Municipal Antitrust Liability after *Boulder*

Andrew W. Lester

Follow this and additional works at: https://digitalcommons.law.ou.edu/olr

Part of the Law Commons

Recommended Citation

This Comment is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.
COMMENTARY

Municipal Antitrust Liability After Boulder

ANDREW W. LESTER*

On January 13, 1982, the United States Supreme Court handed down its decision in Community Communications Co. v. City of Boulder,1 which denied home-rule charter municipalities the state action exemption from liability under the Sherman Antitrust Act.2 The Court held that when a state has not specifically directed or authorized an anticompetitive practice by a political subdivision of that state, the political subdivision is subject to federal antitrust supervision.3 More particularly, the mere fact that a municipality is a home-rule city pursuant to a provision of the state constitution is not in and of itself a sufficient authorization by the state to remove the municipality from antitrust scrutiny.4 Numerous predictions have been made concerning the day-to-day effects of Boulder on the political subdivisions of the states.5 Some

© 1983 Andrew W. Lester
3. The basics of antitrust law are beyond the scope of this discussion. Of course, these fundamental concepts will be important in any case involving potential antitrust liability of governmental entities. For example, even if a plaintiff could show that a municipality had no state action immunity, and had potentially violated the Sherman Act, the defendant may be able to raise the rule of reason as a defense. Obviously, municipal attorneys will need to acquaint themselves with the large body of antitrust law.
4. The Court stated: “Acceptance of such a proposition—that the general grant of [home-rule] power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of ‘clear articulation and affirmative expression’ that our precedents require.” Boulder, 455 U.S. at 56. The majority repeatedly emphasized that the grant of home-rule authority is simply a neutral statement, not one impelling a specific course of action.
5. Justice Rehnquist, for example, introduced his dissent by stating that:
   The Court’s decision in this case is flawed in two serious respects, and will thereby impede, if not paralyze, local governments’ efforts to enact ordinances and regulations aimed at protecting public health, safety, and welfare, for fear of subjecting the local government to liability under the Sherman Act, 15 U.S.C. § 1 et seq. Boulder, 455 U.S. at 60 (1982) (Rehnquist, J., dissenting).

827
commentators have predicted catastrophe, while others have foreseen business as usual. This article examines events in the realm of antitrust liability of political subdivisions following Boulder and makes some predictions and recommendations concerning the future course of events.

**History of the State Action Doctrine**

The leading case in the area of state protection from antitrust liability is *Parker v. Brown,* which held that there was "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislatures." *Parker* and its progeny formulated what has become known as the "state action doctrine," which shields states from exposure to certain aspects of the federal antitrust laws.

In *Parker,* plaintiff, a private raisin producer, sought to enjoin numerous officials of the state of California from enforcing and administering a marketing prorating program pursuant to the California Agricultural Prorate Act. That Act, ostensibly enacted to prevent waste, set up a method of categorizing raisins and setting prices for each category.

For purposes of reaching its decision, the Court assumed, without so holding, that the prorate program, if made effective solely by private contract, combination, or conspiracy, would have violated the Sherman Act. Because there was no suggestion of a purpose to restrain state action in the Sherman Act's legislative history, the Court held: "The State in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish a monopoly but, as sovereign,

6. "If municipalities are permitted only to enact ordinances that are consistent with the pro-competitive policies of the Sherman Act, a municipality's power to regulate the economy will be all but destroyed . . . . This country's municipalities will be unable to experiment with innovative social programs." *Id.* at 67 (Rehnquist, J., dissenting).
7. "The dissent's dire predictions about the consequences of the Court's holding should therefore be viewed with skepticism." *Id.* at 58 (Stevens, J., concurring).
9. *Id.* at 350-51.
12. Parker v. Brown, 317 U.S. 341, 350 (1943). Additionally, the Court assumed "that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce." *Id.*
13. "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51.
imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.\textsuperscript{14} Although Congress may constitutionally limit the powers of individual states in certain circumstances, it did not choose to do so when it enacted the Sherman Act. Thus, because the California Act was not private action but rather "state action" enforcing the restraint of trade, the Sherman Act was not violated.

For thirty years, the Supreme Court left the \textit{Parker} holding virtually untouched. In \textit{Goldfarb v. Virginia State Bar},\textsuperscript{15} however, the Court held that because a local bar association's minimum fee schedule was not required by a sovereign act of the state, the state action doctrine did not apply so as to protect the bar association from antitrust scrutiny.\textsuperscript{16} The fact that the Virginia Bar Association provided disciplinary measures for violations of the local minimum fee did not suffice as state action, where the state, as sovereign, had not directed the creation of such schedules through either legislative enactment or state supreme court rule.\textsuperscript{17}

Then, in \textit{Cantor v. Detroit Edison Co.},\textsuperscript{18} the Court stated that private anticompetitive activities may not be sheltered from antitrust liability under the state action doctrine by mere acquiescence in the activities by the state.\textsuperscript{19} In \textit{Cantar}, the state Public Utilities Commission had approved certain tariffs under which the defendant was to provide light bulbs to its customers free of charge.\textsuperscript{20} Because the state had not

\begin{itemize}
  \item \textit{Id.} at 352.
  \item \textit{Id.} at 598. The Court noted:
    The mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws. Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws. Therefore, assuming that there are situations in which the existence of state regulation should give rise to an implied exemption, the standards for ascertaining the existence and scope of such an exemption surely must be at least as severe as those applied to federal regulatory legislation.
    \textit{Id.} at 596-97. The majority held: "[N]either Michigan's approval of the tariff filed by respondent, nor the fact that the lamp-exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program." \textit{Id.} at 598.
  \item For facts, see \textit{id.} at 582-85.
\end{itemize}
affirmatively directed the no-cost distribution of light bulbs, the private entity could be found subject to antitrust liability.\footnote{21}

The next year, in \emph{Bates v. State Bar of Arizona},\footnote{22} the Court held that a mandatory ban on attorney advertising, which had been adopted and enforced by the Arizona Supreme Court, constituted state action under \emph{Parker}.\footnote{23} The Court unanimously found that "the state policy is so clearly and affirmatively expressed and that the State's supervision is so active" as to preclude antitrust liability.\footnote{24} Nevertheless, the ban was found to be unenforceable as violative of the first amendment.\footnote{25}

In 1978 the Court altered the \emph{Parker} doctrine. In \emph{City of Lafayette v. Louisiana Power & Light Co.},\footnote{26} Justice Brennan achieved majority support for the proposition that a city, when acting as an owner and provider of services, acts as a private, profit-making business entity for the purposes of the Sherman Act.\footnote{27} But when Justice Brennan wrote that the essential distinction between \emph{Lafayette} and \emph{Parker} was that \emph{Lafayette} involved a political subdivision of a state, and not the state itself, he could only attract the votes of three other Justices.\footnote{28} Brennan stated that when the state has not directed the anticompetitive activity of the political subdivision, the state action doctrine does not apply.\footnote{29}

The swing vote proved to be that of Chief Justice Burger, who emphasized the proprietary nature of the activities conducted by the municipality.\footnote{30} If the activity complained of is not governmental, the

\footnote{21} "Accordingly, even though there may be cases in which the State's participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it, this record discloses no such unfairness." \emph{Id.} at 594-95.

\footnote{22} 433 U.S. 350 (1977).

\footnote{23} "The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior. Moreover . . . the rules are subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." \emph{Id.} at 362.

\footnote{24} \emph{Id.} at 362.

\footnote{25} \emph{Id.} at 381-82.


\footnote{27} Both the plurality, \emph{id.} at 407-08, and the Chief Justice, \emph{id.} at 424-25 (Burger, C.J., concurring), agreed on this point.

\footnote{28} "Plainly petitioners are in error in arguing that \emph{Parker} held that all governmental entities, whether state agencies or subdivisions of a State, are, simply by reason of their status as such, exempt from the antitrust laws." \emph{Id.} at 408.

\footnote{29} "[W]hen the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws." \emph{Id.} at 416.

\footnote{30} "This case turns, or ought to, on the District Court's explicit conclusion, unchallenged here, that '[t]hese plaintiff cities are engaging in what is clearly a business activity; activity in which profit is realized.'" \emph{Id.} at 418 (Burger, C.J., concurring).
Chief Justice argued, the *Parker* holding would not preclude examination of the activity for antitrust liability. In *Lafayette*, therefore, the Chief Justice urged the Court to remand for a determination of whether the city’s activities were governmental or proprietary.

While the Supreme Court held that proprietary activities of a governmental entity of a state were subject to antitrust scrutiny, the procedural posture of *Lafayette* precluded a holding that the specific activities forming the subject matter of the complaint were proprietary. Nevertheless, the Court opened the door in *Lafayette*, permitting complaints to be brought against municipalities based upon the Sherman Act.

The Court also held in 1978 that a state statutory scheme that inhibited competition may nonetheless be protected from antitrust scrutiny by the state action doctrine. The state regulation in question gave to the California New Motor Vehicle Board the power to approve or disapprove the opening of a dealership within a market area containing an existing dealership. Because the regulation embodied a clearly articulated and affirmatively expressed state policy to permit existing dealers an opportunity to present a claim of injurious competition, the Court would not allow examination of the activities for antitrust violations.

31. Burger believes that “the running of a business enterprise is not an integral operation in the area of tradional government functions.” *Id.* at 424 (Burger, C.J., concurring). In both *Lafayette* and National League of Cities v. Usery, 426 U.S. 833 (1976) (holding that state governmental activities, within the meaning of the tenth amendment, could not be regulated by Congress under its commerce clause power), Burger identified the nature of the challenged activity as the crucial issue.

32. Burger cited Cantor v. Detroit Edison Co., 428 U.S. 579, 596 (1976) for the proposition that “[t]here is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy.” City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 425 (1978) (Burger, C.J., concurring).

33. The four dissenters in *Lafayette* emphasized that a municipality is itself a governmental subdivision of the state. Justice Stewart stated: “[T]he plurality today blurs, if indeed it does not erase, this logical distinction between private and governmental action . . . . [I]t is senseless to require a showing of state compulsion when the State itself acts through one of its governmental subdivisions.” *Lafayette*, 435 U.S. at 431-32 (Stewart, J., dissenting). Additionally, the dissent indicated disagreement with the proprietary/governmental dichotomy raised by the Chief Justice.


35. The dispositive answer is that the Automobile Franchise Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the “state action” exemption.

*Id.* at 109.
Breaking with what had become an annual tradition of revising *Parker*, the Court waited until 1980 before handing down its next state action doctrine decision. In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,\(^{36}\) the Court again held that in order for antitrust immunity to adhere to a regulatory plan, the restraint must be one that is "clearly articulated and affirmatively expressed as state policy."\(^{37}\) Additionally, the restraint must be actively supervised by the state.\(^{38}\)

In summary, the state action doctrine shields states from certain types of liability under the federal antitrust laws.\(^{39}\) Furthermore, the state action doctrine extends certain immunities to those persons who are acting pursuant to a clearly defined state policy in a manner that would otherwise subject that person to scrutiny under congressional antitrust enactments.\(^{40}\)

*The Boulder Holding*

In *Boulder* the Court considered the question of whether the municipal regulatory activity regarding cable television "constitutes the action of the State of Colorado itself in its sovereign capacity [or] constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. . . ."\(^{41}\) From the city of Boulder’s viewpoint, the Court answered unfavorably.

The city of Boulder derived its home-rule authority from the Colorado home-rule amendment to the state constitution.\(^{42}\) In 1979 the City Council of Boulder enacted an emergency ordinance that prohibited the cable television company then operating within the city from expanding its coverage to additional quarters of Boulder. The purpose of the ordinance was to allow competitors an opportunity to enter the market.\(^{43}\)

Plaintiff-petitioner, the original cable television franchise holder in

---

37. Id. at 105, quoting from *Lafayette*, 435 U.S. at 410.
38. California Retail Dealers Assoc. v. Midcal Alum., Inc., 445 U.S. 97, 105 (1980). Furthermore, the Court stated that "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." Id. at 106.
42. Colo. Const., art. XX, § 6, which provides in part: "It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters . . . ."
43. For facts, see *Boulder*, 455 U.S. at 43-48.
Boulder, filed an action against the city seeking injunctive relief under section 1 of the Sherman Act.\textsuperscript{44} The district court granted a preliminary injunction. Petitioner sought certiorari from the reversal of that decision by the Tenth Circuit Court of Appeals.\textsuperscript{45}

In reversing the judgment of the court of appeals, the majority held that the city of Boulder's status as a home rule city did not in and of itself shield it from antitrust scrutiny, because the state constitutional provision permitting home rule provided no clear articulation or affirmative expression by the state of a precise policy.\textsuperscript{46} Thus, the majority stated: "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 . . . . The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality."\textsuperscript{47}

The majority denied that municipalities would be inhibited from fulfilling governmental duties, stating that the holding "means only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws."\textsuperscript{48} Thus, the Court held that cities are exempt from antitrust liability only insofar as the state specifically provides.

In a strong and vociferous dissent, Justice Rehnquist, joined by the Chief Justice and Justice O'Connor, argued that the Court misinterpreted the \textit{Parker} doctrine as an exemption rather than as a preemption. By calling the state action doctrine an exemption of states from coverage under the antitrust laws, the Court was in essence finding that the Sherman Act is limited in its coverage to other than state-directed activities. According to the dissent, however: "The question addressed in \textit{Parker} and in this case is not whether State and local governments are \textit{exempt} from the Sherman Act, but whether statutes, ordinances, and regulations enacted as an act of government are \textit{preempted} by the Sherman Act under the operation of the Supremacy Clause."\textsuperscript{49}

The difference between an exemption and a preemption is subtle, albeit significant. If \textit{Parker} concerns an issue of preemption, the question is whether Congress has taken the opportunity to occupy the area of regulation concerned, thereby rendering any state or local enact-

\textsuperscript{44} 15 U.S.C. § 1 (1976).
\textsuperscript{45} For the procedural posture, see \textit{Boulder}, 455 U.S. at 46-48.
\textsuperscript{46} \textit{Id.} at 55.
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{Id.} at 57, quoting \textit{Lafayette}, 435 U.S. at 416.
\textsuperscript{49} 455 U.S. at 60 (Rehnquist, J., dissenting) (emphasis in original).
ments ineffective. If, on the other hand, the issue is one of exemption, the question is whether Congress has affirmatively exempted specific activities from coverage under its own legislative enactments. If a preemption were indeed the issue in Boulder, the judgment of the Tenth Circuit should have been affirmed.

The reasoning of the dissent is clearly correct. In Parker, the Court noted in dicta: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." As the dissent in Boulder aptly stated, "This is clearly the language of federal pre-emption under the Supremacy Clause." The point made in Parker is that Congress had enacted no affirmative proscription; Congress simply did not intend to preempt the state legislation that was under scrutiny in that case. Despite the accurate portrayal of the exemption/preemption dichotomy by the dissent, however, the majority indelibly labels the state action doctrine as an exemption.

Boulder and Federalism

The dissenters also argued that the majority improperly "treats a political subdivision of a State as an entity indistinguishable from any privately owned business." The Court countered that a municipality, unlike a state, is not a sovereign entity, and therefore is not entitled to the treatment afforded a state.

Thus, the majority concluded that cities, because they are not states, are not a recognized part of the federal system. What the Court essen-

50. We are confronted with questions under the Supremacy Clause when we are called upon to resolve a purported conflict between the enactments of the Federal Government and those of a state or local government, or where it is claimed that the Federal Government has occupied a particular field exclusively, so as to foreclose any state regulation. Where preemption is found, the state enactment must fall without any effort to accommodate the state's purposes or interests.

Id. at 61 (Rehnquist, J., dissenting).

51. "Exemption involves the interplay between the enactments of a single sovereign—whether one enactment was intended by Congress to relieve a party from the necessity of complying with a prior enactment." Id. at 61 (Rehnquist, J., dissenting).


53. 455 U.S. at 63.

54. In New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978), the Court referred to the Parker doctrine as the "state action' exemption." Id. at 109 (emphasis added). Yet, even though the state action doctrine was so labeled, the analysis of the dissent in Boulder on this point seems correct.

55. 455 U.S. at 60.

56. Id. at 53.
tially held is that political subdivisions have no standing to argue that home-rule authority gives them, for federalism purposes, the sovereignty of the state.

The holding of Boulder makes evident that a municipality will not be treated for federalism purposes as a state unless there is a precise and affirmative direction from the state to that effect. In the first place, the Court noted that actions of cities are not in and of themselves state action. The majority then held that the general home-rule authority granted to the city of Boulder, as well as to other cities throughout the United States, was not a "clearly articulated and affirmatively expressed state policy." Home rule, the Court stated, does not create an affirmative directive, but rather a statement of "mere neutrality respecting the municipal actions challenged as anticompetitive." Because no specific state action is involved, no deference needs to be given to the actions of municipalities taken pursuant to the city's home-rule powers. The state action doctrine simply does not apply. Thus, for federalism purposes, the concept of home rule has almost no meaning.

Despite statements to the contrary, the opinion of the Court deeply affects concepts of federalism. As the dissent notes, "notions of federalism are implicated when it is contended that a municipal ordinance is pre-empted by a federal statute." Indeed, almost half of the fifty states sought to regain previously lost control over home-rule localities by filing briefs as amici curiae against the position of the city of Boulder. This turn of events graphically illustrates that there is a twofold analysis upon which one must embark when studying issues of federalism, namely: (1) Does the question involve a state or a political subdivision of a state, and (2) if the issue concerns a political subdivision, has the state specifically directed the municipality to act in a certain manner? If the latter question is applicable and answered in the negative, no federalism argument can be made.

Although it is true, as the Court holds, that cities are not in and of themselves sovereign, it nevertheless appears that states have the power

57. The decision in Boulder was not limited to its facts. Rather, it was meant to apply across the board to home-rule cities. Some have suggested that perhaps Boulder only applies to charter cities that derive their authority from certain types of constitutional provisions. A full analysis of Boulder, however, makes manifest that the Court did not intend to create such a distinction.
58. Id. at 52.
59. Id. at 55 (emphasis by the Court).
60. Id. at 69 (Rehnquist, J., dissenting).
61. Id. at 71 n.7 (Rehnquist, J., dissenting).
to give to their political subdivisions a measure of their sovereignty. The question is how the state passes on that sovereignty. Protestations of the dissent notwithstanding, it is now apparent that the state policy may not be a general grant of the power of the state. Rather, it must be affirmatively expressed and clearly articulated.63

Boulder Questions Unanswered

Left unanswered by Boulder is the extent of potential liability for a political subdivision. In the final footnote of its opinion, the Court stated that it "does not confront the issue of remedies appropriate against municipal officials."64 The Court also stated that "[i]t 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."65

Apparently this limitation assured the majority of the necessary fifth vote, namely that of Justice Stevens.66 In his concurring opinion, Justice Stevens emphasized that the majority had not decided that there had been a violation of the Sherman Act, but simply that homerule municipalities may be found liable thereunder. The concurring opinion indicates that such liability will rarely be found. Furthermore, the concurrence and the majority make apparent that the Court will at least attempt to limit the types of activities that could give rise to municipal antitrust liability.67

63. Indeed, the main purpose of the home-rule movement is to allow cities to act instead of the state in purely municipal matters. The state retains power to overrule charter cities in matters of statewide concern. It seems logical that the state, by permitting home rule itself, passes its sovereignty to the city insofar as the city acts on purely municipal concerns.

64. 455 U.S. at 57 n.20. In what is perhaps the most strongly worded criticism of the majority opinion, the dissent states: "It will take a considerable feat of judicial gymnastics to conclude that municipalities are not subject to treble damages to compensate any person 'injured in his business or property.'" 455 U.S. at 65 n.2 (Rehnquist, J., dissenting).

65. Id. at 57 n.20, quoting from 435 U.S. at 417 n.48. Rehnquist believes the most disturbing part of the Court's opinion is that portion which leaves open the possibility that a different standard would be applied to municipalities. For example, he writes:

If the Rule of Reason were "modified" to permit a municipality to defend its regulation on the basis that its benefits to the community outweigh its anticompetitive effects, the courts will be called upon to review social legislation in a manner reminiscent of the Lochner era. Once again, the federal courts will be called upon to engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that this Court has properly rejected.

455 U.S. at 67 (Rehnquist, J., dissenting).

66. Id. at 58-60. Because Justice Blackmun had dissented in Lafayette, some might argue that he provided the fifth vote. Yet, Stevens's concurring opinion indicates a certain lack of ease on his part with the prospect of municipal antitrust liability.

67. When such issues arise before the Court, it will be interesting to see whether the three dissenters in Boulder will vote to limit liability or to limit the situations in which municipal antitrust liability may be found.
Boulder Summarized

In summary, political subdivisions of a state may be held liable for violations of federal antitrust statutes. They are not protected by the Parker state action exemption unless the activities that form the subject matter of the complaint constitute the action of the state in its sovereign capacity or unless such activities further or implement a clearly articulated and affirmatively expressed state policy. The state policy cannot merely consist of a general grant of state power, nor can it consist of state neutrality. Rather, the state must have directed the activity. Nevertheless, the Court also indicated in Boulder that it would not hold cities to the same standard of conduct as is prescribed for private business entities.68

The dissent strongly countered that Parker concerned an issue of preemption, not of exemption.69 It further implied that the dichotomy forged by the majority between states and their political subdivisions was more imagined than real.70 Finally, the dissent intimated that the Court’s decision may cause drastic consequences for local governmental bodies.71 Despite the persuasive arguments of the dissent, the opinion drafted by Justice Brennan subjecting municipalities to antitrust scrutiny stands as the holding of the Court.

Post-Boulder Cases

Since the Court handed down its decision in Boulder, several lower courts have had the opportunity to review factual situations giving rise to Boulder-type issues. One case directly on point is Pueblo Aircraft Service, Inc. v. City of Pueblo,72 which, like Boulder, concerned the potential liability of a constitutionally created home-rule municipality under the Sherman Act.73

The plaintiff in Pueblo had been a fixed base operator (aircraft service and sales) at the municipally owned and operated airport. When the lease agreement between the parties was due to expire, the city solicited bids from the public. Plaintiff, an unsuccessful bidder, was forced to quit the premises.74

On appeal from the dismissal of the complaint,75 the Tenth Circuit

68. 455 U.S. at 56 n.20.
69. Id. at 60.
70. Id. at 68-70.
71. Id. at 67.
72. 679 F.2d 805 (10th Cir. 1982), cert. denied, 103 S.Ct. 762 (1983). Pueblo was decided by the same court that had handed down the decision overturned by the Supreme Court in Boulder.
73. The sections at issue here were 15 U.S.C. §§ 1, 14 (1976).
74. Pueblo, 679 F.2d at 806, 807.
Court of Appeals considered the posture of the case in light of \textit{Boulder}. The issue, as phrased by the court, was "whether the State of Colorado by affirmative legislative action granted City an exemption from operation of federal antitrust laws by virtue of [certain] statutory language . . . ."\textsuperscript{76} The pertinent provision of the Colorado statute provided that municipal airports are owned and operated as "public governmental functions, exercised for a public purpose, and matters of public necessity . . . ."\textsuperscript{77}

The court found the city to be exempt from federal antitrust liability, reasoning that the activities that formed the substance of the complaint constituted the action of the state of Colorado itself\textsuperscript{78} and, in any event, furthered a clearly articulated policy of the state. Stating that the applicable statute made the operation of the airport a governmental, as opposed to a proprietary, function of the city,\textsuperscript{79} the Tenth Circuit held that \textit{Pueblo} was merely implementing a legislative directive. Thus, the state of Colorado had extended its exemption from antitrust scrutiny to its political subdivisions as concerns the operation of municipal airports.

The essence of \textit{Pueblo} is that the Tenth Circuit is rather reluctant to find liability against a municipality under the Sherman Act. Basically, the court sent the message that it thought little of the majority opinion in \textit{Boulder}. The Colorado statute in question, though certainly expressing a state policy,\textsuperscript{80} is hardly of a precatory nature.\textsuperscript{81} Nevertheless, the court found that the statutory language fully shielded the political subdivision with the antitrust exemption possessed by the state. Although the court recognized that \textit{Boulder} mandates the scrutiny of a state's political subdivisions for potential antitrust liability, the opinion likewise makes evident that the Tenth Circuit will

\begin{itemize}
  \item \textsuperscript{76} 679 F.2d at 809.
  \item \textsuperscript{77} \textit{Colo. Rev. Stat.} § 41-4-101 (1973).
  \item \textsuperscript{78} "In its 'governmental capacity' a municipality acts as an arm of the state for the public good on behalf of the state rather than itself." 679 F.2d at 810.
  \item \textsuperscript{79} Thus, the Court noted that "[I]n the absence of an express statutory direction, such as that contained in C.R.S. 1973 § 41-4-101, supra, the operation of a municipal airport is generally regarded as a proprietary function rather than a governmental function." \textit{Id.} at 810, 811.
  \item \textsuperscript{80} \textit{Cf. Town of Hallie v. City of Eau Claire}, 700 F.2d 376 (7th Cir. 1983) (holding that the pertinent state enabling legislation need not \textit{compel} the anticompetitive activity, but may merely be a general authorization, where a traditionally municipal function is involved).
  \item \textsuperscript{81} \textit{Cf. Hybud Equip. Corp. v. City of Akron}, No. C78-1735A, C78-65A (N.D. Ohio 1983), in which the court applied the state action immunity because "the legislature contemplated the use of anti-competitive measures" by political subdivisions. Slip op. at 18. The district court was hearing this case for the second time; the Supreme Court had remanded it for decision in light of \textit{Boulder}. \textit{See also Gold Cross Ambulance v. Kansas City}, 705 F.2d 1005 (8th Cir. 1983).
\end{itemize}
give every advantage allowable pursuant to Boulder to the municipality seeking an antitrust exemption. 82

Perhaps the most widely publicized holding concerning municipal antitrust liability since Boulder was handed down by the Fifth Circuit on March 17, 1983. In Affiliated Capital Corp. v. City of Houston, 83 the court held that the Houston plan for dividing the city among numerous cable television (CATV) franchises constituted a per se violation of the Sherman Act. Affiliated Capital represents the first instance in which a federal court has held a city official personally liable for money damages for an antitrust violation.

In 1977 the city of Houston received a number of unsolicited bids for a cable television franchise. Mayor Jim McConn, in order to ease the political pressures and in order to give several applicants a franchise, impelled four applicants to work together to decide among themselves (1) how the city should be divided into separate markets, and (2) which applicant should obtain a franchise in each of the different sectors. After the process had begun, the mayor further insisted that another group, led by his personal attorney, be added to the pool. Any plan devised by these cable television companies would require the approval of the Houston City Council before it could become effective.

Plaintiff, which until September, 1978, had been barred by federal regulation from operating a CATV company, applied for a franchise after the others had made the agreement, but prior to the Council’s approval thereof. When the City Council accepted the plan put forth by the other five applicants, plaintiff sought legal and equitable relief under section 1 of the Sherman Act.

The district court entered a judgment non obstante veredicto in favor of the defendants. The jury, in response to interrogatories submitted to it, had indicated that plaintiff had suffered damages in the amount of $2.1 million. Nevertheless, the district court thought that the responses to the other interrogatories did not support the jury’s assessment of liability. 84 The Fifth Circuit, however, reversed in a two-to-one decision, reinstating the jury verdict. 85

The majority found that the agreement among competing CATV companies constituted a traditional horizontal market division, a per

82. Instead of merely relying upon the Colorado home-rule provision, as in Boulder, the Tenth Circuit in Pueblo used specific statutory authority. Of course, it came to the same conclusion as it had reached in the prior case.

83. 700 F.2d 226 (5th Cir. 1983). In an interesting turn of events, the Fifth Circuit has agreed to a rehearing en banc. 714 F.2d 25 (5th Cir. 1983).


85. 700 F.2d 226, 238 (5th Cir. 1983).
se violation of section 1 of the Sherman Act. Additionally, the court found that the actions of the mayor in securing the agreement constituted involvement in a conspiracy, thereby likewise subjecting McConn to liability for treble damages. The dissent noted that the majority relied substantially upon one expert's testimony in reaching its conclusion. Chief Judge Clark’s basic disagreement with the majority rested in his belief that the court should examine the challenged activities under the rule of reason instead of following a per se analysis. Interestingly, neither the majority nor the dissent cited *Boulder*. It is particularly remarkable that the dissent did not cite *Boulder* for the proposition that money damages may not be available against city officials.

There are two possible interpretations of *Affiliated Capital*. The first explains that decision as an indication that the Fifth Circuit is more than willing to assess money damages against municipalities and their officers and employees in antitrust cases. The more probable interpretation states an exception to the *Noerr-Pennington* doctrine. When compared with other recent decisions, a theory is apparently emerging that basically examines whether the governmental action being attacked was taken in a seemingly corrupt manner. If "dealing" appears to have been a major concern, courts will be more likely to impose antitrust liability.

Conducting government in an open, clean manner should substantially reduce exposure of cities to antitrust liability. Avoiding the appearance of collaboration with an interested party will help. Acting in

86. *Id.* at 237.
87. *Id.* at 238.
88. *Noerr-Pennington* precludes antitrust liability for lobbying and other joint efforts of private individuals or entities to obtain legislation or other governmental action. The doctrine essentially is based upon the first amendment. See United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).
89. Cf. Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982). That opinion reversed the granting of summary judgment in favor of defendants on various issues, including both a § 1983 and an antitrust claim. Summary judgment is granted sparingly in such cases. Thus, the result should not have been altogether unexpected. In the *Noerr-Pennington* portion of its opinion, the court said that any "legitimate lobbying efforts may have been accompanied by illegal or fraudulent actions [on the part of city officials]." *Id.* at 746. Because there was a genuine issue as to a material fact, the court felt constrained to reverse the decision of the trial court.
90. Whether the theory is the so-called "co-conspirator exception" to *Noerr-Pennington* is certainly open to debate. Compare Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) and Affiliated Capital Corp. v. City of Houston, 700 F.2d 226 (5th Cir. 1983) with Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975) and Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982). A more appropriate name would be the "good government exception."
a "governmental" manner appears to be one of the keys. The Fifth Circuit, however, did not so limit its decision. Actually, the court seemed to downplay the significance of McConn's dealing, instead emphasizing the mayor's apparent abandonment of the power to conduct traditional governmental functions to private parties.\(^\text{91}\) All of these factors, taken together, indicate that courts will attempt to assure through the Sherman Act that governments act governmentally.

One case concerning a different type of political subdivision of a state pointed out several issues involved in post-\textit{Boulder} types of controversies.\(^\text{92}\) The plaintiff in \textit{Ronwin v. State Bar of Arizona}\(^\text{93}\) failed to gain admission to the Arizona Bar. Specifically, Ronwin alleged that the Bar merely admitted a pre-set number of applicants, thereby violating section 1 of the Sherman Act.\(^\text{94}\) The district court dismissed the action as to all defendants for failure to state a claim upon which relief can be granted.\(^\text{95}\) On appeal, the Ninth Circuit reversed as to the individual members of the admissions committee.\(^\text{96}\)

Noting the standard of state involvement called for in \textit{Boulder}, the Court contrasted the facts before it with the situation involved in \textit{Bates v. State Bar of Arizona}.\(^\text{97}\) In \textit{Bates}, the Arizona Supreme Court had adopted the rule which the Bar at that time sought to enforce,\(^\text{98}\) and thereby exempted the Bar from Sherman Act antitrust scrutiny under the state action doctrine. In \textit{Ronwin}, however, the Arizona high court had neither adopted nor directly authorized the alleged policy.\(^\text{99}\)

91. Thus, the court stated that "[j]ust as following this common practice [of soliciting bids] the city simply passively accepted applications as they arrived . . . Mayor McConn had let it be known that he did not want to choose between competing applicants. He wanted the applicants to work together, resolve any overlaps in their territories and present him with a finished product. \textit{He abdicated his responsibility in the franchising process to a group of powerful Houston businessmen.}" Affiliated Capital v. City of Houston, 700 F.2d 226, 228 (5th Cir. 1983) (emphasis added).

92. That \textit{Boulder} applies not only to cities but also to other political subdivisions of a state demonstrates that the twenty-two states that filed briefs in \textit{Boulder} against the position of the city may have been unwise. While states have regained a measure of lost power at the expense of cities, they may have surrendered much to the federal government.


94. \textit{Id.}

95. \textit{Id.} at 695.

96. \textit{Id.} at 694. The court affirmed as to the Bar itself since there were no allegations of wrongdoing against the Bar. \textit{Id.} at 694 n.1.


98. That rule restricted attorney advertising.

99. Because of the procedural posture of \textit{Ronwin}, plaintiff had yet to prove that the policy in fact existed.
That the Arizona Supreme Court had delegated to the Bar the general authority to administer membership examinations was insufficient to constitute a "clearly articulated and affirmatively expressed" state policy. In any event, there was no active supervision by the state. Thus, the court held that Ronwin should have the opportunity to obtain scrutiny of the challenged actions under the Sherman Act.

Two other decisions of interest considered allegations of governmental antitrust liability in light of Boulder. In Allied Artists Picture Corp. v. Rhodes, the court found that a blind bidding requirement of state law compelled governmental action and therefore could not give rise to antitrust scrutiny. Likewise, in Jackson v. Taylor, the court dismissed a complaint brought by prisoners alleging Sherman Act violations by prison officials in fixing a price of twenty-five cents for local telephone calls. The district court noted that, while "governmental agencies are not immune from antitrust laws simply because they are governmental agencies," the regulation of prisons, including the setting of a fee for local telephone calls, was a governmental function and therefore exempt from scrutiny.

There appears to be a split among federal courts as to the proper interpretation of Boulder. Whereas the Ninth Circuit interpreted Boulder relatively strictly against the political subdivision, the Tenth Circuit gave the city of Pueblo every benefit conceivable. On the other hand, some courts apparently will place heavy emphasis upon the distinction between a governmental and a proprietary function.

Because of the decision in Boulder, municipalities, as well as other political subdivisions of states, potentially face a myriad of claims of antitrust violations. Actually, it is difficult to imagine what activities are not potentially the subject of such scrutiny. Licensing requirements are prime objects for challenge as restricting competition. Likewise, other types of occupational regulation will be attacked.

100. Delegating to the Bar the power to administer the entrance examination is analogous to the delegation of general home-rule authority. In order to have shielded the Bar from antitrust scrutiny, the state should have directed that the Bar enforce a policy of admitting only a predetermined number of bar applicants. See Ronwin v. State Bar of Arizona, 686 F.2d 692, 695 (9th Cir. 1981).
101. Of course, plaintiff still would have to show the very existence of the challenged activities.
102. 679 F.2d 656 (6th Cir. 1982).
104. Id. at 595.
105. Id.
107. It is not difficult to imagine numerous possible complaints. For example, a disgruntled plumber might bring an action because of a regulation requiring certain types of pipe.
operation of entities to the exclusion of competitors from the private sector will be challenged as anticompetitive. Examples of such operations include airports, stadiums, transit systems, sewer services, trash collection, electrical works and other utilities. Cable television and other franchising arrangements will likewise face antitrust scrutiny. Methods of procurement for municipalities will be screened. Perhaps of greatest importance, Boulder will provide yet another method for challenging zoning restrictions.

Decisions of other political subdivisions will also be subjected to increasing challenge. Thus quasi-public agencies, such as bar associations operating only under a general mandate, must be prepared to defend against claims arising under Boulder. Simply stated, Boulder will tend to cause an ever-increasing number of cases to be filed against public bodies.

Boulder Reconsidered

The problem Boulder creates is that it potentially subjects governmental entities to a large number of substantial claims, thereby causing those entities to expend ever-increasing sums of limited funds to defend against those actions. Boulder may have the same type of impact


112. See, e.g., Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983).


115. See, e.g., Community Builders, Inc. v. Phoenix, 652 F.2d 823 (9th Cir. 1981).

116. See, e.g., Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); Affiliated Capital Corp. v. City of Houston, 700 F.2d 226 (5th Cir. 1983); Omega Satellite Prod. Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982); Catalina Cablevision Assoc. v. City of Tucson, Civ. No. 82-459 (D. Ariz. 1983).


118. See, e.g., Allied Artists Picture Corp. v. Rhodes, 679 F.2d 656 (6th Cir. 1982); Security Fire Door Co. v. Los Angeles, 484 F.2d 1028 (9th Cir. 1973).

119. See, e.g., Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982); Mason City Center Assoc. v. City of Mason City, 468 F. Supp. 737 (N. D. Iowa 1979).

120. See, e.g., Ronwin v. State Bar of Arizona, 686 F.2d 692 (9th Cir. 1981).
that *Monroe v. Pape*121 has had over the past two decades in the area of litigation under the Civil Rights Act of 1871. While in 1961, the year in which *Monroe v. Pape* was decided, only a handful of cases were filed annually against governmental bodies and their employees under the Civil Rights Act, the number now is in the many thousands. Likewise, antitrust actions against municipalities will surely multiply.

Parties aggrieved by municipal actions may be tempted to seek satisfaction through Sherman Act claims based upon some exception to the *Noerr-Pennington* doctrine. Especially in this sense, *Boulder* may come to be regarded as yet another weapon with which to threaten public bodies. If cases such as *Affiliated Capital* will encourage municipalities to operate in an open, clean manner, such an exception could have desirable effects.

The dissent in *Boulder*, however, aptly states the impracticality of treating a municipality in a like manner as a business entity.122 To counter that argument, the majority hints that it might view at least certain municipal actions in a different light. Remaining unanswered, however, is how such a judicial policy would be accomplished.

Significantly, the Court states: "We hold today only that the *Parker v. Brown* exemption was no bar to the District Court's grant of injunctive relief . . . . Moreover, as in [Lafayette], we do not confront the issue of remedies appropriate against municipal officials."123 Thus, the Court has yet to determine whether a court may hold political subdivisions liable for money damages. Furthermore, even if money damages are available, the Court has not stated whether treble damages may be had.124

Additionally, the *Boulder* Court indicated that a different set of

---

122. By treating the municipal defendant as no different from the private litigant attempting to invoke the *Parker* doctrine, the Court's decision today will radically alter the relationship between the States and their political subdivisions. Municipalities will no longer be able to regulate the local economy without the imprimatur of a clearly expressed state policy to displace competition.

*Boulder*, 455 U.S. at 70-71. (Rehnquist, J., dissenting).
123. Id. at 56-57 n.20.
124. In order to rebuff a treble damages claim, a municipality should consider a line of reasoning that compares the claim to that of City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). In *Fact Concerts*, the Court held that municipalities were not subject to punitive damages under the Civil Rights Act of 1871. Reasoning that the common law did not allow such damages against cities, the Court stated that section 1983, by not specifically providing for such damages, indicated a congressional intention not to change that standard. Obviously, however, the comparison is by no means perfect. When it enacted the antitrust laws, Congress surely did not intend that cities be liable for treble damages. Nevertheless, Congress plainly intended that treble damages be an integral part of private enforcement actions. *But cf.* Affiliated Capital Corp. v. City of Houston, 700 F.2d 226 (5th Cir. 1983).
substantive rules may apply when the federal antitrust laws subject political subdivisions to scrutiny.\textsuperscript{125} The obvious hesitancy of the Court explicitly to hold that a municipality has violated the Sherman Act\textsuperscript{126} may be a key factor in limiting the effects of \textit{Boulder}.\textsuperscript{127}

Local governing bodies will nonetheless face increasing numbers of challenges under the \textit{Boulder} doctrine. Unsuccessful bidders will charge collusion. Those who fail licensing examinations will claim both a violation of their civil rights and a violation of antitrust statutes. Those whose rezoning applications are denied will challenge the denial as a violation of section 1 of the Sherman Act, especially where there is even a hint of political dealing. In essence, cities will have to defend, under threat of treble damages, against numerous new charges of violations of some type of right.

The number of frivolous claims will, in all likelihood, increase. \textit{Ronwin v. State Bar of Arizona} simultaneously points out both the potential dangers as well as the limitations of \textit{Boulder}. \textit{Ronwin} simply holds that the plaintiff should be given the opportunity to present evidence that might establish an antitrust violation.\textsuperscript{128} The Ninth Circuit, however, expressed marked skepticism about plaintiff’s prospects for success.\textsuperscript{129} Likewise, \textit{Jackson v. Taylor} illustrates the kinds of trivialities that will be brought against cities in federal court.\textsuperscript{130} Thus, the problem is that political subdivisions will be forced to spend increasing amounts of time and resources defending such suits.

Despite recent attempts to restrict antitrust analysis to economic matters,\textsuperscript{131} antitrust law tends to embody populistic notions. When analyzing municipal activities under \textit{Boulder}, notions of good government may be relevant. Thus, a showing that the challenged activities were conducted for the health, safety, and welfare of the community,

\begin{itemize}
\item \textsuperscript{125} \textit{Boulder}, 455 U.S. at 56 n.20.
\item \textsuperscript{126} Indeed, it is difficult to imagine exactly how the city of Boulder could have violated the Sherman Act, given the facts of that case. Construing Boulder’s actions as anticompetitive would take a feat of “judicial gymnastics.” \textit{Boulder}, 455 U.S. at 40 n.2 (Rehnquist, J., dissenting). See supra note 64.
\item \textsuperscript{127} Municipalities should argue that activities such as licensing and franchising are the substance of which local governments consist and for which local governments operate.
\item \textsuperscript{128} Thus, the Court stated that “Ronwin should not have been denied the opportunity to prove that the grading policy was designed to limit competition among Arizona attorneys, as opposed to being designed to ensure that attorneys had the necessary qualifications.” See Ronwin \textit{v. State Bar of Arizona}, 686 F.2d 692, 698 (9th Cir. 1981).
\item \textsuperscript{129} See, e.g., \textit{id.} at 700 n.9.
\item \textsuperscript{130} \textit{Jackson v. Taylor}, 539 F. Supp. 593 (D.D.C. 1982). Since \textit{Boulder} most of the municipal antitrust decisions have concerned the appropriateness of some type of pretrial disposition of the case. Although the frequency of successful complaints may be minimal, cities will have to devote substantial funding to the defense of antitrust actions.
\end{itemize}
and not simply as an expedient political solution or as a means of benefiting the friends of those in power, may be vital to the ultimate success of the defense of Boulder claims.

Largely overlooked, but perhaps the most unsettling aspect of Boulder, is its effect on issues of federalism. Basically, the Court has stripped home-rule cities of standing for federalism purposes. The means of rescue for municipalities from the federalism implications of Boulder may arrive through the distinction between an exemption and a preemption. Should the Court have second thoughts about its opinion, it could pursue a line of cases distinguishing Boulder as concerning an issue of exemption rather than preemption. Of course, in order for the Court to so restrict Boulder, it would have to embark upon the difficult task of establishing that differentiation after having specifically blurred any distinctions.132

Whether the effect of the Court’s holding turns out to be the destruction of “the ‘home rule’ movement in this country . . .”133 remains to be seen. Obviously, however, Boulder has dealt a serious blow to the status of home-rule charter cities. Additionally, it has caused a serious diminution in the power of a municipality as compared to the state.

Conclusion

In Boulder, the Supreme Court held that the state action doctrine espoused forty years earlier in Parker v. Brown134 does not protect political subdivisions of states from scrutiny for violations of federal antitrust regulations. The Court stated that a municipality is not exempt from antitrust liability unless the subject activities constitute the action of the state in its sovereign capacity or the activities further or implement a clearly articulated and affirmatively expressed state policy.135 Though allowing a plaintiff to seek injunctive relief, the Court nevertheless would not comment on whether money damages against municipalities are appropriate.136 Furthermore, the Court indicated that activities that might subject a private entity to antitrust liability might be viewed in a different light when conducted by a political subdivision.137

132. See generally Kennedy & Lester, supra note 62.
134. 317 U.S. 341 (1943).
135. Boulder, 455 U.S. at 71,
136. Id. at 56 n.20. But cf. Affiliated Capital Corp. v. City of Houston, 700 F.2d 226 (5th Cir. 1983).
137. Boulder, 455 U.S. at 57 n.20.

https://digitalcommons.law.ou.edu/olr/vol36/iss4/4
In a strongly worded dissent, three Justices maintained that the state action doctrine concerned an issue of preemption, not exemption. If the question is one of preemption, so the dissent argues, it becomes evident that Congress never affirmatively preempted state and local regulations. Moreover, there could be no violation of the antitrust laws because "[p]reempted state or local legislation is simply invalid and unenforceable."\textsuperscript{138}

Since the Court reached its decision in \textit{Boulder}, a number of cases have shed some light on the matter. Yet, at present, there appears to be no clear trend. Thus, in \textit{Pueblo} the Tenth Circuit found that a seemingly innocuous state statute satisfied the "clearly articulated and affirmatively expressed" arm of \textit{Boulder}, as well as the "active supervision" prong, thereby giving to the city of Pueblo the antitrust exemption of the state of Colorado.\textsuperscript{139} In \textit{Affiliated Capital},\textsuperscript{140} however, the Fifth Circuit Court of Appeals held the former mayor of Houston liable for money damages for his role in a conspiracy resulting in a per se violation of section 1 of the Sherman Act.\textsuperscript{141} In \textit{Ronwin v. State Bar of Arizona},\textsuperscript{142} the Ninth Circuit Court of Appeals held that plaintiff had the right to present evidence that a certain method of admitting new bar licensees violated section 1 of the Sherman Act; despite that, the court indicated it felt plaintiff's chances of proving his claim were slim.\textsuperscript{143} Thus, apparently there will be substantial disagreement among the circuits as to the latitude to give to plaintiffs in pressing antitrust claims against political subdivisions.

Cities must develop programs to prevent antitrust liability. A local government should assess its operations, seeking to isolate those with potential antitrust problems. Likewise, the city should identify those officers and employees who may be involved in antitrust claims. Municipal attorneys should create an antitrust compliance program for the city, its officials, and its employees, calling attention to the potential problems and describing methods of avoiding those troubles. A successful program will minimize exposure of political subdivisions to Sherman Act scrutiny.

\textsuperscript{138} Id. at 69 n.4 (Rehnquist, J., dissenting).
\textsuperscript{139} Municipalities within the Tenth Circuit can take solace in the \textit{Pueblo} holding. That circuit, at least, appears willing to give political subdivisions every benefit within the strictures of \textit{Boulder}.
\textsuperscript{140} Affiliated Capital Corp. v. City of Houston, 700 F.2d 226 (5th Cir. 1983).
\textsuperscript{142} 686 F.2d 692 (9th Cir. 1982).
\textsuperscript{143} By contrast to the Tenth Circuit, the Ninth Circuit Court of Appeals apparently interprets \textit{Boulder} as necessitating more factual findings before allowing some type of pretrial disposition.
It is essential that municipal officers who may be involved in antitrust claims base all actions and decisions on the enhancement of the public health, safety, and welfare. As part of the overall antitrust compliance program, cities should create a compliance documents program, first detailing the circumstances in which documents must be created, and then setting forth specific guidelines as to the retention and destruction of particular documents. Once the compliance program is in place, cities must be prepared to obey its mandates. Additionally, cities should continually audit their compliance, revising their activities as needed.

Cities potentially face an ever-growing number of claims brought pursuant to the Boulder doctrine. Whether they will also face serious liability remains to be seen. In any event, Boulder will continue to play an important role in future actions.