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So You Still Think You’re Safe Under the Antitrust Laws? Another Word Of Advice To Those Who Would Ignore The States

By Robert M. Langer, Erika L. Amarante & Erik H. Zwicker*

Eight years ago, in the fall of 2002, we authored an article in the pages of the Antitrust Report that warned of the dangers of assuming that state antitrust law would always be the same as its federal counterpart.1 That warning is even more salient today than when originally written. The United States Supreme Court’s 2007 decision in Leegin Creative Leather Products, Inc. v. PSKS, Inc.,2 holding that minimum resale price maintenance is no longer per se illegal under Section 1 of the Sherman Act and should instead be subject to the rule of reason, created a flood of debate (and, in some states, legislative action and litigation) over whether state antitrust law would follow the new federal standard. In the wake of Leegin, it is more important than ever for antitrust practitioners to stay apprised of developments in state antitrust law.

The differences between state and federal antitrust law are not, by any stretch, limited to resale price maintenance. Indeed, the 2002 Article highlighted three additional areas, including the state response to the indirect purchaser doctrine of Illinois Brick Co. v. Illinois,3 state court application of the United States Supreme Court’s decision in Copperweld Corp. v. Independence Tube Corp.,4 and the applicable test for tying claims brought under state law.5 Because there are so many areas in which state and federal antitrust laws might differ both substantively and procedurally, the examples in the 2002 Article were not meant to be exhaustive, but merely illustrative.

Here, we highlight several more examples of areas in which state antitrust law may differ substantially from federal law.6 We start with an update on minimum resale price maintenance post-Leegin, where there are currently more questions than answers regarding a state’s ability to choose not to follow the new federal rule. We then turn to a discussion of an important antitrust immunity—the state action doctrine—which may or may not apply under many state antitrust statutes and case law. Last, we discuss the differences between the federal and state grants of parens patriae authority, which can lead to significant differences in the types of remedies that a state attorney general may pursue under state versus federal law.

While many state statutes contain “harmonization” provisions, which provide in varying forms that state courts should be “guided by” or “give due deference to” federal antitrust cases, the harmonization provisions are rarely mandatory. Due to principles of sovereignty and federalism,
states remain free, with certain limited exceptions,7 to choose a different interpretation for their state statutes, especially if the statutory language is different. And, since every commercial transaction that affects commerce in the United States also affects commerce within some state, at least one state’s antitrust laws will likely apply to every company’s competitive decisions.

The toughest question is whether a state with existing precedent under its state law, and generally following federal antitrust law as a guide, will adopt a complete reversal of federal precedent, like the Leegin decision, into state jurisprudence. Several factors will play into the analysis: (1) whether the language in the state statute differs from the language of the corresponding federal statute; (2) how developed the existing state case law is on a particular topic; and (3) whether the state has a statutory “harmonization” provision or tends to follow federal precedents as persuasive authority. Applying these and other factors, the result could, and likely will, be different for different states, leading to a patchwork of antitrust laws to complement, or contradict, federal antitrust law. That patchwork adds several layers of complexity to any attempt to counsel clients about their competitive activities. The examples that follow serve as cautionary illustrations of how critical it can be to consider applicable state antitrust statutes and jurisprudence when counseling clients.

Minimum Resale Price Maintenance: The Uncertain Future

We start with the obvious and recent example of the states’ response to Leegin. Before Leegin, minimum resale price maintenance had been treated, without deviation, as per se illegal both by federal and state courts since at least the U.S. Supreme Court decision of Dr. Miles Medical Co. v. John D. Park & Sons Co.8 in 1911. Leegin thus overruled almost a century of precedent by extending the rule of reason by the rule of reason.9 For such a watershed decision, Leegin has had a smaller impact on actual business practices than expected, and for good reason. Not only did states respond with differing interpretations of their antitrust laws, but Congress also proposed (and continues to debate) legislation to overturn Leegin.10

Ironically, five years before Leegin, the 2002 Article raised the issue of whether state antitrust law would follow the rule of Khan,11 which held in 1997 that maximum resale price maintenance was subject to the rule of reason, and not per se illegal. The article noted that thirty-three states joined in an amicus curiae brief urging the Court to reach the opposite result in Khan,12 and that certain states, including California, had precedent holding both minimum and maximum resale price maintenance per se illegal.13 Similarly, in Leegin, thirty-seven states joined in an amicus curiae brief urging the Court to preserve the rule of per se illegality for minimum resale price maintenance, again to no avail.14 The days following Leegin therefore created more questions than answers regarding how the states might respond.

The first test case came in March 2008, just nine months after the Leegin decision.15 The states of Michigan, Illinois and New York filed suit in the Southern District of New York against high-end furniture maker, Herman Miller, Inc., for allegedly fixing the minimum resale price at which the company’s furniture was advertised or offered for sale.16 The complaint alleged a violation of Section 1 of the Sherman Act and the state antitrust laws of New York, Michigan and Illinois.17 Although the complaint did not explicitly allege the theory that minimum price resale maintenance is per se illegal, it also did not allege relevant market power, indicating that the states were relying on a per se analysis. The complaint made no mention of Leegin, or the fact that per se allegations would no longer suffice under federal law.18

The Herman Miller complaint was interesting for several reasons. First, New York’s position
was not surprising, given its role as lead in the states’ amicus brief in *Leegin* and the public pronouncements from the New York Attorney General’s Office regarding the *Leegin* decision’s effect on New York state law. What was surprising, however, was that the New York state law allegations in the *Herman Miller* complaint rested solely on several provisions of the Donnelly Act itself and not on Section 369-a of the New York General Business Laws, which prohibits price fixing as a matter of contract law. Although the publicly-stated position of the New York Attorney General’s Office has been that Section 369-a, although not part of the state anti-trust statute, renders minimum resale price maintenance per se unlawful, the *Herman Miller* complaint did not cite Section 369-a at all.

Second, that Michigan joined the complaint was surprising, given that: (a) the relevant provision of the Michigan Antitrust Reform Act (Section 445.772) is nearly identical to Section 1 of the Sherman Act, and (b) the statute further provides that “[i]t is the intent of the legislature that in construing all sections of this act, the courts shall give due deference to interpretations given by the federal courts to comparable anti-trust statutes, including, without limitation, the doctrine of per se violations and the rule of reason.” Although “due deference” does not mandate that Michigan courts follow applicable federal precedents, it appears that, as a practical matter, Michigan state law has very few differences from the Sherman Act. Indeed, in a pre-*Leegin* vertical price-fixing case decided in 1995, the United States District Court for the District of Michigan pronounced that “Michigan antitrust law is identical to federal law and follows the federal precedents.”

Third, most surprising of all, Illinois joined the *Herman Miller* complaint, despite the fact that the language and history of its state law can be interpreted to apply the rule of reason to all claims of resale price maintenance. Illinois also has a statutory harmonization provision, which provides in relevant part “[w]hen the wording of this Act is identical or similar to that of a federal antitrust law, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act.” Thus, Illinois appears to have diverted from its own statutory text and precedents in order to join the *Herman Miller* complaint.

For some states, there may be textual differences in the language of the statute that would lend support to the argument that minimum resale price maintenance is per se illegal under that state’s law. For example, California’s Cartwright Act provides that it is unlawful to “fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.” In February 2010, the California Attorney General filed a complaint in California state court against DermaQuest, Inc., alleging that a vertical resale price maintenance agreement was “in per se violation of the Cartwright Act” and California’s unfair competition law. Within three weeks, the California Attorney General achieved a stipulated final judgment, imposing an injunction and civil penalties. Because of the consent decree, the court did not need to decide whether the Cartwright Act really does hold minimum resale price maintenance per se illegal, instead of applying the rule of reason. The same was true in *Herman Miller*, where a consent decree quickly entered and the court never decided the applicable standard of review. Thus, it remains an open question whether courts will treat minimum resale price maintenance as per se illegal under the state antitrust laws in California, Michigan, Illinois and New York.

New York may soon have its answer. In March 2010, the New York Attorney General filed a verified petition against Tempur-Pedic International, Inc. that alleged that the company violated state law by enforcing minimum retail prices for its products. The case is not based on the Donnelly Act, like *Herman Miller* was, and instead brings together New York General Business Law
Section 369-a\textsuperscript{33} with New York Executive Law Section 63(12), which authorizes the New York Attorney General to file a petition “[w]henever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business.”\textsuperscript{34} Tempur-Pedic’s pending motion to dismiss will force the Supreme Court of New York to determine whether Section 369-a—which provides only that resale price maintenance agreements are \textit{unenforceable}, not illegal—can be used to render an alleged vertical price maintenance agreement per se illegal.

Even when the text of a state statute differs substantially from the Sherman Act and expressly prohibits price fixing, it is far from certain that the state will apply the per se rule to allegations of minimum resale price maintenance. For instance, Tennessee’s statute explicitly prohibits “all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article…”\textsuperscript{35} Analyzing that statute, the United States District Court for the Eastern District of Tennessee recently predicted that the Tennessee Supreme Court would not likely depart from \textit{Leegin} and, therefore, dismissed a minimum resale price maintenance claim under state law for failure to establish a relevant product market.\textsuperscript{36} According to the District Court: “Plaintiffs have asserted no good reason why the Tennessee courts would not follow the holding of the United States Supreme Court in \textit{Leegin} and analyze resale price maintenance agreements under the rule of reason.”\textsuperscript{37} A Kansas trial court reached a similar conclusion in \textit{O’Brien v. Leegin Creative Leather Products}.\textsuperscript{38} The applicable Kansas statute declares it unlawful to “fix any standard or figure, whereby such person’s price to the public shall be, in any manner, controlled or established.”\textsuperscript{39} Interpreting this statute, the Kansas trial court rejected the per se rule and instead opted in favor of applying a rule of reason to the minimum resale price maintenance claim. The Kansas Supreme Court will review that decision on direct appeal, and soon will be the first appellate court to decide, post \textit{Leegin}, whether a minimum resale price maintenance claim, prosecuted under state law, should be adjudged under the per se rule or the rule of reason.\textsuperscript{40} As in most states, the outcome of the \textit{O’Brien} case will depend on a variety of individualized factors. For instance, Kansas generally takes a strict approach to resale price maintenance agreements.\textsuperscript{41} There is no federal harmonization provision in the Kansas statute, and the Kansas Supreme Court has held that while federal antitrust precedent “may be persuasive authority for any state court interpreting its antitrust laws, such authority is not binding upon any court in Kansas interpreting Kansas antitrust laws.”\textsuperscript{42} Last, the Kansas Attorney General has filed an amicus brief in the \textit{O’Brien} case arguing that resale price maintenance is per se illegal under Kansas state law.\textsuperscript{43} Where the Kansas Supreme Court will land on this issue remains to be seen.

One state has responded aggressively to \textit{Leegin}, and amended its state antitrust statute to expressly reject application of the rule of reason to minimum resale price maintenance. In 2009, the Maryland General Assembly amended the Maryland Antitrust Act to provide explicitly that “a contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service is an unreasonable restraint of trade or commerce.”\textsuperscript{44} Despite a harmonization provision in the Maryland Antitrust Act,\textsuperscript{45} this 2009 amendment makes clear that Maryland is intentionally departing from federal law with respect to the U.S. Supreme Court’s decision in \textit{Leegin}.

Whether the Maryland amendment complies with principles of federalism is another open question. While Maryland and other states that may interpret their laws as prohibiting any and
all minimum resale price maintenance agreements will argue that the United States Supreme Court decision in California v. ARC America Corp. is dispositive, that decision dealt only with the states’ ability to provide a remedy to indirect purchasers that would not be available under federal law in the wake of Illinois Brick. The Supreme Court held that the rule limiting recoveries under the Sherman Act did not also prevent indirect purchasers from recovering damages flowing from violations under state law.

ARC America’s decision that a group of plaintiffs could recover under state law when that same group could not recover under federal law is fundamentally distinct from the question of whether a party can be liable for a price-fixing conspiracy under state law yet not liable for the same conduct under federal law. Simply put, ARC America concerned procedural, not substantive, differences in antitrust law. If there is a federal policy holding that resale price maintenance may be procompetitive and should be judged under the rule of reason, query whether the states can contradict that federal policy. The question of liability under one regime but not the other was neither addressed nor decided in ARC America, and likely will not be addressed in the resale price maintenance context for many years to come.

The one consistent lesson in the three years since Leegin is that the shape of resale price maintenance law will continue to be inconsistent and uncertain. Each state statute will require interpretation based on many individualized factors: the language in the statute’s text, the legislative history and intent, any pre-Leegin precedent on resale price maintenance, whether the state has a harmonization provision in its statute and/or follows federal precedent in its case law and, if so, how the harmonization is applied in practice. Analyzing these factors may lead to a different result in different states. Adding complexity, states may choose to follow the aggressive path that Maryland blazed, and pass additional “Leegin repealer” statutes. The future of resale price maintenance law is likely to remain unsettled for many years to come.


The state action doctrine is another area of antitrust law where state laws may differ from federal jurisprudence. Born out of the U.S. Supreme Court decision of Parker v. Brown, the state action doctrine, as it was originally conceived, stands for the proposition that a federal court cannot enjoin a state from creating and effectuating a regulatory scheme on the ground that the state policy impedes competition. In its most succinct form, the state action doctrine provides that a state is immune from federal antitrust laws. Since state policies are often implemented on a local or private level, however, the Supreme Court later extended this holding to provide federal antitrust immunity to municipalities, and even private actors, for conduct that is the foreseeable result of a state statute and, in the case of private actors, is actively supervised by the state. In California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., the Supreme Court announced a two-part test for determining whether state action immunity should apply: “[f]irst, the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’; second, the policy must be ‘actively supervised’ by the State itself.”

But this is only half of the story. The state action doctrine is based on the principle that federal antitrust laws are not intended to disrupt or restrain clearly established state regulatory policies. It does not follow that state antitrust laws are equally impotent in regard to state regulatory policies. The principles of federalism and comity, on which the federal state action doctrine stands, have no application in the context of a state policing its own policies.

That said, state legislatures are free to specify if and when a state policy or program is immune from antitrust scrutiny under its own state
antitrust laws. Often, states will include a statutory exemption for state action in their antitrust statutes. However, the existence of a statutory provision immunizing state action from antitrust laws does not guarantee immunity for private actors participating in a government-run regulatory program. The statutory exemption, depending on its precise language, could be interpreted as a state parallel to the federal state action immunity doctrine; it could be read to offer additional immunity from state antitrust laws, or it could be construed to narrow state action immunity under state law.

As with resale price maintenance, discussed above, it is critical to examine the text of each particular state statute, existing precedent and whether the state has a harmonization provision in order to evaluate the scope of state action immunity, if any, that exists under a particular state’s law. Because that analysis will be individualized for each of the fifty states, we have included a state-by-state chart as an appendix to this article. As detailed in the appendix, at one end of the spectrum, there are more than a dozen states that have not enacted any statutory antitrust exemption for state or municipal action. On the other extreme, seven states expressly incorporate the federal state action doctrine into their statutes. The majority of states fall somewhere in between: the statute includes some form of express immunity for state or municipal action, and the language and history of the statutory text, as well as the state’s harmonization provision, if any, and case law, will determine the scope of that immunity.

Some states, like California and Oklahoma, have avoided the question altogether, at least with respect to certain governmental entities, by narrowing the definition of “persons” subject to the state antitrust act. For example, the Cartwright Act defines the term “persons” to include “corporations, firms, partnerships and associations,” thereby exempting states and municipalities from the provisions of the Act. The Oklahoma Antitrust Reform Act takes an even more direct approach by explicitly excluding “the State of Oklahoma, its departments, and its administrative agencies” from the definition of “person.” These provisions say nothing about whether private parties acting pursuant to a state or municipal program would be exempt from antitrust scrutiny. Moreover, these provisions should not necessarily be read as statutory counterparts to Parker immunity. For example, in Fine Airport Parking v. City of Tulsa, the Oklahoma Supreme Court considered a state antitrust claim against the City of Tulsa in which the plaintiff alleged that the City operated an airport parking facility in violation of the Oklahoma Antitrust Reform Act. Although the Court ultimately held that the city’s conduct was not subject to state antitrust laws because it was the intention of the state legislature that the city act “as the arm of the state for the public good” in its operations of the facility, Oklahoma’s highest court rejected the incorporation of the federal state action immunity doctrine into state law because “[t]he principles of federalism supporting the Parker doctrine are meaningless in an analysis of municipal liability under the Oklahoma Antitrust Reform Act.”

The Supreme Courts of Indiana and Wisconsin have likewise determined that “federal precedent is [not] appropriate in considering whether governmental immunity is available to municipal and local government units under state antitrust laws.” Although neither state has incorporated any governmental immunity into its state antitrust statutes, courts in both states have found certain governmental actors to be immune from state antitrust liability.

Connecticut provides another example of a narrowly-construed doctrine of state action immunity. Connecticut General Statutes Section 35-31(b) provides in relevant part that “Nothing contained in [the Connecticut Antitrust Act] shall apply to those activities of any person when said activity is specifically directed or required by a statute of this state, or of the United States.” In 1975, in Mazzola v. Southern New England Telephone Co., the Connecticut Supreme Court
interpreted Section 35-31(b) to represent “a narrowly drawn version of the doctrine of ‘state action’ immunity from antitrust liability articulated by the United States Supreme Court in Parker v. Brown.”69 As the Mazzola court pointed out, the “Parker doctrine draws a firm line, in short, between activities actually commanded by the state, which are immune from antitrust liability and action merely approved or tolerated.”70 In contrast, Section “35-31(b) limits [the Parker] holding by purporting to immunize only activities which are ‘specifically’ required or directed by state or federal statutes.” 71 The Court therefore determined that the governmental immunity under Connecticut law was more narrow than that under the federal cases.

Thirty years later, the Connecticut Supreme Court revisited Section 35-31(b), to decide whether Connecticut’s passage of a harmonization provision in 1992 required the Court to incorporate the broader federal standards for state action immunity it had rejected in Mazzola. In Miller’s Pond Co. v. City of New London,72 the Supreme Court answered that question in the negative, and adhered to the narrowly-defined state action immunity set forth expressly in Section 35-31(b) and its prior decisions. First, the Miller’s Pond court noted that the state’s new harmonization statute “merely gave legislative imprimatur to what this court has been doing long before its enactment, namely, looking to case law construing relevant federal statutes as persuasive authority.”73 The Court also held that the harmonization statute was without application when analyzing a “state antitrust statute without federal parallel.”74 Second, because state courts are not required to “incorporate the federal case law defining state action immunity into” Section 35-31(b), the Court held that it would follow Mazzola as the governing standard for state action immunity from Connecticut antitrust laws.75

The lesson is clear: State action immunity from federal antitrust laws does not ensure state action immunity from state antitrust laws. Therefore, before advising a client in a highly regulated industry about whether and how to proceed with a regulatory program that may result in anticompetitive effects, practitioners need to consider not only the Parker progeny but also state statutory exemptions, state harmonization statutes and state case law interpreting the application of Parker to state antitrust laws.

**Parens Patriae Authority: Expanded Damages, Longer Time To Sue?**

Why are the differences between federal and state antitrust laws so relevant for the antitrust practitioner? The answer is that private plaintiffs and state attorneys general alike have the opportunity to choose wholesale which law they want to apply. Whether it is to have standing as an indirect purchaser, to benefit from the per se rule when alleging a maximum or minimum resale price maintenance violation or to sue for conduct that fits squarely within Parker, private plaintiffs can take advantage of the divergence between federal and state law by filing suit under state antitrust statutes rather than Title 15 of the United States Code. State attorneys general, too, can be expected to pursue a claim under federal law, state law or both depending upon which is more favorable to their case.76

The same holds true when a state attorney general brings suit, “not because of any particular injury to a business of the state,” but on behalf of “all her citizens,”77 or parens patriae. Federal law grants state attorneys general parens patriae standing to bring a federal antitrust claim in federal court.78 Most state attorneys general also have parens patriae authority to bring a state claim in state court.79 In some instances, key procedural differences between the federal grant of parens patriae authority and the state grant of parens patriae authority can lead to a greater price tag for a client defending an antitrust claim under state law. Therefore, parens patriae is not only a vehicle by which state attorneys general can bring federal and state antitrust claims on behalf of the citizens of the state, it is also
another example where the difference between federal and state antitrust law can lead the unknowing practitioner to give inaccurate, and costly, advice.

Twenty-three states and the District of Columbia have granted state attorneys general standing, by statute, to bring a parens patriae claim under state antitrust law. Other states have granted state attorneys general parens patriae authority under the common law. For example, in Louisiana, there is no explicit parens patriae provision in the state’s antitrust statutes. Nevertheless, Louisiana courts have recognized parens patriae authority arising from Article IV, Section 8 of the Louisiana Constitution, which provides that “the attorney general shall have authority . . . to institute, prosecute, or intervene in any civil action or proceeding” as necessary “for the assertion or protection of any right or interest of the state.” Similarly, although the Maine antitrust laws do not have a statutory provision granting parens patriae standing to the state attorney general, at least one federal court has held that the Maine Attorney General has authority as parens patriae to seek damages under Maine’s antitrust laws.

For the antitrust practitioner, a state attorney general’s authority to bring a parens patriae action under state law is significant, not just because a state attorney general can choose the law most favorable to the state, but also because the state authority may provide for additional remedies, or procedural advantages, that would be unavailable under the federal counterpart. As just one example, state law can differ on the issue of when a state might bring an action. While federal antitrust law has a four-year statute of limitations for parens patriae actions, states may have limitations periods of varying length, or none at all. Maine has a six-year statute of limitations that is applicable to all civil actions. In non-antitrust cases, the Maine Attorney General has taken the position that the six-year statute of limitations is not enforceable against the state. Whether that argument would prevail in a parens patriae case based on the Maine antitrust act remains to be seen.

Similarly, while Connecticut’s statute contains a four-year statute of limitations for seeking injunctive relief or treble damages, the statute does not specifically state a limitations period for an antitrust action brought by the State as parens patriae. At least one trial court has held that there is no statute of limitations for parens patriae actions under Connecticut law. There is an argument, however, that the four-year limitations period applies when the State is suing “on behalf of the people of the state,” if the individuals themselves would be time-barred from bringing a claim in their own right. That issue remains open under Connecticut law. Maine and Connecticut are just two examples where the limitations period may be longer than that under federal law, or even non-existent. These differences can be critical when advising clients, and illustrate the need to stay apprised of developments under state law.

In addition to the discrepancy between the federal and state statutes of limitations, federal statutory parens patriae authority and state parens patriae authority also diverge because Section 4C of the Clayton Act limits a state attorney general’s authority to “act as parens patriae” only on behalf of “natural persons” and does not permit a state attorney general to recover damages on behalf of business entities. Close attention to state parens patriae statutes, however, provides at least the argument that this is not always the case under state law. For example, Connecticut’s parens patriae statute provides that the “Attorney General may . . . , in enforcing the provisions of this chapter, bring an action” as “parens patriae for persons residing in the state.” Not only does the Connecticut statute, unlike its federal counterpart, omit the modifier “natural” before “person,” but the Connecticut Antitrust Act also defines “person” to mean “any individual, proprietorship, corporation, limited liability company, firm, partnership, incorporated and unincorporated association, or any other legal or commercial
entity." This possible expansion under state parens patriae authority, even if it remains an open question, changes the calculus in evaluating a client’s risks.

Connecticut, like Nevada and Virginia, is also one of three states that explicitly provides, by statute, that the state attorney general can recover damages to the state’s general economy as the result of an antitrust violation. Federal parens patriae authority does not permit the recovery of damages to a state’s general economy. Although neither Nevada nor Virginia courts have expounded in a reported decision to date on the general economy damage provision, the Connecticut Supreme Court has determined that “the state has standing to pursue a parens patriae antitrust claim for damages to its general economy pursuant to § 35-32(c)(2).” In State v. Marsh & McLennan Cos., the Court considered Connecticut’s harmonization provision, Section 35-44b, but held that the provision does not require the Court “to incorporate the federal preclusion of general economy damages into the state antitrust scheme.” Instead, the Court noted that “our legislature, unlike Congress, expressly made [general economy damages] available in parens patriae antitrust actions.”

To follow federal law in this regard “would render the general economy damages provision of §35-32(c)(2) superfluous, a result we cannot countenance.”

The foregoing examples make clear that the particular intricacies of a state’s parens patriae authority can lead a practitioner, and hence a client, down an unforgiving path far away from the known boundaries of federal law. Careful attention to state antitrust statutes and cases is therefore a must for the antitrust practitioner.

Conclusion

In 2002, we concluded that “the most elementary lesson to learn from the states’ willingness to reject federal antitrust analysis when it strikes them as inconsistent with their own prior precedent—or merely wrong—is that it is very difficult to counsel corporate clients on how to avoid antitrust claims.” That statement holds true today. The patchwork of antitrust laws in each state may complement, contradict or conflict with federal law. There are myriad examples of possible differences between state and federal law, and this article has highlighted only a few. But the examples discussed here and in the 2002 Article should make it painfully obvious to antitrust practitioners, and their clients, that they simply cannot ignore the laws of the states in which they do business. Practitioners must pay close attention to states’ ever-evolving, and often inconsistent, approaches to federal law, as well as their reactions to any possible or future changes in the federal law. Only by staying apprised of state antitrust law can we hope to evaluate and address more accurately the unique antitrust issues, choices, and risks facing our clients on a daily basis.
NOTES

1 See Robert M. Langer, Suzanne E. Wachstock and Erika L. Amarante, So You Think You’re Safe Under the Antitrust Laws? A Word of Advice to Those Who Would Ignore the States, ANTITRUST REPORT (Matthew Bender, Fall 2002) (hereinafter the “2002 Article”).


3 431 U.S. 720 (1977); see 2002 Article at 74–79. Since the 2002 Article, there have been many additional decisions on the indirect purchaser doctrine. For a fifty-state survey of Illinois Brick repealer statutes, see Michael A. Lindsay, Overview of State RPM, ANTITRUST SOURCE, October 2009, available at http://www.abanet.org/antitrust/at-source/09/10/Oct09-LindsayChart10-23f.pdf.

4 467 U.S. 752 (1984); see 2002 Article at 79–82 (noting that the Louisiana Supreme Court rejected Copperweld’s holding under its state antitrust act in Louisiana Power & Light Co. v. United Gas Pipe Line Co., 493 So.2d 1149, 1160 (La. 1986)). Since the 2002 Article was published, the Louisiana Legislature amended La. Rev. Stat. Ann. § 51:122 on August 15, 2003 to provide that, under Louisiana antitrust law, “a parent corporation, limited liability company, partnership, or partnership-in-command is not capable of conspiring with any subsidiary that it controls, and each such controlled subsidiary is not capable of conspiring with any other wholly owned subsidiary controlled by the same common parent.” La. Rev. Stat. Ann. § 51:122(c) (2010).

5 See 2002 Article at 85–87.

6 Again, as in 2002, we do not intend to offer a comprehensive analysis of the material differences between state and federal antitrust laws, or the procedural interrelationships between state and federal enforcement bodies. Many resources exist for such a comprehensive overview. See, e.g., ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES (4th Ed. 2009) (hereinafter “STATE ANTITRUST PRACTICE AND STATUTES”).

7 There are circumstances where state antitrust laws have been preempted. See, e.g., Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 635–37 (1975) (holding that, with respect to labor policy, “federal law does not admit the use of state antitrust law to regulate union activity that is closely related to organizational goals”); Robertson v. NBA, 389 F. Supp. 867, 880–81 (S.D.N.Y. 1975) (concluding that the “interstate nature of professional basketball precludes state antitrust regulation”); Partee v. San Diego Chargers Football Co., 668 P.2d 674, 678–79 (Cal. 1983) (concluding that “application of the Cartwright Act” to professional football, “would be in conflict with the commerce clause”).

8 220 U.S. 373 (1911).


11 After Leegin, bills were sponsored in both the House and Senate seeking to overturn the decision. For example, in October 2007, Senators Kohl, Biden and Clinton introduced Senate Bill 2261 which proposed to add the following sentence to Section 1 of the Sherman Act: “Any contract, combination, conspiracy or agreement setting a minimum price below which a product or service cannot be sold by a retailer, wholesaler or distributor shall violate this Act.” Discount Pricing Consumer Protection Act, S. 2261, 110th Cong. (1st Sess. 2007). Similar bills have been re-introduced each year in both the House and Senate. See, e.g., Discount
12 See 2002 Article at 82–85 (discussing Khan, 522 U.S. at 3).
13 See id. at 83–84.
15 The Leegin decision was issued on June 28, 2007.
18 See Herman Miller, supra n. 16.
20 N.Y. Gen. Bus. Law § 369-a, entitled “Price-fixing prohibited,” provides in relevant part: “[a]ny contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law.”
21 See Himes, supra n.19, at 4 (“In view of §369-a, courts applying New York law should continue to treat vertical price fixing as a per se Donnelly Act violation, regardless of Leegin’s change in federal antitrust law.”)
22 See Herman Miller, supra n.16, at ¶47. Although the Donnelly Act does not contain a statutory harmonization provision, case law supports using federal precedent as a guide. See, e.g., Anheuser-Busch, Inc. v. Abrams, 520 N.E.2d 535, 539 (N.Y. 1988) (“[The Act] should generally be construed in light of Federal precedent and given a different interpretation only where state policy, differences in statutory language or legislative history justify such a result.”).
23 Mich. Comp. Laws Ann. § 445.772 (2010) provides: “A contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful.” Compare 15 U.S.C. § 1 (2010): “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.”
26 See STATE ANTITRUST PRACTICE AND STATUTES, Illinois, at 16-9 & n.59 (citing legislative history of the Illinois statute and noting that resale price maintenance is prohibited only in cases when it unreasonably restrains trade or commerce under the rule of reason); see also STATE ANTITRUST PRACTICE AND STATUTES, Illinois, at 16-10 (“Illinois case law on vertical price fixing … is consistent with the holding in Leegin that the rule of reason applies to analysis of vertical price-fixing agreements”).
28 Cal. Bus. & Prof. Code § 16720 (2010). Besides California, more than a dozen
states have language in their antitrust statutes that specifically mentions price fixing or controlling prices and arguably may require application of the per se rule to minimum resale price maintenance. See, e.g., Michael A. Lindsay, Overview of State RPM, ANTITRUST SOURCE, October 2009, available at http://www.abanet.org/antitrust/at-source/09/10/Oct09-LindsayChart10-23f.pdf (citing statutory provisions from California, Connecticut, Hawaii, Illinois, Indiana, Kansas, Maryland, Minnesota, Mississippi, Montana, Nevada, New Jersey, New York, Ohio, South Carolina, Tennessee, and West Virginia).

29 California v. DermaQuest, Inc., No. RG10497526, at ¶¶14, 17 (Cal. Sup. Ct. Feb. 5, 2010). California’s position in this regard is not surprising. In fact, the 2002 Article highlighted California as a state that might decline to follow Khan’s holding that maximum resale price maintenance agreements are subject to the rule of reason. See 2002 Article at 84.


34 N.Y. Exec. Law § 63(12) (2010).


37 Id.


40 O’Brien, supra n.38.

41 See STATE ANTITRUST PRACTICE AND STATUTES, Kansas, at 19-8; see also Joslin v. Steffen Ice & Ice Cream Co., 54 P.2d 941, 943 (Kan. 1936) (holding that an oral agreement between an ice supplier and grocery that fixed the grocery’s retail price of ice violated Kansas law, without any analysis of competitive effects: “A manufacturer of ice may fix the price at which he will sell his product, but the law will not permit him and his buyer to agree as to the price the latter will charge when he in turn sells that product to third parties”).


45 The Maryland Antitrust Act provides that “[i]t is the intent of the General Assembly that, in construing this subtitle, the courts be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters.” Md. Code Ann., Com. Law § 11-202(a)(2) (2010).


48 490 U.S. at 100. See also 2002 Article at 75.

www.ftc.gov/os/comments/resaleprice
maintenance/index.shtm (hereinafter
“Langer Submission”).

50 See, e.g., Michael A. Lindsay, “Resale Price Maintenance and the World After Leegin,” 22(1) ANTITRUST 32, 33 (Fall 2007) (“ARC America dealt with a procedural or remedial rule, rather than a substantive rule of conduct. Leegin, however, dealt with a substantive rule of conduct: whether minimum RPM agreements are automatically illegal.”); see also Michael A. Lindsay, State Resale Price Maintenance Laws After Leegin, ANTITRUST SOURCE (Oct. 2009), at 5–6, available at http://www. abanet.org/antitrust/at-source/09/10/10-09.html.

51 See Langer Submission, at 6–9. To answer this question properly would require a lengthy discussion of sovereignty, federalism and the Eleventh Amendment that is beyond the scope of this article. For a discussion of these principles in another context, see generally Robert M. Langer & Peter A. Barile III, Can the King’s Physician (Also) Do No Wrong? Health Care Providers and a Market Participation Exception to the State Action Immunity Doctrine, ANTITRUST REPORT 2 (Matthew Bender, October 1999) (hereinafter “Langer & Barile”).

52 317 U.S. 341 (1943).

53 State action immunity, as applied to the state itself, is limited to equitable relief because the Eleventh Amendment safeguards the state from paying monetary damages in federal court. See generally Langer & Barile, supra n.51, at 5–9.

54 See Town of Hallie v. City of Eau Claire, 471 U.S. 34, 45 (1985) (extending state action immunity to a municipality because the municipality’s actions were taken “pursuant to a clearly articulated state policy”); S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 65–66 (1985) (holding that the defendants, private rate bureaus, were immune from federal antitrust liability because their anticompetitive conduct was “taken pursuant to a clearly articulated state policy” and was “actively supervise[d]” by the “States, through their agencies”). Along the same lines, the Clayton Act also expressly prohibits the recovery of damages “in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.” 15 U.S.C. § 36(a) (2010).


56 Id. at 105 (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978)).

57 See Parker v. Brown, 317 U.S. at 350–51 (holding that the Sherman Act “gives no hint that it was intended to restrain state action or official action directed by a state”).

58 See generally Appendix (Arizona, Arkansas, Hawaii, Indiana, Louisiana, Mississippi, New York, North Carolina, Pennsylvania, South Dakota, Vermont, Wisconsin, and Wyoming). Of course, the absence of a statutory provision does not mean that the state would not apply the state action immunity doctrine, in some form, as a matter of common law. See, e.g., In re Bates, 555 P.2d 640, 642–43 (Ariz. 1976) (citing Parker with approval in the context of a federal and state antitrust claim); Reppond v. City of Denham Springs, 572 So.2d 224, 229–30 (La. Ct. App. 1990) (applying the federal state action immunity standard in deciding whether a municipality was immune under Louisiana antitrust law); Madison Cablevision, Inc. v. City of Morganton, 386 S.E.2d 200, 212–23 (N.C. 1989) (applying federal state action immunity test to a state law claim).

59 See generally Appendix (Colorado, Florida, Idaho, Massachusetts, North Dakota, Rhode Island, and Utah).
60 See id. (California, Ohio and Oklahoma).
61 Cal. Bus. & Prof. Code § 16702 (2009); see also Freitas v. City of San Francisco, 92 Cal. App. 913, 921 (Cal. Ct. App. 1979) (confirming that cities and political subdivisions are not “persons” who can be sued under the Cartwright Act).
64 Id. at 15, 23.
65 Brownsburg Cnty. Sch. Corp. v. Natare Corp., 824 N.E.2d 336, 348 (Ind. 2005); see also Hallie v. Chippewa Falls, 314 N.W.2d 321, 323–24 (Wis. 1982) (stating that the federal “Parker exemption is not applicable” to a state antitrust claim because the “relationship between the federal government and the states is not parallel to the relationship between the state government and the cities”).
66 See Brownsburg, 824 N.E.2d at 341; Hallie, 314 N.W.2d at 326. But see American Med. Transp. v. Curtis-Universal, Inc., 452 N.W.2d 575, 579–83 (Wis. 1990) (holding that the city of Milwaukee is not immune from state antitrust liability in connection with its adoption of an allegedly anticompetitive ambulance service system because the court could not conclude that “the authority of towns and counties to contract for ambulance services evinces a legislative intent to contract in a way that leads to monopoly or restraint of trade”) (internal quotations omitted).
68 363 A.2d 170 (Conn. 1975).
69 Id. at 178 (internal quotations omitted).
70 Id. at 179.
71 Id. at 178. The Mazzola court characterized the Parker test as allowing an antitrust exemption for activities that were “commanded” or “directed” by a state legislature. Id. Thus, the Court read as significant the Connecticut General Assembly’s choice of the phrase “specifically directed or required by a statute.” Id. (emphasis added).
72 873 A.2d 965 (Conn. 2005).
73 Id. at 980 (citing Westport Taxi Serv., Inc. v. Westport Transist Dist., 664 A.2d 719, 728 (1995)).
74 Id. at 981.
75 Id. at 979.
76 For example, if the Maryland Attorney General’s Office is bringing a minimum resale price maintenance claim, it will likely file suit under state law due to Maryland’s Legin repealer statute.
79 See, e.g., Cal. Bus. & Prof. Code § 16760(a)(1) (“[t]he Attorney General may bring a civil action in the name of the people of the State of California, as parens patriae on behalf of natural persons residing in the state, in the superior court of any county which has jurisdiction of a defendant, to secure monetary relief as provided in this section for injury sustained by those natural persons to their property by reason of any violation of this chapter.”).
81 The twenty-three states are: (1) Arkansas—Ark. Code Ann. § 4-75-212(b) (2010); (2) California—Cal. Bus. & Prof

82 See, e.g., Minnesota ex rel. Humphrey v. RI-MEL Inc., 417 N.W.2d 102, 112 (Minn. Ct. App. 1987) (holding that the State of Minnesota is authorized, despite the absence of a parens patriae statute, to bring a parens patriae action under state law “for the protection of public rights”).


85 See 15 U.S.C. § 15b (2010) (“[a]ny action to enforce any cause of action under section 4, 4A or 4C shall be forever barred unless commenced within four years after the cause of action accrued.”).


87 See Antitrust Practice and Statutes, Maine, at 22–27 (citing Jenness v. Nickerson, 637 A.2d 1152, 1158 (Me. 1994); State v. Crommett, 116 A.2d 614, 616–17 (Me. 1955)).

88 Conn. Gen. Stat. § 35–40 (2010) provides that “[a]ny action under sections 35-34 and 35–35, shall be forever barred unless commenced within four years after the cause of action shall have accrued.”


91 Support for this argument appears in State v. Levi Strauss & Co., 471 F. Supp. 363, 371 & n. 7 (D. Conn. 1979), which held on a motion to remand that the State’s parens patriae authority does not “change the nature” of a suit brought on behalf of a specific group of individuals, and that, therefore, each individual must independently meet the citizenship and amount in controversy requirements for federal diversity jurisdiction.


95 See Conn. Gen. Stat. § 35-32(c)(2) (2010) (“[t]he Attorney General may also, in enforcing the provisions of this chapter, bring an action in the name of the state as... parens patriae with respect to damages to the general economy of the state or any poli-
tical subdivision thereof . . .”); Nev. Rev. Stat. § 598A.160(1)(b) (2010) (“[t]he Attorney General may bring a civil action for any violation of the provisions of this chapter in the name of the State of Nevada and is entitled to recover damages . . . [a]s parens patriae, with respect to direct or indirect damages to the general economy of the State of Nevada or any political subdivision.”); Va. Code Ann. § 59.1–9.15(d) (2010) (“[t]he Attorney General may bring a civil action to recover damages and secure other relief as provided by this chapter as parens patriae respecting injury to the general economy of the Commonwealth.”).

98 Id.
99 Id. at 325.
100 Id. at 328.
101 Id. at 326.
102 2002 Article at 88.
Appendix One: State Action Immunity Chart

<table>
<thead>
<tr>
<th>State</th>
<th>Statutory Exemption</th>
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<tr>
<td>AL</td>
<td>Ala. Code § 11-92A-12(19) (2010) (authorizing an industrial development authority to exercise its granted powers even if “as a consequence of the exercise of such powers it engages in activities that may be deemed ‘anticompetitive’ within the contemplation of the antitrust laws of the state or of the United States”).</td>
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<tr>
<td>AK</td>
<td>Alaska Stat. § 45.50.572(g) (2010) (stating that the Alaska Restraint of Trade Act does “not forbid activities expressly required by a regulatory agency of the state” or “permitted by a regulatory agency of the state...if the regulatory agency has given due consideration to the possible anticompetitive effects before permitting the activities, and enforcement of the [Act] would be disruptive of the regulatory scheme”).</td>
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<td>AZ</td>
<td>The Arizona Uniform State Antitrust Act does not contain a statutory exemption for state action.</td>
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<td>AR</td>
<td>Arkansas antitrust statutes do not contain a statutory exemption for state action.</td>
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<tr>
<th>Case Law</th>
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<tr>
<td>Chugach Elec. Ass’n v. Regulatory Comm’n of Alaska, 49 P.3d 246, 252 (Alaska 2002) (applying the federal state action immunity test, as articulated in Midcal, to a state law claim).</td>
</tr>
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<td>In re Bates, 555 P.2d 640, 642-43 (Ariz. 1976) (citing Parker with approval in the context of a federal and state antitrust claim), aff’d in part, rev’d in part, 433 U.S. 350 (1977); Mothershed v. Justices of the Supreme Court, 410 F.3d 602, 609-10 (9th Cir. 2005) (predicting that “the Arizona Supreme Court would most likely follow Bates” and apply the federal state action immunity doctrine to a state antitrust claim). But see Delaney v. City of Phoenix, 1985-2 Trade Cas. (CCH) ¶ 66,711 (Ariz. Super. Ct. 1985) (stating that Parker immunity is inapposite to a state antitrust claim but nevertheless finding a municipality exempt because the municipality’s conduct was specifically authorized by a state statute).</td>
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<td>Gipson v. Morley, 233 S.W.2d 79, 83 (Ark. 1950) (holding that a taxpayer cannot enjoin the state from enforcing a state act that fixes the price of alcohol because “it is within the competency of the legislature to determine under the police power what regulatory rules are needful in controlling a type of business fraught with perils to public peace, health and safety as is the liquor business”).</td>
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**Case Law**


There are no reported decisions that construe or apply this exemption.
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<tr>
<th>State</th>
<th>Statutory Exemption</th>
<th>Case Law</th>
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<tbody>
<tr>
<td>DC</td>
<td>D.C. Code Ann. § 28-4518 (2010) (exempting “conduct or activity specifically regulated, permitted, or required by any regulatory body, agency, or commission acting under statutory authority of the District of Columbia or the United States”).</td>
<td>There are no reported decisions that construe or apply this exemption.</td>
</tr>
<tr>
<td>FL</td>
<td>Fla. Stat. Ann. § 542.20 (2010) (stating that the Florida Antitrust Act immunizes “[a]ny activity or conduct exempt under Florida statutory or common law or exempt from the provisions of the antitrust laws of the United States”).</td>
<td>Duck Tours Seafari, Inc. v. City of Key West, 875 So. 2d 650, 653 (Fla. Dist. Ct. App. 2004) (confirming that “the doctrine of state action immunity which has developed under federal antitrust law is also an available defense to a suit against a municipality for a violation of Florida’s antitrust laws” and applying the federal state action immunity test); Sebring Utilities Comm’n v. Home Savings Ass’n, 508 So. 2d 26, 28 (Fla. Dist. Ct. App. 1987) (stating that “the Florida Antitrust Act provides any activity or conduct exempt under federal antitrust law is also exempt from the Florida Antitrust Act”).</td>
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<tr>
<td>GA</td>
<td>Ga. Code Ann. §§ 36-65-1, 2 (2010) (providing that “in the exercise of powers specifically granted to them by law, local governing authorities of cities and counties are acting pursuant to state policy” and that in exercising such powers, “local governing authorities shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia”).</td>
<td>Strykr v. Long County Bd. of Comm’rs, 593 S.E.2d 348, 349 (Ga. 2004) (citing Town of Hallie in support of holding a county immune under state and federal antitrust laws); Executive Town &amp; Country Servs. v. Young, 376 S.E.2d 190, 192 (Ga. 1989) (stating that, “[b]y the provisions of [Ga. Code Ann. §§ 36-65-1, 2],” a “city is made specifically immune from antitrust liability”).</td>
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<td>HI</td>
<td>The Hawaii Antitrust Act does not contain a statutory exemption for state action.</td>
<td>Big Island Small Ranchers Ass’n v. State, 588 P.2d 430, 436 (Haw. 1978) (holding that Hawaii antitrust statutes do not apply to the state of Hawaii under the theory of sovereign immunity); Daly v. Harris, 215 F. Supp. 2d 1098, 1125 (D. Haw. 2002) (holding that municipalities are not immune from Hawaii antitrust statutes but cannot be subject to the treble damages provision).</td>
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| ID    | Idaho Code § 48-107(1) (2010) (the Idaho Competition Act does not apply to “(a) Activities that are exempt from the operation of the federal antitrust laws”; “(b) Activities required or affirmatively approved by any statute of this state or of the United States or by a regulatory agency). | Plummer v. City of Fruitland, 87 P.3d 297, 301 (Idaho 2004) (holding that when a city is “properly exercising its police power...it is accordingly afforded the statutory exemption from the Idaho Competition Act because such an exercise of police power is authorized by the state constitution”); Alpert v. Boise Water Corp., 795 P.2d 298, 303-04 (Idaho 1990) (citing Town of Hallie in support of upholding...
of this state or of the United States duly acting under any constitutional or statutory authority vesting the agency with such power”; or “(c) Activities of a municipality or its officers or employees acting in an official capacity, to the extent that those activities are authorized or directed by state law”).

**IL** 740 Ill. Comp. Stat. 10/5(15) (2010) (the Illinois Antitrust Act does not apply to “the activities of a unit of local government or school district and the activities of the employees, agents and officers of a unit of local government or school district”).

**IN** The Indiana Antitrust Act does not contain a statutory exemption for state action.

**IA** Iowa Code § 553.6(4), (5) (2010) (the Iowa Competition Law does not apply to “activities or arrangements expressly approved or regulated by any regulatory body or officer acting under authority of this state or of the United States” or “activities of a city or county, or an administrative or legal entity created by a city or county, when acting within its statutory or constitutional home rule powers and to the same extent that the activities would not be prohibited if undertaken by the state.”).

**Case Law**

- Dismissal of state antitrust claims against a municipality; *Denman v. Idaho Falls*, 4 P.2d 361, 362-63 (Idaho 1931) (holding that state antitrust laws are inapplicable to valid exercises of a municipality’s power).


- *Brownsburg Cmty. Sch. Corp. v. Natare Corp.*, 824 N.E.2d 336, 348 (Ind. 2005) (rejecting “the federal state action immunity doctrine under state antitrust law” and stating that “federal precedent is [not] appropriate in considering whether governmental immunity is available to municipal and local government units under state antitrust laws”).

- *Fed. Land Bank of Omaha v. Tiffany*, 529 N.W.2d 294, 296-297 (Iowa 1995) (interpreting § 553.6(4)’s exemption to apply because federal state action immunity applies and § 553.2 of the Iowa Code prescribes a “uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices”).
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<td>KS</td>
<td>Kan. Stat. Ann. § 12-205(b) (2009) (exempting, from civil liability, conduct of “municipalities and the officers and employees thereof...except for injunctive relief under the antitrust laws of the state of Kansas” and except as provided by Kan. Stat. Ann. § 12-205(d) (2009), which states that “[n]othing contained in this section shall preclude the attorney general or any county or district attorney from bringing an action against a municipality for a violation of the antitrust laws or any other laws of the state”).</td>
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<td>LA</td>
<td>Louisiana antitrust statutes do not contain a statutory exemption for state action.</td>
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<td>ME</td>
<td>10 Me. Rev. Stat. Ann. § 1104(4), (5) (2009) (stating that “[n]o damages, interest on damages, costs or attorneys fees may be recovered [for antitrust violations] from any political subdivision,...or official or employee of a political subdivision acting in an official capacity” or “in any claim against a person based on any official action directed by a political subdivision,...or official or employee of a political subdivision acting in an official capacity”).</td>
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<td>Classic Communications v. Rural Tel. Serv. Co., 956 F. Supp. 910, 919 (D. Kan. 1997) (stating that “Parker immunity is not applicable to state [antitrust claims] because” where “federal antitrust laws are not implicated, the purpose behind state action immunity disappears”).</td>
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<td>There are no reported decisions that construe or apply this exemption.</td>
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<td>Reppond v. City of Denham Springs, 572 So. 2d 224, 229-30 (La. Ct. App. 1990) (applying the federal state action immunity standard in deciding whether a municipality is immune under the state antitrust laws); Ehlinger &amp; Assoc. v. Louisiana Architects Ass’n, 989 F. Supp. 775, 785-86 (E.D. La. 1998) (stating that “[i]t would indeed be anomalous to hold that state legislation that clearly articulated a policy to supplant competition with regulation intended that persons acting pursuant to that policy would be liable under the state antitrust laws” and finding the defendants immune from state antitrust laws based on federal precedent), aff’d, 167 F.3d 537 (5th Cir. 1998).</td>
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<td>NJ</td>
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</table>
State | Statutory Exemption | Case Law
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NM | N.M. Stat. Ann. § 57-1-16 (2010) (stating that “[n]othing contained in the Antitrust Act...is intended to prohibit actions which are: A. clearly and expressly authorized by any state agency or regulatory body acting under a clearly articulated and affirmatively expressed state policy to displace competition with regulation; and B. actively supervised by the state agency or regulatory body which is constitutionally or statutorily granted the authority to supervise such actions when the agency or regulatory body does not have any proprietary interest in the actions”); N.M. Stat. Ann. § 57-1-17 (2010) (providing that “no damages or interest on damages may be recovered under the Antitrust Act...in any claim against a person based on any official action directed by a local government or official or employee thereof acting in an official capacity; provided, however, that in an action for permanent injunction brought against a person based on any official action directed by a local government or official or employee thereof acting in an official capacity, costs and reasonable attorneys’ fees may be granted to the prevailing party”). | (holding that the defendant was exempt from state antitrust laws, under § 56:9-5(c), because the “regulation in question is authorized and permitted by the Casino Control Act”). Valdez v. State, 54 P.3d 71, 75-76 (N.M. 2002) (holding that a municipality, a county and private-party defendants could not be liable under the New Mexico Antitrust Act and Unfair Practices Act because the alleged anti-competitive conduct was “under the primary jurisdiction of...a regulatory agency” and “expressly permitted” by state statute”); In re Elec. Serv., 697 P.2d 948, 951 (N.M. 1985) (stating that “the New Mexico Antitrust Act specifically exempts from the Act arrangements that are approved by a regulatory body acting under statutory authority”). But see City of Sunland Park v. Macias, 75 P.3d 816, 823-24 (N.M. Ct. App. 2003) (stating that the “rationale underlying the state action immunity doctrine does not apply to causes of action brought pursuant to the New Mexico Antitrust Act” and holding, without reference to § 57-1-16, that the “state action immunity doctrine is inapplicable” to the New Mexico Antitrust Act). |
NY | The Donnelly Act does not contain a statutory exemption for state action. | Prof’l Ambulance Serv., Inc. v. Abramowitz, 328 N.Y.S.2d 467, 470 (N.Y. Sup. Ct. 1972) (holding that it is a violation of the Donnelly Act for a municipal police department to preclude a company from servicing emergency calls; declaring that a “municipality acting in a proprietary capacity cannot under the guise of exercising its police power create a monopoly” but stating that “a monopoly or agreement in restraint of trade may, upon occasion, be warranted in the exercise of police power” so long as “the privilege granted” is “reasonable, necessary and
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<td>NC</td>
<td>North Carolina antitrust statutes do not contain a statutory exemption for state action.</td>
<td>appropriate for the protection of public health,” bears “a real substantial relation to the object to be achieved” and does “not violate fundamental law or interfere with enjoyment of fundamental rights beyond necessities of the case”) (italics in original); American Consumer Indus. v. City of New York, 281 N.Y.S.2d 467, 474 (N.Y. App. Div. 1967) (declaring an agreement between New York City and a company void because the City did not show “that the purpose of the market is furthered or intended to be furthered by this regulation” and “[i]ncreasing its revenue does not warrant the city to establish an otherwise illegal monopoly”).</td>
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<td>ND</td>
<td>N.D. Cent. Code § 40-01-22 (2010) (providing that “[a]ll immunity of the state from the provisions of the Sherman Antitrust Act is hereby extended to any city or city governing body acting within the scope of the[ir] grants of authority”).</td>
<td>There are no reported decisions that construe or apply this exemption.</td>
</tr>
<tr>
<td>OH</td>
<td>Ohio Rev. Code Ann. § 1331.01 (2010) (defining person to include “corporations, partnerships, and associations,” thereby exempting states and municipalities from the provisions of the Act).</td>
<td>Madison Cablevision, Inc. v. City of Morganton, 386 S.E.2d 200, 212-13 (N.C. 1989) (applying the federal state action immunity doctrine to a state law claim and holding that municipal ownership and operation of cable television systems does not violate North Carolina’s antitrust laws because, “[w]here the legislature has authorized a city to act, it is free to carry out that act without fear that it will later be held liable under state antitrust laws for doing the very act contemplated and authorized by the legislature”); State ex rel. Utils. Comm’n v. North Carolina Textile Mfrs. Ass’n, Inc. 328 S.E.2d 264, 271 (N.C. 1985) (holding that “the rates of public utilities under the jurisdiction of the Utilities Commission are not subject to attack on the basis that they violate the antitrust laws”) (citing Parker).</td>
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<td>Thaxton v. Medina City Bd. of Educ., 488 N.E.2d 136, 138 (Ohio 1986) (holding that a public board of education is not a “person,” and cannot be liable under the Valentine Act “when the board operates within its clear legal authority”); Stow v. Summit County, 590 N.E.2d 1363, 1364 (Ohio Ct. App. 1990) (holding that a county and a city are not “persons”</td>
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<tr>
<td>State</td>
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<td>Case Law</td>
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<td>OK</td>
<td>Okla. Stat. tit. 79, § 202(3) (2010) (defining “person” so that it “does not include the State of Oklahoma, its departments, and its administrative agencies, except the Grand River Dam Authority and the Oklahoma Municipal Power Authority to the extent that their goods or services are not regulated by the Oklahoma Corporation Commission”).</td>
<td>within the meaning of the Valentine Act); Bd. of County Comm’rs of Wood County v. Toledo, No. 92WD086, 1993 Ohio App. LEXIS 4478, at *16-17 (Ohio. Ct. App. Sept 24, 1993) (holding that a municipal utility is constitutionally exempt from the Valentine Act “[s]ince a municipality’s authority to operate a public utility is constitutionally derived and the legislature is without authority to enact statutes to limit its operation”).</td>
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<td>OR</td>
<td>Or. Rev. Stat. § 646.740(6) (2010) (exempting “activity specifically authorized under state law or local ordinance”).</td>
<td>Fine Airport Parking, Inc. v. City of Tulsa, 71 P.3d 5, 11 (Okla. 2003) (rejecting the incorporation of the federal state action immunity doctrine into state law because “[t]he principles of federalism supporting the Parker doctrine are meaningless in an analysis of municipal liability under the Oklahoma Antitrust Reform Act” but nevertheless holding that a city’s operation of an airport parking facility was not subject to state antitrust laws because the state legislature intended the city to operate the facility “as the arm of the state for the public good”).</td>
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<td>PA</td>
<td>Pennsylvania, which has not enacted a general antitrust statute, does not have a statutory exemption from antitrust liability for state action.</td>
<td>There are no reported decisions that construe or apply the Parker immunity doctrine in the context of a state antitrust claim.</td>
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<td>RI</td>
<td>R.I. Gen. Laws § 6-36-8 (2010) (stating that “[a]ny activity or activities exempt from the provisions of the antitrust laws of the United States shall be similarly exempt from the provisions of this chapter” and that “[n]othing contained in this chapter shall be construed to apply to activities or arrangements approved by any regulatory body or officer acting under statutory authority of this state or of the United States”).</td>
<td>Riley v. R.I. Dep’t of Envtl. Mgmt., No. PC 04-0987, 2005 R.I. Super. LEXIS 62, at *34-35 (R.I. Super. Ct. Apr. 27, 2005) (recognizing that the state action exemption should be “liberally construed in harmony with federal statutes and ruling judicial interpretations of the United States courts” and immunizing the defendant because it “is a regulatory agency that exists by legislative grant of power, and, as such, its [regulatory] actions...are presumed valid and exempt from attack under antitrust law”) (internal quotations omitted).</td>
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SD South Dakota antitrust statutes do not contain a statutory exemption for state action.

TN Tenn. Code Ann. § 7-51-1004 (2010) (providing that any municipality or other governmental entity is immune from antitrust liability when regulating passenger transportation services); Tenn. Code Ann. § 7-54-107 (2010) (exempting from state antitrust laws all “contracts for the construction, operation or maintenance of an energy production facility”).

TX Tex. Bus. & Com. Code Ann. § 15.05(g) (2010) (exempting “actions required or affirmatively approved by any statute of this state or of the United States or by a regulatory agency of this state or of the United States duly acting under any constitutional or statutory authority vesting the agency with such power” and stating that “[n]othing in this section shall be construed to prohibit activities that are

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Ward v. Dick Dyer & Assocs., 403 S.E.2d 310, 311-12 & n.1 (S.C. 1991) (holding that § 39-5-40(a) exempts “those actions or transactions which are allowed or authorized by regulatory agencies or other statutes” but does not immunize conduct simply because it is “subject to regulatory control”; noting in a footnote that securities transactions are exempt from claims under UTPA); InMed Diagnostic Servs., L.L.C. v. MedQuest Assocs., 594 S.E.2d 552, 556 (S.C. Ct. App. 2004) (holding that the regulatory exemption of § 39-5-40 applies to the defendant’s conduct because the conduct involves “a process for which [a regulatory agency] has formulated exacting procedural requirements” and “[w]hether or not [the defendant] followed these procedures correctly is uniquely within the competency of [the regulatory agency]”).

Byre v. City of Chamberlain, 362 N.W.2d 69, 74-75 (S.D. 1985) (applying the Parker doctrine to a state antitrust claim and holding that a city that monopolizes garbage collection is immune from state antitrust liability if the city’s conduct “furthers or implements clearly articulated and affirmatively expressed state policy”).


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<td>UT</td>
<td>Utah Code Ann. § 76-10-915(1)(f) (2010)</td>
<td>Summit Water Dist’ Co. v. Summit Cty., 123 P.3d 437, 448 (Utah 2005)</td>
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<td>VT</td>
<td>Vermont, which has not enacted a general antitrust statute, does not have a statutory exemption from antitrust liability for state action.</td>
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<td>VA</td>
<td>Va. Code Ann. § 59.1-9.4(b) (2010) (stating that “[n]othing contained in [the Virginia Antitrust Act] shall make unlawful conduct that is authorized, regulated or approved (1) by a statute of this Commonwealth, or (2) by an administrative or constitutionally established agency of this Commonwealth or of the United States having jurisdiction of the subject matter and having authority to consider the anticompetitive effect, if any, of such conduct. Nothing in this paragraph shall be construed to alter or terminate any other applicable limitation, exemption or exclusion”).</td>
<td>Fairfax County Water Auth. v. City of Falls Church, 78 Va. Cir. 177, 180 (Va. Cir. Ct. 2009)</td>
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<td>WA</td>
<td>Wash. Rev. Code §19.86.170 (2010) (exempting “actions or transactions permitted by any...regulatory body or officer acting under statutory authority of this state or the United States”).</td>
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<td>WV</td>
<td>W. Va. Code § 47-18-5(b) (2010) (providing that the West Virginia Antitrust Act exempts “any person whose activities or operations are regulated, to the extent of such regulation, pursuant to the laws of this State or of the United States, by a regulatory agency of this State or of the United States”).</td>
<td>There are no reported decisions that construe or apply this exemption.</td>
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<td>WI</td>
<td>The Wisconsin Antitrust Act does not contain a statutory exemption for state action.</td>
<td>Hallie v. Chippewa Falls, 314 N.W.2d 321, 323-24 &amp; 326 (Wis. 1982) (stating that the federal “Parker exemption is not applicable” to a state antitrust claim because the “relationship between the federal government and the states is not parallel to the relationship between the state government and the cities,” but nevertheless exempting a city from state antitrust liability because “the legislature did not intend that a city should be liable under the state antitrust law” for attempting to tie the collection of sewage and other municipal services to access to a sewage treatment facility”); American Med. Transp. v. Curtis-Universal, Inc., 452 N.W.2d 575, 579-83 (Wis. 1990) (holding that the city of Milwaukee is not immune from state antitrust liability in connection with its adoption of an allegedly anticompetitive ambulance service system because the court could not conclude that “the authority of towns and counties to contract for ambulance services evinces a legislative intent to contract in a way that leads to monopoly or restraint of trade”) (internal quotations omitted).</td>
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<td>WY</td>
<td>Wyoming antitrust statutes do not contain a statutory exemption for state action.</td>
<td>Kautza v. City of Cody, 812 P.2d 143, 146 (Wyo. 1991) (holding that a municipality is not liable for offering a service at a below-cost rate because Wyo. Stat. Ann. § 40-4-107(a), which states that it is unlawful “to sell, offer for sale or advertise for sale any article or product, at less than the cost thereof,” applies to “any person, partnership, firm, corporation, joint-stock company, or other association” and “has no application” to a municipality).</td>
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