Nebraska Law Review

Volume 57 | Issue 4 Article 14

1978

State Action Immunity and Municipalities: The Sherman Act Looks for New Territory: *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977)

Fred T. Witt Jr.
University of Nebraska College of Law

Note

State Action Immunity and Municipalities: The Sherman Act Looks for New Territory

Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977).

I. INTRODUCTION

Numerous exemptions from the antitrust laws have been recognized to facilitate certain activities which cannot (or for various reasons, should not) be carried on in a competitive atmosphere.[1] In *Parker v. Brown*,[2] the Supreme Court recognized that federal and state governments would not be subject to the antitrust laws for official governmental activities. Under the so-called *Parker* "state action" exemption, the Court held that a state was exempt from prosecution when it acted through its legitimate state agencies or officers pursuant to legislative authority.[3]

During the twenty years following the decision, *Parker* drew little attention. Recently, however, the state action exemption has been a highly litigated antitrust area.[4] Many of these decisions have centered on whether the state required the anticompetitive activity or merely permitted the conduct without any specific statutory authorization.[5] The Supreme Court's recent decisions in *Goldfarb v. Virginia State Bar*[6] and *Bates v. State Bar of Arizona*[7] seem to dispel the uncertainty by advocating that the anticompetitive activity should be "compelled" by the state before immunity will be granted. In its most recent decision, *City of Lafayette v. Louisiana Power & Light Co.*,[8] the Supreme Court recognized that

1. For a complete discussion of the numerous exemptions, see J. VON KALINOWSKI, ANTITRUST LAWS & TRADE REGULATION (16F BUSINESS ORGANIZATIONS 1978).
2. 317 U.S. 341 (1943).
3. *Id.* at 351-52.
4. *See* notes 29-31 & accompanying text *infra.*
5. *Id.*
6. 421 U.S. 773 (1975).
7. 433 U.S. 350 (1977).
8. 98 S. Ct. 1123 (1978).

the proper standard is whether the state "directed" or "authorized" the anticompetitive practice.[9] However, the courts' inability to adequately handle the myriad factual issues which plaintiffs have attempted to distinguish from those cases illustrates that the uncertainty remains. Particularly, there has been much difficulty in consistently applying the state action doctrine to municipalities. Such was the case in *Whitworth v. Perkins*,[10] in which the fifth circuit was presented with the issue whether the acts of a municipality were immune under *Parker*. The case provided the court with an opportunity to articulate which factors are relevant to a consideration of the immunity defense. However, as this note will discuss, the court failed to do so and thus added to the existing uncertainty in the area.

II. FACTS

In 1961, defendant Perkins founded the city of Impact, Texas, on the border of the city of Abilene in Taylor County. Until that time the county was one in which alcoholic beverages were not sold.[11] Under the appropriate Texas statutes,[12] the city of Impact passed a provision allowing for the sale of alcohol, thereby creating "an 'oasis' on the boundary of a 'dry' city in a 'dry' county."[13] In conjunction with the approval of the sale of alcohol, the city council adopted a comprehensive zoning ordinance which prohibited the sale of alcohol in areas of the city which were zoned residential.

In 1967, plaintiff Whitworth bought a plot of land in Impact which was zoned residential. Eight years later, Whitworth sought to open a liquor store on his property and filed an application with the county judge for the necessary approval.[14] Not surprisingly, the request was denied in accordance with the zoning ordinance. Whitworth then brought suit against the city of Impact, its mayor, secretary, and three city councilmen, alleging a conspiracy in re-

9. *Id.* at 1138. *See* note 46 & accompanying text *infra.*
10. 559 F.2d 378 (5th Cir. 1977).
11. *Id.* at 379.
12. TEX. REV. CIV. STAT. ANN. art. 666-32 (Vernon Penal Aux. Pamp. 1977; to be codified in TEX. ALCO. BEV. CODE ANN.).
13. 559 F.2d at 380.
14. TEX. REV. CIV. STAT. ANN. art. 667-6 (Vernon Penal Aux. Pamp. 1977; to be codified in TEX. ALCO. BEV. CODE ANN.). According to article 667-6, if the application is approved after the initial hearing before the county judge, the judge will then recommend to the Texas Liquor Control Board that a license should be granted. However, the board has the power to refuse a license under discretionary authority granted it by article 667-6(c). If the application is denied by the judge or by the board, the applicant may, within 30 days, appeal to the district court in the county in which the application is made, as provided in article 667-6(e).

straint of trade in regard to the sale of alcoholic beverages.[15]

The District Court for the Northern District of Texas granted the defendant's motion for summary judgment on the ground that a valid city ordinance was in effect. Therefore, the court had no justification for looking beyond the ordinance into "the motives or the integrity of the members of the municipal legislative body in the exercise of their legislative powers."[16]

III. THE DECISION

In reversing the district court's dismissal, the Court of Appeals for the Fifth Circuit initially stated that the zoning ordinance did not automatically grant the defendants immunity when, according to the allegations, the ordinance itself was the result of the alleged conspiracy to restrain trade.[17] The court supported its conclusion by a careful analysis of *Parker v. Brown*,[18] in which it attempted to determine whether the Impact ordinance was adopted under the guise of state action[19] and, therefore, immune from the antitrust laws. Distinguishing *Parker* from the facts in *Whitworth*, the fifth circuit found that while *Parker* involved a state program implemented for the public welfare in conjunction with the United States Department of Agriculture, *Whitworth* involved the act of a municipality, allegedly in a conspiracy with private individuals and with no manifest state or federal approval.[20]

Due to these important differences, the court in *Whitworth* reasoned that an automatic exemption under *Parker* should not be granted. Rather, on the basis of prior fifth circuit decisions in *Woods Exploration & Producing Co. v Aluminum Co. of America*,[21] *Jeffrey v. Southwestern Bell*,[22] and *City of Lafayette v. Louisiana Power & Light Co.*,[23] "[a] thoughtful analysis is called for to ensure that it is a *bona fide* governmental decision for which exemption is being sought."[24]

Moreover, further analysis was necessary, according to the court, because the facts of *Whitworth* did not involve the direct action of the state, but that of a municipality. Accordingly, on remand the state statutes had to be scrutinized by the lower court to

15. 559 F.2d at 380.
16. *Id.*
17. *Id.*
18. 317 U.S. 341 (1943).
19. 559 F.2d at 380.
20. *Id.* at 380-81.
21. 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).
22. 518 F.2d 1129 (5th Cir. 1975).
23. 532 F.2d 431 (5th Cir. 1976), *aff'd*, 98 S. Ct. 1123 (1978).
24. 559 F.2d at 381.

determine whether the municipality was acting pursuant to the powers granted it by the legislature.[25] The court added that if the lower court reached the issue of immunity, it should also consider the recent Supreme Court decisions in *Cantor v. Detroit Edison Co.*,[26] and *Bates v. State Bar of Arizona*.[27] Stating that these two decisions "clarified the scope" of the *Parker* doctrine, the court nonetheless failed to explain exactly how *Cantor* and *Bates* shed new light on the area.[28]

IV. ANALYSIS

A. Immunity of Municipalities

Although *Whitworth* is not subject to question on the conclusion that immunity is not to be granted automatically, it is subject to question on a number of other issues. First, the fifth circuit made a simple comparison between the facts of *Parker* and *Whitworth* and thereby concluded that since the facts of *Whitworth* were clearly distinguishable, immunity should not be granted. In so doing, the court ignored the important standards which have been set out in the Supreme Court's recent decisions involving the *Parker* doctrine. In addition, although the fifth circuit commented on the necessity of a close analysis of the relevant state statutes, it failed to consider the Texas statutes which authorized the city council to adopt the zoning restrictions. As a result, little guidance was provided on the methods of analysis regarding the immunity question and the requisite amount of state involvement necessary for immunity to be granted.

The foundation for the grant of immunity under a claim of state action was set forth in *Parker v. Brown*.[29] In *Parker*, the Supreme Court held that a California raisin marketing program designed to stabilize the industry did not violate the antitrust laws because "[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state."[30] According to the decision in *Parker*, immunity will be granted for an otherwise illegal act under the an-

25. *Id.*
26. 428 U.S. 579 (1976).
27. 433 U.S. 350 (1977).
28. 559 F.2d at 381.
29. 317 U.S. 341 (1943). *Parker* was based on Lowenstein v. Evans, 69 F. 908 (C.C.D.S.C. 1895), and Olsen v. Smith, 195 U.S. 332 (1904). In *Olsen*, the Court held that the licensing of Texas harbor pilots by the state of Texas was not invalid under the Sherman Act on the ground that "no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law." *Id.* at 345.
30. 317 U.S. at 351. Chief Justice Burger, delivering the opinion of the Court in

titrust laws if the program or act derives "its authority and its efficacy from the legislative command of the state."[31]

Under this broad state action exemption enunciated in *Parker*, it is not surprising that the lower courts' interpretations were often inconsistent and broad in their application.[32] On the basis of

---

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), interpreted *Parker* as holding

> that an anticompetitive marketing program which "derived its authority and its efficacy from the legislative command of the state" was not a violation of the Sherman Act because the Act was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government.

Id. at 788.

31. 317 U.S. at 352. For a more complete analysis of *Parker*, see Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine*, 76 COLUM. L. REV. 1 (1976); Slater, *Antitrust & Government Action: A Formula for Narrowing* Parker v. Brown, 69 NW. L. REV. 71 (1974); Verkuil, *State Action, Due Process and Antitrust: Reflections on* Parker v. Brown, 75 COLUM. L. REV. 328 (1975).

32. *See, e.g.*, Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136 (5th Cir. 1977) (immunity denied where state did not require or intend the anticompetitive activity by the NCAA). *Compare* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) (immunity denied where Canadian law did not compel the discriminatory pricing); United States v. National Soc'y of Prof. Eng'rs, 555 F.2d 978 (D.C. Cir. 1977) (professional society cannot prohibit competitive bidding among its members); Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626 (9th Cir. 1977) (local dental group not immune where it required its members to join a national dental association as a condition of membership); Ballard v. Blue Shield of S.W. Va., Inc., 543 F.2d 1075 (4th Cir. 1976) (no immunity where state law merely allows the act, but does not compel it); Miller v. Granados, 529 F.2d 393 (5th Cir. 1976) (state statutes did not require the anticompetitive activity of a private party; therefore, no immunity); Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) (no immunity for the city in its operation of municipal arenas and stadiums where the act is not compelled by the state); Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (no exemption for the District of Columbia Armory Board where it granted an exclusive lease of R.F.K. stadium to a football team); Knuth v. Erie-Crawford Dairy Coop. Ass'n, 395 F.2d 420 (3d Cir. 1968) (rebate program was not required by state law and was, therefore, not immune); Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977) (no immunity for a state bar association attempting to restrict the working of title opinions on the ground that it constituted the practice of law); Brenner v. State Bd. of Motor Vehicle Mfrs., Dealers & Salesmen, 413 F. Supp. 639 (E.D. Pa. 1976) (state agency exempt if its action is compelled by the state); United States v. Pacific S.W. Airlines, 358 F. Supp. 1224 (C.D. Cal.), *cert. denied*, 414 U.S. 801 (1973) (a merger which was not compelled by state statute was not immune); Schenley Indus., Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n, 272 F. Supp. 872 (D.N.J. 1967) (state of New Jersey merely allowed price fixing, but did not compel such conduct and, therefore, no immunity); *with* Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973) (organization within the university was granted immunity from an alleged conspiracy involving a sponsored event); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,

these lower court decisions, it is clear that a simple analysis of *Parker* is not the end but rather the beginning of an exemption analysis. *Parker* must currently be read in conjunction with the Supreme Court's subsequent decisions in *Goldfarb v. Virginia State Bar*,[33] *Cantor v. Detroit Edison Co.*,[34] and *Bates v. State Bar of Arizona*.[35] As a result, by simply comparing the facts in *Whitworth* with *Parker*, and then denying that an exemption could be based on the facts presented, the fifth circuit in *Whitworth* failed to recognize the importance of the Supreme Court's recent pronouncements on the issue of state action immunity.

The current treatment of the state action exemption was initiated in *Goldfarb*, in which the Supreme Court held that a state bar association was not immune from the antitrust laws when it issued minimum fee schedules for attorneys' services in the state of Virginia. Relying on *Parker*, Chief Justice Burger noted that the initial inquiry into whether the state bar was exempt from the Sherman Act must center on "whether the activity is required by the State acting as sovereign."[36] Applying that standard, the Court stated that there was no evidence of a state statute which required the anticompetitive conduct and concluded that "it is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direc-

424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970) (immunity granted only where the state's legislature affirmatively provides for comprehensive regulation); Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970) (body created by the legislature for the purposes of public transportation was immune); E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966) (immunity granted airport officials entering into a price fixing agreement as conducting a valid governmental function); Parmlelee Transp. Co. v. Keeshin, 292 F.2d 794 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961) (wrongful conduct of an Interstate Commerce Commission member held immune); Alphin v. Henson, 392 F. Supp. 813 (D. Md. 1975), *aff'd*, 538 F.2d 85 (4th Cir. 1976) (municipality not liable under the antitrust laws for the anticompetitive acts of its airport manager under the immunity doctrine); Trans World Assoc. v. City & County of Denver [1974-2] Trade Cas. ¶ 75,293 (D. Colo. 1974) (where the legislature provides that the city shall run its airport, city is immune when it performs that function); Murdock v. City of Jacksonville, 362 F. Supp. 1083 (M.D. Fla. 1973) (immunity granted where the city acted within its powers in exclusively leasing the city coliseum to a single wrestling promoter); Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299 (D. Mass. 1957) (immunity granted state insurance commission for alleged conspiracy with private parties); Anderson v. Comm'n on Special Revenue, [1977-2] Trade Cas. ¶ 61,726 (Super. Ct. Conn. 1977) (state commission exempt due to specific statutory authority).

33. 421 U.S. 773 (1975).
34. 428 U.S. 579 (1976).
35. 433 U.S. 350 (1977).
36. 421 U.S. at 790.

tion of the State acting as a sovereign."[37]

In *Cantor*[38] the anticompetitive conduct was the distribution of free light bulbs by an electric company, which allegedly foreclosed competition in the light bulb market. In the plurality opinion written by Justice Stevens, the Court held that although a private electric company was regulated by the state, the specific anticompetitive activities were not compelled by the state and should, therefore, not be immune from the antitrust laws.[39] The Court reasoned that although the distribution of electricity was regulated by the state of Michigan, the relevant statutes did not make any reference to light bulbs. In addition, although the cost of the light bulbs was included in the rates approved by the Michigan Public Service Commission and these rates could not be adjusted without commission approval, the Court nevertheless concluded that the mere acquiescence in the program does not satisfy the "compelled" standard.[40] The Court also noted that a critical factor in *Cantor* was the fact that the defendant was not a public official or agency acting within a scope of authority granted by the legislature, but rather was a private party exercising "sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision."[41]

In *Bates* the Supreme Court distinguished *Goldfarb* and *Cantor* and held that the state bar, by prohibiting attorney advertising, was not subject to the antitrust laws. Unlike *Goldfarb*, the state bar's restrictive measures in *Bates* were compelled by the state because the rules were ordered by the Arizona Supreme Court.[42] The Court distinguished *Cantor* on the basis of three issues: (1) the claim was against a private party in *Cantor*, whereas the claim in *Bates* was against the state; (2) the state did not have a distinct regulatory interest in light bulbs while the state had a great concern in the control of lawyers; and (3) the action was compelled by the state through the Arizona Supreme Court and not merely permitted as in *Cantor*.[43]

Subsequent to *Whitworth*, the Supreme Court decided *City of*

37. *Id.* at 791.
38. For a more complete discussion of *Cantor*, see Dorman, *State Action Immunity; A Problem Under* Cantor v. Detroit Edison, 27 CASE W. RES. L. REV. 503 (1977); Recent Development, *Antitrust Law—Immunity—Anticompetitive Activities Required of State-Regulated Public Utility Not Immune from Antitrust Attack*, 62 CORNELL L. REV. 628 (1977).
39. 428 U.S. at 593, 604.
40. *Id.* at 592-93.
41. *Id.* at 593.
42. 433 U.S. at 359-60.
43. *Id.* at 361-62.

Lafayette v. Louisiana Power & Light Co.,[44] which involved the question whether a city operating a power plant was automatically exempt from the antitrust laws under *Parker*. The plurality opinion written by Justice Brennan held that municipalities are not exempt simply because of their status as subdivisions of state government. Rather, they will be exempt only "when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.' "[45] The Court recognized that the municipality is not required to specifically base its exemptions on an express legislative mandate in order to qualify for the *Parker* exemption. However, the subdivision must present some "evidence that the State authorized or directed a given municipality to act as it did."[46]

Because *Goldfarb* held that the standard is whether the act of the municipality was "compelled" by the legislature and not merely "authorized," it could be argued that *Lafayette* enunciates a broader standard. However, a closer reading of *Goldfarb* suggests that where the state or one of its subdivisions is involved, the proper standard most likely will be whether the conduct was "authorized." This interpretation is supported by the Court's intimation in *Goldfarb* that had the Virginia Supreme Court recommended the fee schedule, pursuant to its authority to supervise the practice of law, the state supreme court would have been immune from the antitrust laws.[47]

Since the Supreme Court sought to clarify the scope of *Parker* in *Goldfarb, Cantor, Bates* and *Lafayette, Parker* simply cannot be relied upon by itself as the determinative case in deciding whether a municipality will be deemed immune from the antitrust laws, as it was in *Whitworth*. Rather, before a "test" is to be applied, the defendant must be categorized according to its character as either a private party acting under the direction of the state, as in *Cantor*, or a state acting through an agent under the direction of the state's legislature or constitution, as in *Parker* and *Bates*. This initial determination is necessary because *Cantor* and *Bates* illustrate that

44. 98 S. Ct. 1123 (1978).
45. *Id.* at 1138 (quoting 532 F.2d at 434).
46. *Id.* at 1137.
47. In *Goldfarb*, the fee schedule was not specifically authorized by the State Bar or the Virginia Supreme Court, but rather was issued by the County Bar. In this context, the Court stated that "although the State Bar apparently has been granted the power to issue ethical opinions, there is no indication in this record that the Virginia Supreme Court approves the opinions." 421 U.S. at 791. The fifth circuit agreed with this distinction in City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976), *aff'd*, 98 S. Ct. 1123 (1978), as have a number of commentators. *See* Dorman, *supra* note 38, at 510; Handler, *supra* note 31, at 12-13.

an important consideration which has affected the Court's analysis is whether the state was in fact named as the defendant in the litigation. If the state is not the defendant, *Cantor* indicates that the defendant's conduct as a private party is more likely to be held in violation of the antitrust laws under the state action doctrine.[48]

Although *Whitworth* involved a subdivision of state government, the standard of review should have begun with deciding whether, in fact, the state of Texas was legitimately involved in the alleged violative conduct through statutory authorization. In its analysis of whether the state of Texas had authorized the alleged anticompetitive act, the court in *Whitworth* found that on the basis of a simple comparison of the facts of *Parker*, this threshold requirement was not met because unlike *Parker*, "there [was] no such federal, or even state conduct suggesting tacit approval."[49] This analysis appears tenuous because not only did the court fail to make a close examination of the relevant Texas statutes to substantiate this claim, but such analysis represents a substantial departure from the standard of review used by the fifth circuit in its recent decisions involving state action. In *City of Lafayette v. Louisiana Power & Light Co.*,[50] the fifth circuit recognized that "a subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws. Rather, a district court must ask whether the state legislature contemplated a certain type of anticompetitive restraint."[51] Thus, the fifth circuit's analysis of state action immunity prior to *Whitworth* had recognized the importance of determining whether the governmental body's anticompetitive activity was within the clear intent of the state legislature.[52]

If a similar approach had been adopted in *Whitworth*, the city council's enactment of the zoning ordinance would have been found to be clearly within the intent of the Texas legislature. Generally, the Texas statutes authorize cities to restrict the use of property located within their boundaries.[53] More specifically, the Texas Liquor Control Act[54] provides:

48. 428 U.S. at 591, 610-11.
49. 559 F.2d at 381.
50. 532 F.2d 431 (5th Cir. 1976), *aff'd*, 98 S. Ct. 1123 (1978).
51. *Id.* at 434. The Supreme Court in *Lafayette* specifically adopted this language in holding that an "adequate state mandate . . . exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'" 98 S. Ct. at 1138 (quoting 532 F.2d at 434).
52. 532 F.2d at 434. The fifth circuit had previously used the "legislative intent" approach in Jeffery v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975).
53. TEX. REV. CIV. STAT. ANN. art. 1011(a) (Vernon 1963).
54. TEX. REV. CIV. STAT. ANN. arts. 666 to 667 (Vernon Penal Aux. Pamp. 1977; to be codified in TEX. ALCO. BEV. CODE ANN.).

> All incorporated cities and towns are hereby authorized to regulate the sale of beer within the corporate limits of such cities and towns by charter amendment or ordinances; . . . such cities and towns may also designate certain zones in the residential section or sections of said cities and towns . . . where such sales may be prohibited.[55]

It is firmly established that the state's power to zone is a valid exercise of the state's police power to protect the public welfare.[56] Through legislative mandate, the state of Texas has specifically delegated zoning authority to the municipalities subject, of course, to the direction of the legislature.[57] Accordingly, there existed express state authorization allowing the Impact city council to zone within the city limits.

B. Scope of Authority

Under prior fifth circuit decisions, the immunity analysis would have concluded after the "legislative intent" standard had been satisfied.[58] However, not only is it difficult for courts to determine the intent of the legislature,[59] but more importantly, *Bates* and *Goldfarb* share the common opinion that the determination of intent should simply represent the beginning of an exemption analysis.[60] As a result, the state could not be said to be involved in *Whitworth* unless it was clear that the Impact city council acted within its scope of authority when it passed the allegedly anticompetitive zoning ordinance. A clear resolution of this issue is important because if immunity from the antitrust laws is to be granted only for actions pursuant to the state's legislative prescription, action outside the grant of authority should obviously not be protected.

The "scope of authority" analysis would first focus on the zoning process and at what points the city council could have exceeded its authority. The discussion would then be directed to the

---

55. *Id.* art. 667-10½.
56. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (enactment of zoning regulations is a valid act under the municipality's police power).
57. Coffee City v. Thompson, 535 S.W.2d 758, 766 (Tex. Civ. App. 1976).
58. "In our opinion, though, it is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent." City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976), *aff'd*, 98 S. Ct. 1123 (1978). The Supreme Court expressly approved this analysis. 98 S. Ct. at 1138.
59. Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt From Sherman Act Coverage Under the* Parker *Doctrine?*, 65 GEO. L.J. 1547, 1565 (1977).
60. Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (other factors considered were whether the state was the actual defendant and whether the state had an independent regulatory interest); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (the threshold inquiry was whether the state compelled the act).

issue of council misconduct and the probability that it acted outside its scope of authority. After litigation, the city of Impact was held to be validly incorporated in the state of Texas.[61] A short time later, in a local option election, as required by state law,[62] the voters of the city of Impact approved the sale of liquor in the community. Also, as required by statute,[63] the city council adopted a comprehensive zoning ordinance which prohibited the sale of alcohol in areas zoned residential. Of these three acts, only the adoption of the comprehensive zoning ordinance was not made pursuant to an election. Therefore, according to Texas law, this was the only point upon which any misconduct of the Impact city council could be based in connection with the sale of liquor.

In its exercise of the zoning power, the council must act in relation to the public welfare, health and safety.[64] Due to these amorphous guidelines, the courts have recognized that when reviewing a council's decision on zoning, the council should not be overruled unless it can be shown that the zoning action was arbitrary or capricious, thereby amounting to an abuse of discretion.[65] This policy of limited review has been recognized by the fifth circuit.[66] Moreover, the Supreme Court has stated that "if the validity of the

61. Perkins v. State, 367 S.W.2d 140 (Tex. 1963). Under TEX. REV. CIV. STAT. ANN. arts. 1133 to 1140 (Vernon 1963), a city cannot be incorporated without a vote of the residents living within the boundary of the proposed city.

62. TEX. REV. CIV. STAT. ANN. art. 666-32 (Vernon Penal Aux. Pamp. 1977; to be codified in TEX. ALCO. BEV. CODE ANN.).

63. The statute provides in part:

> Such regulations shall be made in accordance with a comprehensive plan and designed to . . . promote health and the general welfare . . . . Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality . . . .

TEX. REV. CIV. STAT. ANN. art. 1011(c) (Vernon 1963).

64. City of San Antonio v. Lanier, 542 S.W.2d 232 (Tex. Civ. App. 1976); McWhorter v. City of Winnsboro, 525 S.W.2d 701 (Tex. Civ. App. 1975); Burkett v. City of Texarkana, 500 S.W.2d 242 (Tex. Civ. App. 1973).

65. City of University Park v. Benners, 485 S.W.2d 773 (Tex.), *appeal dismissed*, 411 U.S. 901 (1972); Royal Crest, Inc. v. City of San Antonio, 520 S.W.2d 858 (Tex. Civ. App. 1975); Thompson v. City of Palestine, 502 S.W.2d 570 (Tex. Civ. App. 1973), *rev'd on other grounds*, 510 S.W.2d 579 (Tex. 1974); City of San Antonio v. Hunt, 458 S.W.2d 952 (Tex. Civ. App. 1970); City of Farmers Branch v. Hawnco, Inc., 435 S.W.2d 288 (Tex. Civ. App. 1968); Wallace v. Daniel, 409 S.W.2d 184 (Tex. Civ. App. 1966); Burford v. Austin, 379 S.W.2d 671 (Tex. Civ. App. 1964); Pitre v. Baker, 111 S.W.2d 359 (Tex. Civ. App. 1937).

66. Blackman v. City of Big Sandy, 507 F.2d 935 (5th Cir. 1975); Sough Gwinnett Venture v. Pruitt, 491 F.2d 5 (5th Cir. 1974); Higginbotham v. Barrett, 473 F.2d 745 (5th Cir. 1973).

legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[67]

C. Existence of a Conspiracy

Against this background, the plaintiff in *Whitworth* alleged that the council's adoption of an ordinance prohibiting the sale of alcohol on premises zoned residential was an integral part of a conspiracy in restraint of trade.[68] Before reaching the conspiracy question, the initial issue to be resolved was whether the Impact zoning ordinance failed the standard zoning test as being arbitrary, capricious and not in relation to the welfare of the community. The fifth circuit was presented with a similar claim in *Blackman v. City of Big Sandy*.[69] In *Blackman*, the court held that the city council's zoning plan which prohibited the sale of alcohol on residential property was valid because "the City might be legitimately concerned about the presence of a liquor establishment and its accompanying traffic in the midst of homes, churches and a school."[70] In support of its decision, the court cited *Village of Belle Terre v. Boraas*,[71] in which the Supreme Court held that "the police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[72]

Considering not only the recognized presumption of validity that the city council's legislative decisions have, but also the broad power to zone in the public interest, it is quite apparent that the city council had the authority to regulate the use of property, including the sale of liquor. In addition, as compared with other recent cases on this point, the Impact city council's zoning action did not have the characteristics which have been regarded as questionable. The zoning ordinance represented a legislative rather than a proprietary function,[73] and it was not an action in the course

67. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926). *See also* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).
68. 559 F.2d at 379-80.
69. 507 F.2d 935 (5th Cir. 1975).
70. *Id.* at 936.
71. 416 U.S. 1 (1974).
72. *Id.* at 9.
73. "Proprietary functions" are defined in Texas as "those which are intended primarily for the private advantage and benefit of persons within the corporate limits of the municipality as distinguished from that of the general public." Pontarelli Trust v. City of McAllen, 465 S.W.2d 804, 807 (Tex. Civ. App. 1971). A "governmental function" of a city has been recognized to include those activities "enjoined upon it by law and are given it by the state as a part of the state's sovereignty, to be exercised by the city in the interest of the general public." *Id.* at 807.

of the purchase or sale of goods by the municipality.[74] Both of these factors have been mentioned as activities which foster the conclusion that the municipality should not be granted immunity.[75]

Even accepting the fact that the Impact city council was authorized by the state of Texas to zone, and that the city council's decision had a presumption of validity, it remains to be determined whether the council nonetheless adopted the ordinance pursuant to a conspiracy in restraint of trade.[76] Concluding that there were issues of fact present which warranted a judicial hearing of the plaintiff's case, the court in *Whitworth* stated that "the mere presence of the zoning ordinance does not necessarily insulate the defendants from antitrust liability where, as here, the plaintiff

---

If the subject of the plaintiff's claim had involved a proprietary function of the Impact city council which could have otherwise been performed by private enterprise, there is authority for the proposition that the municipality is not regarded as acting as an agent of the state and, therefore, should be liable as an individual or corporation would be for the same acts. Mr. Chief Justice Burger expressly adopted this approach in City of Lafayette v. Louisiana Power & Light Co., 98 S. Ct. 1123, 1141-43 (1978) (Burger, C.J., concurring). *See also* Barnes v. Merritt, 428 F.2d 284 (5th Cir. 1970); Crow v. City of San Antonio, 157 Tex. 250, 301 S.W.2d 628 (1957).

However, the dissent in *Lafayette* described the distinction between proprietary and governmental functions "as a quagmire . . . with distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation." 98 S. Ct. at 1147 (Stewart, J., dissenting).

74. Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580 (7th Cir. 1977) (park district operated retail stores selling golf equipment); Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) (municipality operating a sports arena, stadium and airport); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970) (commercial transactions with public officials); Azzaro v. Town of Branford, [1974-2] Trade Cas. ¶75,337 (D. Conn. 1974) (town purchasing fire and casualty insurance). *But see* Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975) (cable TV franchise issued by city council); Padgett v. Louisville & Jefferson County Air Board, 492 F.2d 1258 (6th Cir. 1974) (airport); E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966) (airport); Trans World Assoc. v. City & County of Denver, [1974-2] Trade Cas. ¶75,293 (D. Colo. 1974) (airport); Murdock v. City of Jacksonville, 361 F. Supp. 1083 (M.D. Fla. 1973) (municipal arena).

75. *See* notes 73-74 & accompanying text *supra*.

76. Because this was an appeal from a summary judgment decision in favor of the defendants, the appellate court's review should have centered on whether triable issues of fact existed in accordance with FED. R. CIV. P. 56(c). In Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464 (1962), the Supreme Court stated that in looking at the record in the manner most favorable to the appealing party, "[s]ummary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* at 467 (quoting FED. R. CIV. P. 56(c)).

asserts that the enactment of the ordinance was itself a part of the alleged conspiracy to restrain trade."[77] In support of its position, the court noted that the specific issue of whether immunity will be extended to a state official who conspires with private parties had not been decided by the Supreme Court and, therefore, should not be quickly dismissed.[78]

Although it is accepted that a motion for summary judgment should not be freely granted,[79] the fifth circuit failed to enunciate the standards which the lower court should follow at trial when faced with the conspiracy issue. This lack of guidance will be important for two reasons. First, as is the case of the immunity question in general,[80] the conspiracy issue involving a governmental body has been inconsistently interpreted by the courts.[81] Second, although a court cannot anticipate every relevant issue, the fifth circuit failed to mention the defense of immunity on the basis of the *Noerr-Pennington*[82] doctrine, which allows antitrust immunity for private parties legitimately attempting to influence the decisions of public officials.

Because the Supreme Court in *Parker* specifically refused to decide the issue, the allegation of a conspiracy in which the state is involved has, not surprisingly, been interpreted inconsistently. In *Duke & Co. v. Foerster*,[83] the allegation of a conspiracy was held to state a claim of action where the act was not compelled by the state and it was alleged that the governmental officials were participating with private parties in a scheme to injure competition, rather than merely being influenced by them.[84] In an equally convincing opinion, the court in *Metro Cable Co. v. CATV of Rockford, Inc.*,[85] held that where genuine political activities are involved, valid attempts to influence the decisions of a political body do not fall within the meaning of "conspiracy" for the purposes of an anti-

77. 559 F.2d at 379.
78. In *Parker*, the Supreme Court stated 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." 317 U.S. at 351-52.
79. *See* note 76 & accompanying text *supra*.
80. *See* note 32 & accompanying text *supra*.
81. *See* notes 82-83 & accompanying text *infra*.
82. 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).
83. 521 F.2d 1277 (3d Cir. 1975). *See also* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 (1962); Harmon v. Valley Nat'l Bank, 339 F.2d 564 (9th Cir. 1964).
84. 521 F.2d at 1281-82.
85. 516 F.2d 220 (7th Cir. 1975). *See also* Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969); E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966).

trust claim.[86] Briefly, the significance of these two cases for the purposes of the present discussion is to illustrate the difficulty which other courts have had in dealing with the conspiracy issue. Because of this difficulty, the fifth circuit, at a minimum, should have set out some preliminary standards on the conspiracy issue to aid lower court review. As it now stands, the lower court, in considering the other cases on this issue, could justifiably agree with either *Duke* or *Metro Cable.*

In a related issue, the dilemma for the lower court in *Whitworth* increases if the *Noerr-Pennington* doctrine is pleaded as an additional defense by the defendants. In essence, the *Noerr-Pennington* doctrine states that joint action by private parties to influence the decisions of public officials will be immune from the antitrust laws.[87] However, this exemption is limited by the "sham" exception, which will cause the exemption to be denied if, among other things, the joint activity is merely an attempt to injure competition by denying it equal access to the governmental agency[88] rather than a legitimate attempt to influence the decision-making process of a legislative body.[89]

By naming all of Impact's city officials as defendants, the plaintiff in *Whitworth* was clearly alleging that the officials had conspired with private parties to restrain trade in the sale of alcoholic beverages. Therefore, *Whitworth* arguably represents a good example of the type of conduct which the *Noerr-Pennington* doctrine sought to exempt from the antitrust laws. This issue was presented in *Metro Cable Co. v. CATV of Rockford, Inc.*,[90] in which the plaintiff alleged that the city council and mayor, induced by large campaign contributions from individuals, unreasonably denied his application for a cable television license. The court recognized that because the city council was a legislative body operating in a political setting and the state statutes authorized the city

86. 516 F.2d at 230.
87. United Mine Workers v. Pennington, 381 U.S. 657 (1965).
88. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972).
89. *See generally* Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); Ernest W. Hahn, Inc. v. Codding, [1977-1] Trade Cas. ¶61,425 (N.D. Cal. 1976); Rush-Hamption Indus., Inc. v. Home Ventilating Inst., 419 F. Supp. 19 (M.D. Fla. 1976); Foret v. Point Landing, Inc., [1976-2] Trade Cas. ¶61,106 (E.D. La. 1976); B.A.M. Liquors, Inc. v. Satenstein, [1976-2] Trade Cas. ¶60,977 (S.D.N.Y. 1976); Associated Radio Serv. Co. v. Page Airways, Inc., 414 F. Supp. 1088 (N.D. Tex. 1976); REA Express, Inc. v. California Motor Transp. Co. [1975-2] Trade Cas. ¶60,386 (N.D. Cal. 1975); United States v. Otter Tail Power Co., 360 F. Supp. 451 (D. Minn. 1973), *aff'd without opinion*, 417 U.S. 901 (1974); United States v. Empire Gas Corp., 393 F. Supp. 903 (W.D. Mo. 1975), *aff'd*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).
90. 516 F.2d 220 (7th Cir. 1975).

council to issue the cable television licenses, the *Noerr-Pennington* doctrine applied.[91] As a result, the court concluded:

> Nothing in the *Noerr* opinion or any other case of which we are aware suggests any reason for believing that Congress, not having intended the Sherman Act to apply to combined efforts to induce legislative action, did intend the Act to apply if a member of the legislative body agreed to support those efforts.[92]

This is not to argue that based on the similarity of *Metro Cable*, the court in *Whitworth* should, therefore, exempt the defendants, but rather it illustrates the potential complexity of *Whitworth* which the fifth circuit failed to take into full account in its opinion. In the meantime, although the Supreme Court in *Lafayette* has held that municipalities are not automatically exempt, the proper procedure by which the immunity question is to be analyzed within the fifth circuit remains clouded, with few meaningful guidelines of permissible conduct for potential litigants and municipalities.

D. Application of Twenty-First Amendment

A final argument of possible relevance to *Whitworth* is that the antitrust laws simply are not applicable because the act of the city council was protected by the twenty-first amendment.[93] Section two of the amendment states that "the transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[94] This provision has been interpreted as providing the states with broad power to regulate the use and distribution of liquor within their borders.[95] As a result, "a state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."[96]

Although the states are authorized to regulate alcohol, the antitrust laws will not be automatically deemed inapplicable because "the validity of a charge under the Sherman Law relating to intoxicating liquors depends upon the utilization by a State of its constitutional power under the Twenty-first Amendment."[97] Therefore, the question whether the antitrust laws should be set aside in

91. *Id.* at 229.
92. *Id.* at 230.
93. U.S. CONST. amend. XXI.
94. *Id.* § 2.
95. California v. LaRue, 409 U.S. 109 (1972); Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964).
96. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964).
97. United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 301 (1945).

favor of the twenty-first amendment in *Whitworth* is narrowed to questions of (1) whether the Impact city council acted pursuant to a Texas state policy which sanctions the alleged anticompetitive conduct; (2) whether the act can be characterized as within the state's constitutional power under the twenty-first amendment and (3) if so, whether the twenty-first amendment preempts the commerce clause in this instance.

While the Texas courts have stated that municipalities do not have the express power to issue or refuse liquor licenses,[98] it is evident that through the zoning power, cities do in fact control the physical location of liquor establishments. This conclusion is directly reflected in the Texas Liquor Control Act.[99]

Therefore, it may be contended that by adopting the comprehensive zoning ordinance which prohibited the sale of alcohol on lots zoned residential, the Impact city council was acting pursuant to the state's overall regulatory policy which controls the sale of alcohol. Because the issue whether the state has sanctioned the activity is of critical importance to the application of the twenty-first amendment,[100] it is clear that a more thorough analysis of the Texas liquor statutes and the role of the city council in the regulatory scheme is needed. However, because the statutes specifically authorized the actions of the Impact city council and there exists "the added presumption in favor of the validity of the state regulation in this area that the Twenty-First Amendment requires,"[101] it is likely that the antitrust laws would be rendered inapplicable.

V. CONCLUSION

In *Whitworth v. Perkins* the fifth circuit sought to remain consistent with the present trend towards a more precise analysis of the *Parker* state action immunity question. By applying this stan-

98. Davis v. Coffee City, 356 F. Supp. 550 (E.D. Tex. 1972); Munoz v. City of San Antonio, 318 S.W.2d 573 (Tex. Civ. App. 1959).

99. TEX. REV. CIV. STAT. ANN. art. 667-10½ (Vernon Penal Aux. Pamp. 1977; to be codified in TEX. ALCO. BEV. CODE ANN.). *See* note 55 & accompanying text *supra*.

100. In order for the twenty-first amendment to preempt the application of the antitrust laws, the state must exercise its twenty-first amendment powers so that the specific anticompetitive conduct is sanctioned by the state's liquor policy. *See generally* Lamp Liquors, Inc. v. Adolph Coors Co., 563 F.2d 425 (10th Cir. 1977); United States v. Erie County Malt Beverage Distrib. Ass'n, 264 F.2d 731 (3d Cir. 1959); Adolph Coors Co. v. A & S Wholesalers, Inc., [1975-1] Trade Cas. ¶60,187 (D. Colo. 1975); B.A.M. Liquors, Inc. v. Satenstein, [1975-1] Trade Cas. ¶60,248 (S.D.N.Y. 1975); V. & L. Cicione Inc. v. C. Schmidt & Sons, Inc., 403 F. Supp. 643 (E.D. Pa. 1975); Fairfield County Beverage Distrib., Inc. v. Narragansett Brewing Co., 378 F. Supp. 376 (D. Conn. 1974); Schnapps Shop, Inc. v. H.W. Wright & Co., 377 F. Supp. 570 (D. Md. 1973).

101. California v. LaRue, 409 U.S. 109, 118-19 (1972).

dard, the court correctly determined that there are important factors which a court must weigh before a municipality is to be granted immunity from the antitrust laws. However, by resting its decision on a simple comparison of the facts in *Whitworth* and *Parker*, the court failed to fully consider the importance of the Supreme Court's recent pronouncements on the question of state action immunity.

In addition, by refusing to consider the relevant Texas statutes in order to determine the extent of the state's involvement and the possible application of the *Noerr-Pennington* defense, the court failed to provide a meaningful direction which would, at a minimum, define the parameters of review for lower courts. The court also failed to consider the argument that the antitrust laws might simply be inapplicable in *Whitworth* because the Impact city council was acting pursuant to the State's power to regulate alcohol which is protected from federal intervention by the twenty-first amendment. Overall, while it is now clear that municipalities are not automatically exempt, the fifth circuit has increased the uncertainty which presently exists on this question by denying the lower courts and potential litigants a modicum of guidance concerning the proper analysis of an exemption question. Until the issue is decisively concluded,

> [e]ach time a city grants an exclusive franchise, or chooses to provide a service itself on a monopoly basis, or refuses to grant a zoning variance to a business . . . state legislative action will be necessary to insure that a federal court will not subsequently decide that the activity was not "contemplated" by the legislature.[102]

Fred T. Witt, Jr. '79

102. City of Lafayette v. Louisiana Power & Light Co., 98 S. Ct. 1123, 1151 (1978).