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Antitrust Liability of Municipal Corporations: The Per Se Rule vs. the Rule of Reason - A Reasonable Compromise

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Antitrust Liability of Municipal Corporations: The Per Se Rule vs. The Rule of Reason—A Reasonable Compromise

Ramon A. Klitzke*

I. THE PROBLEM

In *City of Lafayette v. Louisiana Power & Light Co.*,[1] the Supreme Court held that a city is not automatically immune from the antitrust laws when the state grants it power to own and operate an electric utility system both within and beyond the city limits. However, the Court offered no suggestion as to the choice of an appropriate analysis for imposing antitrust liability once immunity has been discarded.[2] When this issue reaches the Court, its resolution will be difficult because the conduct of the cities in *City of Lafayette* is usually summarily held to violate the Sherman Act, without regard to business alternatives or the reasonableness of the resulting restraints on competition.[3]

In *City of Lafayette,* the cities of Lafayette and Plaquemine, Louisiana, sued the Louisiana Power & Light Company, alleging violations of sections 1 and 2 of the Sherman Act.[4] In a counterclaim, Louisiana Power charged the cities with several federal antitrust violations: (a) sham litigation to delay or prevent Louisiana Power's construction of a nuclear

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1. 435 U.S. 389 (1978).

2. Chief Justice Burger, in a concurring opinion, alludes to the problem but does not attempt to solve it. 435 U.S. at 424 (Burger, C.J., concurring).

3. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

4. 435 U.S. at 391-92; City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 432 (5th Cir. 1976). The plaintiff cities' allegations were not involved in the appeal.

power plant; (b) anticompetitive covenants in the cities' debentures that excluded all competition in electric power service within the municipal boundaries; (c) the extension of power service beyond the time periods allowed by state law; and (d) requiring customers outside the city limits to buy electricity from the city in order to obtain gas and water.[5]

The fourth allegation, which on its face constitutes tying, is a business practice that has been denounced repeatedly as per se illegal without any allowance for business justification.[6] Whether the species of tying allegedly engaged in by the City of Plaquemine would be per se illegal has not yet been determined.[7] If it is, however, the question arises whether a municipal corporation is so imbued with the public interest that the legitimate economic power deliberately granted by the state is not of the type contemplated by the normal tying cases. In other words, is the dominant economic power enjoyed by the tying service, the city's gas and water service, inherent in the delegation of municipal power to the city? If so, a preliminary analysis is required to determine whether a per se rule or a rule of reason approach is appropriate.[8]

A second major issue in *City of Lafayette* is the allegation of sham litigation for the primary purpose of unreasonably restraining Louisiana Power's ability to compete. This issue entails analysis substantially different from that for per se liability.[9] The landmark case of *Parker v. Brown*[10] rendered antitrust liability inapplicable to "state action" where the state imposed anticompetitive restraints "as an act of government."[11] This rule was extended later to concerted efforts to influence lawmakers to enact legislation detrimental to competitors of the lobbyists, or to influ-

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5. 435 U.S. at 392 n.6; 532 F.2d at 432-33.

6. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 498-99 (1969). *See also* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST §§ 150, 152 (1977).

7. Electrical service was tied to the tying product, gas and water service; the defendant allegedly had the requisite market power to unreasonably restrain competition in electrical service. 435 U.S. at 403-04. *See* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502-03 (1969). The cities, the original plaintiffs, alleged improper refusals to wheel power, boycotts directed at the cities, and sham litigation. 435 U.S. at 392 n.5.

8. This issue could easily have been addressed in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), which involved an allegation of tying "free" light bulbs (the cost of which must have been absorbed in the rates charged for the tying service) to electrical service. But the case did not address this issue. It was held that the anticompetitive activity did not qualify for the state action exemption since the free light bulb program was not mandated by state regulation. *Id.* at 598. In *City of Lafayette*, on the other hand, the issue was "under what circumstances a State's subdivisions engaging in anticompetitive activities should be deemed to be acting as agents of the State." 435 U.S. at 410 n.40.

9. Interestingly enough, each party alleged sham litigation by the other. 435 U.S. at 392 nn.5&6.

10. 317 U.S. 341 (1943).

11. *Id.* at 350-52. *See State Action*, 48 ANTITRUST L.J. 1281 (1980).

ence the executive branch to enforce such laws.[12] The Supreme Court has warned, however, that there may be instances in which the alleged conspiracy "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."[13] Such sham efforts were found in *California Motor Transport v. Trucking Unlimited*[14] where the defendants had instituted state and federal proceedings to resist and defeat applications for trucking company operating rights. A cursory analysis indicates that the sham litigation rule should apply to a municipal corporation in the same way that it does to a private business competitor, at least when the municipality engages in proprietary activity in competition with private business. This interesting and complex issue is addressed by a companion article in this symposium and is not discussed here.

This article addresses the issue of the choice of appropriate antitrust analysis of municipal proprietary conduct[15] and will suggest some reasons for modification of the traditional approach. Uniform application of the antitrust laws to municipal and non-municipal enterprises alike is appealing because of the massive volume of precedent and judicial experience with non-municipal antitrust issues. Uniformity begets certainty, and predictability is as necessary to municipal corporations as it is to other businesses. However, strict application of traditional antitrust concepts to municipalities may preclude consideration of unique factors that do not affect competition but that do relate to the municipality's goal of serving the public interest. A municipal corporation differs from private enterprise in purpose, function, and method of operation. Equating these distinguishable entities for all antitrust purposes produces inequitable results.

Initially, this article undertakes a brief overview of the current state of antitrust analysis. The complementary concepts of the rule of reason and the per se doctrine, as currently applied, are central to the adjudication of anticompetitive conduct. Continuing from that point, it will be instructive to examine antitrust analysis in cases where purported immunities have

12. United Mine Workers of America v. Pennington, 381 U.S. 657, 669-71 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-38 (1961). *See also* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (petition of administrative agency by competitors immune from antitrust liability).

13. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. at 144 (1961).

14. 404 U.S. 508 (1972).

15. In his concurring opinion, Chief Justice Burger, quoting the district court's opinion, denotes this as, "business activity," "activity in which a profit is realized." 435 U.S. at 418 (Burger, C.J., concurring). The old governmental-proprietary distinction is not being referred to at this point.

not been found to apply. Recent decisions involving the learned professions and regulated utilities suggest, by analogy, the manner in which municipal conduct might be analyzed if a modified approach is not used. Traditional antitrust analysis does not properly account for the unique business setting in which cities operate and the public policies underlying municipal decisions. Thus, section IV of this article provides a modified approach for consideration of these factors. Finally, the article deals with two related considerations: the extent to which municipalities should be permitted to initiate sham litigation and the question of whether the appropriate antitrust rule should be applied retroactively, purely prospectively, or partially prospectively.[16]

II. THE RULE OF REASON AND ITS COUNTERPART, THE PER SE DOCTRINE

The vague, overbroad language of section 1 of the Sherman Act[17] invites substantial judicial interpretation. It is recognized that the intent of Congress was to reach as far as the Constitution would permit;[18] nevertheless, some limitation on the sweep of the act was required. The classic articulation of the standard by which business conduct was to be judged came in *Standard Oil Co. v. United States*.[19] There, the Sherman Act was construed to prohibit only those acts that unduly restrain trade.[20] The Court stated that "the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason . . . ."[21] This rule was further delineated in *Chicago Board of Trade v. United States*:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the

16. *See* text accompanying notes 110-23 *infra*.

17. 15 U.S.C. § 1 (1976): "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal." The statute was originally enacted on July 12, 1890. Sherman Act, ch. 647, § 1, 26 Stat. 609.

18. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 398 (1978) (citing Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 229-35 (1948)).

19. 221 U.S. 1 (1911).

20. *Id.* at 60.

21. *Id.* at 62.

> purpose or end sought to be attained, are all relevant facts.[22]

In sum, only those restraints that unduly or unreasonably restrain trade violate the Sherman Act. Under the rule of reason, unreasonableness may be found only after all market considerations, business reasons, and viable alternatives are reckoned with.

Recent cases have relied primarily upon the classic enunciation of the rule of reason.[23] It must be observed that the scope of the analysis is limited, as expressed in *National Society of Professional Engineers v. United States*[24] where the Court noted that the inquiry into the reasonableness of a restraint "is confined to a consideration of impact on competitive conditions."[25] No broad justification is permitted; only the scope of the competitive effect should be considered. Thus, under the rule of reason, an anticompetitive restraint on trade will not be excused by countervailing considerations of public safety or welfare.

Once the rule of reason had received judicial acceptance, certain business practices were found so frequently and clearly destructive of competition that there was little need to dwell upon possible justification for them. Although the term "per se" had not yet been adopted, an early case involving an agreed division of markets by horizontal competitors summarily held the agreement anticompetitive, without regard to the market conditions for the agreement.[26]

Although the strictures of the rule were later shaken,[27] in its final form the per se rule was embraced as the prescribed test for price fixing,[28] group boycotts,[29] division of markets between horizontal competitors,[30] and tying arrangements.[31] A frequently-quoted test for applying the per se rule was enunciated by Justice Black in *Northern Pacific Railway v. United States*:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are

22. 246 U.S. 231, 238 (1918).

23. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). In both cases, *Chicago Board of Trade* was quoted as a statement of the rule.

24. 435 U.S. at 690-91 & n.17.

25. *Id.* at 690 & n.16.

26. United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

27. *See* Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

28. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

29. Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).

30. White Motor Co. v. United States, 372 U.S. 253, 263 (1963).

31. International Salt Co. v. United States, 332 U.S. 392 (1947).

> conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.[32]

The Court has cautioned against hasty adoption of a per se rule for practices formerly analyzed under the rule of reason; only after considerable experience with certain business relationships should courts classify them as per se antitrust violations.[33] While the Court has referred to the per se rule as "a valid and useful tool of antitrust policy and enforcement,"[34] such a drastic rule is not necessarily appropriate for analyzing the activity of municipalities. Municipalities are clothed with a protective mantle of public policy, and there may be "redeeming virtue" that outweighs any "pernicious effect." Several cases suggest that traditional per se concepts do not apply in unusual contexts[35] and the proprietary activity of a municipal corporation may qualify for special treatment.

A number of factors are relevant in deciding whether to extend a per se rule to a particular business practice not theretofore adjudicated violative of section 1 of the Sherman Act. A preliminary process applies a "mini rule of reason" for this purpose. The per se rule is justified when:

> (1) the practice unreasonably and substantially restrains competition in most instances;
> (2) legitimate objectives or redeeming virtues are rarely present, while viable business alternatives are usually present;
> (3) it is necessary to dispense with lengthy and complex litigation over monopoly power and issues of purpose or effect of business practice; and
> (4) a bright line is useful in distinguishing the practice from other

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32. 356 U.S. 1, 5 (1958).

33. United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08 (1972).

34. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 8 (1979) (footnote omitted).

35. *See* National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679 (1978); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). In Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) and Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), utilities were subjected to standard antitrust analysis where they exceeded the scope of the statutory monopoly. A municipality, however, does not necessarily lend itself to traditional analysis since different public policies obtain.

less anticompetitive practices.[36]

The Supreme Court has not retreated from its position that a number of business restraints warrant the summary treatment the per se rule provides.[37] Some practices, such as price fixing, have become so firmly engulfed by the rule that little preliminary analysis is needed when the earmarks of the practice are found. Other types of restraint gradually are being included in the per se category after careful consideration by courts. Occasionally, business practice is even removed from the per se category.[38] Classification or declassification of the practice requires detailed analysis of the competitive market conditions and substantial judicial justification for the change.[39] For the antitrust defendant, a determination that challenged conduct constitutes a per se violation is highly significant. The effect of the per se doctrine's conclusive presumption of illegality is to foreclose any proof of excuse or justification for the activity[40] and the detailed inquiry under the rule of reason is unavailable. A per se rule is justified because it provides clear guidelines to the business community, allows greater predictability, and minimizes the burdens on the judicial system imposed by the more complex rule of reason cases.[41] As the Supreme Court has noted, courts often are of limited utility in examining difficult economic problems;[42] however, courts usually do not apply per se rules to business restraints until they have had considerable experience analyzing them.[43]

Allegations of antitrust violation require a meticulous and painstaking preliminary investigation to classify the challenged conduct into one of a number of competitive restraints that have been catalogued in the past. Where the type of activity is new or unique, a more detailed inquiry is required. *White Motor Co. v. United States*[44] was the first case to come

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36. See the extensive discussion in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). *See also* P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 314 (1978); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST §§ 70-72 (1977).

37. *See* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

38. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57 (1977). *Sylvania* overruled United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), which had declared vertical territorial restrictions to be per se illegal where title to goods had passed to a buyer.

39. *See, e.g.*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969).

40. "*Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices . . . . Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them." Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1977).

41. *Id.*

42. United States v. Topco Assocs., Inc., 405 U.S. 596, 609 (1972).

43. *Id.* at 607-08.

44. 372 U.S. 253 (1963).

before the Supreme Court involving a challenge to a vertical territorial restriction. The Court indicated that comprehensive knowledge of the actual impact of the restraint was required.

> We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain . . . . We need to know more than we do about the actual impact of these arrangements on competition to decide whether they . . . should be classified as *per se* violations of the Sherman Act.[45]

If the alleged restraint is not readily identifiable as one of the established per se types, categorization analysis is utilized before proceeding to apply the rule. Thus, in *United States v. Sealy, Inc.*,[46] it was necessary for the Court to go beyond mere form and to determine the substance of the territorial restraints in question.[47] Once the Court found that the restraints were, in fact, horizontal, the agreements were held illegal per se.[48] Categorization analysis also seeks to pinpoint denominative elements of the per se offense. For example, in *Fortner Enterprises, Inc. v. United States Steel Corp.*[49] the Court's categorization analysis involved extensive economic and market analysis to show specific elements of a tying situation.[50]

The dogmatic approach of the per se doctrine is thus ameliorated to some degree by allowing the defendant the opportunity to show, at an early stage in the inquiry, that a per se rule is inappropriate. Furthermore, depending upon the species of conduct involved, in-depth analysis of the market and economic structure of the business and industry must be made in some cases. The threshold opportunity to justify or explain the business conduct is critical for the defendant because, if a per se rule is applied, no further explanation or justification will be permitted.

The Burger Court has adopted a sympathetic attitude to antitrust goals and gives preference to antitrust rather than regulatory solutions to competitive restraints.[51] The Court has moved, to some degree, from a strict,

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45. *Id.* at 263.

46. 388 U.S. 350 (1967).

47. Licenses granted by Sealy to local manufacturers contained territorial restrictions. Although this arrangement appeared to be a vertical restraint, it was classified as a horizontal allocation of territory because Sealy was controlled by the licensees. *Id.*

48. *Id.* at 357-58.

49. 394 U.S. 495 (1969).

50. This kind of analysis is required to show that a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product, as well as to show that a not unsubstantial amount of interstate commerce is affected. *Id.* at 499-506.

51. Posner, *The Antitrust Decisions of the Burger Court*, 47 ABA ANTITRUST L.J. 819, 821 (1978).

abstract per se approach to more realistic rule of reason analysis.[52] This approach should bring more meticulous analysis of the economic realities of competitive restraints.[53] On the other hand, the antitrust defendant should now be able to marshal more persuasive reasons to justify the restraint before succumbing to the compulsion of the per se rule.

For the municipal defendant, the implications of the foregoing analysis are significant. First, the continued vitality of antitrust litigation against municipalities is assured. Second, a move away from frequent application of per se rules may accrue to the benefit of cities, because special economic considerations may be offered in their defense. Third, where possible per se violations are asserted, the preliminary inquiry into the circumstances surrounding the activity may be the only opportunity for municipalities to offer unique justifications in defense. Finally, after *Professional Engineers*,[54] there is considerable doubt that the traditional rule of reason approach is flexible enough to take public interest factors into account. With this in mind, the next section of this article deals with the possibility of special treatment in the absence of a specific antitrust immunity.

III. ANTITRUST ANALYSIS IN THE ABSENCE OF IMMUNITY

As was the case in *Lafayette*, the issue of immunity frequently is raised on a motion for summary judgment or dismissal. There is thus sparse guidance from case law as to the method by which courts will apply antitrust law to municipalities.[55] It is instructive to examine related cases applying antitrust law in the absence of immunity to entities other than municipalities. While the results in these cases may not be particularly encouraging to municipal defendants, they indicate that courts might consider distinctions between different types of enterprise.

A. The Learned Professions

Whatever hope there was for the existence of antitrust immunity for the learned professions was effectively eliminated by the decision in *Goldfarb v. Virginia State Bar*.[56] In that case, fee schedules for member attor-

52. Bock, *An Economist's View of the Supreme Court's Recent Antitrust Decisions*, 47 ABA ANTITRUST L.J. 829, 830 (1978).

53. *Id.* at 844.

54. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978).

55. *See, e.g.*, Kurek v. Pleasure Driveway & Park District, 583 F.2d 378 (7th Cir. 1978); Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978). In *Woolen*, the court merely stated that the city "must play by the same competition rules as others." *Id.* at 1040.

56. 421 U.S. 773 (1975). Although there was a *Parker* defense raised in *Goldfarb* as well, the

neys were alleged to violate the antitrust law. The Court first considered the conduct and found: "[A] naked agreement . . . the effect on prices is plain . . . . [A] classic illustration of price fixing."[57] This, under traditional analysis, was a clear per se violation; there is no suggestion that any approach other than a traditional one was used to reach this conclusion. As to the immunity of the profession, the Court stated: "The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act . . . nor is the public-service aspect of professional practice controlling."[58] Thus, the lack of immunity meant liability under traditional analysis. As in *City of Lafayette*, the status or identity of the defendant did not provide an antitrust defense. Further, the public service aspects in *Goldfarb* did not justify special antitrust treatment.

It is important to note, however, that the Court qualified its finding with a footnote:

> 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 . . . . [A] particular practice, which could properly be viewed as a violation of the Sherman Act in another context, [may] be treated differently.[59]

If a certain activity is to be treated differently, and the immunity determination is not to be the source of special consideration, then flexibility should be used in applying the antitrust laws after immunity has been rejected. The end suggested by the *Goldfarb* footnote could be achieved by modification of traditional antitrust analysis.

In *Professional Engineers*, the Court did not opt for this alternative, but merely restated the classic rule of reason test and refused to consider other non-competitive justifications.[60] Whether the Court applied a per se rule or the rule of reason is uncertain.[61] In either case, however, the Court avoided the special treatment suggested in *Goldfarb*.

These cases are consistent with *Lafayette* since the status or identity of the defendant was not, of itself, sufficient for immunity. In each case, the restraint involved was a species of price fixing, a practice absolutely and vigorously condemned by antitrust courts. Neither case, therefore, presented a compelling need for innovative analysis. It is unlikely that any

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analysis here deals only with the defendant's reliance on immunity for a learned profession.

57. *Id.* at 782-83 (footnote omitted).

58. *Id.* at 787 (citations omitted).

59. *Id.* at 788-89 n.17.

60. 435 U.S. 679, 686-96 (1978).

61. Note, *The Professions and Noncommercial Purposes: Applicability of Per Se Rules Under the Sherman Act*, 11 U. MICH. J.L. REF. 387, 414 (1978); Note, 62 MARQ. L. REV. 260 (1978).

justifications could be offered that would offset the particularly negative effect of price fixing in a free market.[62] Nonetheless, a possibility for a more liberal approach may ultimately be found in cases involving different conduct.

B. Regulated Utilities

Analysis of antitrust violations by regulated activities again reflects a traditional analysis. There is, however, some indication from the Supreme Court that utilities may warrant special treatment because of the unique market structure in which they operate.

In *Otter Tail Power Co. v. United States*,[63] the Court found a per se violation of the Sherman Act in contract provisions that restricted the utility's obligation to "wheel" or wholesale power. The Court also found that Otter Tail was using its monopoly power unlawfully to maintain its dominant position in the market for electricity in rural areas.[64] The majority opinion is a straightforward application of traditional antitrust concepts.

The dissent, however, in this 4-3 decision, raised some interesting questions. Justice Stewart observed that Otter Tail was part of a "highly regulated, natural-monopoly industry wholly different from those that have given rise to ordinary antitrust principles."[65] He also noted that, under the facts of the case, there would be a monopoly at the retail level, whether power was sold by Otter Tail or by a municipally owned company. This factor, in his view, sufficiently distinguished the case for antitrust purposes: "Antitrust principles applicable to other industries cannot be blindly applied to a unilateral refusal to deal on the part of a power company, operating in a regime of . . . licensed monopolies."[66] The dissenting opinion in *Otter Tail* was subsequently referred to in *Cantor v. Detroit Edison Co.*[67] The majority in *Cantor* recognized the special character of public utilities and noted that regulation, either state or federal, is imposed on utilities to "avoid the consequences of unrestrained competition."[68] Referring to the dissent in *Otter Tail Power*, the Court stated:

> [P]ublic utility regulation typically assumes that the private firm is a

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62. *See* Kennedy, *Of Lawyers, Lightbulbs, and Raisins: An Analysis of the State Action Doctrine Under the Antitrust Laws*, 74 NW. U.L. REV. 31, 73 (1979).
63. 410 U.S. 366 (1973).
64. *Id.* at 377-79.
65. *Id.* at 382 (Stewart, J., dissenting).
66. *Id.* at 389.
67. 428 U.S. 579, 596 n.35 (1976).
68. *Id.* at 595.

> natural monopoly and that public controls are necessary to protect the consumer from exploitation. There 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.[69]

This suggests that traditional antitrust analysis applies when the utility is operating in traditional competitive activity. Where competition is not the norm, it is assumed that appropriate state regulation exists to forestall the evils of "unrestrained competition" or natural monopoly. This does not anticipate the problem created by *City of Lafayette*. How will the antitrust law be applied to a natural monopoly, not subject to state regulation[70] and not necessarily operating in an area of normal business activity?

The concurring opinion by Justice Blackmun suggests a "rule of reason" balancing test for evaluating the anticompetitive conduct.[71] The balance to be struck is between harm to competition and benefit to state interests, such as public health or safety. Justice Blackmun recognized that state-sanctioned monopoly and private activity should not be treated alike; the existence of state delegation of power gives weight to the justification on public interest grounds.[72]

The central issue in *Cantor* was, of course, the breadth of the state action immunity. For the purposes of the decision, the antitrust violation was assumed. The balancing test proposed by Justice Blackmun was intended to be a method for accommodating state regulation with the antitrust laws. While it has not been used as a method for determining whether the antitrust laws apply,[73] the underlying rationale may have utility in antitrust analysis. It recognizes that public interest factors are critical in this area of antitrust law. The various opinions in *Otter Tail* and *Cantor* emphasize that not all conduct is identical for antitrust pur-

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69. *Id.* at 595-96 (footnotes omitted).

70. The municipal utilities in the *City of Lafayette* case were not subject to state regulation. 435 U.S. at 404 n.27. *See also* Note, *Antitrust—Whither Municipal Antitrust Liability After* Lafayette?, 15 WAKE FOREST L. REV. 89, 100-04 (1979).

71. Cantor v. Detroit Edison Co., 428 U.S. 579, 610-12 (1976) (Blackmun, J., concurring).

72. *Id.* at 611.

73. *See* Davidson & Butters, Parker *and* Usery*: Portended Constitutional Limits on the Federal Interdiction of Anticompetitive State Action*, 31 VAND. L. REV. 575, 593-94 (1978); Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363, 1387 (1978). The test proposed by Justice Blackmun has been the subject of much comment. *See, e.g.*, Kennedy, *supra* note 62; Rogers, *The State Action Antitrust Immunity*, 49 U. COLO. L. REV. 147 (1978); Note, *The State Action Antitrust Exemption: The Confinement of the Parker Doctrine Within the Emerging Cantor Formula*, 29 HASTINGS L.J. 211 (1977).

poses. Utilities present a unique problem that usually is addressed by specific statutory regulation.[74] This uniqueness should not be ignored if the conduct in question is not covered by an antitrust immunity.

IV. ANTITRUST ANALYSIS OF MUNICIPAL ACTIVITY

A. Some Preliminary Observations

The proper scope of the *Parker* state action immunity has generated considerable scholarly debate.[75] The line of cases culminating in *City of Lafayette* has defined the limits of the doctrine's application, but the primary focus of these discussions has been the application of immunity. A strict standard for granting immunity is justified because immunity precludes *any* antitrust investigation, without regard to the degree of anticompetitive effect present. Thus, there is no compelling requirement that government and private enterprise be treated differently at the immunity stage.

It does not follow, however, that these entities should be equated for *all* antitrust purposes. Rejection of antitrust immunity should not always *require* a traditional application of traditional antitrust concepts. Implicit recognition that some conduct may take on a different character based on factors relating to the identity of the actor is evidenced in several immunity cases.[76] The Court in *City of Lafayette* suggested as much: "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."[77] Even if immunity is withheld, the distinction between private and municipal proprietary conduct should be considered at some point in the proceedings. Obviously, status alone should not be controlling. Nonetheless, there are distinctions between private and governmental activity that, if properly considered, should affect the outcome of the analysis.

Traditional rule of reason analysis, as described in *Professional Engi-*

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74. *See* text accompanying notes 87-89 *infra*.

75. *See, e.g.*, Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U.L. REV. 693 (1974); Slater, *Antitrust and Government Action: A Formula for Narrowing* Parker v. Brown, 69 NW. U. L. REV. 71 (1974); Teply, *Antitrust Immunity of State and Local Governmental Action*, 48 TUL. L. REV. 272 (1974).

76. *See, e.g.*, National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). *See also* Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363, 1364-70 (1978).

77. 435 U.S. at 417 n.48. The use of the word "appear" is curious. The appearance of anticompetitive effect is not the basis of liability; rather, it is the *existence* of anticompetitive effect which triggers antitrust sanctions. If appearance is all that concerns the court, then the note is superfluous.

neers,[78] is not flexible enough to account for factors other than those that have some effect on competition. To limit the analysis to this degree is to assume that a municipality is the functional equivalent of private enterprise in all cases. There are major differences between the two entities that justify a modified approach for the defendant municipality.[79] The first of these relates to public interest and is based on the role of the municipality operation.[80] Uniqueness may be the result of a different economic motivation on the part of the city. It may also result from the market structure, as in the case of a municipal utility. Obviously, traditional analysis would account for economic factors to the extent competition is affected. But where there are anticompetitive effects caused by public policy reasons, traditional analysis would ignore the justifications and condemn the conduct.

From a practical standpoint, the point in the analysis at which these distinctions are considered makes little difference. The present type of antitrust analysis may be divided into three stages. The first stage, the determination of antitrust immunity, is not the appropriate point to raise distinctions between the entities.[81] The differences might, however, be considered at the second stage, the application of antitrust law. Alternatively, they could be mitigating factors considered at the third stage, when remedies and damages are determined.[82] Regardless of the stage at which the distinctions are considered, ultimately the goal is minimization of liability.

B. Distinctions Between Municipal and Private Enterprise

The first difference between a municipality and private enterprise is the element of public interest. Municipal corporations must serve dual roles. In what is denominated the "governmental" role, municipalities act as agents of the state.[83] Most frequently this is accomplished through a

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78. *See* text accompanying notes 60 & 61 *supra*.

79. Note, *The Antitrust Liability of Municipalities Under the* Parker *Doctrine*, 57 B.U. L. REV. 368, 379, 381-82 (1977) [hereinafter cited as Note, *Liability of Municipalities*].

80. *See, e.g.*, *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 285-86 (1978); Note, *Liability of Municipalities*, *supra* note 79, at 381-84; Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt From Sherman Act Coverage Under the* Parker *Doctrine?*, 65 GEO.L.J. 1547, 1556-61 (1977); Note, *Antitrust Law—Municipal Immunity—Application of the State Action Doctrine to Municipalities*, 1979 WIS. L. REV. 570, 580-82.

81. The fact that immunity absolves the actor in all cases is an underlying reason for the result in *City of Lafayette*.

82. See Comment, *Antitrust Treble Damages as Applied to Local Government Entities: Does the Punishment Fit the Defendant?*, 1980 ARIZ. ST. L.J. 411.

83. *See* Note, *Liability of Municipalities*, *supra* note 79, at 377-78.

delegation of the state's police power.[84] In the other, "proprietary" role, the municipality seeks to further the creature comfort interests of its citizens. It is not always possible to distinguish clearly between these two roles.[85] The range of services provided by a municipality includes fire and police protection, education, public health facilities, refuse collection, and utilities. To varying degrees, these functions reflect the state's interest in the health, welfare, and safety of its inhabitants. However, the type and quality of a particular service also reflects the local concerns of the city's residents. To the extent the two roles overlap, immunity will attach, after *City of Lafayette*, only where there is explicit state authorization and direction for the municipality's conduct.[86] It is conceivable that some service activity would not meet the *City of Lafayette* test, but would nevertheless involve an element of public interest. To equate that activity with private enterprise interests is to ignore this distinction.

Public interest is also involved in another way. Depending upon the particular service involved, the municipality will encounter varying levels of competition from private business. It is unlikely, for example, that a private firm would endeavor to provide city-wide police or fire protection. It is likely, however, that private businesses would be engaged in refuse collection and utility services. Citizens have come to demand certain services from government; thus, for an activity which cannot attract entrants from the private sector, an important public interest is served by the municipality that provides a desired or required service without regard to direct economic reward.

Related to the public policy element of municipal conduct noted above are some unique economic factors. First, some services provided by municipalities are in areas conducive to the development of natural monopoly.[87] Competition in these areas is inadequate to prevent concentration of economic wealth and power. Thus, one goal of antitrust law, free competition, is not achieved. State regulation is used as an acceptable substitute for competition to prevent the abuses of monopoly.[88] State regulation, of course, is generally permitted, even though anticompetitive, by application

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84. *See* 1 E. YOKLEY, MUNICIPAL CORPORATIONS §§ 62-64 (1956 & Supp. 1978).

85. 2 E. MCQUILLIN, MUNICIPAL CORPORATIONS §10.05 (3d ed. 1979).

86. 435 U.S. at 417.

87. Utilities are the chief example. *See* Jones, *Antitrust and Specific Economic Regulation: An Introduction to Comparative Analysis*, 19 A.B.A. ANTITRUST SECTION 261, 267-69 (1961). For a discussion of the utility industry in general, see Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 COLUM. L. REV. 64 (1972); Shenefield, *Antitrust Policy Within the Electric Utility Industry*, 16 ANTITRUST BULL. 681 (1971); Note, *Regulation, Competition, and Your Local Power Company*, 1974 UTAH L. REV. 785. For an argument against regulation of utilities, see Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55 (1968).

88. *See* Kennedy, *supra* note 62, at 49-50 (1979).

of the *Parker* immunity. A municipality may still seek the same ends, although it is not subject to, or a participant in, state regulation. To the extent that a municipality acts to prevent abuse of natural monopoly power,[89] some consideration should be afforded it.

Municipal operation of certain utility services may provide for reduced rate levels.[90] Rate-setting by the municipality may or may not generate excess revenue (the equivalent of "profits") for the city.[91] Even if the rates do generate "profit," the excess revenue may be applied to reduce tax levies for other services. Where a private entity is involved, profit must be returned to owners and consumer benefit is usually limited to those consumers who are also owners. For municipalities, the beneficiaries of excess revenues are all of the resident taxpayers. Of course, this distinction breaks down where city services are provided outside the political limits of the city.

The municipal corporation is also subject to control by its electorate. As the plurality in *City of Lafayette* noted, this control is not necessarily sufficient to displace the antitrust law.[92] But, why should the citizens not be allowed to submit to anticompetitive practices in order to achieve some associated public benefit? Consumers of goods and services in the private sector do not have the option to control the anticompetitive behavior of private suppliers.

The distinctions discussed above are not sufficient to justify complete antitrust immunity. Involved in any analysis of these factors are a number of questions of degree that must be resolved on a case-by-case basis. There are, however, distinctions that are significant enough to compel some separate treatment under the antitrust laws. The framework of analysis to be employed is described in the following section.

C. *A Framework for Antitrust Analysis*

The decision in *City of Lafayette* was confined to the first stage of antitrust analysis, but the process in which no immunity is found may affect the analysis used in the second stage. Any modification of traditional analysis will depend on the degree to which distinctions are considered at the first stage. In any event, the traditional antitrust analysis can easily be

89. The possibility of abuse is recognized in *City of Lafayette*. 435 U.S. at 403-04.

90. Note, *Regulation, Competition, and Your Local Power Company*, 1974 UTAH L. REV. 785, 793 n.55.

91. 12 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 35.37c. (1970 & Supp. 1979).

92. 435 U.S. at 406.

adjusted to the unique circumstances of cities.

1. Analysis Based on the Plurality's Test in *City of Lafayette*

The *Lafayette* plurality applied a test for immunity based on the source of the challenged conduct. If the municipality is acting pursuant to the authorization or direction of the state, immunity will attach.[93] This approach reflects a narrow view of the *Parker* doctrine.[94] Immunity will be extended beyond the state level only in those cases where it is determined that the state contemplated the anticompetitive conduct. Subordinate state agencies, municipalities, and private parties will not be afforded special treatment unless a significant state policy is furthered by their conduct.[95]

Where the state legislative enactment is silent as to state policy, or the state policy is neutral, there is no need at the immunity stage to delve into possible justifications for the anticompetitive practices. Therefore, unless justifications are to be considered at the third stage (the determination of remedies and damages) or ignored entirely, then they must be considered at the second stage.

The first step in traditional analysis is a preliminary examination of the challenged conduct to determine whether the per se rule applies. At this point, the unique business setting of a particular municipal activity may be asserted to avoid a per se classification. It is also appropriate to consider the public policy factors unique to cities at this point. Frequently, the two considerations are interrelated. There may be reasons for avoiding a per se application that are not found in the usual setting of solely private competition. Granted, if the effect of the municipality's conduct is unreasonably destructive of competition, strong policy reasons might be needed to justify the conduct. But, as Justice Blackmun suggested in his opinion in *Cantor*, courts are equipped to balance these considerations.[96]

The per se rule recognizes the particularly serious consequences of certain behavior. The application of per se rules assumes that there rarely, if ever, would be any sufficient justification for the conduct, and therefore any inquiry into purpose or consumer benefit is superfluous. The assumption loses some force in the municipal context, where public policy factors have greater weight,[97] and the need for a much greater degree of preliminary scrutiny of municipal conduct is apparent. However, once that point

93. *Id.* at 417.
94. See Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363, 1364 (1978).
95. 435 U.S. at 413.
96. 428 U.S. at 612 (Blackmun, J., concurring).
97. See Kennedy, *supra* note 62, at 67.

is passed, there is no need for a modified per se approach. The conclusive presumption of illegality should apply equally to municipalities and private actors.

The allegation of tying made in the *City of Lafayette* case provides a good example.[98] If the allegation is true, the conduct in question constitutes a traditional per se offense. If it could be shown that the case is novel or unique, or that there are substantial policy factors underlying the conduct, then a per se rule is inappropriate. If, on the other hand, there is no public policy justification for the tying arrangement, a per se rule should be applied. Where distinctions relating to the status of the enterprise are not significant, it is obvious that antitrust treatment should be the same.

Where there are sufficient reasons for not applying a per se rule, it may also be appropriate to adopt a modified rule of reason approach. Under the traditional rule of reason approach, all competitive effects are considered but, as noted above, the municipal defendant could offer justifications for anticompetitive conduct based on factors other than its competitive effect. These justifications are available to a municipality to a greater degree than to private actors.[99] Again, the balancing approach suggested by Justice Blackmun is an appropriate way to expand traditional rule of reason analysis.[100]

2. The Proprietary-Governmental Test

Chief Justice Burger's concurring opinion in *City of Lafayette* suggested a test for immunity based on a distinction between proprietary and governmental activity.[101] If this test is used, there would be careful inquiry at the first stage into both the policy and economic motivation for the municipality's conduct. Obviously, where public policy factors are paramount, the activity would be classified as governmental and would be immune from antitrust liability. Proprietary activity would be immune only if required by the state, and then only to the extent necessary to make the regulatory scheme work.[102] Thus, proprietary activity not re-

98. 435 U.S. at 403-04.

99. "Private parties charged with conspiring to restrain trade are not allowed to claim that they are acting in the public interest because they are not subject to public control and because self-interest may affect their judgment. When a restraint is imposed by city officials acting as representatives of the public, however, it has the sanction of a disinterested and representative body . . . . " *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 277, 285-86 (1978).

100. *Cf. id.* at 286 (suggesting a test for municipal regulation based on a rational relation standard).

101. 435 U.S. at 418-26 (Burger, C.J., concurring).

102. *Id.* at 425-26.

quired by the state would then be scrutinized under the antitrust law.

Under this test, because justifications for the activity would be considered at the first stage of analysis, there is less reason to suggest a modified antitrust approach. However, detailed inquiry has resulted in intense analysis of the competitive setting making the need for strict application of per se rules less compelling.[103] This test has met criticism because of the difficulty in drawing clear distinctions between proprietary and governmental activity.[104] Nonetheless, if this approach can be the basis for a modified rule of reason test, a fairer and more thorough result will be obtained. Public policy factors that support finding governmental activity under Chief Justice Burger's test can adequately be considered under a rule of reason approach and then weighed against the anticompetitive effect. No clear cut distinction is necessary. Only a careful judicial balancing of the competing factors need be accomplished.

D. An Example

To demonstrate a flexible approach to antitrust analysis of municipal conduct in light of *City of Lafayette*, and to illustrate the potential difficulties of using only traditional antitrust concepts in the absence of absolute *Parker* immunity, let's create a hypothetical problem. Suppose that, in a given city, three competing private firms provide refuse collection service to subscription customers for a fee of $10 per month. The competition in this market has reached a short-term equilibrium position, and by reason of cost factors, service fees are at a level where further reductions are impossible.[105] There is no competition based on non-price factors because services offered by the firms are identical. Assume further that the city officials perceive a need for a city-run service in order to provide better sanitation for the city for important and legitimate public health reasons. The city can reduce health hazards through the use of more modern, more sanitary collection equipment. Also, the new equipment will be more cost-efficient, and more frequent collections can be made. The purchase of new equipment is made possible by financing that is less costly than financing available to private operators. The city can provide

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103. *See* Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976). The court in *Mackey* explained that once a court has undertaken lengthy and burdensome inquiries into the operation of a particular industry, there is no basis for application of the per se doctrine. *Id.* at 619-20.

104. 435 U.S. at 433 (Stewart, J., dissenting). *See also* Note, *Liability of Municipalities, supra* note 79, at 384-85; Note, *Antitrust Law—Municipal Immunity—Application of the State Action Doctrine to Municipalities*, 1979 WIS. L. REV. 570.

105. If this service is of a type which lends itself to the creation of a natural monopoly, then in the long run, one of the three competing firms could gain a superior position and eliminate the other two. This possibility does not affect the outcome of this example.

this service at a cost to customers of $7 per month, including the debt service on the financed equipment. This is possible because of economies of scale (reduced overhead, existing public works department, facilities for bookkeeping and billing) and the use of modern equipment. Further, the city is not generating excess revenue ("profits") at this price. Without specific state authorization, the city enacts an ordinance establishing the program. Participation by residents is voluntary. At this point rational consumers will switch from the private firms to the public service.[106] The private services will probably be unable to meet this new competition, and ultimately they will be driven from the market. Elimination of competition is hastened or facilitated if the city subsidizes its service with revenues generated from other sources.

The negative effects on competition, caused by the entry of the city into the market for this service, are clear.[107] The city enjoys substantial monopoly power by virtue of its status as the governing unit. Is there an illegal use of that power here? If a private competitor achieved the same monopoly power under similar circumstances, there would not necessarily be an antitrust violation. But analyzing only the competitive aspects of the city's conduct ignores other determinative factors. First, there are valid health and public welfare reasons for the city's conduct; second, there is no profit motive for the city to enter the market; third, city residents are presumably benefited by the city's entry, and this is the primary reason for such entry.

Traditional antitrust analysis of this problem would ignore effects not directly related to competition. This approach would ignore important factors of public health, welfare, and convenience, factors that are reasons for the very existence of the city. Such factors arise in a number of proprietary operations of municipalities. Municipalities may operate sports arenas, convention centers, airport facilities, transit and utility systems, or public health services. A city may regulate competition through zoning commissions or through purchasing or franchising operations.[108] The city frequently has massive economic power based on its status as a govern-

106. It is possible that the private firms would attempt to meet the lower service fee. The city, by virtue of the advantage of generating revenue from other sources, can eliminate competition by merely operating this service at a loss for a period.

107. The example may be varied. Assume that the city was generating excess revenue. Chief Justice Burger might find this clearer evidence of proprietary activity. Furthermore, if the city had an established collection service and passed an ordinance closely regulating private firms, thereby making it more difficult to enter the market, would the conduct be permitted? Alternatively, what if the city granted an exclusive license to one private firm?

108. Bangasser, *Exposure of Municipal Corporations to Liability for Violations of the Antitrust Laws: Antitrust Immunity after the* City of Lafayette *Decision*, 11 URB. LAW. vii (1979).

mental entity.[109] If only the *effect* of this power is considered, there is a much greater chance of an unfavorable result in antitrust litigation. The *source* of the power is examined under the immunity analysis of *City of Lafayette*. Under modified antitrust analysis, it is essential that the non-competitive *justifications* for the competitive *use* of the power be considered. Because municipalities differ substantially from private enterprises, the weight of these justifications must be given greater significance.

V. Related Considerations

A. Sham Litigation

One allegation in the counterclaim against the City of Lafayette concerned the use of "sham" litigation that purportedly had an anticompetitive effect on the power company.[110] The fundamental issue addressed by the Court was immunity and an exception thereto. Under the *Noerr-Pennington*[111] doctrine, private parties may act in concert to influence governmental action. The doctrine does not, however, necessarily apply to all such conduct, and where the action is not taken in good faith, it is a violation of the Sherman Act.[112]

Even without the *Parker* immunity, a municipality could conceivably rely on the *Noerr-Pennington* doctrine as a primary defense. Again, the question of status or identity of the perpetrator of the restraint is not relevant to the determination of immunity. The test for legality is whether the principal purpose of the concerted activity is to influence public officials or, instead, to block a competitor's access to the decision-making process.[113] Where there is a "pattern of baseless, repetitive claims," an abuse of the governmental process will probably be found.[114] Arguably, a municipality should be able to show much greater justification for conduct of this nature. For example, if a large number of city residents were affected by a particular problem, then judicial economy, strategy, and logistics suggest that the municipality act in their stead. However, there is no need for a modified rule of reason approach to this municipal conduct.

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109. *See* Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine*, 76 COLUM. L. REV. 1, 17-18 (1976).

110. 435 U.S. at 405.

111. The doctrine takes its name from the two cases in which it was established, Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and United Mine Workers v. Pennington, 381 U.S. 657 (1965).

112. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136-37 (1961).

113. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 511-13 (1972).

114. *Id.* at 512.

The traditional approach will appropriately consider all factors in determining whether a baseless claim against the municipality exists.

B. Retroactivity

Federal decisions are commonly accorded retroactive as well as prospective effect,[115] but some cases are limited to purely prospective, or a modified prospective, effect.[116] A number of factors must be considered in making this determination. In *Chevron Oil Co. v. Huson*,[117] the Supreme Court discussed these factors:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application . . . .[118]

City of Lafayette was apparently a case of first impression establishing a new principle of law. Also, the case overruled no precedent. Thus, to justify only prospective application of the result, it is necessary to determine whether the resolution was clearly foreshadowed. In defining this principle in another case,[119] the Court noted that "whatever development in antitrust law was brought about was based to a great extent on existing authorities and was an extension of doctrines which had been growing and developing over the years. These cases did not constitute a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks."[120] Implied exemptions to the antitrust laws are not favored,[121] and the few cases involving the *Parker* doctrine closely limited its application. Nonetheless, preceding cases in various circuits applied the *Parker* doctrine with different levels of severity.[122] Thus, it is not absolutely certain whether the *City of Lafayette* result would fit into the first part of the test. As to the second factor,

115. 1 MOORE'S FEDERAL PRACTICE ¶ 0.402 [3.-2-1] (2d ed. 1974).
116. *Id.* at ¶ 0.402 [3.-2-2].
117. 404 U.S. 97 (1971).
118. *Id.* at 106-07 (citation omitted).
119. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).
120. *Id.* at 498-99.
121. 435 U.S. at 399.
122. *Compare* Washington Gas Light Co. v. Virginia Elec. Power Co., 438 F.2d 248 (4th Cir. 1971), *with* Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971).

whether retroactive application of the rule in *City of Lafayette* will further or retard its operation, it must be remembered that the antitrust laws are both deterrent and punitive. Retroactive application would not further the deterrent purpose. The punitive objective, particularly harsh because of the statutory treble damages provision, presents difficulty when the third factor is considered.

The possibility of unjust injury or hardship is significant after the *City of Lafayette* result. Generally, a finding of hardship is based on justifiable reliance on the prior rule. However, if a decision clarifies the law in an uncertain area, the lack of controlling precedent provides no basis for reasonable reliance. "[A] party here can do no more than act upon the best available guesses of how a court . . . will approach the conflict . . . ."[123] Although there is substantial hardship if a municipality is held liable for treble damages,[124] substantial injury brought about by justifiable reliance on prior law, is lacking since the uncertainty of the law precludes justifiable reliance.[125] Nor can it be argued that the result in this case was not foreshadowed. The Court in *Parker* pointed out that "we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade."[126] The doctrine, as it evolved through *Cantor*,[127] *Goldfarb*,[128] and *Bates*,[129] was narrowed in actual application. It cannot be said that "prior to those cases potential antitrust defendants would have been justified in thinking that then current antitrust doctrines permitted them to do all acts conducive to the creation or maintenance of a monopoly . . . ."[130] Thus, the case does not present compelling reasons for prospective application of the new rule. If the rule is applied retroactively, there is further justification for a modified antitrust analysis, either at the second or third stage. As the dissent in *City of Lafayette* noted, the implications for municipalities are serious indeed. Because immunity may not be found, a modified approach would ameliorate the potential harsh effects of retroactivity.

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123. Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 946 (1962).

124. 435 U.S. at 440-41 (Stewart, J., dissenting).

125. 1 MOORE'S FEDERAL PRACTICE ¶ 0.402 [3.-2-4] (2d ed. 1974).

126. 317 U.S. at 351-52 (citation omitted). Of course, this dictum can be read both ways. The very ambiguity suggests caution for a potential actor.

127. Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

128. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

129. Bates v. State Bar, 433 U.S. 350 (1977).

130. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 499 (1968).

VI. CONCLUSION

City of Lafayette v. Louisiana Power & Light is fair warning to municipalities everywhere that the day of unfettered use of competitive restraints is past. The state action doctrine does not automatically exempt municipal conduct affecting private enterprise competing with municipal services. Municipalities have lost their implied exclusion from antitrust law, if ever they had such an exclusion. Thus, even a lawful monopolist may be subject to antitrust regulation when it seeks to exploit its monopoly in a manner not contemplated by its statutory authorization.

Having disposed of the protective mantle of state action immunity, the analysis turns to the practical application of antitrust rules and tests developed for private enterprise and private competitive restraints. The harsh, dogmatic per se rule does not lend itself to flexible adjustment in contemplation of the status of the municipality as an entity for the furtherance of the public health, safety, and welfare. The finality with which the rule summarily prohibits particular competitive restraints is inappropriate where many justifying factors favor an approach that takes into consideration the principal reasons for the existence of the municipality.

The traditional rule of reason, with its expansive approach and its acceptance of business reasons for the restraint, as well as its consideration of the availability of viable alternatives, is more appropriate than is the per se rule in analyzing the conduct of a municipality. But the rule of reason does not satisfy the need for a unique application of an antitrust rule that will recognize the authorized monopoly power inherent in municipal services and yet not unduly penalize the municipality for wielding such power. What is needed is an analytical approach that will restrict unfair extension of the statutory monopoly power of the municipality and at the same time permit all use of that power necessary to gain the full benefits of necessary services to which citizens of the municipality are entitled. The dilemma is obvious; the solution is not.

This paper has suggested a modified antitrust approach to the question of liability once the state action immunity has been rejected. Preferably, the approach should be incorporated into an early stage of the analysis, immediately after the rule of immunity has been found inapplicable. Before categorically labeling the municipal activity as per se illegal, the purpose for the existence of the municipality should be considered, as well as the public welfare objectives of the municipal service and the restraints effected by the challenged conduct. It may be that few municipally imposed anticompetitive restraints will be found to be per se illegal under this approach, but that is preferable to an analysis that is blind to the special situation of the municipality.

Urban citizens have come to rely upon government for many services

that were once privately provided. The list will expand as citizens demand more and more for their tax dollars. On the other hand, it has never been thought that municipal power should be used to unreasonably restrain private business enterprise in its appropriate arena. Where private enterprise and municipal power compete, compromise is necessary to satisfy the conflicting policies. It is hoped that the moderate approach this article suggests will effectuate such compromise where municipal proprietary services and private enterprise interact competitively.