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LIABILITY OF MUNICIPALITIES UNDER THE ANTITRUST LAWS: LITIGATION STRATEGIES

*John Vanderstar**

Lawyers are increasingly being called upon to defend municipalities in suits brought by disgruntled developers, cable television operators and other entrepreneurs who challenge, under the antitrust laws (and the Constitution), municipal regulations and decisions that give a favorable franchise to the plaintiff's competitor or otherwise fail to promote the plaintiff's business aspirations.¹ Consequently, there has been much concern over the question of antitrust immunity for municipalities.²

In *Parker v. Brown*,³ the Supreme Court held that a state is not precluded under the federal antitrust laws from imposing certain anticompetitive restraints as a governmental act.⁴ The Court, however, has held that a municipal government does not enjoy the immunity from antitrust claims that applies to states under *Parker* unless it can show that its decision to displace competition is "an act of government by the State as sovereign" or is "pursuant to state policy to displace competition with regulation or monopoly public service."⁵ To qualify for this immunity a municipal program must be "clearly articulated and affirmatively expressed state policy" and must also be "actively supervised by the State itself."⁶ In *Community Communications Co. v. City of Boulder*,⁷ the Court held that a home rule city ordinarily cannot invoke the state's immunity for the very reason that the

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1. Criminal or government injunction cases are so unlikely as not to warrant separate treatment.

2. See, e.g., Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. L. REV. 435 (1981).

3. 317 U.S. 341 (1943).

4. *Id.* at 351-52.

5. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978).

6. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quoting *Lafayette*, 435 U.S. at 410).

7. 455 U.S. 40, 55 (1982).

state has delegated to the city government the power to act as it sees best: "A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought."

This article outlines some of the considerations that may bear on the question of antitrust liability once it is determined that no immunity can be obtained. It focuses on the attitude of the Supreme Court, the purposes of the antitrust laws, and the requirement of a conspiracy, including the "bathtub" conspiracy doctrine and the *Noerr* doctrine, and concludes with a brief discussion of abstention and of constitutional claims under 42 U.S.C. § 1983.

What is the scope of antitrust liability of municipal government? Unfortunately, there is no definite answer to this question, but the immunity decisions and other cases spelling out the basic rationale of the antitrust laws contain the basis for a response. Numerous decisions have also suggested lines of defense that might prove fruitful. The cost to municipalities of litigating pending and future cases, however, is likely to be substantial before the key issues are finally settled, perhaps with the development of a new "municipal rule of reason."

I. THE IMMUNITY DECISIONS

The immunity decisions hint at an answer to the question of the scope of municipal antitrust liability. The voting and the language of the Supreme Court in these cases indicate that the Court will not hasten to hold municipalities liable under the antitrust laws.

In *City of Lafayette v. Louisiana Power & Light Co.*,⁸ the Supreme Court held, five to four, that municipally owned electric companies were not immune from antitrust liability unless their actions were taken "pursuant to state policy to displace competition with regulation or monopoly public service."⁹ Vigorous dissents by Justice Stewart, joined by Justices White and Rehnquist, and by Justice Blackmun, lamented the calamitous impact of the holding on local governments. Justice Brennan's plurality opinion pointedly left open the question of the scope of liability: "It may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government."¹⁰ And the Chief Justice, who supplied the fifth vote denying antitrust immunity, did so only because the municipal activities at issue

8. 435 U.S. 389 (1978).

9. *Id.* at 413.

10. *Id.* at 417 n.48.

were "proprietary" and because the municipalities were simply engaged in "an ordinary dispute among competitors in the same market."¹¹

Justice Brennan's opinion for the five-to-three majority in *Community Communications Co. v. City of Boulder*,¹² repeated his language from *Lafayette* in responding to the dissenting opinion of Justice Rehnquist (joined by Justice O'Connor and the Chief Justice).¹³ Justice Stevens, concurring in the majority opinion, wrote separately for the sole purpose of emphasizing that the issue of liability is distinct from immunity and might well be decided differently.¹⁴

It is thus fair to predict that at least the five current members of the Court who did not fully endorse the *Lafayette* and *Boulder* holdings—the Chief Justice and Justices White, Blackmun, Rehnquist, and O'Connor—will be cautious in approving the imposition of liability upon local governments, particularly where they act in a "governmental" rather than in a "proprietary" capacity.¹⁵ Also, in view of Justice Brennan's twice stated cautionary footnote and Justice Stevens' separate opinion in *Boulder*, the remaining Justices who joined in Justice Brennan's opinions ruling against immunity can be expected to tread just as cautiously when the liability issue is squarely presented.¹⁶

II. PURPOSES OF THE ANTITRUST LAWS

Similar indications can be drawn from opinions that have, over the years, identified the main purposes of the antitrust laws. For example, the Supreme Court has referred to the Sherman Act as relating to "business competition"¹⁷ and as aimed at "combinations of business and capital organized to suppress commercial competition."¹⁸ The Court has been reluctant to apply the antitrust laws to the conduct of those who are not

11. *Id.* at 419 (Burger, C.J., concurring in part).

12. 455 U.S. 40 (1982) (Justice White did not participate).

13. *Id.* at 56 n.20.

14. *Id.* at 58 & n.1 (quoting *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976)).

15. This distinction seems out of step with modern tort concepts, see W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 131 (4th ed. 1971), but the point cannot be ignored. See *National League of Cities v. Usery*, 426 U.S. 833, 854 n.18 (1976) (contrasting an earlier case applying a federal penal statute to a state-owned railroad with the Court's holding in *Usery* that the Fair Labor Standards Act cannot, in view of the tenth amendment, be applied to state and local government employees).

16. Justice Rehnquist, however, observed in *Boulder* that once liability is established it would "take a considerable feat of judicial gymnastics" to avoid the imposition of treble damages if they would otherwise be appropriate. 455 U.S. at 65 n.2 (Rehnquist, J., dissenting).

17. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 n.15 (1940).

18. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944).

engaged in commercial activities. The Sherman Act, the Court has said, "is aimed primarily at combinations having commercial objectives and is applied to only a very limited extent to organizations, like labor unions, which normally have other objectives."¹⁹ Likewise, in *Goldfarb v. Virginia State Bar*,²⁰ although striking down a minimum-fee schedule established by members of the bar, the Court pointed out that:

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas.²¹

Lower court cases also show that when the defendants are not engaged in normal commercial activities, conduct that is claimed to violate the antitrust laws will be scrutinized with special care under the rule of reason. Thus, the film rating system developed by the movie producing industry was challenged but upheld in *Tropic Film Corp. v. Paramount Pictures Corp.*,²² and a similar result was reached in *American Brands, Inc. v. National Association of Broadcasters*,²³ when cigarette manufacturers unsuccessfully challenged an agreement among broadcasters not to air cigarette commercials. Amateur sports leagues and an organization that accredits colleges have also been successful in defeating antitrust challenges to certain of their activities.²⁴

It may be that these decisions have been undermined by *National Society of Professional Engineers v. United States*.²⁵ There the Supreme Court held that an engineer society's competitive bidding restraints, which allegedly protected the public against shoddy and unsafe buildings, are subject to Sherman Act challenge. The Court reasoned that this kind of protection of the public was not a proper justification, where entrepreneurs stood to benefit financially from the restraints they sought to impose.²⁶

19. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959).

20. 421 U.S. 773 (1975).

21. *Id.* at 788 n.17.

22. 319 F. Supp. 1247 (S.D.N.Y. 1970).

23. 308 F. Supp. 1166 (D.D.C. 1969).

24. *See, e.g., Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136 (5th Cir. 1977); *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970); *Erie Buffalo Tondas v. Amateur Hockey Ass'n of the United States*, 438 F. Supp. 310 (W.D.N.Y. 1977).

25. 435 U.S. 679 (1978).

26. *Id.* at 696.

Where, however, the restraints are closely supervised by public authorities, unlike the restraints struck down in *Cantor, Goldfarb*, and *Professional Engineers*, there is less need to employ the antitrust laws or to be concerned about power residing in the wrong hands. Surely, a governmental decision that competitive bidding by engineers should not be permitted because it could lead to shoddy and unsafe buildings does not raise the concerns that produced the result in *Professional Engineers*.

The relevance of this line of reasoning to municipal antitrust liability is obvious. A decision by a municipal government to displace competition in pursuit of some other public purpose seems to lack certain essential qualities of the type of conduct that normally falls under the ban of the Sherman Act.²⁷

The facts of *Boulder* provide a good example. The plaintiff held a twenty-year nonexclusive franchise, granted by the city, to build and operate a cable television business. The firm had confined its operations to an area of the city that, because of terrain, did not enjoy good off-the-air television service. Technological advances, however, made it possible for the firm to offer more than just clearer reception from nearby television stations, and in 1979 it announced its intent to expand into other areas. The city council foresaw that the same technological developments might stimulate the market entry of other firms, but it feared that the plaintiff would have too much of an edge *as a result of its franchise*. It enacted a three-month moratorium on further expansion while it studied a new cable policy that would attract new entrants, and thus *more competition*, in the provision of a new service to residents of the city.²⁸

Had such a step been taken by a manufacturer—prohibiting branching by its distributor in order to encourage more competition in the distribution of its products, for example—one could argue that such a competition-influencing decision is unlawful when made by private interests. According to this argument, the marketplace should govern that decision and should allow the distributor who was, for whatever reason, better positioned to benefit from new developments to reap the rewards of that circumstance. In *United States v. Arnold, Schwinn & Co.*,²⁹ the Supreme Court relied on this argument and held that such decisions are per se violations of the antitrust laws. Now, however, the competitive pros and cons must be balanced under the rule of reason. *Continental T.V., Inc. v. GTE*

27. There may also be difficulties in finding the requisite effect on interstate commerce, a prerequisite to antitrust liability under federal law. See, e.g., *Kendrick v. City Council of Augusta*, 516 F. Supp. 1134, 1140 (S.D. Ga. 1981).

28. *Boulder*, 455 U.S. at 44-46.

29. 388 U.S. 365 (1967).

*Sylvania, Inc.*³⁰ overruled the *Schwinn* per se rule, but the arguments must still be evaluated under traditional antitrust concepts.³¹

Do such arguments apply, however, when a publicly accountable municipal agency makes the decision? In such a case, the public, not private interests, elects to freeze entrepreneurial development while the situation is being sorted out. Although potential new entrants may well benefit from such action, it is not they who have instituted the freeze. A federal judge is not called upon to weigh *ab initio* the pros and cons of a private decision. Instead, he or she is asked to oversee a decision already made by a public body that has the duty and responsibility to consider the public interest.³² It is unlikely the 1890 Congress that enacted the Sherman Act intended it be used as a vehicle for federal courts to review a broad range of municipal decisions, even where municipalities do not enjoy immunity from the Act.³³

Justice Brennan may have had such an analysis in mind when he suggested, in both *Lafayette* and *Boulder*, that liability does not necessarily follow from lack of immunity.³⁴ In *Boulder*, he sought to buttress this suggestion with a "compare . . . with" citation of *Professional Engineers* and *Exxon Corp. v. Governor of Maryland*.³⁵ In some respects, the *Exxon* case is a bit off the point. That case involved a challenge to a Maryland state law that, inter alia, required oil companies that gave gasoline service stations "voluntary allowances" to make them available to all stations in the state.³⁶ The law was challenged on the basis that it was inconsistent with section 2(b) of the Robinson-Patman Act,³⁷ which allows a firm accused of price discrimination to defend on the ground that a lower price was necessary to meet an equally low price offered by a competitor.³⁸ The Supreme Court rejected the challenge, reasoning that section 2(b) only permitted, and did not require, sellers to discriminate when the prescribed condition

30. 433 U.S. 36 (1977).

31. *Id.* at 57.

32. See generally Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693, 705 (1974) (cited by Justice Brennan in *Lafayette*, 435 U.S. at 417 n.48).

33. Cf. *National League of Cities*, 426 U.S. 833 (1976).

34. *Lafayette*, 435 U.S. at 417 n.48; *Boulder*, 455 U.S. at 56-57 & n.20.

35. *Boulder*, 455 U.S. at 51 n.20 (comparing *Professional Eng'rs*, 435 U.S. 679 (1978) with *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978)).

36. 437 U.S. at 119-20. The law, upheld by the Supreme Court, also forbade the ownership of service stations in the state by oil companies. Justice Brennan, however, did not address this aspect of the case.

37. 15 U.S.C. § 13(b) (1976).

38. *Id.*

existed.³⁹ Thus, there was no fundamental inconsistency between state and federal law.⁴⁰ Moreover, the challenged law was state law, not a municipal ordinance. Nevertheless, *Professional Engineers* can be read to say that a net anticompetitive effect is enough to strike down a practice, while Justice Brennan, in *Boulder*, summarized the *Exxon* holding this way: "anticompetitive effect is an insufficient basis for invalidating a state law."⁴¹ Thus, *Exxon's* application to a case challenging municipal action that eliminates competition needs to be considered.

III. CONSPIRACY DOCTRINE IN GENERAL

In addition to examining the purposes of the antitrust laws, it may also be useful to consider a critical element of a typical Sherman Act case—the plaintiff's need to prove a "contract, combination or conspiracy."⁴² Here, the plaintiff's case may meet the "bathtub" conspiracy obstacle.

The "bathtub" concept questions whether some "persons" are legally capable of conspiring with one another. Thus a corporation and its officers cannot be guilty of a conspiracy if the officers are acting in their capacity as officers. A corporation can act only through its officers and employees. To allow a conspiracy claim in such a case would leave little freedom to corporations, acting unilaterally, to pursue their business objectives.⁴³

Applying this concept to municipal governments, it seems likely that plaintiffs who are attempting to prove conspiracy will have to find defendants who are not government officials or agencies to place them within section 1 (and the conspiracy to monopolize aspect of section 2).⁴⁴ Because a municipal government can act only through such persons and agencies, finding a conspiracy based solely on municipal action would seem to run afoul of the "bathtub" doctrine. Government officials and agencies are *supposed to* work together, not compete. It would therefore be difficult to justify a holding that such joint action, even if it produced an anticompetitive result, is an unlawful conspiracy. Yet numerous antitrust cases against municipal governments seem to be predicated on just such a notion.⁴⁵

39. *Exxon Corp.*, 437 U.S. at 131-32.

40. *Id.*

41. *Boulder*, 455 U.S. at 56 n.20.

42. 15 U.S.C. § 1 (1976). [Hereinafter the word "conspiracy" is used as a shorthand for these terms].

43. *See, e.g.*, *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464 (1962).

44. This article does not discuss the monopolization and attempt to monopolize aspects of § 2, 15 U.S.C. § 2 (1976). A municipality rarely has or wants a monopoly in the line of commerce the plaintiff would be complaining about.

45. *See, e.g.*, *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. 671 (N.D. Ohio 1979), *aff'd sub nom.* *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981),

To meet this problem, plaintiffs sometimes allege that the beneficiary of the allegedly anticompetitive activity is part of the conspiracy. Even in a case of this kind there are difficulties in proving a Sherman Act conspiracy. In *Greyhound Rent-A-Car, Inc. v. City of Pensacola*,⁴⁶ the city had solicited bids for car rental concessions at the municipal airport. It planned to award concessions to the four highest bidders. Five firms entered bids. Dollar Rent-A-Car entered the lowest bid, but it claimed that Greyhound's bid did not meet specifications requiring, inter alia, five years experience on a national scale; Greyhound had offices in only seven states. The city council considered the advice of Dollar's counsel that this specification posed no antitrust problem but worried that it might be exposed to liability claims. Dollar then accepted the city attorney's request that the company indemnify the city if it were sued for rejection of Greyhound's bid—a set of facts an antitrust plaintiff is happy to learn about. The council gave Dollar the fourth slot and Greyhound sued under section 1, alleging a conspiracy between the city and Dollar. The jury found for the defendants, and the court of appeals affirmed.⁴⁷ The critical question was the conspiracy allegation. There was no evidence that Dollar had induced the city to adopt the specification that led to Greyhound's disqualification. Also, the jury and the court of appeals accepted the city's contention that the city council did not know about the indemnity and hence that it was not a quid pro quo for the decision to disqualify Greyhound. An antitrust lawyer might be forgiven for concluding that this case might well have come out differently if purely private defendants had been involved. But maybe a municipal government is different—enough so to produce a different result.⁴⁸

A different problem was presented in *Mason City Center Associates v. City of Mason City*.⁴⁹ The plaintiffs brought suit on a municipal decision denying their request for rezoning of a tract of land on the edge of town. The city had contracted with two private developers to carry out its plan to promote development of its downtown area. The contract contained a statement affirming the city's "policy to discourage any development contrary to the stated objectives" of the downtown development plan—again a

vacated and remanded, 455 U.S. 931 (1982). The lower courts both found immunity, although not on the same grounds, and never reached the question of whether an unlawful conspiracy had been properly pleaded. After *Boulder*, the Supreme Court remanded the case to the Sixth Circuit for further consideration.

46. 676 F.2d 1380 (11th Cir. 1982).

47. *Id.*

48. See also *Kendrick v. City Council of Augusta*, 516 F. Supp. 1134, 1141 (S.D. Ga. 1981).

49. 671 F.2d 1146 (8th Cir. 1982).

set of facts bound to make an antitrust plaintiff happy.⁵⁰ The plaintiffs claimed that their rezoning application was denied because of this commitment and they sued the city, members of the city council, and the two developers for treble damages. The city council members were permitted to testify that they were motivated, not by the commitment, but by "their views on the propriety of downtown as opposed to suburban development, and because of their desire to adhere to the previously adopted comprehensive plan."⁵¹ This testimony apparently was accepted by the jury, which found against the plaintiffs, and the court of appeals affirmed on the theory that the agreement with the developers was not the cause of plaintiffs' injury.⁵²

It is not at all clear that purely private defendants could ever defeat a Sherman Act claim with such self-serving testimony, or that a court even would allow the jury to hear it. But the *Mason City* court apparently believed that a municipal government is somehow different, in antitrust terms, from a private defendant. In any event, *Mason City* certainly will be cited in favor of allowing a defense based upon proper public purpose where a municipal government is sued, even if private parties are also sued as coconspirators.

IV. OUTSIDE CONSULTANTS OR AGENTS

A variant of the conspiracy issue arises when a private defendant is a consultant to a municipal government or is the vehicle by which the allegedly anticompetitive activity is carried out. Let us suppose that a city is considering, as was Akron, Ohio, how to handle waste disposal and, simultaneously, how to develop new sources of energy for downtown businesses. Let us suppose further that a consultant has advised the city that the best solution would be a city-owned recycling plant, operated by a private party under contract, that would convert solid waste to steam or electricity, and that such a plant would not be economically feasible unless all solid wastes collected in the city were processed through the plant.⁵³ If private waste disposal firms sued under the antitrust laws, could the consultant or the plant operator be joined as defendants and thus supply the necessary conspiracy element?⁵⁴

One difficulty facing a plaintiff in such a situation is the general rule—a

50. *Id.* at 1148.

51. *Id.* at 1149.

52. *Id.* at 1150.

53. *Cf. City of Akron*, 485 F. Supp. at 674, 687-89.

54. The plaintiffs in *City of Akron* sued only municipal and state defendants so the question was not presented there.

variant of the "bathtub" doctrine—that a principal and its agent cannot be guilty of conspiracy, at least if the agent did not participate knowingly in the challenged conduct with an intent to bring about the anticompetitive result. Understanding this rule requires discussion of *Albrecht v. Herald Co.*,⁵⁵ and some of the lower court cases that have construed it.

In *Albrecht*, a newspaper publisher urged a distributor to discontinue selling newspapers at prices higher than those the publisher had suggested. When the distributor refused, the publisher told the distributor that it would begin offering the newspapers directly to the distributor's customers at the suggested price. The publisher also retained Milne Circulations Sales, Inc., to conduct direct solicitation of the distributor's customers. Milne "was aware that the aim of the solicitation campaign was to force [the distributor] to lower his price."⁵⁶ The publisher then turned over the successfully solicited customers to Kroner, who understood that he would have to charge the suggested price and that, if the distributor began complying with the publisher's demands, he might have to return the customers to the distributor. The Supreme Court held that the conspiracy requirement of section 1 was satisfied by these facts.⁵⁷

Albrecht formed the basis for an Eighth Circuit decision finding an unlawful conspiracy between an airline and its advertising agency. In *International Travel Arrangers, Inc. v. Western Airlines, Inc.*,⁵⁸ the plaintiff arranged travel group charters, a business that can provide substantial competition to scheduled airlines. Western had observed advertising for such charters on the west coast (not by the plaintiff) and asked its advertising agency to formulate a response. It found that the agency already had begun working on such a program. Ads developed by the agency proved to be effective in limiting the charters' competitive threat. When the plaintiff began offering similar charter flights from the Twin Cities to Hawaii, Western, which had a monopoly on that route, began a campaign to prevent the plaintiff from gaining a foothold. A key component of the campaign was the advertising agency's placement of newspaper and radio ads, similar to those used on the west coast, in the Twin Cities area. The ads were found to be false, misleading and deceptive in a number of respects.⁵⁹ The court of appeals, after a bench trial, upheld the district court's findings that the campaign was an unreasonable restraint of trade and that Western and its advertising agency were coconspirators within the meaning of sec-

55. 390 U.S. 145 (1968).

56. *Id.* at 150.

57. *Id.* at 153.

58. 623 F.2d 1255 (8th Cir.), *cert. denied*, 449 U.S. 1063 (1980).

59. 623 F.2d at 1264.

tion 1 of the Sherman Act.⁶⁰ Critical to this result was the finding that the agency had participated in the campaign—indeed, it had actually carried out a key part of it—with knowledge that the purpose was to prevent the charter firms from becoming a competitive threat.

Other cases have followed a different approach and have not found a conspiracy. For example, in *Friedman, Inc. v. Kroger Co.*,⁶¹ the Third Circuit read *Albrecht* as requiring a finding of three factors in instances where a plaintiff alleges that the principal actor has conspired with a lesser party: (1) the lesser party must know of the principal actor's purpose to restrain trade; (2) both participants must stand to benefit from the restraint and thus share in the purpose to restrain trade; and (3) the agreement with the lesser party must itself restrain trade rather than being merely collateral.⁶² Because not all of these factors were present in *Friedman*, the court found no liability.⁶³

The Second Circuit reached a similar conclusion in *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*⁶⁴ Amstar, the defendant, had been marketing its sugar through independent brokers but decided to change its system and market exclusively through brokers that handled only its products. It cancelled all of its brokerage arrangements and entered into new exclusive arrangements with two of its former independent brokers. Two of the terminated brokers sued Amstar and the new brokers, claiming a conspiracy among them. The plaintiffs were denied relief because the new brokers had not knowingly and actively participated in Amstar's allegedly unlawful scheme to bring about an anticompetitive result.⁶⁵ The court also explained that a broker is not independent, and therefore cannot be a coconspirator, where it merely acts as a means to bring in customers while the principal decides on the price and other conditions of a sale.⁶⁶

Thus, liability seems to turn on the outsider's degree of involvement and knowledge of the purpose of the activity in which it participates. Merely supplying information and advice to the principal defendant—the normal function of a consultant—would seem an insufficient basis for holding the

60. *Id.* at 1266-68.

61. 581 F.2d 1068 (3d Cir. 1978).

62. *Id.* at 1073.

63. *Id.* See also *Kreizer v. American Academy of Periodontology*, 516 F. Supp. 1034, 1037-40 (D.D.C. 1981).

64. 602 F.2d 1025 (2d Cir.), *cert. denied*, 444 U.S. 917 (1979).

65. 602 F.2d at 1032-33.

66. *Id.* at 1031 n.5. See also *Contractor Util. Sales Co. v. Certain-Teed Prod. Corp.*, 638 F.2d 1061, 1075 (7th Cir. 1981).

consultant as a coconspirator.⁶⁷ Likewise, carrying out the directions of the principal defendant should not be enough where there is no participation in formulating the anticompetitive scheme.⁶⁸ Indeed, it has been suggested that the outsider can be held as a coconspirator only if its very agreement with the principal eliminates a competitive force or otherwise restrains trade.⁶⁹

V. THE *NOERR* DOCTRINE

A point that might have been raised in the *Greyhound* case is that the antitrust laws do not apply at all where a private party seeks legislative action, even if it is designed to injure a competitor. This is the so-called *Noerr* doctrine.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,⁷⁰ the Supreme Court held that the antitrust laws do not apply to a firm's genuine efforts to influence legislation even though the legislation would give the firm a competitive edge, the firm plainly sought the result, and the campaign includes unfair and illegal tactics, including an effort to destroy the good will of the firm's competitors.⁷¹ The Court said that the antitrust laws are not aimed at political activities, nor are they designed to establish a code of ethics for political behavior.⁷² The first amendment implications of such an effort to regulate political behavior played a central role in the decision.⁷³ In *United Mine Workers of America v. Pennington*,⁷⁴ the Court expanded *Noerr* and applied it to efforts to influence administrative action, and in *California Motor Transport Co. v. Trucking Unlimited*,⁷⁵ the doctrine was held applicable to litigation. For the *Noerr* doctrine to apply, the undertakings must be genuine and untainted by fraud and they must not be "sham," i.e., not in fact aimed at denying the competitor access to the

67. See, e.g., *Virginia Academy v. Blue Shield*, 469 F. Supp. 552, 559 (E.D. Va. 1979), *aff'd*, 624 F.2d 476 (4th Cir. 1980).

68. See, e.g., *National Tire Wholesale, Inc. v. Washington Post Co.*, 441 F. Supp. 81, 87 (D.D.C. 1977), *aff'd*, 595 F.2d 888 (D.C. Cir. 1979); *Austin v. House of Vision, Inc.*, 404 F.2d 401 (7th Cir. 1969).

69. Note, "Conspiring Entities" Under Section 1 of the Sherman Act, 95 HARV. L. REV. 661, 679 (1982). See also Harrington, *The Bathtub Overflows: Conspiracy With Advertising Agents, Management Consultants, Commission Brokers and Other "Outside" Agencies Under Section 1 of the Sherman Act*, 22 ANTITRUST BULL. 741 (1977).

70. 365 U.S. 127 (1961).

71. *Id.*

72. *Id.* at 135-36.

73. *Id.* at 137-38.

74. 381 U.S. 657 (1965).

75. 404 U.S. 508 (1971).

governmental process.⁷⁶

Noerr has been applied at the municipal level numerous times. In *Mark Aero, Inc. v. Trans World Airlines, Inc.*,⁷⁷ the plaintiff had been unsuccessful in its efforts to persuade Kansas City authorities to reopen the in-town municipal airport for a new passenger service to St. Louis. The city was concerned, among other things, about the economic impact such an act would have on the large, handsome international airport, also owned by the city but located eighteen miles from downtown. The unsuccessful entrepreneur sued, not the city, but two major airlines, alleging that they had conspired to block the plaintiff from gaining access to the market for air carrier service between Kansas City and St. Louis. Its allegations, however, addressed the airlines' efforts to induce (and even to "coerce") the city to deny the plaintiff's request.⁷⁸ The court of appeals held that *Noerr* provided a defense.⁷⁹ Indeed, the court's opinion contains strong indications of hostility toward the use of antitrust suits as a means for reviewing political decisions by municipal governments. The court stated that the matter was a "governmental problem, to be solved by the electorate through its proper officials." The court saw no need for its intervention based on the antitrust statutes.⁸⁰ Furthermore, the court emphasized that the question of whether to open a competing airport was a policy question in the realm of city government, involving such issues as "risks to the new airport, risks as to airport financing and a shift in airport activity." The resolution of such questions, the court said, "is a matter of city government."⁸¹

An aspect of the *Noerr* issue that is not altogether clear is whether naming the municipal government itself or any municipal officials as defendants produces a different result. *Pennington* noted that the government action the defendants had allegedly conspired to procure "was the act of a public official who is not claimed to be a coconspirator,"⁸² thus implying that naming the official as a coconspirator might produce a different result.

76. *Id.* at 511; see *Noerr*, 365 U.S. at 144.

77. 580 F.2d 288 (8th Cir. 1978).

78. *Id.* at 292.

79. *Id.* at 294-95.

80. *Id.* at 289-90.

81. *Id.* at 292. Other cases applying the *Noerr* doctrine to municipal governments are *Miracle Mile Assocs. v. City of Rochester*, 617 F.2d 18 (2d Cir. 1980); *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975); *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956 (W.D. Mo. 1982); and other cases cited in *In re Airport Car Rental Antitrust Litig.*, 521 F. Supp. 568, 585 n.25 (N.D. Cal. 1981).

82. *Pennington*, 381 U.S. at 671.

In *Metro Cable Co. v. CATV of Rockford, Inc.*,⁸³ the Seventh Circuit did not think that naming an official warranted a different result. However, another Seventh Circuit decision and cases in other courts suggest otherwise.⁸⁴

The plaintiff in *Metro Cable* had unsuccessfully bid for a cable television franchise in Rockford, Illinois. It sued the successful cable operator and related parties, as well as the mayor and the leading alderman. The district court dismissed under *Noerr*,⁸⁵ and the court of appeals affirmed.⁸⁶ Although it was alleged that the mayor and alderman were persuaded to vote for the private defendants in exchange for "substantial" campaign contributions,⁸⁷ the court said that such allegations do not change the result: A key point of *Noerr* is that the Sherman Act is not aimed at regulating political behavior, and the fact that the effort to induce legislative action was effective—which necessarily would involve favorable votes by some legislators—cannot take the case out of the *Noerr* doctrine.⁸⁸ A similar result was reached in *Sun Valley Disposal Co. v. Silver State Disposal Co.*,⁸⁹ which the *Metro Cable* court cited.⁹⁰

Within months of *Metro Cable*, the Third Circuit reached the opposite result on similar facts in *Duke & Co. v. Foerster*.⁹¹ That case involved allegations that the plaintiff had been precluded from selling its malt beverages at Pittsburgh's Three Rivers Stadium and other public arenas. Among the defendants were three municipal corporations and a county commissioner sued in both his official and individual capacities. The district court dismissed on the basis of *Noerr* (and *Parker v. Brown*) but the court of appeals reversed. The court said that the *Noerr* doctrine protects a government agency that acts favorably on a request for an anticompetitive act *if* the agency acts within its legal power and in what it considers to be the public interest.⁹² Where the complaint alleges "official participation" by the agency in a scheme to restrain trade, however, the result is different.⁹³ The court did not cite *Metro Cable*, nor did it cite the Ninth Circuit's *Sun Valley* decision. Instead, it cited an earlier Ninth Circuit

83. 516 F.2d 220 (7th Cir. 1975).

84. See *infra* notes 91, 96 and accompanying text.

85. 375 F. Supp. 350, 357-58 (N.D. Ill. 1974).

86. 516 F.2d at 222.

87. *Id.* at 223.

88. *Id.* at 230.

89. 420 F.2d 341 (9th Cir. 1969).

90. 516 F.2d at 229.

91. 521 F.2d 1277 (3d Cir. 1975).

92. *Id.* at 1282.

93. *Id.*

case, *Harman v. Valley National Bank*,⁹⁴ although *Sun Valley* had indicated that *Harman* was no longer good law.⁹⁵

In *Kurek v. Pleasure Driveway & Park District*,⁹⁶ a different Seventh Circuit panel held that *Noerr* does not protect government officials who knowingly receive a "sham" bid and use it to coerce another bidder. The court reasoned that *Noerr* was based on the "essential dissimilarity" between improper political activity and the type of conduct proscribed by the antitrust laws and on the need to maintain an open flow of information to the government.⁹⁷ The court concluded that neither rationale was pertinent to the case before it.⁹⁸

In *Federal Prescription Service, Inc. v. American Pharmaceutical Association*,⁹⁹ the plaintiff challenged a campaign by the defendants to keep its mail-order prescription drugs off the market. After a bench trial, the court found that the Iowa Board of Pharmacy had been actively involved in the campaign and held that *Noerr* did not protect the Board.¹⁰⁰

Discerning a single set of principles from these disparate holdings is not easy. The facts are very important, so the various reasons that led to the *Noerr* decision and its progeny must be examined and analyzed in the context of a particular case. Nevertheless, the *Noerr* doctrine may provide a defense in many types of municipal antitrust liability cases.

VI. ABSTENTION

By definition, suits that threaten cities with antitrust liability tend to involve questions of state law. For example, where a municipal government has decided to award someone an exclusive cable television franchise or to deny an application to rezone a tract of land, state law usually provides the municipal government with the underlying authority to act. In such cases, another obstacle that might confront plaintiffs is the doctrine of abstention, although the result might be only a suspension of proceedings rather than termination of the case.

Three different rationales have been developed for a federal court to abstain from deciding a case that is properly before it. They bear the

94. 339 F.2d 564 (9th Cir. 1964).

95. *Sun Valley*, 420 F.2d at 342-43. See also *Affiliated Capital Corp. v. City of Houston*, 519 F. Supp. 991, 1021 (S.D. Tex. 1981).

96. 557 F.2d 580, 593-94 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992 (1978) (in light of *Lafayette*, 435 U.S. 389 (1978)), *reinstated per curiam*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979).

97. *Id.* at 592 (quoting *Noerr*, 365 U.S. at 136-37).

98. *Id.*

99. 484 F. Supp. 1195 (D.D.C. 1980).

100. *Id.* at 1207-09.

names of the Supreme Court decisions that gave them birth: *Pullman*, *Burford*, and *Younger*.

In *Railroad Commission v. Pullman Co.*,¹⁰¹ the Court held that a federal court should abstain when the case involves an *unsettled* question of state law the resolution of which could affect an issue of federal *constitutional* law raised in the case, either by making it unnecessary to decide the constitutional question or by changing the setting in which that question is to be decided.¹⁰² Such issues will not often be presented in an antitrust case, but they may be raised where a claim is also made under 42 U.S.C. § 1983.¹⁰³

In *Burford v. Sun Oil Co.*,¹⁰⁴ the Court held that federal courts should abstain from deciding difficult questions of state law that involve important state policies or administrative concerns.¹⁰⁵ For example, a state's land use policies might not sufficiently direct anticompetitive conduct by municipalities to warrant immunity under *Parker v. Brown*, yet a decision on the merits of a federal antitrust claim might well affect the manner in which the state's land use policies are to be carried out. In such a case, abstention may be appropriate.¹⁰⁶ Where the federal claim does not challenge land use decisions on their merits, but on the ground that they were fraudulently made, however, abstention under *Burford* is inappropriate.¹⁰⁷

Finally, in *Younger v. Harris*,¹⁰⁸ the Court held abstention appropriate if resolution of the federal claim would require an injunction against a pending state criminal proceeding.¹⁰⁹ A number of decisions have broadened the doctrine to cover quasi-criminal situations that would involve federal courts' interference with state court proceedings, thus raising problems of federal-state relations similar to those that lead to the *Younger* decision.¹¹⁰ In an antitrust case involving a local redevelopment plan alleged to have been a "sham," the district court abstained because the relief sought by the plaintiff would have interfered with a condemnation case filed in a state

101. 312 U.S. 496 (1941).

102. *Id.* at 501.

103. *See infra* note 112 and accompanying text.

104. 319 U.S. 315 (1943).

105. *Id.* at 317-18.

106. *See* *Huron Valley Hosp., Inc. v. City of Pontiac*, 666 F.2d 1029, 1034 (6th Cir. 1981). *Cf.* *Kent Island Joint Venture v. Smith*, 452 F. Supp. 455, 464 (D. Md. 1978) (action challenging land use decisions of a local government under 42 U.S.C. § 1983 in which the court abstained, noting that a district court is not a "state-wide Court of Zoning Appeals.").

107. *Heritage Farms, Inc. v. Solebury Township*, 671 F.2d 743 (3d Cir.), *cert. denied*, 102 S. Ct. 2270 (1982).

108. 401 U.S. 37 (1971).

109. *Id.* at 53-54.

110. *See* *Moore v. Sims*, 442 U.S. 415 (1979); *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Juidice v. Vail*, 430 U.S. 327 (1977); *Huffman v. Pursue*, 420 U.S. 592 (1975).

court after the federal case had been filed.¹¹¹

VII. CONSTITUTIONAL CHALLENGES

Finally, a brief word should be said about constitutional challenges to municipal decisions, since these are frequently joined with antitrust claims. The statutory basis for such challenges is typically 42 U.S.C. § 1983, one of the laws enacted following the conclusion of the Civil War.¹¹²

The volume of litigation under this section has been enormous.¹¹³ As might be expected, the typical case involves a civil rights issue in the ordinary sense of that term—race discrimination, arrests without probable cause, other police misconduct and the like. It is difficult to apply the principles developed in the typical cases to the less frequent and quite different use of section 1983 in cases brought by unsuccessful entrepreneurs who question government decisions having nothing to do with traditional civil rights concerns. A few general points are, however, noteworthy.

First, a municipal corporation can be liable for a section 1983 violation.¹¹⁴ However, it may not be sued under a respondeat superior theory “for injury inflicted solely by its employees or agents.”¹¹⁵ The corporation may be held liable only when the acts complained of constitute “execution of a government’s policy or custom.”¹¹⁶

Second, although governmental officials may be sued, some enjoy absolute immunity.¹¹⁷ Other officials enjoy a qualified immunity. Specifically,

111. *Schiessle v. Stephens*, 525 F. Supp. 763 (N.D. Ill. 1981).

112. 42 U.S.C. § 1983 (1976). The section states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

113. See, e.g., Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1136 n.7 (1977).

114. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), *overruling*, *Monroe v. Pape*, 365 U.S. 167 (1961).

115. *Monell*, 436 U.S. at 694.

116. *Id.*

117. See, e.g., *Nixon v. Fitzgerald*, 102 S. Ct. 2690 (1982) (the President); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (legislators); *Butz v. Economou*, 438 U.S. 478 (1978) (administrative officials who perform functions analogous to those of judges and prosecutors); *Stump v. Sparkman*, 435 U.S. 349 (1978) (judges); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors). This immunity also applies to municipal officials acting in a legislative capacity. *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980).

in *Harlow v. Fitzgerald*,¹¹⁸ the Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."¹¹⁹

Because *Harlow* is so recent, it is worth observing that it overruled a line of cases that also had made officials liable if they acted with malice.¹²⁰ The Court in *Harlow* was persuaded that allegations of malice are too easily made and are difficult to defeat without a full trial, thus undercutting one of the purposes of qualified immunity—to spare officials the burdens of discovery and trial and thus minimize the disruption to effective government such cases can cause.¹²¹ Thus, it should be rare indeed for a city official to be held liable for damages in a suit claiming, for example, that his or her decision not to approve a building permit was unlawful because it violated some yet-to-be-decided principle of constitutional law.

VIII. CONCLUSION

When the law is new and still developing, it requires more courage and foresight than this author possesses to make predictions about where it is heading. The circumstances under which municipalities and their officials will be held liable for antitrust violations, or for violations of section 1983 in connection with noncivil rights actions, are not capable of prediction. What can be predicted with confidence, however, is that local governments will spend many dollars for litigation and suffer considerable disruption and uncertainty as court struggle to find the answers to these questions in the course of developing a "municipal rule of reason."

118. 102 S. Ct. 2727 (1982).

119. *Id.* at 2738.

120. *See, e.g.*, *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975).

121. *Harlow*, 102 S. Ct. at 2738.