COMMENT

TIPPING THE ANTITRUST SCALES: MUNICIPAL GOVERNMENTS AND THE COMMERCIAL INTERESTS THAT LOBBY THEM

The state action doctrine of *Parker v. Brown*[1] has provided varying degrees of antitrust immunity to governmental bodies since its promulgation in 1943. However, the limits of that protection have been in doubt when the entity seeking immunity is not a state government, but a local authority operating independently or in response to state policies. Public utilities and those competitors attempting to acquire franchise areas have been concerned with municipal governments taking actions that exceed the boundaries of antitrust immunities.[2] Such actions have sometimes included conspiratorial agreements to restrain competition between city governments and competing utilities. The effect of the recent decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*,[3] in conjunction with the Local Government Antitrust Act,[4] has been to provide more extensive protection to municipalities enacting restrictive regulatory policies[5] and to allow business representatives to seek favorable government action with reduced risk of antitrust suits. However, the expanded lobbying opportunities might not compensate for damages resulting from the broadened municipal antitrust protection, so the *Omni* decision may be harmful to business interests.

The *Omni* case involved a suit by a billboard company (Omni) against Columbia Outdoor Advertising, Inc. (COA) and COA's alleged co-conspirator, the City of Columbia, South Carolina. Omni claimed that COA and the city engaged in anticompetitive activities aimed at protecting COA's virtual monopoly position in the outdoor billboard market, and in return COA gave city officials favorable treatment which included free billboard advertisements for their political campaigns. Omni's claim rested on the existence of a conspiracy exception to antitrust immunity that would ostensibly remove the antitrust immunity from the city and its private co-conspirator, Columbia Outdoor Advertising, Inc. The Supreme Court rejected the existence of such an exception to antitrust immunity, largely based on the impracticality of permitting conspiracy theories to form the basis of antitrust suits against the government.

This clarification of the law, which should reduce litigation and increase

1. 317 U.S. 341 (1943).

2. City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1348 (1991).

3. *Id.*

4. 15 U.S.C. §§ 34-36 (1988).

5. "Today the Court adopts a significant enlargement of the state action exemption." 111 S. Ct. at 1360. (Stevens, J., dissenting).

municipal powers and autonomy, is encouraging to city governments. Public utilities and other industries that rely on the existence of municipal franchise agreements or favorable regulations should be concerned about the implications of this ruling, despite the broadened freedom to lobby the government for favorable action. Companies seeking to enter a new marketplace or seek franchises from city governments may find the *Omni* decision harmful to their interests.

This commentary describes the current state of the antitrust laws with regard to municipal governments and the commercial interests that lobby them. Naturally, there are implications for the relationship between public utilities and municipal governments. The comment first explores the framework of the state action antitrust immunity, its exceptions, and the impact of this recent decision on the state action doctrine. The discussion then turns to the contours of and exceptions to the corresponding immunity provided to private parties who petition the government for favorable action. The comment concludes with some predictions and early indications of the effect of the *Omni* decision on regulated industries and private lobbying activities.

I. STATE ACTION ANTITRUST IMMUNITY

Parker v. Brown[6] established an exemption to the antitrust laws known as the state action doctrine, which provides generally that the actions of a state or of its officers are not subject to antitrust liability.[7] The immunity applies regardless of whether the actions would violate antitrust laws if done by private parties. The state action immunity, as delineated in *Parker*, is based on the principle of state sovereignty[8] and supported by the lack of demonstrated legislative intent to control state actions.[9] However, the *Parker* decision described state action in a general sense, without mentioning how that doctrine might affect municipal governments.

The *Goldfarb v. Virginia State Bar*[10] ruling provided more specific guidance for determining when a town's endeavors are an act of state. Relying on language in *Parker*,[11] the U.S. Supreme Court provided a limited antitrust immunity to municipalities[12] by allowing the exemption if the state, acting

6. *Parker* involved a suit by a producer of raisins to enjoin enforcement of a state marketing program adopted pursuant to the California Agricultural Prorate Act. The suit alleged that the state program would cause irreparable injury to the producer's business. The Supreme Court upheld the marketing program, in part because the Sherman Act was intended to prohibit private agreements in restraint of trade, rather than governmental action which had anticompetitive effects. Parker v. Brown, 317 U.S. 341, 350-52 (1943).

7. *Id.* at 350-51.

8. *Id.* at 351.

9. "The 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. . . . There is no suggestion of a purpose to restrain state action in the Act's legislative history." *Id.* at 351. The Court cites to 21 Cong. Rec. 2562, 2457; *see also* 21 Cong. Rec. at 2459, 2461.

10. 421 U.S. 773, 790-91 (1975).

11. "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Parker*, 317 U.S. at 350-51.

12. *Goldfarb* did not specifically mention municipalities, but in ruling that state and county bar associations do not receive state action immunity for setting minimum fee schedules, the Supreme Court

within its sovereign power, had "compelled" the anticompetitive restraints on trade.[13] The state compulsion requirement, however, appears to have been too restrictive for practical purposes. It suggested that, for a city government to be protected under the state action immunity, it must have been given a specific legislative mandate from the state. Although the Supreme Court upheld the compulsion requirement two years later in *Bates v. State Bar of Arizona*,[14] the Court went on to develop a more comprehensive legal standard only a year after *Bates* in *Lafayette v. Louisiana Power & Light Co.*[15]

A. City Governments and State Action Immunity: The Two-Prong Standard

The *Lafayette* standard declared that the anticompetitive actions of a state or its agents would be protected if they were done "pursuant to state policy to displace competition with regulation or monopoly public service."[16] In addition to this pronouncement, the Court hinted at what would later become the established test for determining whether a municipality's actions are protected. The restraint must be:

(1) pursuant to a clearly articulated and affirmatively expressed state policy, and
(2) actively supervised by the state.[17]

Lafayette distinguished municipalities from state governments for the purpose of determining the status of their immunity under the antitrust laws. The Court expressed concern that city governments were more likely to look after "parochial interests"[18] and act to the detriment of business constituents.

Lafayette also stated that municipalities are not necessarily required to "be able to point to a specific, detailed legislative authorization" for a successful defense, and that, while a city's immunity is not so easily established as that of a state, it is sufficient that the legislature envisioned possible anticompetitive effects when it granted the authority to the city to operate in a particular area.[19] This would also include "neutral" state policy, such as the enabling "Home Rule" amendments often enacted by states to allow municipalities to govern their daily affairs.[20]

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applied the state action immunity to agencies of the state "compelled", not merely "prompted" or "authorized", to enact policies with anticompetitive effects. This would appear to include municipal governments. 421 U.S. at 789-91.

13. *Id.* at 791.

14. 433 U.S. 350, 360 (1977).

15. 435 U.S. 389 (1978).

16. *Id.* at 413. However, "even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." *Id.* at 417 (citing Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)).

17. *Id.* at 410.

18. "If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." *Id.* at 408.

19. *Id.* at 415.

20. A "home rule" municipality is "granted by the state constitution extensive powers of self-government in local and municipal matters, . . . and with respect to such matters the City Charter and

The Supreme Court fleshed out the *Lafayette* standard in *New Motor Vehicle Board of California v. Orrin W. Fox Co.*,[21] when it ruled that California's Automobile Franchise Act clearly articulated and affirmatively expressed a state program to replace "unfettered business freedom"[22] in determining the establishment and placement of automobile dealerships. The state board's approval procedures, though not an issue in the case, satisfied the requirement of active state supervision.

The Court applied the *Lafayette* test strictly in *California Liquor Dealers Association v. MidCal Aluminum, Inc.*[23] The state's mere authorization of price setting practices by private parties, as opposed to establishment or regulation of prices, was not sufficient to meet the active state supervision prong of the *Lafayette* test.[24] *MidCal* was a reflection on the language of *Parker* that refused to allow a state to grant antitrust immunity by authorizing others to violate the law or by simply declaring their action to be lawful.[25]

The Court developed the *Lafayette* two-prong test due to concern that municipalities would misuse their limited governing power to the detriment of others.[26] These concerns culminated in *Community Communications Co. v. City of Boulder,*[27] in which the Court, departing from some language in *Lafayette*,[28] rejected the Colorado Home Rule Amendment as a basis for antitrust immunity for the City of Boulder. Neutral state policies contemplating anticompetitive regulations no longer satisfied the *Lafayette* standards. This was a harsh result for city authorities attempting to govern local affairs. *Boulder*, however, was a recognition from *Parker* of our "dual system"[29] of government.[30]

The dual system concept grants sovereign powers to the federal and the state governments, but stops short of creating a third tier of sovereignty in municipalities. Justice Brennan, writing for the majority in *Boulder*, asserted that this arrangement "has no place for sovereign cities."[31] He agreed with the dissent in the court of appeals, which stated that "[w]e are a nation not of

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ordinances supersede the laws of the State." Community Communications Co. v. City of Boulder, 455 U.S. 40, 43-44 (1982). *See infra* note 27 and accompanying text.

21. 439 U.S. 96 (1978).

22. *Id.* at 109.

23. 445 U.S. 97 (1980).

24. "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Id.* at 106.

25. *Id.* at 106 (citing Parker v. Brown, 317 U.S. 341, 351 (1943)).

26. Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412-13 (1978).

27. 455 U.S. 40 (1982).

28. At most, the "state policy may be neutral." *Lafayette*, 435 U.S. at 414.

29. *Parker*, 317 U.S. at 351.

30. [P]lainly the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A state that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which the municipal liability is sought.

Boulder, 455 U.S. at 55. It is interesting to note, considering this deviation from *Lafayette*, that Justice Brennan wrote the language in both opinions. *Contra supra* note 28.

31. *Boulder*, 455 U.S. at 53.

'city-states' but of States."[32]

B. A Statutory Safe Harbor for Cities: The Local Government Antitrust Act

In response to the *Boulder* decision[33] and its resulting increase in antitrust suits filed against local governments,[34] the Congress passed the Local Government Antitrust Act of 1984 (LGAA).[35] The LGAA provides an absolute immunity to local governments and their officers from antitrust monetary damages, although it still allows injunctive and declaratory relief. Therefore, it releases city governments from the burden of costly antitrust damage suits and reduces the impact of the *Lafayette* two-prong test, though it is still applied in suits for injunctions.

Almost immediately after the LGAA's passage, the Supreme Court condensed the *Lafayette* test to a single standard of "clear articulation" in *Town of Hallie v. city of Eau Claire*.[36] Unincorporated townships sought to enjoin the city of Eau Claire from anticompetitive sewage collection. The Court found that the state statutes allowing cities to operate sewage systems were a clear expression of a state policy to replace competition with regulation that clearly contemplated anticompetitive effects, and thus satisfied the "clear articulation" requirement.[37] The Court went on to say that "the active state supervision requirement should not be imposed in cases in which the actor is a municipality."[38] As the court ruled later in *Patrick v. Burget*,[39] it is now only necessary for the state to retain the ultimate control or power of review over the anticompetitive conduct.

C. Cities Out of Bounds: Exceptions to State Action Immunity

Having seen the expansion of municipal autonomy through the LGAA and *Hallie*, we now turn to the exceptions to the state action doctrine, those

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32. *Id.* at 54 (citing Community Communications Co. v. City of Boulder, 630 F.2d 704, 717 (10th Cir. 1980)).

33. "[L]ocal governments throughout the country have lived in the shadow of [*Boulder*], and it is time that the Congress answers at least one major question that *Boulder* raised: Whether both local governments and nongovernmental parties acting at the direction of local governments should be liable for treble damages." Palm Springs Medical Clinic, Inc. v. Desert Hospital, 628 F.Supp. 454, 460 n.4 (C.D. Cal. 1986) (citing statement by Senator Thurmond as part of an exhaustive review of the LGAA's legislative history).

34. It would appear that in many instances, the practical impact of *Boulder* has been to paralyze the decisionmaking functions of local government. The threat of antitrust treble damage actions has caused local officials to avoid decisions that may touch on the antitrust laws even when such decisions have involved critical public services.

47 Antitrust & Trade Reg. Rep. (BNA) No. 1179 at 379. *Id.* at 459 n.4 (citing statement of Senate Committee).

35. 15 U.S.C. §§ 34-36 (1988).

36. 471 U.S. 34 (1985).

37. *Hallie* rejected the argument that the municipality must show that its actions were "compelled" by the state in order to satisfy the "clear articulation" requirement: "[C]ompulsion is simply unnecessary as an evidentiary matter to prove that the challenged practice constitutes state action. . . . [A]lthough compulsion affirmatively expressed may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality acted pursuant to clearly articulated state policy." *Id.* at 45-46.

38. *Id.* at 46-47.

39. 486 U.S. 94 (1988).

areas in which injunctive relief may be granted to injured parties, aside from those cases that fail the *Lafayette* test.

The possible existence of a "commercial" or "market participant" exception has been the subject of some controversy. This exception would remove the antitrust protection from a government entity that hinders competition while engaging in commercial activities. *Parker* alluded to a market participant exception, referring to *Union Pacific Railroad Co. v. United States*:[40] "[W]e have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade."[41] However, lower courts[42] have stated that the *Parker* state action doctrine does not distinguish between governmental activities and marketplace participation, indicating that no commercial exception exists.

In *City of Columbia v. Omni Outdoor Advertising, Inc.*, the Court suggested, in dicta, a possible market participant exception to the state action immunity.[43] "[State action] immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market."[44] Therefore, it would appear that where the city is itself a commercial participant, its enactment of restrictive regulatory policies may place it outside the sphere of *Parker* immunity and subject it to injunctive remedies.[45] However, since the *Omni* ruling, the Court of Appeals for the Eighth Circuit has refused to adopt that theory, stating that "the market participant exception is merely a suggestion and is not a rule of law."[46] The Tenth Circuit Court of Appeals has continued to hold the view that state-action immunity does not turn on "proprietary" versus "governmental" distinctions.[47] The fate of the commercial exception to state action immunity remains unclear.

This exception seems appropriate: The potential for abuse becomes apparent when a local government participates in supposedly private business activities. Considering the problems that might be created by a marriage between entrepreneurial profit motive and the full weight of governmental reg-

40. "[I]t is understandable that city and railroad might individually and even cooperatively work hand in hand to promote the city's economic welfare. . . . But the promotion of civic advancement may not be used as a cloak to screen the granting of discriminatory advantages to shippers." 313 U.S. 450, 465 (1941).

41. Parker v. Brown, 317 U.S. 341, 351-52 (1943).

42. Limeco, Inc. v. Div. of Lime of Miss. Dept. of Agric. & Commerce, 778 F.2d 1086 (5th Cir. 1985); Allright Colorado, Inc. v. City and County of Denver, 937 F.2d 1502, 1510 & n.11 (10th Cir. 1991).

43. "We reiterate that, with the possible market participant exception, any action that qualifies as state action is [protected]." 111 S. Ct. 1344, 1353 (1991).

44. *Id.* at 1351.

45. Due to the enactment of the Cable Communications Policy Act of 1984, local governments are authorized to own and operate their own cable television services, so this commercial participant exception might not apply to cable television cases. However, it may be of interest to follow the case of Warner Cable Communications v. City of Niceville, 911 F.2d 634 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2839 (1991) [certiorari was denied, but motions by cable industry associations to file briefs as amicus curiae were granted].

46. Paragould Cablevision, Inc. v. City of Paragould, Ark., 930 F.2d 1310, 1313 (8th Cir. 1991).

47. Allright Colorado, Inc. v. City and County of Denver, 937 F.2d 1502, 1510 & n.11 (10th Cir. 1991).

ulatory powers, the threat of antitrust scrutiny is desirable.[48] Otherwise, a municipality could choose to enter a given market, tax and regulate its competitors out of existence, and claim state action immunity for its profitable business venture.

In *Allright Colorado, Inc. v. City and County of Denver*,[49] a municipality chose to enter the airport shuttle market pursuant to a state policy allowing counties to operate airports and regulate the embarkation of passengers. The Tenth Circuit Court of Appeals upheld its anticompetitive actions, despite the market participant exception suggested in *Omni*. "The fact that the city is also in some sense a competitor of plaintiffs does not alter the basic test for state action immunity nor does it diminish the city's regulatory authority over the Airport and the plaintiffs' activities."[50] The facts of the case suggest that when a municipality runs a business and regulates its competitors, the threat to commercial interests is greater than if the city had acted either as a regulator or as a fair competitor.

The city ordered the private shuttle operators to operate at unfavorable pick-up locations and to follow meandering access routes, saving the best locations for the municipal operation.[51] The city imposed access fees on the private operators and required them to sign permit agreements in which they would agree to pay the fees or be barred from the airport terminal. The permit agreements also required the private operators to disclose financial information and customer lists to the Manager of Public Works.[52] Expert testimony noted that over a period of five years, the city operation enjoyed a "significant increase"[53] in market share, while the plaintiffs experienced a similar decline.

Omni suggested another exception, one in which bribery of public officials or the violation of state or federal law is involved. But the Court favored punishing those actions through statutes addressing such evils: "Congress has passed other laws aimed at combatting corruption in state and local governments."[54] The Court did not wish to begin regulating ethics in government via the antitrust laws:[55] "Insofar as [the Sherman Act] sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity."[56]

The final exception to be dealt with is the conspiracy exception. This

48. *Cf.* Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 681-82 & n.65-67 (1991):

> The [proprietary/governmental] distinction is notoriously unworkable. Worse, it bears no relation to the policy concerns relevant to issues of antitrust immunity. The government poses at least as great a threat to competition when regulating as it does when running a business, and it has just as much potential to further the public interest as a business as it does as a regulator.

49. 937 F.2d 1502 (10th Cir. 1991).

50. *Id.* at 1510.

51. *Id.* at 1504.

52. *Id.* at 1505.

53. *Id.* at 1505 & n.4.

54. City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1353 (1991).

55. However, the appearance of corruption in the *Omni* case was apparently most troubling to Justice Stevens, who wrote the dissenting opinion.

56. *Omni*, 111 S. Ct. at 1353 (citing Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 140 (1961)).

exception removes the state action immunity from the government when public officials conspire with private interests to restrain competition. In the past, various courts have upheld this exception,[57] as it was thought to be based on language in *Parker*. The Court's language in *Hoover v. Ronwin*[58] reflected a mood of disfavor toward a conspiracy exception, as such suits were thought to neutralize the *Parker* doctrine.[59] *Omni*, however, declared that the *Parker* language referred to the commercial participant exception,[60] and thus resolved a previously open question concerning the antitrust immunities of municipalities and the commercial interests that lobby them.

The *Omni* ruling definitively abolished the conspiracy exception to state action, largely because allowing conspiracy theories to form the bases of antitrust suits against the government would be impractical. A conspiratorial agreement might be nothing more than an agreement to enact a regulation. "Since it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urge upon them, such an exception would virtually swallow up the *Parker* rule: All anticompetitive regulation would be vulnerable to a 'conspiracy' charge."[61] Because it is unavoidable that regulations will benefit some members of society and harm others, such "ex post facto judicial assessments"[62] will jeopardize the ability of the states to regulate intrastate commerce. Further, the Court chose to avoid the "deconstruction of the government process and probing of the official 'intent'," stating that such inquiries were reserved for discrimination cases.[63]

In light of this decision, municipalities will receive greater protection from suits previously allowed by the LGAA that are based on allegations of conspiracy, even when only injunctive relief is sought. Because the state action doctrine continues to provide immunity in suits for injunctive relief, only in cases where the government entity acts outside the boundaries of its protection under *Parker* will injunctions be issued, and not for allegations of conspiracy. Additionally, when a municipality acts as a commercial participant or takes anticompetitive actions not pursuant to a clearly articulated, affirmatively expressed state policy, injunctive relief may be granted to an injured party.

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57. Whitworth v. Perkins, 559 F.2d 378, 380-82 (5th Cir. 1977), *vacated*, 435 U.S. 992, *aff'd on reh'g*, 576 F.2d 696 (1978), *cert. denied*, 440 U.S. 911 (1979); Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075, 1082-83 (5th Cir. 1988).

58. 466 U.S. 558, 580 (1984).

59. "[To] allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among the [advisory] committees, commissions or others . . . would emasculate the *Parker v. Brown* doctrine." *Id.*

60. The sentences from [*Parker*] simply clarify that this immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market. . . . These sentences should not be read to suggest the general proposition that even governmental *regulatory* action may be deemed private - and therefore subject to antitrust liability - when it is taken pursuant to a conspiracy with private parties.

Omni, 111 S. Ct. at 1351.

61. *Id.*

62. *Id.* at 1352 (citing Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 56 (1985)).

63. *Id.*

II. EFFECT OF OMNI ON PARTIES SEEKING FAVORABLE TREATMENT FROM MUNICIPALITIES

This section covers the antitrust immunity provided to private parties as they petition local governments for favorable "state action." At the outset, it should be noted that this immunity applies to the action of petitioning for favorable regulations, permits, or other government actions.[64] The leading cases of *Eastern R.R. President's Conference v. Noerr Motor Freight, Inc.*[65] and *United Mine Workers v. Pennington*[66] have provided antitrust protection to private parties seeking favorable government actions regardless of anticompetitive intent or effect. This protection has generally been known as the *Noerr-Pennington* doctrine.

The *Noerr-Pennington* doctrine protects the fundamental interests of a party's First Amendment right to petition the government for redress of grievances,[67] while recognizing the importance of an unrestricted flow of information between private citizens and their representatives in the government.[68] This doctrine also respects the dissimilarity between agreements to seek governmental action and agreements traditionally condemned by the antitrust laws.[69] These interests are distinguishable and separate from those protected by the state action doctrine.[70]

The *Omni* ruling describes the relationship between *Parker* state action immunity and *Noerr-Pennington*:

> *Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States' acts of governing, and the latter the citizens' participation in government. Insofar as the identification of an immunity-destroying 'conspiracy' in concerned, *Parker* and *Noerr* generally present two faces of the same coin. The *Noerr*-invalidating conspiracy alleged here is just the *Parker*-invalidating conspiracy viewed from the standpoint of the private-sector participants rather than the governmental participants.[71]

The *Noerr-Pennington* immunity protects concerted efforts to influence legal or administrative proceedings as well as governmental action.[72] However, a distinction is drawn between the conduct in the political arena and action taken in the administrative and judicial processes. Misrepresentations, perjury, or other unethical conduct, unpunished in the political arena, are not

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64. By contrast, *Parker* clearly states that a government has no authority to authorize illegal acts or declare illegal conduct to be lawful. "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . ." Parker v. Brown, 317 U.S. 341, 351 (1943).

65. 365 U.S. 127 (1961).

66. 381 U.S. 657, 669-70 (1965).

67. *Noerr*, 365 U.S. at 137-38.

68. *Id.* at 137.

69. *Id.* at 136-37.

70. Lafayette v. Louisiana Light & Power Co., 435 U.S. 389, 399-400 (1978). The interests protected by the state action doctrine, mentioned in *Noerr*, involve the sovereignty and "dual system" language from Parker (citing *Noerr*, 365 U.S. at 137-38, and Parker v. Brown, 317 U.S. 341, 351 (1943)).

71. City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1355 (1991).

72. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

protected by the *Noerr-Pennington* immunity in the adjudicatory process.[73]

A. The "Sham" Exception: Expensive Penalty for Abuse of Process

In cases where the lobbying effort or institution of legal or administrative proceedings is not directed toward influencing governmental action, the "sham" exception to *Noerr-Pennington* removes the immunity from the lobbying party. Sham lobbying efforts aimed at interfering with a competitor's business activities[74] may trigger antitrust liability. Sham litigation can be a costly exercise, as it will not only precipitate treble damage antitrust suits, but it may also give rise to court-imposed sanctions against attorney representatives for taking part in an abuse of legal or administrative processes. The sham exception applies when the purpose of lobbying activity is to harass or delay entry into a given market by a competitor,[75] obtain a patent by fraud,[76] or bar a competitor from access to government or judicial authorities.[77]

The mere intent to harm a competitor, however, is not sufficient to make petitioning a sham. Anticompetitive motives are protected by *Noerr-Pennington*. The method of implementing these motives is important. "The 'sham' exception to *Noerr* encompasses situations in which persons use the governmental *process-* as opposed to the *outcome* of that process- as an anticompetitive weapon."[78] As the U.S. Supreme Court observed in *Omni*, "The purpose of delaying a competitor's entry into the market does not render lobbying a 'sham', unless . . . the delay is sought to be achieved only by the lobbying process itself, and not by the governmental action that the lobbying seeks."[79]

Success by a petitioning party may be a factor in determining whether action is a sham, but it is not dispositive in and of itself. The significant factor for consideration is not the success of the claim but whether the litigant sincerely sought legislative or judicial relief.[80] Omni might have sued COA under the sham exception if there had been frivolous lobbying directed at delaying or preventing Omni's entry into the market. Of course, the losing party may have severe difficulties establishing that those who prevailed had no

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73. "Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.' " *Id.* at 512-13.

74. *Noerr*, 365 U.S. at 144.

75. [T]he repetitive use of litigation by Otter Tail [Power Co.] was timed and designed principally to prevent the establishment of municipal electric systems and thereby to preserve defendant's monopoly. I find the litigation comes within the sham exception to the *Noerr* doctrine as defined by the Supreme Court in *California Transport* . . .

United States v. Otter Tail Power Co., 360 F.Supp. 451, 452 (D.C. Minn. 1973), *aff'd*, 417 U.S. 901 (1974).

76. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965).

77. The barring of access to government or judicial authorities through litigation may be a factor, though not an essential element. *See* Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 674 F.2d 1252, 1269 (9th Cir. 1982). The *Otter Tail* case found a "sham" even though no access barring was shown. *Otter Tail*, 360 F.Supp. at 451-452. The *California Motor Transport* decision created this permissible element of inquiry. *California Motor Transport*, 404 U.S. at 515, 517-18.

78. City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1354 (1991).

79. *Id.*

80. *In re* Burlington Northern, Inc., 822 F.2d 518, 526-28, 530 (5th Cir. 1987).

"genuine desire"[81] to win. In the absence of evidence clearly showing ulterior motives, an antitrust plaintiff may be unable to base liability on the sham exception where the defending party prevailed in the sham proceeding. Despite the sham exception, however, a petitioner should not fear automatic liability if he does not prevail in his efforts. So long as a petitioner has a reasonable belief in the success of his claims, *Noerr-Pennington* protects him "even though he ultimately loses."[82]

B. Commercial Exception to Noerr-Pennington?

The commercial exception to the state action doctrine discussed in Part I creates the impression that a corresponding exception to *Noerr-Pennington* exists. Courts have distinguished from state action immunity the situation in which the government is a commercial participant, indicating the possibility that the government could be subject to antitrust liability when it participates in the marketplace.[83] *Omni* tells us that there is a "possible"[84] commercial exception to the state action doctrine, and this seems to comport with the court's stated interest in regulating business, rather than political activity. However, the U.S. Court of Appeals for the Ninth Circuit has explicitly ruled that there is no analogous commercial exception to *Noerr-Pennington*.[85]

Omni was silent on the question of a commercial exception to *Noerr-Pennington*. But in looking at the interests protected by the doctrine, it may be irrelevant to a private party's *Noerr-Pennington* immunity that the government entity is also engaging in commercial activities. The mere fact that the government is a market participant does not diminish the First Amendment rights of a private party. Nor does the government's commercial participation stifle its interest in preserving the free flow of information to public decisionmakers. Further, the acts of petitioning the government for favorable treatment are not synonymous with agreements to restrain trade that are proscribed by the antitrust laws.[86]

The commercial exception to state action immunity, however, indicates that when the government is a commercial participant, the *government's* risk of antitrust liability is increased. It does not follow that private lobbying parties are to be subjected to increased risks as well simply because they exercise their rights to petition the government for favorable action. In *Video International Production, Inc. v. Warner-Amex Cable Communications, Inc.*,[87] the city government was not truly a commercial participant, but it acted with anticompetitive motives for its own economic interests. The court refused to extend antitrust liability to the defendant cable company for its lobbying activ-

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81. *Id.* at 528.

82. *Id.* at 530.

83. Union Pacific Railroad Co. v. United States, 313 U.S. 450, 465 (1941). *See supra* notes 40-41.

84. *Omni*, 111 S. Ct. at 1353.

85. "There is no commercial exception to *Noerr-Pennington*." *In re* Airport Car Rental Antitrust Litigation, 693 F.2d 84, 88 (9th Cir. 1982).

86. Eastern R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136-37 (1961).

87. 858 F.2d 1075, 1083 (5th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989).

ities. The courts have not recognized a commercial exception to the *Noerr-Pennington* immunity.

C. *Omni Removes Conspiracy Exception to Noerr-Pennington Doctrine*

The *Noerr-Pennington* doctrine has in the past appeared to be subject to a conspiracy exception like that of the now-repudiated *Parker* conspiracy exception. The *Omni* Court, after recognizing the unsettled status of the *Noerr-Pennington* conspiracy exception among courts of appeals and its own holding in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,[88] rejected the conspiracy exception to *Noerr-Pennington*. The reasoning was the same as for the rejection of the conspiracy exception to *Parker*, because the Court considered these doctrines "complementary," like "two faces of the same coin."[89] This ruling again reflects the Court's unwillingness to scrutinize political activity via the antitrust laws.

The effect on existing regulated industries is that it is unlikely that a company will be joined in a suit as a co-conspirator with a municipality and be forced to pay monetary damages under the Local Government Antitrust Act,[90] as Columbia Outdoor Advertising, Inc. was in *Omni*. The *Omni* decision also has assisted rural electric cooperatives in an antitrust suit brought by several Alabama cities.[91] The cities alleged that the cooperatives had conspired to suppress competition in the retail electric market. The Eleventh Circuit Court of Appeals foreclosed the cities' claims that were based on conspiracy and limited the inquiry to the *Lafayette* test for state action immunity for the cooperatives.[92] Municipalities, historically the targets of conspiracy suits, are likewise unable to allege conspiracies when they challenge regulated industries under the federal antitrust laws.

On the other hand, the ouster of the conspiracy exception may have deleterious effects on new or expanding enterprises seeking entry to a new market. Veiled alliances between local officials and the private sector, previously condemned by the now-repudiated conspiracy exception, might go unchecked now that the risk of antitrust liability is removed. That the Supreme Court does not wish to punish this type of behavior with antitrust laws does not erase the economic harm done by such actions. Of course, there is still an exposure to private parties involved in bribery, fraud, or other corruption,[93] but, as stated previously, other laws have been written to deal with those problems.

Sham litigation, however, must still be avoided, as the "sham" exception to *Noerr-Pennington* will remove the antitrust protection. Caution is warranted, for perhaps the rejected conspiracy exception had some overlap with the sham exception. That is, the same activities that once were considered to trigger the conspiracy exception could be used to make out a sham case, espe-

88. 486 U.S. 492, 502 n.7 (1988).

89. City of Columbia v. Omni Outdoor Advertising Inc., 111 S. Ct. 1344, 1355 (1991).

90. *Id.* at 1348 & n.2.

91. Municipal Utilities Bd. of Albertville v. Alabama Power Co., 934 F.2d 1493 (11th Cir. 1991).

92. *Id.* at 1501.

93. "Congress has passed other laws aimed at combatting corruption in state and local governments." *Omni*, 111 S. Ct. at 1353.

cially since even the courts admit that "[t]here is no precise definition to the sham exception."[94]

Omni left open the possibility that antitrust plaintiffs might proceed under state antitrust laws.[95] The Court did not rule on Omni's state law antitrust claim, nor did it deal with related claims of trade libel, inducement to breach of contract, or the setting of artificially low rates. Public utilities harmed by local government actions should consider proceeding under state antitrust laws for redress, but not using a conspiracy theory.

Despite the potential for increased lobbying opportunities, the *Omni* case may prove unkind to business interests due to the expansion of the state action immunity. The rejection of a conspiracy exception, coupled with the refusal of some courts, despite *Omni*, to recognize a market participant exception, may result in an increased likelihood of government-sponsored damage to business. In cases decided after *Omni*, federal courts have upheld municipal actions that were harmful to commercial interests, including a town council's denial of an industrial revenue bond,[96] a failure to award a public construction contract to the lowest bidder,[97] and a municipality's "predatory" entry into the cable television business.[98] The actions were allegedly based on unexpressed anticompetitive motives.

In *Fisichelli v. Town of Methuen*,[99] town councillors allegedly conspired among themselves to deny the plaintiffs' application for an industrial revenue bond to build a shopping mall. One member of the council sought to prevent the bond issue due to a personal pecuniary interest,[100] and, it was alleged, the other councillors agreed to protect their colleague.[101] The district court granted the town's motion to dismiss the conspiracy claim in light of the *Omni* decision and suggested that the plaintiffs proceed under the state administrative processes or corruption laws.[102]

In *Buckley Construction, Inc. v. Shawnee Civic & Cultural development authority*,[103] the public development authority rejected the lowest bidder for a construction contract. State law authorized the agency to award the contract to the contractor determined to be the lowest "*responsible*" bidder.[104] The agency had the discretion to reject any or all bids if it was in the state's best interest. The court found that the anticompetitive actions met the *Lafayette*

94. Earnest W. Hahn, Inc. v. Codding, 615 F.2d 830, 837 n.8 (9th Cir. 1980).

95. "There also remains to be considered the effect of our judgement upon Omni's claim against COA under the South Carolina Unfair Trade Practices Act." *Omni*, 111 S. Ct. at 1356.

96. Fisichelli v. Town of Methuen, 764 F.Supp. 2 (D. Mass. 1991).

97. Buckley Const., Inc. v. Shawnee Civ. & Cultural Dev. Auth., 933 F.2d 853 (10th Cir. 1991).

98. Paragould Cablevision, Inc. v. City of Paragould, Ark., 930 F.2d 1310, 1313 (8th Cir. 1991).

99. *See supra* note 96.

100. The plaintiffs had initially sought to lease space in the shopping mall to one of the defendants, a pharmacist serving on the town council. After the plaintiffs and the councillor could not agree on a lease, the plaintiffs found another pharmacy to fill the space. Fisichelli v. Town of Methuen, 653 F.Supp. 1494, 1496 (D. Mass. 1987).

101. *Fisichelli*, 764 F.Supp. at 3 & n.1.

102. *Id.* at 4.

103. *See supra* note 97.

104. Buckley Const., Inc. v. Shawnee Civ. & Cultural Dev. Auth., 933 F.2d 853, 856 (10th Cir. 1991).

two-prong test for state action immunity.[105]

The *Buckley* opinion offered few details to explain why the Development Authority rejected Buckley Construction, Inc., in favor of a competitor. The Authority may indeed have acted with the best of intentions. Buckley may have been judged to be less than "responsible." On the other hand, the Authority might have engaged in an anticompetitive conspiracy. The federalism principles upheld in *Omni* have apparently erased those distinctions. "Once a municipality establishes it is entitled to state action immunity, the subjective motivation of the actors involved in the decisionmaking process should not come into play. . . . This approach preserves the federalism principles which are the heart of the state action doctrine."[106]

In *Paragould Cablevision v. City of Paragould, Ark.*,[107] the local cable television franchise holder sued the City for its "predatory" entry into the cable television market. Dissatisfied voters approved the municipal operation of cable television. Cablevision conceded that state law allowed the city to enter the cable television market, but the company objected to the means used to accomplish that goal. According to Cablevision, the city would be in a position to exploit its monopoly status in supplying utilities and drive Cablevision out of the market. The Eighth Circuit Court of Appeals apparently read *Omni* narrowly to mean that neither conspiracy nor market participant[108] exceptions existed for the purpose of determining state action immunity, and rejected Cablevision's antitrust claims.

In *C & A Carbone, Inc. v. Town of Clarkstown*,[109] the town entered into an agreement with a local recycling facility in which the recycling facility would build a transfer station and the town would gurantee a specified tonnage or suffer a penalty. The town later enacted a law which required all wastes collected outside the city limits to be processed at the contracted facility. The plaintiff, a local competitor of the contracted facility, was found hauling solid waste, at a lower unit price, to a landfill in Indiana. The town sought to prevent the plaintiffs from operating a transfer station and disposing of solid waste generated within the town.

The case was decided more than three months after *Omni*, so a conspiracy exception was not an available theory. The court found several state laws authorizing local control of waste disposal, and that the local ordinance was a foreseeable result of those enabling laws. The plaintiffs were unable to seek relief based on the anticompetitive local law benefiting the contracted facility. *Omni* effectively reduced their options to little more than corruption laws and lobbying activity.

In future disputes between municipalities and commercial interests, business representatives will need to look to other remedies for protection from harmful government actions. On the other hand, municipalities will be encouraged to make decisions without fear of conspiracy claims and costly

105. *Id.* at 857.
106. *Id.* at 856.
107. 930 F.2d 1310 (8th Cir. 1991).
108. *See supra* p. 88.
109. 770 F.Supp. 848 (S.D.N.Y. 1991).

litigation, and this seems to be consistent with the legislative intent of the Local Government Antitrust Act.[110]

As for private lobbying activities, the rejection of a conspiracy exception to *Noerr-Pennington* immunity appears to reward *successful* lobbying, but allows harm to those who fail in their bid for favorable municipal actions. "[I]t is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners."[111] The *Omni* decision clarifies that government actors may depart from purely economic and mathematical decisionmaking, and make value judgements about what best serves the public interest. *Parker* "was not meant to shift that judgment from elected officials to judges and juries."[112]

When a city government is intent on taking actions that are harmful to a local business, the entrepreneur may be put in a position where he is prevented from recovering losses through the courts under the antitrust laws. At that point, no amount of petitioning before the city will help him. The expansion of state action immunity, coupled with the LGAA, greatly enhances the position of municipalities with respect to antitrust law, but the corresponding "privilege" of increased lobbying opportunities may not benefit the business person to the same extent. But it is clear that lobbying activities may be conducted more freely, with reduced risk of antitrust liability, now that the conspiracy exception to the *Noerr-Pennington* immunity has been eliminated.

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110. *See supra* notes 33-34.

111. City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1352 (1991).

112. *Id.*