the services or other area of the economy in which the conduct occurs.

4. One issue raised by this Commission in its Request for Public Comment on state action immunity is whether the Local Government Antitrust Act of 1984 ("LGAA") should be repealed. The LGAA bars damage claims against local governments and private individuals based on official action while leaving an injunctive relief remedy in place. It was passed due to concerns that the clear articulation and active supervision tests were too onerous and unpredictable. The LGAA itself contains neither requirement. Since the passage of the LGAA, the Supreme Court has relaxed the clear articulation requirement and also held that the active supervision requirement does not apply to local governments. Based on my experience, I doubt that the injunctive relief remedy is a significant deterrent to anticompetitive conduct by local governments. Congress should study the impact of the LGAA and changes in the law since its adoption to determine whether it is still justified. One alternative would be to repeal of the LGAA and substitute a statute that provides the local government entities are subject to single, not treble, damages.

5. The current case law on active supervision, from the Supreme Court's 1992 decision in Ticor and otherwise, does require substantive review of the conduct in question. The three prong test suggested by the FTC Report goes beyond that necessary to establish that the state has reviewed and approved the conduct in question, and may be unworkable and unjustified in many cases. If the active supervision requirement is applied to hybrids it should be limited to situations where the majority of the decision making entities within the hybrid agency are private market participants. If applied to local governments acting as market participants, it should be applied by regular review and reauthorization of the conduct by the legislature rather than case by case with respect to all business decisions by the local government entity.

6. Federalism and state sovereignty do not justify state action immunity where the costs of the anticompetitive conduct are borne primarily by citizens of other states. This "interstate spillover" issue can sometimes be addressed through application of the commerce clause, (see, eg, Granholm v. Heald, 125 S. Ct. 1885 (2005), striking down state laws barring out of state wineries from shipping wine directly to in-state consumers). It is also difficult to come up with an analytical model to determine when immunity will be lost due to spillover. Nonetheless, where a state has authorized anticompetitive conduct the costs of which are borne primarily by citizens of other states, courts should include the spillover factor in determining whether immunity is justified.

I. INTRODUCTION

I am pleased and honored to have the opportunity to address the Commission regarding state action immunity.[1]

The issues raised by the Commission on state action immunity largely parallel those raised in the FTC Staff Report[2] – whether there is a need to strengthen the clear articulation and active supervision requirements, whether there should be a market participant exception, how to treat hybrid entities, the interstate spillovers, etc. The Comments of the ABA Antitrust Section on the FTC Report ("Section Comments"), which I understand have been distributed to

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[1] I have been litigating and advising clients on state action issues since the 1970s. For the last six years I have served as Vice-Chair and then Chair of the Exemptions and Immunities Committee of the ABA Antitrust Section. I was one of the authors of the Section's State Action Practice Manual published in 2000. I am also a member of the Section's Task Force on Exemptions and Immunities created in 2003. In that role I worked extensively on the Section's Comments on the FTC Staff Report on the State Action doctrine ("FTC Report"). I am testifying, however, purely in my individual capacity, and not as a representative of the ABA Antitrust Section, the Task Force, clients, my law firm, or anyone else.

[2] The FTC Staff Report on State Action immunity was issued in September 2003. The ABA Antitrust Section issued its Comments on the FTC Staff Report in April, 2005.

each Commissioner, largely reflect my views on these subjects. One issue raised by the Commission, however, and not addressed in either the FTC Report or the Section Comments, is whether the Local Government Antitrust Act of 1984[3] should be repealed. My Section II below will address this issue. In Section III, I will supplement the Section's Comments on the other issues raised by the Commission with a few comments of my own.

At the outset, let me emphasize that I endorse the basis and rationale for state action immunity, and believe it has a proper place in antitrust jurisprudence. The state action doctrine attempts to resolve the tension between principles of federalism favoring states' rights and national policies favoring competition. Unlike some immunities or exemptions, state action immunity has a Constitutional basis – federalism.[4] Federalism is grounded in the Constitution itself, and "is a system in which there is a sensitivity to the legitimate interests of both state and national governments, and in which the national government, anxious though it may be to vindicate and protect federal rights . . ., always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states. Younger v. Harris, 401 U.S. 37, 44 (1971). While exemptions to the antitrust laws should be rare, and construed narrowly, there are times when other values may trump national competition policy. This is true of state action immunity. More practically, despite persistent criticism from commentators[5] over the years and inconsistent

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3 15 U.S.C. §§ 34-36

4 Parker v. Brown, 317 U. S. 341, 350-51 (1943) (stating that dual system of government under the Constitution states are sovereign save only as Congress may constitutionally subtract from their authority): Town of Hallie v. City of Eau Claire, 471 U. S. 34, 38 (1985); Cantor v. Detroit Edison Co., 428 U. S. 579, 632 (1976) (Justice Stewart cites legislative history of Sherman Act stating that no attempt is made to invade the legislative authority of the states.

5 See, e.g., Daniel J. Gifford, Federalism, Efficiency, The Commerce Clause And The Sherman Act:Why We Should Follow A Consistent Free-Market Policy, 44 Emory L. J.

and confusing court decisions,[6] state action immunity has been widely accepted by the courts and embraced by Congress.[7]

Nonetheless, in some respects the state action doctrine has, as stated in the FTC Report, "lost its moorings." This is particularly true with respect to local government which often provide services – such as electricity, medical and transportation services – also available from private entities. Local governments sometimes use this power to grant local monopolies for various services, which then attempt to use that monopoly to disadvantage competitors at a high cost to consumers. See, e.g., City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) (public utility required customers of defendant private utility to purchase electricity from it as a condition of continued water and gas service). Unlike states, local government entities are not sovereigns, and thus immunity for them is not justified or required by principles of federalism. Id. at 409-413

An analytical model that requires the State itself to make a clear statement of its intention to displace competition should be required before immunity attaches. This would force legislators to consciously decide to displace competition in the exercise of their sovereign powers. There has, however, been some erosion of that requirement in state action jurisprudence

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1227 (1995); Easterbrook, Antitrust and the Economics of Federalism, Journal of Law & Economics, Vol. XXVI, p. 23 (1983).

6 Compare, e.g., City of Lafayette, Louisiana v. Louisiana Power & Light Co., 435 U.S. 389 (1978) (emphasizing that cities are economic entities subject to the antitrust laws) with Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) (stating that there is little danger that cities will act to pursue their own private interests).

7 1984 U.S.C.C.A.N. 4602 (1984) (emphasizing that the passage of the LGAA would "in no way limit" antitrust immunity for states (p.2).

which, when combined with the LGAA's bar on damage claims, leaves a large segment of our economy immune from the antitrust laws.[8]

II. The Development of State Action Immunity and the LGAA

A. Early Supreme Court Decisions: Compulsion to Clear Articulation

At issue in Parker v. Brown, 317 U.S. 341 (1943) was a California program that regulated the production and marketing of raisins by the state's growers. The California legislature authorized the program by statute, and the statute itself specifically authorized programs to restrict competition among the growers and to maintain prices in the distribution of agricultural commodities. There could be no doubt that the legislature made a conscious decision to displace competition. Justice Stone's opinion adopts a stringent test – that competitive restraints qualify for antitrust immunity only to the extent that they constitute "state action or official action directed by the state." 317 U.S. at 351. Thus, under both its facts and holding, Parker requires more than just the authority to act for state action immunity to exist – the anticompetitive activity must be "directed" by the state.[9]

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) presented the question of whether a minimum fee schedule for lawyers published and entered by a state bar association

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[8] Although I could find no reliable estimate of the amount of commerce transacted by local governments, a 2002 U.S. Census Report shows there are over 70,000 such entities excluding school districts, www. census.gov/govs/www/gid2002.html.

[9] In Parker, the legislature itself had directed the anticompetitive conduct. A later case held that State Supreme Courts, at least when acting in a legislative capacity in regulating bar admissions, occupy the same position as a state legislature. Hoover v. Ronwin, 466 U.S. 558 (1984). Lower courts are split on whether state executive agencies are likewise entitled to confer immunity by authorizing the conduct in question. Compare Neo Gen Screening Inc. v. New England Newborn Screen Program, 187 F.3d. 24, 28-29 (1st Cir. 1999) (the term "State" includes officials of the executive branch) with Haas v. Oregon State Bar, 883 F.2d, 1453, 1456 (9th Cir. 1989) (state bar was not the state for purposes of conferring immunity).

was immune. Even though the state bar was a state agency by law, neither the Legislature nor the State Supreme Court had taken any action to require adherence to the minimum fee schedule. The Court confirmed that there must be some sort of compulsion from the legislature for immunity to exist. It found no immunity and phrased the critical inquiry as follows: "[I]t is not enough that . . . anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the state acting as sovereign. 421 U.S. at 773.[10]

The first case to deal with immunity for antitrust claims against local governments was City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978). Here the Court lowered the bar somewhat by concluding that the legislature need only have "contemplated the kind of action complained of." Id at 415. In City of Lafayette, cities which operated electricity utility systems filed antitrust claims against a private investor-owned electric utility with which it competed. The defendant private utility counterclaimed, also asserting antitrust claims based on alleged tying and frivolous litigation by the public utility. The Court first found that the definition of persons covered by the antitrust laws included cities,[11] and that cities are not entitled to state action immunity by reason of their status alone as they are not sovereign entities under principles of federalism. 435 U.S. at 411. Parker, it found, does not exempt all government conduct, but only that authorized by a state as sovereign pursuant to a policy to

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[10] By contrast, in Bates v. State Bar of Arizona, 433 U.S. 350 (1977) the state Supreme Court itself imposed a ban on lawyer advertising. The court found immunity since the Arizona Constitution authorized the state Supreme Court to regulate the practice of law. Retreating somewhat from the compulsion test of Parker and Goldfarb, the court held it was sufficient that the advertising rules reflected a "clear articulation" of the state policy and were subject to a "pointed re-examination" by the policymaker – the Arizona Supreme Court.

[11] In Parker, the Supreme Court stated that the Sherman Act makes no mention of the state, and gives no hint that it was intended to restrain state action or official action directed by the state. 317 U.S. at 351.

displace competition with regulation or monopoly public service.[12] It found the conduct at issue in City of Lafayette – that the city would provide customers with gas and water service only on the condition they also purchase electricity from the city and not defendant and frivolous sham litigation before federal agencies delaying power plant construction—was not authorized or contemplated by the legislature when it authorized the city to provide electricity.

California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) involved a challenge by a private party to a California wholesale wine pricing system that effectively functioned as a resale price maintenance program. Here the court established a two part test for state action immunity – the first being that the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy" and the second being that the policy must be "actively supervised" by the state. 445 U.S. at 105. The court struck down the program based on its failure to satisfy the active supervision prong. It did, however, find clear articulation from a statute which authorized price setting and enforced the prices set by private parties.

Midcal was followed shortly by Community Communications v. City of Boulder, 455 U.S. 40 (1982) which again dealt with immunity for local governments. It involved a home rule statute, which allowed cities to exercise the full right of self-government. The plaintiff was a cable television company that wanted to expand its service in the City of Boulder. Pursuant to the home rule statute, however, the Boulder City Council enacted an "emergency" ordinance

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[12] The Lafayette court rejected the argument that because local government is subject to political control, the welfare of its citizens is assured through the political process, stating that "the argument that consumers dissatisfied with service may seek redress through the political process is without merit." 435 U.S. at 406. The court also noted that in 1972 there were 62,437 different units of local government, many of which participate in the economic life of this country, with the potential to serious distort the rational and efficient allocation of resources. Id. at 407

prohibiting petitioner from expanding its business for three months until the Council could draft a model cable television ordinance and invite others to enter the market under the terms of that ordinance. The Supreme Court held the general grant of authority under the home rule statute was not sufficient clear articulation to immunize the city from antitrust claims by the plaintiff cable company arising from its enactment of the emergency ordinance.

B. **The Passage of the LGAA**

The Local Government Antitrust Act of 1984[13] was passed largely in response to City of Boulder, following an extensive lobbying campaign by the National League of Cities and similar organizations. There was an understandable concern that local government officials would be subject to treble damages as a result of simply doing their duty and this could threaten the public treasury as well as discourage public service.[14] As described in greater detail below, the LGAA barred damage suits against local governments, local government employees acting in an official capacity, and private parties if their conduct is based on official action directed by a local government. This damage bar is not linked at all to state action immunity, or to any requirement that the legislature authorize or contemplate the conduct giving rise to the antitrust claim.

The legislative history of the LGAA reveals that the other alternatives considered were to tie municipal immunity to state immunity, provide for complete immunity for "sovereign" as opposed to "commercial" activity, and applying the rule of reason test to activities of municipalities with the proviso that, contrary to National Society of Professional Engineers v. United States, 435 U.S. 679 (1979), factors related to public health, safety, or welfare could be

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13 15 U.S.C. § § 34-36 (2000)

14 1984 U.S.C.C.A.N. 4602, 4603-11 (1984)

considered by courts. The first alternative was rejected as too uncertain in light of Midcal and Boulder,[15] the second due to the "interpretative difficulties" of applying the proprietary vs. governmental distinction,[16] and the last since it was unclear as to what kind of evidentiary showing would be required.[17] Congress ultimately decided, however, to go with a remedy limitation – the bar on damages – leaving the injunctive relief alternative still available.[18]

The LGAA reverses City of Lafayette by providing that the term "person" under the antitrust laws does not include any such local government entity. 15 U.S.C. § 34 (2). The term "local government" is defined broadly as follows (15 U.S.C. § 34 (1):

> (A) a city, county, parish, town, township, village or any other general function governmental unit established by state law or
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> (B) a school district, sanitary district, or any other special function governmental unit established by state law in one or more states.

The next section, 15 U.S.C. § 35, provides that no damages, interest, cost, or attorney fees[19] may be recovered from any local government or official or employee thereof acting in an official capacity. Finally, 15 U.S.C. § 36 then provides the same bar on damages for private parties "… based on official action directed by local government, or official or employee thereof acting in an official capacity."

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15 Id. at 4614-15. This legislative history also states that more general tests, such as that the local conduct is "valid under state law" or pursuant to "authority vested by the state" likewise would create too much uncertainty.

16 Id. at 4615-16

17 Id. at 4616-18

18 It appears that some consideration was also given to detrebling but retaining actual damages, and to retaining treble damage claims against private individuals. 1984 U.S.C.A.A.N at 4625-26 (Remarks of Congressman Jack Brooks)

19 One case holds that the LGAA bar on the recovery of attorneys fees does not apply to injunctive relief actions. Pine Ridge Recycling v. Butts County, 855 F.Supp. 1264 (M.D. Ga. 1994)

The LGAA does not require that any of the "official" action referenced in the statute be authorized, clearly articulated, required, or actively supervised by the state. Its bar on damages has been extended to a variety of entities, including airports and hospital authorities. Northeast Jet Center v. Lehigh-Northampton Airport Authority, 767 F. Supp. 62 (E.D. Pa. 1991); Cohn v. Wilkes General Hosp., 767 F. Supp. 111 (D.N.C 1991).

C. Later Supreme Court Decisions: From Clear Articulation to Foreseeability With No Active Supervision

In 1985 the Supreme Court issued two decisions on the same day that significantly expanded state action immunity. The first was Southern Motor Carriers Rate Conference Inc. v. United States, 471 U.S. 48 (1985). The conduct at issue was collective rate setting that was authorized, but not required, by state statutes.[20] The District Court entered summary judgment for the government. This was affirmed by the Fifth Circuit holding that compulsion is a threshold element of state action immunity. The Supreme Court reversed and held that a state policy that expressly permits, but does not compel, anticompetitive behavior may be "clearly articulated" within the meaning of Midcal. 471 U.S. at 61. It found the compulsion test to be inconsistent with the principles of federalism since it reduces the range of regulatory alternatives available to the state. 471 U. S. at 61.

The second decision was Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985). The conduct at issue there was that the city had allegedly acquired a monopoly over the provision of sewer treatment services by tying the provision of such services to the provision of sewer collection and transportation services. The Town of Hallie court found clear articulation

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[20] Three states permitted motor carriers to submit rate proposals to public service commissions who could accept, reject or modify them while the fourth state did not review the rates but had articulated an intent to displace price competition. Southern Motor Carriers, 471 U. S. at 65.

based on a grant of authority to a city to run a sewage system since it was "foreseeable" from legislation authorizing cities to construct sewer systems and limit the service areas. Justice Powell's opinion states it is "unrealistic" to require legislatures to state in legislation that the legislature intends for the delegated action to have anticompetitive effects, or to catalog all of the anticipated effects of the statute. 471 U.S. at 43-44. This foreseeable test was also used in City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365 (1991), where the Court held that a ban on billboard construction was immune state action since it was pursuant to zoning authority granted by cities by the state legislation.[21]

Town of Hallie also eliminated the active supervision requirement for at least municipalities, if not all public entities. 471 U.S. at 46-48. The court reasoned that, unlike private entities, there is little danger that pubic entities will engage in private price fixing arrangements and, given the clear articulation requirement, there is little risk they will act to further parochial interests.

D. **The Lower Courts**

In the years since the Town of Hallie and Omni decisions, lower courts often find immunity based on a general grant of authority to act or the existence of a broad regulatory regime. For example, in Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co., 760 F.2d 607 (5th Cir. 1985), a state law authorized the city to enter into contracts governing services at the airport. The court held this was sufficient clear articulation to

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[21] The state had given the city authority to regulate land use and buildings, and the Court held this included authority to suppress competition as the very purpose of zoning regulation is to displace unfettered business freedom. The Omni court also rejected any exception to state action immunity based on a conspiracy with private parties concluding that, with the possible market participant exception, any action that qualifies as state action is *ipso facto* exempt. 499 U. S. at 374-77.

confer immunity for the city to award an exclusive contract to Yellow Cab for service at its airport, thus effectively shutting out other taxi companies. Utilizing the foreseeability test, the Eleventh Circuit in Bankers Insurance Co. v. Florida Residential Property & Casualty Joint Underwriting Ass'n, 137 F. 3d 1293 (11th Cir. 1998) found that a statute granting an association of insurers the right to select insurers to provide property and casualty insurance insulated it from claims by an excluded insurer who alleged that the association had violated Section 1 by anti-competitively revising its bidding standards in mid-review. In Martin v. Memorial Hospital, at Gulfport, 86 F.3d 1391 (5th Cir. 1996) the state law authorized municipal hospitals to contract for services. The court held that this was sufficient clear articulation to insulate an exclusive contract for operating a kidney dialysis facility from any antitrust challenge. Other cases likewise have inferred clear articulation from a general grant of authority. Earles v. State Bd. of Certified Public Accountants, 139 F.3d 1033 (5th Cir. 1998) (authority to regulate accounting profession sufficient to provide immunity for rule barring CPAs from participating in some other professions); Sterling Beef Co. v. Fort Morgan, 810 F.2d 961 (10th Cir. 1987) (law permitting cities to acquire and build gasworks and gas distribution systems sheltered city's refusal to allow its largest gas customer to build a pipeline on its own property to connect with an internal source). While the facts of some of these cases may provide a basis to infer clear articulation from a general grant of authority, they are on the outer edge of the clear articulation doctrine.

Some cases, however, still require that the authorizing legislation show an intent by the state to displace competition. Foremost among these is Surgical Care Center of Hammond v. Hosp.Service Dist. No. 1, 171 F.3d 231 (5th Cir. 1999). This was an en banc opinion issued after an earlier panel had found clear articulation. A private hospital alleged that defendant hospital district had a monopoly in the local market for acute care services and was

attempting to extend this monopoly to outpatient surgical care by anticompetitive conduct. This conduct included pressuring the largest managed care plans into exclusive contracts which tied the availability of acute care services to their commitment to use defendant also for outpatient surgery. The statute at issue, however, simply authorized the hospital's governing commission to contract with or engage in a joint venture with persons to offer and provide hospital services. Distinguishing Town of Hallie and Omni, the en banc court held this statute did not show a clear intent to displace competition noting that all joint ventures are not anticompetitive and it was thus not foreseeable that anticompetitive conduct would flow from the authorizing the hospital to enter joint ventures. The court stated that finding an intent by the state to displace competition from such general authority laws would "stand federalism on its head" since a state would be required to affirmatively disclaim antitrust immunity at the peril of creating a local government entity with power the state did not intend to grant. 171 F.3d at 235. See also Hardy v. City Optical, 39 F. 3d 765 (7th Cir. 1994); Lancaster Community Hospital v. Antelope Valley Hosp. Dist., 940 F.2d 397 (9th Cir. 1991) (broad authority to provide hospital services did not include right to exclude others).

E. **Possible Congressional Action**

The pendulum for local government immunity has now come almost full swing since the City of Lafayette decision. Local governments now enjoy a substantial degree of antitrust immunity from both injunctive relief and damage claims. The LGAA bar on damage actions applies categorically, regardless of whether the state has authorized the official conduct at issue. Unlike the situation that existed at the time of the passage of the LGAA, in many cases a general grant of authority is sufficient to immunize local governments from injunctive relief. Finally, at least for municipalities if not other local government entities, active supervision by the state is no longer required.

Given the substantial role played by local governments in the economy, and the shift in the law since the passage of the LGAA, it may be appropriate for Congress to revisit the nature and scope of LGAA immunity. Although I am not aware of any empirical evidence one way or the other, my own experience in counseling clients is that the injunctive relief remedy alone is not sufficient to deter potentially anticompetitive conduct. While the FTC Report endorses the tougher clear articulation requirement, it does not address the LGAA which bars damage claims against the primary entities that would be subject to such a requirement. One alternative that should be considered is to repeal the LGAA but limit any recovery against local governments as defined therein to single damages.[22] This would impose the prevailing judicial clear articulation test on local governments and provide meaningful deterrence to anticompetitive conduct.

III. **Other Issues Raised By The AMC**

A. **Clear Articulation**

As set forth in the Section Comments, supra, I think the clear articulation requirement should be strengthened along the lines suggested by Judge Higginbotham in Surgical Care Center of Hammond, supra.—the foreseeability test from Town of Hallie and Omni requires a state policy to displace competition beyond a mere naked grant of authority.[23] Just as giving a private corporation a general grant of authority in a state charter to do business does not give it carté blanche to violate the antitrust laws, so should a general grant of authority

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[22] This would partially alleviate the concerns regarding draining the public treasury and discouraging public service. As stated in n. 17 supra, there was some support for it in 1984. This "detrebling" concept was adopted by Congress in the National Cooperative Research and Production Act of 1993 (15 U.S.C. § 4301-05) and the recent Standards Development Organization Advancement Act.

[23] 171 F. 3d at 235-37. This probably falls short of the FTC recommendation which would require a policy to displace competition *in the manner provided.*

to a city to operate a hospital, ambulance service, waste facilities, taxicab services or any other business not give it carté blanche to violate the antitrust laws. A standard which provides that a general authority to act in a particular area goes beyond what is required by principles of federalism and state sovereignty. This can be accomplished by simply requiring authority to act legislation to be accompanied by a statement that the authority includes the right to restrict competition where justified by the public interest. See, eg, Jackson Tennessee Hospital v. West Tennessee Healthcare Inc et al, 414 F. 3d. 608 (10th Cir. 2005) (the statute provided that a hospital district may exercise its powers "regardless of the competitive consequences thereof"). In some cases, such as zoning authority, it may be readily inferred from the nature of the legislation itself.

The clear articulation requirement should also apply to state agencies or departments that regulate businesses or professions and are composed in large part of private participants in those businesses or professions.[24] The opportunity for anticompetitive mischief in such situations is substantial. Immunity should not be available unless the legislature or Supreme Court has affirmatively given them the authority to displace competition.

The clear articulation should also come from the state itself, not subordinate government agencies or non-sovereign local governments. This is the fundamental defect of the LGAA. See also GF Gaming Corp v. City of Black Hawk, No. 04-1178 (10th Cir. 2005) (holding that official action under the LGAA is that clearly articulated and actively supervised by the city itself). The basis for the immunity in the first place is that state sovereignty resulting from federalism, and allowing over 70,000 non-sovereign local governments to unilaterally

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[24] Section Comments, pp. 14-15.

decide that national competition policy should not apply creates a major gap in the enforcement of such policy.

The major purpose and advantage of a strong clear articulation requirement is to force legislatures to make conscious decisions about whether to displace competition with regulation or public monopolies. While I know of no empirical evidence on the subject, I seriously doubt that many legislators intend to displace competition by passing general authorization of cities to provide services or creating agencies to regulating businesses or professions. If such laws had specific language authorizing the displacement of competition, legislators would be forced to confront the issue directly and some such legislation may not pass at all.

B. **Active Supervision**

My views here largely parallel those in the Section Comments.[25] The law is now clear in that "negative option" is not sufficient supervision and there must be some affirmative review and approval by the requisite government agency. FTC v. Ticor Title Insurance Co., 504 U.S. 621 (1992); Sandy River Nursing Care Center v. National Council on Compensation Insurance, 985 F.2d 1138 (1st Cir. 1993). Ticor itself stated that the purpose of the requirement is to determine whether the state has exercised sufficient independent judgment that such that one can conclude that the rates are not simply the result of a private agreement. This requires the state to play a "substantial role" in determining the specifics of the policy such that the anticompetitive scheme is the State's own. 504 U. S. at 634. Ticor explained the seemingly contrary holding of Southern Motor Carriers , which found immunity for a negative option

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[25] Section Comments, pp. 16-17.

statutory scheme, by stating that it dealt only with the clear articulation requirement since the government conceded the active supervision prong was satisfied. 504 U. S. at 639.

I do, however, object to the three prong test proposed by the FTC staff as unrealistic and perhaps draconian in some cases. The third prong – that there be a specific assessment of how the private action comports with the substantive standards established by the legislature – is the ultimate objective and the most important. It can, however, be accomplished short of satisfying the first two prongs – development of adequate factual record and a written decision on the merits, including notice and an opportunity to be heard. A more flexible standard which comports with the realities, as set forth in Ticor, is preferred.

C. **Interstate Spillovers**

This raises the issue of whether immunity should be available when the effects of the authorized anticompetitive conduct impact nonresidents, as was the case in Parker itself where 95% of the raisins were shipped out of state. While Parker rejected a commerce clause attack based on this fact, it did not address the spillover issue in the context of state action immunity. The principle of state sovereignty underlying federalism does not justify an antitrust immunity where the effects of the state action are felt primarily by citizens of another state. Under such circumstances, the state political process cannot be relied upon to protect the interests of out of state buyers. State action immunity does not justify the displacement of national competition policy where the primary result is to allow in-state producers to raise prices to out of state consumers. As discussed in the ABA Comments (pp. 20-21), it is, however, difficult to come up with a workable standard to implement the spillover concept. Nonetheless, when the costs of anticompetitive conduct endorsed by one state falls primarily on citizens of other states this should be a factor considered by the court in determining immunity.

It may well be that the Parker analysis and holding on the commerce clause issue would not prevail today. The Supreme Court's recent decision in Granholm v. Heald, 125 S.Ct. 1885 (2005), striking down state laws barring out of state wineries from shipping wine directly to consumers, reiterated that laws that "mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" violate the commerce clause. 125 S.Ct. at 1895. While Parker rejected the commerce clause attack on the conduct there, it did so based on a rationale – that the raisins were not in interstate commerce because they were processed and packaged before shipping out of state – that is weak and may not apply in our modern world dominated by electronic commerce.

D. **Application of State Action Doctrine To Various Types of Government Agencies**

The AMC Request for Public Comment also seeks comments regarding whether state agencies and departments should be subject to the active supervision requirement, how courts should treat "quasi-governmental" entities with respect to the active supervision requirement, and whether public entities acting as market participants should be subject to the active supervision requirement.

My views on these issues largely mirror those contained in the Section Comments.[26] As to agencies that are truly part of the state under its constitution and statutes, no active supervision should be required. Section Comments, pp. 4-5. As to "quasi-governmental" (described as "hybrids" in the FTC Report and Section Comments) entities, the issue is whether the nexus between the state and the agency is so strong there is little risk that the actor will engage in anticompetitive conduct. Section Comments, pp. 14-15. This usually will be true

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[26] ABA Comments, pp. 14-15; 19.

unless the majority of the decision making entities within the hybrid entity are private market participants. Id. at 15-16. For example, a regulatory board to regulate lawyers composed of lawyers may need some active supervision. The "market participant" exception is a difficult line to draw, and probably best handled by a regular reauthorization of the state action immunity by the legislature rather than case by case with respect to all business decisions of the government entity. Section Comments, pp. 18-19. The market participant exception, however, has been almost uniformly rejected by the courts, and by Congress itself when enacting the LGAA. Section Comments, pp. 19-20; 1984 U.S.C.C.A.N., pp. 4615-16.