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Municipal State Action Antitrust Immunity: A Federalism Argument Against the Bad Faith Exception

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MUNICIPAL STATE ACTION ANTITRUST IMMUNITY: A FEDERALISM ARGUMENT AGAINST THE BAD FAITH EXCEPTION

INTRODUCTION

In the law of antitrust, the state action doctrine immunizes states against claims that they have violated the federal antitrust laws. This immunity, however, is not available exclusively to the states. Bodies other than states also may restrain trade and claim state action antitrust immunity to the extent that they have acted pursuant to state-granted authority to displace competition with regulation.

Accordingly, municipalities or private parties regulated by the state that satisfy the criteria of the state action doctrine cannot be held liable for enacting or administering legislation in restraint of trade. The law remains unsettled, however, whether evidence of a bad faith motivation on the part of local officials vitiates the municipality's state action immunity: can a municipality that satisfies the state action criteria nevertheless lose that protection if it is found that its officials used their state-granted power to regulate in "bad faith"? This Note argues that the answer to this question is no. The intent of municipal officials is irrelevant to state action immunity analysis because the principles of federalism, not the subjective motivations of individuals, determine whether a municipality is immune.

Part I of this Note briefly summarizes the current standard of municipal state action immunity, and identifies the lines of cases for and against finding a bad faith exception to municipal state action immunity. Part II explains why courts should not consider the good or bad faith of individual local officials to determine immunity, and why the arguments in support of the bad faith exception are inadequate. This Note concludes that no bad faith exception to municipal state action immunity should exist.

1. See infra notes 12-17 and accompanying text.
2. See infra notes 18-30 and accompanying text.
3. See infra note 30 and accompanying text.
I. MUNICIPAL STATE ACTION IMMUNITY AND THE PROBLEM OF BAD FAITH

A. State Action Immunity of Municipalities

The antitrust laws promote free market competition by prohibiting unreasonable restraints of trade. The passage of the Sherman Antitrust Act in 1890 symbolized a fundamental commitment by the nation to "unfettered competition" in the marketplace. A basic tension exists, however, between the goal of antitrust laws—unfettered competition—and the non-economic reasons for some state regulation of economic activity: "[c]ompetition simply does not and cannot further the interests that lie behind most social welfare legislation." In 1943, the United States Supreme Court resolved this conflict in *Parker v. Brown*, which holds states acting as sovereigns immune from antitrust attack.

In *Parker*, the Supreme Court found that Congress, in enacting the

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6. Restraints of trade are adjudged according to the "rule of reason," which considers the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable[;] [the history of the restraint[;] the evil believed to exist[;] the reason for adopting the particular remedy[;] and] the purpose or end sought to be attained . . . .


On the state and local levels, federal "antitrust laws, which are intended to promote competition, have inevitably collided with state and local laws that have a tendency to displace competition." H.R. Rep. No. 965, 98th Cong., 2d Sess. 8, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4602, 4609; see Easterbrook, *supra*, at 24. The state action doctrine attempts to reconcile these conflicts with the principles of federalism. See Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 61 (1985).

10. Id. at 341 (1943).

11. Id. at 350-52.
Sherman Antitrust Act, demonstrated no intention of applying the statute to states acting as sovereigns. The rule of Parker, known as the state action doctrine, immunizes state actions that would restrain trade in violation of the federal antitrust laws. To hold otherwise would mean that any time a state attempted to regulate the free market by enacting laws that restrain competition, the antitrust laws would preempt the state’s actions. This conclusion not only would eliminate the states’ police power to regulate, but also would contradict the principles of federalism upon which our republic is based.

12. See Parker v. Brown, 317 U.S. 341, 350-51 (1943). Parker involved a suit by a private raisin producer seeking to enjoin a raisin marketing program adopted by the State of California. Id. at 344. The plaintiff alleged that the program prohibited him from selling his raisins on the free market. Id. at 349. Recognizing the anticompetitive implications of the program, id. at 350, the Supreme Court held that the Sherman Act was not intended to restrain a state from regulating its own domestic commerce. Id. at 352.


14. See Hallie, 471 U.S. at 44 n.7; Parker, 317 U.S. at 350-52; Easterbrook, supra note 9; at 24-25.

15. See Easterbrook, supra note 9, at 24; cf. Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982) (Sherman Act does not preempt state regulation that has anticompetitive effects or that would violate the antitrust laws if engaged in by private parties).

The Justices of the Supreme Court have debated at length whether the state action doctrine constitutes an implied exemption from the federal antitrust laws, or a limit to federal preemption of state law. Compare Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 55 n.18 (1985) (state action doctrine an implied exemption to which Congress has acquiesced for 40 years) and Community Communications Co. v. City of Boulder, 455 U.S. 40, 53-54 (1982) (state action doctrine an “exemption”) with id. at 63 (Rehnquist, J., dissenting) (Parker Court holding “clearly [invokes] the language of federal pre-emption”) and City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 393 n.8 (1978) (finding a reference to state action doctrine as an “exemption” merely a “shorthand” indication that Congress did not intend to prohibit anticompetitive state laws). The Court, however, now appears to draw a distinction between the issues of federal preemption and state action immunity. See Fisher v. City of Berkeley, 475 U.S. 260, 264, 270 (1986) (Court, in dismissing antitrust claim against city, did not reach issue of state action immunity because city’s anticompetitive actions not preempted by federal law). The Fisher holding thus suggests that the state action doctrine is an exemption from antitrust liability. For excellent analyses of the different views, see Boulder, 455 U.S. at 61-65 (Rehnquist, J., dissenting); P. Areeda & H. Hovenkamp, Antitrust Law ¶ 209.1 (Supp. 1987).


For thirty years, the Supreme Court "largely ignored" the state action doctrine.\(^{18}\) Then, beginning in 1975, the doctrine became a regular topic of consideration for the Court.\(^{19}\) The majority\(^{20}\) of these contemporary cases deals with the problem caused by nonsovereign bodies, such as municipalities\(^{21}\) and private parties,\(^{22}\) that restrain trade pursuant to a state program authorizing displacement of competition. Without nonsovereign bodies, a state would be unable to regulate commerce effectively.\(^{23}\) Because they are not sovereign, however, these bodies cannot claim that the principles of federalism protect them. As a result, the Supreme Court extended the state action doctrine to nonsovereign bodies\(^{24}\) to the extent that they act "pursuant to [a] state policy to displace competition with regulation or monopoly public service."\(^{25}\) This standard, moreover, re-

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23. See Southern Motor Carriers, 471 U.S. at 64; Boulder, 455 U.S. at 51; id. at 67 (Rehnquist, J., dissenting); Lafayette, 435 U.S. at 434-35 (Stewart, J., dissenting); Scott v. City of Sioux City, 736 F.2d 1207, 1215 (8th Cir. 1984).

24. The first case to consider the state action immunity of municipalities was City of Lafayette v. Louisiana Power & Light Co, 435 U.S. 389, 412-15 (1978) (plurality opinion). Although Lafayette was a plurality opinion, a majority of the Justices adopted the Court's holdings in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (applying state action immunity to private parties), and in Community Communications Co. v. City of Boulder, 455 U.S. 40, 52 (1982) (applying state action immunity to municipalities).

requires that the state policy be "clearly articulated and affirmatively expressed."[26] 

Under this standard, a municipality seeking to assert a Parker defense need not "point to a specific, detailed legislative authorization."[27] Rather, the anticompetitive effects of the challenged municipal restraint must constitute the kind of action contemplated by the state legislature[28] and must be a foreseeable consequence of engaging in the authorized activity.[29] The state action doctrine immunizes from antitrust liability a municipal restraint that meets these criteria.[30]

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The lesser standard of state action immunity for municipalities reflects the fact that unsupervised private parties would tend to favor self-interest over state policy, while municipalities presumably act in the public interest. See Hallie, 471 U.S. at 47. Moreover, the requirement that a municipality be acting pursuant to a clearly articulated and affirmatively expressed state policy eliminates the "minimal" risk that a municipality will use its regulatory authority to further "purely parochial public interests at the expense of more overriding state goals." Id.

27. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415 (1978) (plurality opinion). To require otherwise would reflect "an unrealistic view of how legislatures work and of how statutes are written." Hallie, 471 U.S. at 43. However, "the State may not validate a municipality's anticompetitive conduct simply by declaring it to be lawful." Id. at 39.

28. See Lafayette, 435 U.S. at 415 (adopting standard applied by court of appeals in City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976)). While mere "neutrality" on the part of a state legislature with respect to the anticompetitive implications of municipal regulation does not meet this test, see Community Communications Co. v. City of Boulder, 455 U.S. 40, 55-56 (1982) (broad grant of municipal "home rule" power did not permit anticompetitive regulation of cable television by municipality), it is satisfied if the anticompetitive effects of municipal regulation "logically would result from . . . [the] broad authority to regulate," Hallie, 471 U.S. at 42. A municipality need not show that the state legislature compelled the activity complained of. See id. at 45-46. Nor must a state legislature "state in a statute or its legislative history that it intends for the delegated action to have anticompetitive effects." Id. at 43.

29. See Hallie, 471 U.S. at 43. In Hallie, the state of Wisconsin delegated to the City of Eau Claire the broad power to provide sewer service to unincorporated townships. Id. at 41. The plaintiffs, a group of unincorporated townships, claimed that the city had exceeded this authority by tying the provision of sewer services to the purchase of sewage transport and collection services. Id. at 36-37. The Hallie Court held that the state contemplated anticompetitive behavior on the part of the municipality, and therefore, because the type of conduct complained of was a "foreseeable" result of the power granted, the city had satisfied the criteria of the state action doctrine. Id. at 42, 47.

30. See id. at 44, 47. For recent decisions holding anticompetitive acts of municipalities immune under the state action doctrine, see Campbell v. City of Chicago, 823 F.2d 1182, 1184-85 (7th Cir. 1987); Auton v. Dade City, 783 F.2d 1009, 1010 (11th Cir. 1986); Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1411-15 (9th Cir. 1985), aff'd on other grounds, 476 U.S. 488 (1986).
B. The Problem of Bad Faith

Despite the extensive history of Supreme Court cases dealing with state action antitrust immunity, some questions remain unanswered with respect to municipalities. One unresolved issue is whether a local government that proves it has satisfied the requirements of state action immunity may lose that protection if its officials use their state-granted power to regulate in bad faith.

Although the cases that create the bad faith exception do not use the term "bad faith," an analysis of the pleadings in those cases shows that the claim is invoked when the plaintiff alleges that municipal officials used their state-granted regulatory power to serve their own financial interests, or those of the plaintiff's competitor, by denying or revoking the plaintiff's right to do business within the municipality. The plaintiffs in

31. See Community Communications Co. v. City of Boulder, 455 U.S. 40, 65 (1982) (Rehnquist, J. dissenting) (noting confusion over whether per se rules of antitrust illegality apply to municipalities in the same manner as to private defendants); Ross, Local Governments and the Antitrust Laws after City of Eau Claire: Is the Fire Finally Out?, 15 Stetson L. Rev. 651, 655-56 (1986) (noting continued confusion); see also infra notes 37-40 and accompanying text.

32. In a recent case, the United States Supreme Court had the opportunity to consider whether evidence of bad faith on the part of a nonsovereign body vitiates state action immunity. See Patrick v. Burget, 56 U.S.L.W. 4430 (U.S. May 16, 1988). Because the case involved a medical "peer review" board, however, the Court was able to deny immunity solely upon the grounds that the state had failed to actively supervise the board's actions. See id. at 4432. Thus, the Court did not consider the plaintiff's allegation that the board had acted in bad faith. See id. at 4431 n.5.

33. The label "bad faith" seems to derive from the first case holding a nonsovereign state body immune from antitrust liability despite an alleged bad faith action by a public official. See Llewellyn v. Crothers, 765 F.2d 769, 774 (9th Cir. 1985) (chiropractor pointed to trial court finding that medical director of state-sponsored fee-fixing program had set high chiropractors' fees out of a dislike for chiropractors). Although Llewellyn did not involve a claim against a municipality, it is often relied upon by courts refusing to consider alleged bad faith conduct of municipal officials in state action immunity cases. See, e.g., Hancock Indus. v. Schaeffer, 811 F.2d 225, 234 (3d Cir. 1987); City Communications, Inc. v. City of Detroit, 650 F. Supp. 1570, 1577 (E.D. Mich. 1987); Traweek v. City and County of San Francisco, 659 F. Supp. 1012, 1038-39 (N.D. Cal. 1986) (special master's findings).

34. The most common claim of bad faith involves an alleged conspiracy between municipal officials and a business competitor of the plaintiff that is designed to favor the conspirators' business interests over those of the plaintiff. See, e.g., Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733, 743 (8th Cir. 1982) (private developer alleged city officials and competing developers conspired to revoke commercial zoning of his land and then to grant development rights to competing developers), cert. denied, 461 U.S. 945 (1983); Corey v. Look, 641 F.2d 32, 34 (1st Cir. 1981) (unsuccessful bidder claimed city awarded parking lot franchise to state-controlled Steamship Authority pursuant to a conspiracy to exclude plaintiff from the market); City Communications, Inc. v. City of Detroit, 650 F. Supp. 1570, 1576 (E.D. Mich. 1987) (plaintiff alleged conspiracy "to continually change the rules of the [cable television] franchise application process so as to accommodate [plaintiff's competitor], and prevent plaintiff from competing fairly for a franchise"); DiVerniero v. Murphy, 635 F. Supp. 1531, 1536 (D. Conn. 1986) (plaintiff alleged city officials and exclusive vendor in city coliseum conspired to hire off-duty police officers to harass street vendors in vicinity of coliseum). For other cases involving conspiracy allegations, see Montauk-Caribbean Airways, Inc. v. Hope, 784
these cases argue that in doing so, local officials exceed their authority to regulate and therefore fail to satisfy the "clearly articulated and affirmatively expressed" test of state action immunity.36

Courts faced with such claims have reached conflicting results. Since the Supreme Court decision of Hoover v. Ronwin,37 which held that the state action doctrine bars an antitrust plaintiff from challenging the motives of state officials,38 most cases have decided correctly that the intent of municipal officials is irrelevant to municipal state action immunity analysis.39 A minority of cases decided since Hoover, however, relies on


38. See id. at 579-80; see also infra text accompanying notes 45-47.

39. See Hancock Indus. v. Schaeffer, 811 F.2d 225, 234 (3d Cir. 1987); City Communications, Inc. v. City of Detroit, 650 F. Supp. 1570, 1576-78 (E.D. Mich. 1987); Traweek v. City and County of San Francisco, 659 F. Supp. 1012, 1039 (N.D. Cal. 1986) (special master's findings); Crocker v. Padnos, 483 F. Supp. 229, 232 (D. Mass. 1980); see also Pendleton Constr. Corp. v. Rockbridge County, 837 F.2d 178, 179 (4th Cir. 1988) (court does not consider allegation that municipality acted in concert with competitor of plaintiff in finding municipality state action immune); Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91, 97 (2d Cir. 1986) (holding town state action immune despite allegation that town conspired with plaintiff's competitor to prevent plaintiff from serving as year-round air carrier at town airport), cert. denied, 107 S. Ct. 248 (1986); Hillman Flying Serv., Inc. v. City of Roanoke, 652 F. Supp. 1142, 1144-46 (W.D. Va. 1987) (finding city state action immune despite allegation that it prevented plaintiff from selling fuel at airport pursuant to illegal conspiracy with competitor of plaintiff), aff'd, No. 87-3037, slip op. (4th Cir. Apr. 21, 1988); cf. Kern-Tulare Water Dist. v. City of Bakersfield, 828 F.2d 514, 522 (9th Cir. 1987) (ordinary error by municipal officials insufficient to vitiate state action immunity); Llewellyn v. Crothers, 765 F.2d 769, 774 (9th Cir. 1985) (bad faith motivation of director of state medical fee-setting agency irrelevant to state action immunity analysis); Scott v. City of Sioux City, 736 F.2d 1207, 1215 (8th Cir. 1984) (mere label "conspiracy" not enough to strip municipality of state action immunity; plaintiff also must allege municipal officials were engaged in "bribery or other illegal acts"), cert. denied, 471 U.S. 1003 (1985).
an older (and incorrect) view that allegations of bad faith conduct by municipal officials vitiate state action immunity.40

While the cases upholding the bad faith exception do have an "intuitive appeal,"41 little in the way of substantive law exists to support them. The doctrine of federalism, which provides the basis for the state action doctrine,42 and the existence of other state and federal laws that may be more appropriate to curb corruption in local government together dictate that bad faith should not destroy municipal state action immunity.

II. ARGUMENTS AGAINST THE BAD FAITH EXCEPTION: FEDERALISM AND THE INAPPLICABILITY OF ANTITRUST LAW

A. Federalism

The doctrine of federalism, with its emphasis on respect for state sovereignty, mandates that allegations of bad faith on the part of municipal officials should not destroy state action immunity.43 The bad faith exception conflicts with the tenets of federalism by calling for the intrusion of federal courts into governmental decision-making on the state or local level, and thus undermines the state action doctrine.44

40. The first case to suggest that bad faith conduct does not satisfy the requirements of municipal state action immunity was Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580, 591 (7th Cir. 1977), vacated and remanded, 435 U.S. 992, reinstated on remand, 583 F.2d 378 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1979). For cases adopting a similar view, see Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733, 746 (8th Cir. 1982), cert. denied, 461 U.S. 945 (1983); Corey v. Look, 641 F.2d 32, 37 (1st Cir. 1981); Whitworth v. Perkins, 559 F.2d 378, 381 (5th Cir. 1977), vacated and remanded sub nom. City of Impact v. Whitworth, 435 U.S. 992, reinstated on remand, 576 F.2d 696 (5th Cir. 1978), cert. denied, 440 U.S. 911 (1979); Schiessle v. Stephens, 525 F. Supp. 763, 776 (N.D. Ill. 1981), aff'd on other grounds, 717 F.2d 417 (7th Cir. 1983); Stauffer v. Town of Grand Lake, 1981-1 Trade Cas. (CCH) ¶ 64,029, at 76,330 (D. Colo. 1980); Mason City Center Assocs. v. City of Mason City, 468 F. Supp. at 76,330 (D. Colo. 1980); Mason City Center Assocs. v. City of Mason City, 468 F. Supp. 737, 743 & n.7 (N.D. Iowa 1979), aff'd on other grounds, 671 F.2d 1146 (8th Cir. 1982).


For purposes of this Note, the unavailability of municipal state action immunity due to bad faith on the part of municipal officials will be referred to as the "bad faith exception."


42. See supra note 17 and accompanying text.

43. See Hancock Indus. v. Schaeffer, 811 F.2d 225, 234 (3d Cir. 1987); City Communications, 650 F. Supp. at 1576-77.

44. See Llewellyn v. Crothers, 765 F.2d 769, 774 (9th Cir. 1985); cf. Hoover v. Ronwin, 466 U.S. 558, 580 (1984) (examination of the intent of state agency or committee "emasculate[s]" Parker doctrine); Scott v. City of Sioux City, 736 F.2d 1207, 1216 (8th Cir. 1984) ("'Ordinary' errors or abuses in the administration of jurisdiction conferred by the state should be left for state tribunals to review." (quoting P. Areeda, Antitrust Law ¶ 212.3b, at 57 (Supp. 1982)), cert. denied, 471 U.S. 1053 (1985).
The Supreme Court already has stated that, for reasons of federalism, there is no bad faith exception to the state action doctrine as applied to the state acting as sovereign.\textsuperscript{45} In \textit{Hoover v. Ronwin},\textsuperscript{46} the Court rejected a rule that would have allowed antitrust plaintiffs "to look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among [those] who necessarily must advise the sovereign" because such a rule would "emasculate the \textit{Parker v. Brown} doctrine."\textsuperscript{47}

This argument applies with equal force to nonsovereign bodies that regulate commerce with the authority of the state, and the lower courts that have rejected the bad faith exception rely substantially on the \textit{Hoover} reasoning.\textsuperscript{48} For instance, in rejecting plaintiffs' argument that a bad faith motivation vitiates state action immunity, the Ninth Circuit has held that "[t]he availability of \textit{Parker} immunity . . . does not depend on the subjective motivations of the individual actors, but rather on the satisfaction of the objective standards set forth in \textit{Parker} and authorities which interpret it."\textsuperscript{49} Once a state has chosen to regulate a market, federal antitrust laws must yield to state sovereignty.\textsuperscript{50}

The policies underlying the state action doctrine itself defeat the disingenuous argument offered by one court choosing to uphold the bad faith exception that it is "probable" that "the State would intend its municipalities to exercise their . . . powers in a manner consistent with the bounds imposed by the federal antitrust laws and the strong national pol-

\textsuperscript{45} See \textit{Hoover v. Ronwin}, 466 U.S. 558 (1984). In \textit{Hoover}, the Supreme Court considered the state action immunity of the Arizona Supreme Court in admitting attorneys to the state bar. \textit{Id.} at 560. The \textit{Hoover} Court held that "where the action complained of—here the failure to admit [plaintiff] to the Bar—was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action." \textit{Id.} at 579-80.

The Arizona Supreme Court admitted attorneys only after they had passed the bar exam, which a committee appointed by the state supreme court administered and graded. \textit{Id.} at 561-63. The plaintiff alleged that the grading system employed by the committee was designed to maintain a monopoly of lawyers in the state by restricting the number of new entrants. \textit{Id.} at 565. The Supreme Court did not decide whether the state committee itself was immune under \textit{Parker}, however, because the Court found that the admission of attorneys rested solely within the power of the Arizona Supreme Court, which was state action immune. \textit{Id.} at 573-74.

\textsuperscript{46} 466 U.S. 558 (1984).
\textsuperscript{47} \textit{Id.} at 580; see \textit{Town of Hallie v. City of Eau Claire}, 471 U.S. 34, 44 n.7 (1985); see also \textit{infra} notes 67-70 and accompanying text.

\textsuperscript{48} See, e.g., \textit{Hancock Indus. v. Schaeffer}, 811 F.2d 225, 234 (3d Cir. 1987); \textit{City Communications, Inc. v. City of Detroit}, 650 F. Supp. 1570, 1576 (E.D. Mich. 1987); see also \textit{Llewellyn v. Crothers}, 765 F.2d 769, 774 (9th Cir. 1985) (state action immunity analysis was designed upon subjective motivations "would compel the federal courts to intrude upon internal state affairs whenever a plaintiff could present colorable allegations of bad faith"); \textit{Euster v. Eagle Downs Racing Ass'n}, 677 F.2d 992, 997 (3d Cir.) ("The state action doctrine was developed to avoid . . . inquiry by federal courts into state legislative wisdom."); cert. denied, 459 U.S. 1022 (1982).

\textsuperscript{49} \textit{Llewellyn}, 765 F.2d at 774; see \textit{Boone v. Redevelopment Agency of the City of San Jose}, 841 F.2d 886, 892 (9th Cir. 1988).
\textsuperscript{50} See \textit{Boone}, 841 F.2d at 890.
icy favoring competition those laws embody.”\(^5^1\) The entire body of state action case law is intended to insure that when a municipality does not act pursuant to a state policy to displace competition with regulation, it must adhere to the federal antitrust laws.\(^5^2\)

Despite these policies and the admonition in *Hoover*, courts following the bad faith exception consistently find that a municipal ordinance enacted in keeping with the state action doctrine does not preclude inquiry into the motive for official conduct when the plaintiff alleges bad faith.\(^5^3\) This conclusion, however, contravenes the principles underlying the *Hoover* decision because the bad faith exception enables federal courts to probe the subjective motivations of municipal actors to whom the state has granted regulatory authority.\(^5^4\) Moreover, the majority of cases decided since *Hoover* has recognized this limit on the power of federal courts and has declined to examine the motives of officials acting under an immune municipal ordinance.\(^5^5\)

Nevertheless, proponents of the bad faith exception argue that when municipal officials violate state criminal laws, it is manifest that the state legislature has not “contemplated” the conduct, and therefore, under the standard articulated in *City of Lafayette v. Louisiana Power & Light Co.*\(^5^2\).

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51. Mason City Center Assocs. v. City of Mason City, 468 F. Supp. 737, 743 (N.D. Iowa 1979), aff’d on other grounds, 671 F.2d 1146 (8th Cir. 1982).
53. See *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733, 746 (8th Cir. 1982), cert. denied, 461 U.S. 945 (1983); Corey v. Look, 641 F.2d 32, 37 (1st Cir. 1981); Whitworth v. Perkins, 559 F.2d 378, 379 (5th Cir. 1977), vacated and remanded sub nom. City of Impact v. Whitworth, 435 U.S. 992, reinstated on remand, 576 F.2d 696 (5th Cir. 1978), cert. denied, 440 U.S. 911 (1979); see also Fischelli v. Town of Methuen, 653 F. Supp. 1494, 1500-01 (D. Mass. 1987) (although state statute clearly authorizes municipality to issue industrial revenue bonds, alleged conspiracy to deny bonding to protect municipal official’s business is not immune); Oberndorf v. City and County of San Francisco, 653 F. Supp. 304, 310 (D. Colo. 1986) (“A state agency’s action is reviewable if the state legislation authorizing the state action did not contemplate use of that authorization to promote city or state officials’ own interest and personal economic benefit.”); DiVerniero v. Murphy, 635 F. Supp. 1531, 1533 (D. Conn. 1986) (finding alleged conspiracy to harass street vendors not immune despite fact that statute clearly authorizes anticompetitive vendor licensing ordinances); cf, Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 566 F. Supp. 1444, 1446 (D.S.C. 1983) (court need not consider whether state action immunity protects a municipal ordinance if plaintiff alleges it was passed in bad faith).
Co.,56 the state action doctrine is inapplicable.57 This argument proves too much, however, because the doctrine of federalism requires that violations of state law be dealt with on the state level.58 Furthermore, questions of state government misconduct are not antitrust issues because antitrust analysis inquires only into the economic ramifications of the act in question.59 By permitting federal courts to investigate allegations of local government misconduct under the guise of the state action doctrine, the bad faith exception turns the federal courts into "superlegislatures."60 In addition, the "contemplated" standard of Lafayette does not require good faith as a component of municipal state action immunity,61

57. See, e.g., Scott v. City of Sioux City, 736 F.2d 1207, 1215 (8th Cir. 1984), cert. denied, 471 U.S. 1003 (1985); Corey v. Look, 641 F.2d 32, 37 (1st Cir. 1981); Fischelli v. Town of Methuen, 653 F. Supp. 1494, 1499 (D. Mass. 1987); Oberndorf v. City and County of Denver, 653 F. Supp. 304, 310 (D. Colo. 1986); Schiessle v. Stephens, 525 F. Supp. 763, 776 (N.D. Ill. 1981), aff'd on other grounds, 717 F.2d 417 (7th Cir. 1983); Stauffer v. Town of Grand Lake, 1981-1 Trade Cas. (CCH) ¶ 64,029, at 76,330 (D. Colo. 1980); Mason City Center Assoc's. v. City of Mason City, 468 F. Supp. 737, 744 (N.D. Iowa 1979), aff'd on other grounds, 671 F.2d 1146 (8th Cir. 1982); see also P. Areeda & H. Hovenkamp, supra note 15, ¶ 212.3b, at 128 n.69 (presuming that state legislatures do not contemplate clear violations of state law by municipal officials); Cirace, An Economic Analysis of the "State-Municipal Action" Antitrust Cases, 61 Tex. L. Rev. 481, 509-10 & n.176 (1982) (municipal officials should be subject to the antitrust laws for activities such as receiving bribes, kick-backs and influence peddling); Dabney, Antitrust Aspects of Anticompetitive Zoning, 24 Antitrust Bull. 435, 467 (1979) (state action doctrine should require local governments to exercise regulatory authority "to benefit the public, not arbitrarily to benefit particular persons"); Ross, supra note 31, at 673 (municipal officials should be subject to the antitrust laws when they act beyond traditional police power and participate in illicit activities). But cf. Hoover v. Ronwin, 466 U.S. 558, 580 & n.34 (1984) (mere challenges of improper motive on part of state supreme court committee should not be sufficient to survive a motion to dismiss); Hancock Indus. v. Schaeffer, 811 F.2d 225, 234 (3d Cir. 1987) (subjective motivations of public officials irrelevant to state action immunity analysis); Llewellyn v. Crothers, 765 F.2d 769, 774-75 (9th Cir. 1985) (same).
58. See Kern-Tulare Water Dist. v. City of Bakersfield, 828 F.2d 514, 522 (9th Cir. 1987); Llewellyn v. Crothers, 765 F.2d 769, 774 (9th Cir. 1985); Chambers Dev. Co. v. Municipality of Monroeville, 617 F. Supp. 820, 821-22 (W.D. Pa. 1985).
59. See, e.g., P. Areeda & H. Hovenkamp, supra note 15, ¶ 212.9b, at 152 (arguing that even if bad faith allegations were proven, there "would simply be no antitrust offense" in Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580 (7th Cir. 1977), vacated and remanded, 435 U.S. 992, reinstated on remand, 583 F.2d 378 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1979)); id. at ¶ 212.9b, at 153 ("The heart of [complaints involving allegations of bad faith conspiracies] ... is not an unreasonable restraint of trade, but rather a local agency's abuse of power."); id. at ¶ 212.9d, at 155 ("Conclusionary [bad faith conspiracy] allegations have kept litigation alive even though the court doubts seriously that the plaintiff will be able to prove its allegations"); M. Lee, Antitrust Law and Local Government 157-58 (1985) (municipal officials' "corruption, bias or stupidity" is irrelevant to the economic issues involved in an antitrust case); see also infra note 74 and accompanying text; cf. Chambers Dev. Co. v. Municipality of Monroeville, 617 F. Supp. 820, 822 (W.D. Pa. 1985) (that municipal state action is "later found to be preempted or ineffective" does not subject the municipality to antitrust liability).
60. See M. Lee, supra note 59, at 34-35.
61. See City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 416-17 (1978) (plurality opinion) (Lafayette standard merely ensures that anticompetitive practices of municipalities are authorized by the state); City Communications, Inc. v. City of
and there is little risk that a municipality will use its regulatory authority in contravention of the "governmental interests of the State." 62

Although no longer needed to protect local governments from the spectre of treble damages, 63 the state action doctrine still serves to protect the state from the considerable burdens of litigation. The Hoover Court denounced claims that challenge the motives of state officials because they are attendant with "substantial 'discovery and litigation burdens.'" 64 Thus, the bad faith exception emasculates the state action doctrine because it entails the protracted litigation expense associated with defending against "conclusory" 65 claims of conspiracy and bad faith. 66

Professor Areeda has pointed out three reasons why allegations of bad faith conspiracies "deserve very little respect from the antitrust court." 67 First, a party displeased with the decision of a municipal body always is

62. See Town of Hallie v. City of Eau Claire, 471 U.S. 34, 47 (1985); see also Hancock Indus. v. Schaeffer, 811 F.2d 225, 235 (3d Cir. 1987) (relying on Hallie to reject the bad faith exception).

63. See P. Areeda & H. Hovenkamp, supra note 15, ¶ 212.3, at 127; infra note 69 and accompanying text. The case of Traweek v. City and County of San Francisco, 659 F. Supp. 1012 (N.D. Cal. 1986), illustrates the unfairness of making municipalities defend against claims of bad faith. In Traweek, the plaintiffs alleged that a conspiracy to eliminate them from the condominium market existed between their competitors and city officials. Id. at 1017. The district court noted that the defendants probably satisfied the state action requirements, but it denied their motion to dismiss because, if proven, the plaintiffs' "threadbare and largely conclusory" allegation of conspiracy would vitiate the state action protection. Id. at 1020-21. Due to the complexity of the issues involved, the district court appointed a special master, at $125 per hour (split between the parties), to determine questions of fact including the allegations of bad faith. Id. at 1035-35. Relying entirely upon Llewellyn v. Crothers, 765 F.2d 769 (9th Cir. 1985) the special master in Traweek concluded that the plaintiffs' allegations of bad faith were irrelevant to the claim. Traweek, 659 F. Supp. at 1039. The special master then recommended that the court grant the defendants' pending motion for summary judgment. Id. at 1042 (special master's findings). Accordingly, the district court adopted the special master's findings, which noted that the court's prior holding had been made under confusion of the existing precedent. Id. at 1037-38. The district court could have avoided the lengthy proceeding, as well as the expense to the municipality of defending against the plaintiffs' "conclusory" claim of conspiracy, had it recognized at the outset that bad faith is not an element of state action immunity analysis.

67. Areeda, supra note 9, at 452; see, P. Areeda & H. Hovenkamp, supra note 15, ¶ 212.3b, at 126-27. Professor Areeda's argument clearly would prevent litigation of the vast majority of bad faith claims that deal with allegations of conspiracy, see supra note 34, and, as he has noted, the Eighth and Ninth Circuits appear to have adopted his position, see supra note 39. See P. Areeda & H. Hovenkamp, supra note 15, ¶ 212.3b, at...
tempted to claim that the decision resulted from a conspiracy against him. Second, the conclusory nature of these claims renders it unlikely that they will be proved in fact. Third, the threat of these claims has a chilling effect on the operation of government bodies.

Moreover, because almost any economic action taken by a municipality can be shown to have a legitimate governmental purpose, if the alleged bad faith conduct benefits the municipality, the problems attendant upon proving that a municipality acted solely to harm the plaintiff are heightened.

B. Other Remedies Offer Adequate Protection Against Corruption in Local Government

Conduct that satisfies the requirements of state action immunity nevertheless may violate state criminal laws, anticorruption laws, or such federal laws as the Racketeering Influenced and Corrupt Organization Act ("RICO") and the Civil Rights Act of 1871. Such reprehensible con-

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128. There is some indication, however, that he has not resolved whether conduct that clearly violates state law also deserves immunity. See id. at 128 n.69.

This Note argues that such conduct, which constitutes only a small number of the bad faith claims by plaintiffs, see supra note 34, should not be the subject of an exception to municipal state action immunity because of the availability of forums better suited to the regulation of such conduct, the practical difficulties associated with defending claims of bad faith, and most important the policy reasons articulated by the Hoover Court.

68. See P. Areeda & H. Hovenkamp, supra note 15, ¶ 212.3b, at 128 n.169. Professor Areeda specifically mentions the following cases as examples of this problem: Corey v. Look, 641 F.2d 32 (1st Cir. 1981); Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977), vacated and remanded sub nom. City of Impact v. Whitworth, 435 U.S. 992, reinstated on remand, 576 F.2d 696 (5th Cir. 1978), cert. denied, 440 U.S. 911 (1979); and Stauffer v. Town of Grand Lake, 1981-1 Trade Cas. (CCH) ¶ 64,029, at 76,330 (D. Colo. 1980). See Areeda, supra note 9, at 450-51; see also Hoover v. Ronwin, 466 U.S. 558, 580 (1984) (noting the temptation for parties who disagree with decisions of state agencies to bring unfounded actions).

69. See Areeda, supra note 9, at 452. For example, in Oberndorf v. City and County of Denver, 653 F. Supp. 304 (D. Colo. 1986), the court admitted that plaintiffs, private property owners, would have extreme difficulty proving the alleged conspiracy between municipal officials and a private developer to condemn plaintiffs' property and then convey it to the private developers. See id. at 309. The court nevertheless denied the defendants' motion to dismiss because it found that, if proven, the conspiracy would have been outside the city's state-granted authority. See id. at 310.


duct on the part of public officials, however, may have no bearing on state action immunity or the antitrust laws. The availability of these alternative remedies removes the need for plaintiffs to rely on antitrust claims to vindicate their rights.

For example, in *Chambers Development Co. v. Municipality of Monroeville,* the plaintiff alleged that the municipality in which the plaintiff owned a landfill site had entered into a conspiracy against the plaintiff to conduct a sham bidding procedure for a garbage disposal contract. The plaintiff claimed that this alleged conspiracy violated RICO as well as the Sherman Act. The court dismissed the plaintiff’s antitrust claim against the municipality, holding that the conduct was “foreseeable” and the fact that it later was found to be “preempted or


74. See M. Lee, supra note 59, at 35, 157-58; see also supra note 58 and accompanying text. DiVerniero v. Murphy, 635 F. Supp. 1531 (D. Conn. 1986), provides a noteworthy example of egregious bad faith conduct mistakenly held to amount to anticompetitive conduct. In *DiVerniero,* the plaintiff alleged that municipal officials and the holder of an exclusive vendor contract in the city coliseum had conspired illegaly to hire off-duty police officers to harass and intimidate street vendors in the area of the coliseum. *Id.* at 1532. The plaintiff claimed that as a result of these activities, he had to close the portion of his gas station business that sold food and novelties to coliseum patrons. *Id.*

In rejecting the defendants’ state action immunity defense, the *DiVerniero* court held that the alleged conspiracy was not the type of “anticompetitive” conduct contemplated by the state legislature. *Id.* at 1537. The Court also held, however, that the city had the power to grant and enforce the exclusive vendor contract and to regulate the business of street vending. *Id.* Given this conclusion, the correct state action question should have been whether the municipality’s state-granted regulatory authority logically would result in the elimination of street vendors as a source of competition with the coliseum. Phrased in this way, the issue of whether the challenged conduct was legal or illegal under state law, in good or bad faith, would be irrelevant to the issue of whether the municipality was state action immune: the only inquiry should be whether the anticompetitive result of the municipality’s actions was foreseeable given the regulatory authority conferred by the state legislature. For a description of the correct approach, see Traweek v. City and County of San Francisco, 659 F. Supp. 1012, 1039-40 (N.D. Cal. 1986) (special master’s findings).

For other cases in which courts have mischaracterized bad faith conduct as anticompetitive conduct and erroneously found that state action immunity did not attach, see Fisichelli v. Town of Methuen, 653 F. Supp. 1494, 1499 (D. Mass. 1987); Oberndorf v. City and County of Denver, 653 F. Supp. 304, 309-10 (D. Colo. 1986); Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 566 F. Supp. 1444, 1446-47 (D.S.C. 1983).


77. *Id.* at 822.

78. *Id.* at 821. The plaintiff also alleged violations of the civil rights laws and various state laws. *Id.* at 821-22.
ineffective” did not alter the municipality’s state action immunity. The court, however, denied the municipality’s motion to dismiss the plaintiff’s RICO allegations.

C. The Local Government Antitrust Act of 1984 Does Not Support the Bad Faith Exception

Last, an argument in favor of the bad faith exception based on the Local Government Antitrust Act of 1984, which eliminates antitrust damage awards against a municipality when municipal officials act in “an official capacity,” is destined to fail. Congress has stated that the Act does not change the substantive law of the state action doctrine. Although no court has yet relied upon the Act as the basis for a bad faith exception to state action immunity, at least one court has stated expressly that this provision does not create a bad faith exception to state action immunity. It reasoned that Congress’ purpose in passing the Act was to extend, not to restrict, municipal immunity.

CONCLUSION

The bad faith exception to state action antitrust immunity of municipalities ignores the doctrine of federalism that forms the basis of the state action doctrine. The Supreme Court already has stated that the bad faith

79. Id. at 822. The court also noted as a reason not to restrict application of the state action doctrine that the “[p]laintiff has in the past effectively used state court remedies to challenge improper municipal actions found to be in conflict with the state's extensive regulatory pattern over waste collection and disposal.” Id.

80. Id. at 824.


83. Id. This argument would be based on statements in the legislative history of the Act to the effect that it does not apply in cases where municipal officials have acted in a criminal capacity. See H.R. Rep. No. 965, 98th Cong., 2d Sess. 20, reprinted in 1984 U.S. Code Cong. & Admin. News 4602, 4621 (“The definition of official conduct allows room for good faith errors by local government officials in conducting the public business. Conduct falls within the definition if the actor ‘could reasonably have construed’ his actions to be within the authority of the local government.”); id. at 20, reprinted in 1984 U.S. Code Cong. & Admin. News at 4621 (“[P]articipation in criminal acts, or other behavior clearly falling outside a local government's authority, would fall outside the definition of official conduct.”) (citing Affiliated Capitol Corp. v. City of Houston, 735 F.2d 1555 (5th Cir. 1984) (en banc), cert. denied, 474 U.S. 1053 (1985)).


87. See id. at 94.
exception is inconsistent with the principles of federalism by holding that the subjective motivations of individual actors are irrelevant to state action immunity when the state acts as sovereign. On the local level, an analysis that requires courts to intrude into the intent of local government officials acting pursuant to state authority emasculates the state action doctrine itself. The bad faith exception exacerbates this problem because it forces municipalities that otherwise have satisfied state action criteria to wage costly defenses against complex and difficult-to-prove claims of bad faith. Therefore, the federal courts that have upheld the bad faith exception should eliminate this element from state action immunity analysis and leave claims of bad faith for the state courts and political processes to determine.

Achilles M. Perry