

Approved Ivan Sand 1/30/85
Date

MINUTES OF THE HOUSE COMMITTEE ON LOCAL GOVERNMENT

The meeting was called to order by REPRESENTATIVE IVAN SAND at
Chairperson

1:30 ~~a.m.~~ p.m. on January 23, 1985 in room 521-S of the Capitol.

All members were present except:

Representative Clyde Graeber, (Excused)

Committee staff present:

Mike Heim, Legislative Research Department
Mary Hack, Revisor of Statutes Office
Gloria Leonhard, Secretary to the Committee

Conferees appearing before the committee:

Representative Dale Sprague, HB 2029

Proponents for HB 2016:

- Mr. Chris McKenzie, League of Kansas Municipalities
- Mr. Dave Retter, City Attorney, Concordia
- Mr. Ed Johnson, City Attorney, Topeka
- Mr. Doug Wright, Mayor, Topeka
- Mr. Andrew Happer, Council President, Overland Park
- Mr. Winnie Kingman, Commissioner, Shawnee County
- Mr. Warren Rhodes, Commissioner, Douglas County
- Mr. Bruce Craig, Commissioner, Johnson County
- Mr. Don Harman, City Manager, Manhattan
- Mr. Tom Glinstra, City Attorney, Olathe
- Mr. Ken Carter, City Manager, Hays
- Mr. Dennis Shockley, City of Kansas City, Kansas
- Ms. Gerry Ray, Johnson County
- Mr. Hannes Zacharias, City of Lawrence
- Mr. Kim Dewey, Sedgwick County
- Mr. Joe Zima, Acting County Counselor, Shawnee County
- Mr. Fred Allen, Kansas Association of Counties
- Ms. Judy Anderson, City of Wichita
- Ms. Beverly Bradley, Kansas Association of Counties

Chairman, Ivan Sand, called for hearings on the following House Bills:

HB 2029, concerning improvement districts; relating to the powers thereof;

Mike Heim, Staff, provided committee members with an overview of HB 2029.
(See Attachment I.)

Representative Dale Sprague, sponsor of the bill provided the committee copies of a letter indicating support of HB 2029 from William E. Gusenius, Attorney-at-Law, Lindsborg, Kansas, on behalf of the Roxbury Improvement District. (See Attachment II.)

Rep. Sprague gave brief background and intent of the bill and requested support for the bill in order to allow the Roxbury Improvement District to provide additional services to that community.

HB 2016, concerning municipalities; relating to antitrust liability; providing immunity therefrom.

Chairman Sand called for testimony from proponents of HB 2016.

Mike Heim, Staff, gave a brief background of the bill. (See Attachment III.)

A question was raised as to how the legislation would affect suits in progress now; i.e., would it nullify? Mr. Heim affirmed that that is the intent.

Mr. Dave Retter, City Attorney, Concordia, Kansas, termed the legislation a reasonable approach which he would recommend for passage with a few

Unless specifically noted the words and marks on this page have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON LOCAL GOVERNMENT,
 room 521-S, Statehouse, at 1:30 ~~xxx~~ a.m./p.m. on January 23, 1985.

amendments; that the remedies available should be considered along with the impact of attorneys fees and getting an injunction.

Mr. Chris McKenzie, representing the League of Kansas Municipalities, reviewed the League's position regarding the antitrust matter and expressed support of HB 2016 with recommended amendments. (See Attachments IV, V, and VI.) Mr. McKenzie urged complete retroactivity for the legislation, with the Legislature making the decision instead of the judge; he stated that the areas set out in the legislation represent "high risk" areas.

Mr. McKenzie introduced the following proponents of HB 2016 who all expressed their support of the bill:

Mr. Ed Johnson, City Attorney, Topeka, in turn introduced Mayor Doug Wright who stated he concurs with the League's recommendations.

Mr. Andrew Happer, Council President, City of Overland Park, expressed his support of HB 2016. (See Attachment VII.)

Ms. Winnie Kingman, Commissioner, Shawnee County, Kansas, stated she concurs with all recommendations.

Mr. Warren Rhodes, Commissioner, Douglas County, Kansas, commented that protection against antitrust lawsuits is vital if good people are to be retained at the city and county levels.

Mr. Bruce Craig, Commissioner, Johnson County, stated he is strongly supportive to pass HB 2016.

Mr. Don Harman, City Manager, Manhattan, Kansas, expressed support for HB 2016.

Mr. Tom Glinstra, City Attorney, Olathe, Kansas, gave an example of a suit filed by a monument company in his city and noted the difficulty of obtaining liability insurance.

Mr. Ken Carter, City Manager, Hays, Kansas, stated his city desires protection as provided by HB 2016 and cited potential problem related to expansion of the city's local airport in area leased for oil exploration.

Mr. Dennis Shockley, City of Kansas City, Kansas, expressed support for HB 2016 and stated they are asking for the same immunity enjoyed before the Boulder decision. (See Attachment VIII.)

Ms. Gerry Ray, representing Johnson County reiterated that the Johnson County Board supports HB 2016.

Mr. Hannes Zacharias, City of Lawrence, expressed support for HB 2016 and distributed copies of testimony. (See Attachment IX.)

Mr. Kim Dewey, representing Sedgwick County, expressed support for HB 2016, and stated he also represents property taxpayers who will pay if the legislation is not passed. (See Board letters -- Attach. X-A, X-B, & X-C.)

Mr. Joe Zima, Acting County Counselor, Shawnee County, expressed support for HB 2016 and urged that "solid waste" be included along with public areas of police and fire.

Mr. Fred Allen, representing Kansas Association of Counties, stated that the Association is concerned about potential lawsuits against counties and lends its support to HB 2016.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON LOCAL GOVERNMENT,
room 521-S, Statehouse, at 1:30 ~~am~~/p.m. on January 23, 1985

Ms. Judy Anderson, City of Wichita, referred to letter supporting HB 2016 by Mayor Bob Knight which was prepared upon the request of the City Commission. (See Attachment XI.)

Ms. Beverly Bradley re-emphasized the need to include "solid waste" in the legislation.

Copies of a written statement from Mr. Louis Stroup, Jr., executive director of Kansas Municipal Utilities, Inc., in support of HB 2016, was presented to Committee members. (See Attachment XII.)

The minutes of the meeting of January 17, 1985, were approved as presented.

The meeting adjourned.

HOUSE COMMITTEE ON LOCAL GOVERNMENT

DATE 1-23-85

NAME	ADDRESS	REPRESENTING
John Spurgeon		Budget
Karen McClain		KS Assoc of Realtors
Bob BRADLEY	LAWRENCE	KS Assoc Counties
Fred Allen	Topeka	K.A.C.
JERRY CONRAD	Topeka	KG & E
Terri Zimmerman	Topeka	Atty General
DAN MORGAN	Topeka	AGC of KS
Ken Carter	Hays	City of Hays
Sherry Ray	Olathe	Jo Co Board of Commissioners
KE DEWAY	525 N. Main 67003	SEDEWICK COUNTY
Bruce R. Craig	Olathe	Jo Co BOCC
Don Harmon	City of Manhattan	City
CHARLES BELT	WICHITA	WICHITA BOARD OF COMMERCE
W. A. Ramsey	Olathe	City of Olathe
SCOTT LAMBERS	OP	OP
ANDREW HAPPER	OP	OP
D. WAYNE ZIMMERMAN	TOPEKA	THE ELECTRIC CO'S ASSOC. OF KS,
Tom Glinstra	olathe	olathe
Myrtle Kingman	Topeka	Shawnee Co. Comm.
Harold R. Main	Topeka	Sn Co Intergov Council
DOUG WRIGHT	TOPEKA	City of Topeka
Ed Jones	"	City Attorney, Topeka
Hannes Zacharias	Lawrence	City of Lawrence
Joseph W. Zima	Topeka	Asst County Counselor
W. Carter	Topeka	Mayor of Topeka

1-23-85

Boy D. Shewket

Warren Rhodes

Jennie Shockley

Jacely Anderson

David Applebar

Chris McKenize

Shawnee

Lawrence

City of K.C., Ks

Wichita

Lawrence Journal World

Topeka

K. C. P. L. Co.
County Commission

Lobbyist

Lobbyist

Reporter

League of Ks. Municipal

(ATTACHMENT I)

1/23/85

MEMORANDUM

January 23, 1985

TO: House Local Government Chairman
FROM: Kansas Legislative Research Department
RE: H.B. 2029

H.B. 2029 amends the improvement district law to permit any improvement district in McPherson County to levy not to exceed 20 mills for street lights.

1/23/85

WILLIAM E. GUSENIUS
ATTORNEY AT LAW
120 E. LINCOLN, BOX 328
LINDSBORG, KANSAS 67456
(913) 227-3632

January 17, 1985

Mr. Dale Sprague
State Capitol Building
Room 112 South
Topeka, Kansas 66612

Dear Dale:

In response to our telephone conversation of yesterday, I am writing on behalf of the Roxbury Improvement District, concerning the pending house bill allowing improvement districts to levy general taxes up to 20 mills for public improvements.

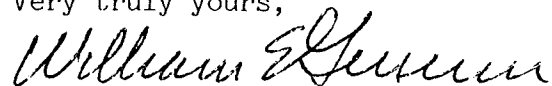
The facts in our situation are that the improvement district covers approximately 160 acres of ground, and includes the unincorporated community of Roxbury, Kansas, which is located in northeastern McPherson County. The improvement district was originally incorporated several years ago for the purposes of establishing and maintaining a sewage treatment facility for the citizens of the Roxbury community.

For many years the citizens of the community have been receiving the benefits of street lights which are located within the town and which are presently owned by Kansas Power & Light. There is a monthly service charge for these lights which has previously been paid simply by voluntary contribution of the citizens of the community. This has become extremely difficult to maintain contributions and it is the wish of the improvement district to take over the funding of the street light operation, as well as the sewer district.

There is relatively little assessed valuation within the boundaries of the 160 acre improvement district, and the current 5 mill general tax authorized by K.S.A 19-2765 will only cover approximately 25 to 30% of the annual cost of operating the street lights. It is for this purpose that we felt a special bill authorizing the improvement district to increase the general levy to 20 mills would be appropriate.

Obviously, this is somewhat a specialized situation, but we feel it is necessary to allow the improvement district to perform additional public interest acts for the benefit of the citizens of the Roxbury community. We would very much appreciate any assistance you can give us in seeing that this bill would be adopted. Thank you.

Very truly yours,



William E. Gusenius

1/23/85

MEMORANDUM

January 23, 1985

TO: House Local Government Chairman
FROM: Kansas Legislative Research Department
RE: H.B. 2016

H.B. 2016 would grant local governments federal and state antitrust immunity in regard to franchising of public utilities, operating municipal water, gas, and electric utilities, franchising of cable television, providing ambulance and emergency medical services, regulating land use through zoning and subdivision regulations, operating sanitary sewerage and storm drainage systems, and operating municipal airports and enforcing airport zoning. The bill shall apply retroactively and shall be effective upon publication in the Kansas Register.

The bill was recommended by the 1984 interim Special Committee on Local Government in regard to Proposal No. 36.

Outline of Remarks of
Chris McKenzie, League of Kansas Municipalities
Concerning H.B. 2016
January 23, 1985

(ATTACHMENT IX)

1/23/85

1. Brief Review of the Antitrust Problem
 - (a) Evolution of state action immunity
 - (b) Supreme Court decisions in 1978 and 1982
 - (c) Resulting lawsuits (estimated 300) and damage claims (See Appendix A)
 - (d) Local Government Antitrust Act of 1984
 - (i) Injunctions still available, including attorney's fees and costs (See Appendix B and C)
2. Response of Kansas Local Governments to Boulder
 - (a) Urge comprehensive federal action
 - (b) Form Municipal Antitrust Liability Task Force
 - (c) Interim Study
3. Recommendations of Municipal Liability Task Force
 - (a) State policy statement needed
 - (b) Concentrate on areas of greatest exposure
 - (c) Delegate state's federal antitrust immunity in those areas
 - (d) Provide exemption from civil liability under the state antitrust laws, except for injunction actions by Attorney General
 - (e) Amend specific statutes
 - (f) Make immunity and exemption retroactive
4. What H.B. 2016 Does
 - (a) Clearly articulates and affirmatively expresses a state policy
 - (b) Delegates the state's civil immunity from federal antitrust liability in actions for damages, injunctive relief, attorneys fees and costs in the seven enumerated areas
 - (c) Creates an exemption from civil liability under the state antitrust laws in the same areas
 - (d) Makes above provisions retroactive
5. What H.B. 2016 Doesn't Do
 - (a) Doesn't expand or limit the authority of municipalities in the enumerated areas
 - (b) Doesn't limit other forms of relief from illegal or unreasonable local government actions
 - (c) Doesn't authorize arbitrary, unreasonable or capricious local government decisionmaking
 - (d) Doesn't limit criminal prosecution for antitrust violations
6. Recommended Amendments to H.B. 2016
 - (a) Bill should explicitly preserve the authority of the Attorney General to bring civil injunction actions against municipalities
 - (b) Should state that bill does not limit antitrust immunity or exemption otherwise available in state statutes for any municipal service or regulatory activity
 - (c) Other minor changes
7. Other Statutory Remedies Still Available
 - (a) Criminal prosecution for bribery, official misconduct, compensation for past official acts, misuse of public funds, etc.
 - (b) Ouster from office for crimes in (a) and recall
 - (c) Statutory remedies for challenging illegal or unreasonable local government actions (See Appendix D)
8. The Nature of Antitrust Litigation
 - (a) Slow and expensive
 - (b) Predisposition not to dismiss at pre-trial stage due to complexity of facts
 - (c) Requires specialized antitrust counsel (City of Richmond, Va. spent \$900,000 on a zoning case without ever going to trial)
9. The Shrinking Municipal Liability Insurance Market
 - (a) Specialized nature of municipal liability coverage due to rapidly changing laws
 - (b) Decreasing willingness by insurance industry to provide coverage at all, much less at reasonable rates (See attached article from Business Insurance magazine in Appendix E)
 - (c) Recent experience with League and KAC sponsored programs
10. Objective of H.B. 2016
 - (a) Limit excessive and recently-created municipal antitrust liability exposure
 - (b) Preserve existing remedies for parties harmed by local government decisions
 - (c) Encourage good government at the local level in Kansas

1/23/85

Recommended Amendments by League of Kansas Municipalities

Session of 1985

HOUSE BILL No. 2016

By Special Committee on Local Government

Re Proposal No. 36

12-19

0018 AN ACT concerning municipalities; relating to antitrust liability;
0019 providing immunity therefrom.

0020 *Be it enacted by the Legislature of the State of Kansas:*

0021 Section 1. (a) When used in this act "municipality" means [New
0022 any city, county, township or other political or taxing subdivision
0023 of the state.

0024 (b) The legislature of the state of Kansas recognizes the
0025 importance and the necessity of providing and regulating certain
0026 services by municipalities in order to serve and protect the [and activities
0027 public's general health, safety and welfare. Municipalities which
0028 are authorized specifically by statute or through the exercise of
0029 the municipalities' home rule power are urged to continue to
0030 provide and regulate such services, and in doing so, all immunity [and activities

0031 of the state of Kansas from the provisions of the federal antitrust
0032 laws shall be extended to the governing bodies of such municipi- [Except as provided
0033 palities and the officers and employees thereof. Such municipi- [in section 2,
0034 palities and the officers and employees thereof also shall be
0035 exempt from civil liability under the antitrust laws of the state of
0036 Kansas in article 1 of chapter 50 of the Kansas Statutes Anno-
0037 tated.

0038 (c) Municipalities shall be immune and exempt from anti-
0039 trust liability as provided by subsection (b) when:

0040 (1) Franchising and supervising the operations and activities [one or more
0041 of public utilities;

0042 (2) operating municipal water, gas and electric utilities;

0043 (3) franchising and supervising operations and activities of [the
0044 cable television businesses; [one or more

0045 (4) providing and supervising ambulance and emergency medical services; [one or more
0046
0047 (5) formulating comprehensive plans for the development of [and implementing
0048 municipalities and regulating land use through the adoption and [by contract or otherwise
0049 administration of zoning and subdivision regulations;
0050 (6) operating sanitary sewerage and storm drainage systems;
0051 or
0052 (7) operating municipal airports and enforcing airport zoning
0053 regulations.
0054 (d) The antitrust immunity and exemption provided by sub-
0055 section (b) shall be in addition to any municipal exemption or
0056 immunity from antitrust liability which might otherwise exist
0057 and shall neither increase nor decrease the authority of municipi-
0058 palities specifically granted by statute or through the exercise of
0059 the municipalities' home rule power to provide or regulate the [or activities
0060 services listed in subsection (c). Paragraph (5) of subsection (c) [it shall not be presumed
0061 shall not authorize municipalities to regulate the occupancy or [that by listing the
0062 location of dwelling units in such a way as to affect an arbitrary [municipal services
0063 exclusion of manufactured housing. [and activities in
0064 (e) The provisions of this act shall apply retroactively. [subsection (c) that
0065 ~~Sec. 2. This act shall take effect and be in force from and~~ [the legislature repealed
0066 ~~after its publication in the Kansas register.~~ [any antitrust immunity
[or exemption otherwise
[available for any
[municipal service
[or regulatory activity.

Sec. 2. (Amendments to state antitrust act to be drafted which preserve authority of Attorney General to bring injunction actions).

Sec. 3. This act shall take effect and be in force from and after its publication in the Kansas Register.

1/23/85



League of Kansas Municipalities

PUBLISHERS OF KANSAS GOVERNMENT JOURNAL/112 WEST SEVENTH ST., TOPEKA, KANSAS 66603/AREA 913-354-9565

TO: House Committee on Local Government
 FROM: Chris McKenzie, Attorney/Director of Research
 DATE: January 23, 1985
 SUBJECT: Testimony in Support of 1985 H.B. 2016

I sometimes believe that whoever said "may you live in interesting times" had local units of government in mind. In the last seven years local units of government in Kansas have witnessed decisions by the Kansas Supreme Court and the U.S. Supreme Court which have opened up whole new areas of municipal liability exposure, including tort liability (1978), liability for damages under the Civil Rights Act of 1871 (42 U.S.C. § 1983) for violations of the federal constitutional or statutory rights of individuals (1978), and federal antitrust liability (1982). I believe it would be an understatement to say that the local government system in Kansas and across the country is still reeling to a certain extent from the impact of these rulings. As a result, cities, counties and other local units have had to scramble to obtain expensive liability insurance coverage and get used to the idea of devoting more and more of their budgeted expenditures to paying legal fees and court judgements. H.B. 2016, like the Local Government Antitrust Act of 1984 enacted by the Congress, is designed to return some semblance of balance to the system.

1. Brief Review of the Antitrust Problem

As pointed out in the report of the Special Committee on Local Government concerning Proposal No. 36, for years municipalities have not been considered to be subject to the federal antitrust laws. Up until the mid-1970s, local units of government were operating under a presumption shared by most individuals that as subdivisions of their respective states they shared in the states' "state action" immunity recognized by the U.S. Supreme Court in the 1943 case of Parker v. Brown. On two occasions since 1978, however, the U.S. Supreme Court has handed down decisions making it clear that cities and other local units of government may be held liable for violations of the federal antitrust laws. The case which struck perhaps the greatest blow to local units of government was handed down in 1982, Community Communications Co. v. City of Boulder, Colorado. In Boulder the Court reaffirmed its previous holding that in order for a political subdivision of the state to qualify for "state action immunity" its allegedly anticompetitive acts must have been undertaken pursuant to a clearly articulated and affirmatively expressed state policy. The Court explicitly held that a constitutional delegation of home rule authority to local units of government, such as that contained in the Colorado Constitution for cities, did not meet the "clearly articulated and affirmatively expressed state policy" requirement. The Court added further uncertainty to the municipal antitrust liability area by refusing to decide whether or not

actions by local units of government need to be actively supervised by their states in order to be covered by the "state action immunity" doctrine.

Since the Supreme Court's decisions, over 300 federal antitrust lawsuits have been filed against municipalities across the country dealing with such subjects as cable television, utility franchising, wastewater treatment, sewerage, zoning, planning and subdivision regulation, and airport management. In one case decided in 1984 in federal district court in Illinois, Unity Ventures v. Village of Grayslake, Ill., Case No. 81C2745, a jury returned a \$9.5 million antitrust verdict against two local governments and several local officials. The trial judge adhered to the automatic treble damages requirement of 15 U.S.C. § 15, raising the total judgement to \$28.5 million.

After two years of lobbying by local government groups, the Village of Grayslake case finally got the attention of Congress and in 1984 it enacted the Local Government Antitrust Act. The Act prohibits awards of damages, interest on damages, costs, or attorney's fees in antitrust actions from any local government, official or employee thereof acting in an official capacity. Similar protection is made available to parties who undertake allegedly anticompetitive actions under the direction of a local government, or official or employee thereof acting in an official capacity. Under the Act private parties may still seek injunctions, including attorney's fees and costs, in order to challenge local government actions. Consequently, the Act does not provide complete immunity to local units of government and their officials or employees. Many municipal attorneys believe that private injunction actions will still be brought with regularity as long as the opportunity for recovering attorney's fees and court costs exists. Indeed, two federal antitrust actions have been filed in Kansas since the passage of the Act against two cities.

2. Response of Kansas Local Governments to Boulder

After the Boulder decision, most municipal officials felt it was most desirable that Congress act to provide immunity from antitrust liability to municipalities. This course of action was viewed as much more preferable than going to state legislatures with requests for legislation delegating the state's immunity in those areas, especially in light of the confusing antitrust decisions rendered by the federal courts, including the U.S. Supreme Court. In the spring of 1984, when it appeared that Congress may not act, the League of Kansas Municipalities and other local government groups requested that the legislature undertake an interim study in the summer of 1984 of the municipal liability issue. In conjunction with that study, the League formed a Municipal Antitrust Liability Task Force, consisting of city and county officials, to study the issue and make recommendations to the Interim Committee. The Task Force also included a representative of the Office of the Attorney General.

3. Recommendations of Municipal Liability Task Force

After extensive study, the Municipal Liability Task Force recommended enactment of legislation in the areas of utility and cable television franchising, emergency medical services and ambulances, solid waste management, planning and zoning, municipal utility services, and airport operations and zoning. These areas were suggested since the growing number of lawsuits that have been filed indicated that they pose the greatest risk of antitrust liability to municipalities. The Task Force recommended that the legislation contain a statement of policy expressly authorizing and affirmatively urging cities and counties to continue the enumerated regulatory and service activities; that it delegate the state's immunity from federal antitrust liability in these areas; that it specifically exempt cities and counties from civil liability under the state antitrust laws; that it specifically amend certain existing statutes dealing with these city and county activities; and that it provide for retroactive application of any immunity or exemption granted. The Task Force advised the Interim Committee that any exemption from civil liability under the state antitrust laws should not effect the power of the attorney general to bring civil injunction actions against municipal officials.

4. What H.B. 2016 Does

H.B. 2016 is designed to meet the Supreme Court requirement that any state legislation granting antitrust immunity to its local units of government "clearly articulate and affirmatively express" a state policy which authorizes the displacement of competition with regulation or monopoly public service. It delegates the state's civil immunity from federal antitrust liability in actions for damages (not covered by the recent federal antitrust act), injunctive relief, attorney's fees and costs in seven enumerated areas. Further, it creates a new exemption from civil liability under the state antitrust laws in the same areas. Finally, it makes the provisions of the Act retroactive.

5. What H.B. 2016 Doesn't Do

According to its terms, H.B. 2016 does not expand or limit the authority of municipalities in the enumerated areas. Secondly, it does not limit access to the court system, either federal or state, by parties seeking relief from the illegal or unreasonable actions of local units of government, and their officials or employees. Finally, it does not limit the opportunity for criminal prosecution by either the U.S. attorney general or the Kansas attorney general, or county attorneys, for criminal violations of federal or state antitrust laws.

6. Recommended Amendments to H.B. 2016

The Municipal Antitrust Liability Task Force recommends certain amendments to H.B. 2016. First, the bill should explicitly preserve the authority of the attorney general to bring civil injunction actions against municipalities, and their officials or employees.

We endorse such an amendment because the attorney general can then continue to protect the interest of all Kansans by policing local government actions which might constitute unreasonable restraints of trade. Secondly, the bill should be amended to include a statement that the enumeration of the seven areas covered by the bill does not limit any antitrust immunity or exemption that might otherwise be available in the state statutes for any municipal service or regulatory activity. Such an amendment is necessary in order to avoid the unintended implication that only those areas mentioned in the bill are covered. As the Municipal Antitrust Liability Task Force advised the Interim Committee, a number of state statutes already provide adequate "state action immunity" for certain local government actions (e.g., city refuse collection pursuant to K.S.A. 12-2101 et seq.). Finally, some minor amendments are suggested in the attached bill draft in order to clarify that municipalities shall be immune or exempt from antitrust liability when issuing "one or more" franchises or taking steps to implement comprehensive development plans.

7. Other Statutory Remedies Still Available

In its report to the Special Committee on Local Government the Task Force recognized that in considering its recommendations the Committee would have to balance city and county concerns about potential antitrust liability and its chilling effect on local government decisionmaking with the concerns of other parties about the potential antitrust effects of local government practices. The Task Force suggested that state law already authorized numerous remedies, both civil and criminal, for the illegal or unreasonable acts of local units of government. Specifically, Article 39, Chapter 21 of the Kansas Statutes Annotated prohibits acts of bribery, official misconduct, compensation for past official acts, discounting a public claim, and misuse of public funds. K.S.A. 60-1205 provides for the ouster of officers convicted of such crimes, and K.S.A. 25-4301 et seq. provides for the recall of public officers by voters for a conviction of a felony, misconduct in office, and incompetence or failure to perform duties prescribed by law. In the area of planning and zoning, as discussed in Appendix D, numerous state and federal statutes already exist which grant persons the right to bring actions in state or federal courts to challenge the reasonableness or legal validity of a zoning or subdivision regulation decision by local units of government in Kansas. The Task Force indicated its belief that the availability and use of these sanctions in the courts and by the voters of Kansas are the preferable way to police the allegedly illegal or unreasonable activities of municipal officials. Exposing the local officials of Kansas, and the units of government they represent, to federal or state antitrust liability simply results in the expenditure of excessive amounts of local government tax moneys in federal and state courts when other adequate remedies are available.

8. The Nature of Antitrust Litigation

It is not only the possibility of treble damages, injunctions, and attorney fee awards that may have a chilling effect on local government decisionmaking in Kansas. The burdens of antitrust litigation also are considerable. In the first place, federal antitrust trials are conducted not in local courts but in the United States district court located a considerable distance from most municipalities. Further, by its very nature, antitrust litigation requires the retention of specialized antitrust counsel who are located only in large metropolitan areas. Finally, due to the specialized expertise necessary to try any antitrust case, the cost of antitrust litigation can be considerable.

Antitrust lawsuits can be expected to be prolonged due to the fact that federal courts have traditionally viewed the disposition of antitrust lawsuits on motions for summary judgement (such motions are made when no real issues of fact need to be decided by a trial) to be inappropriate because of the extensive fact-finding that is necessary in determining the existence of an antitrust violation. In one recent case, the City of Richmond, Virginia decided to enter into a \$2.5 million settlement of an antitrust lawsuit involving one of its zoning decisions only after expending an estimated \$900,000 in legal fees in order to resolve a preliminary legal question which was unrelated to the antitrust issues at stake. While the settlement agreement contained no admission of wrongdoing, the city governing body chose to enter into it due to the mounting legal expenses and in view of the plaintiff's requested damages of \$260 million.

9. The Shrinking Municipal Liability Insurance Market

At the same time municipal officials are facing increasingly broader liability exposure due to recent court decisions, the opportunities for obtaining insurance coverage for such liability appears to be declining. In the October 8, 1984 issue of Business Insurance magazine, contained in Appendix E, it was indicated that seven insurers that wrote liability insurance coverage 18 months ago have left the market and the rates of the remaining insurers are increasing anywhere from 15% to 400%. The article indicates that the legal climate and recent court rulings which have broadened municipal liability exposure have produced more claims and losses. One insurance official indicates in the article that the frequency of lawsuits against public officials is up 400% in the past five years and the cost of defending such suits is more than the insurance industry anticipated. "Out of every \$4 paid out on lawsuits, \$3 goes to legal costs and only \$1 goes to the plaintiffs." Both the League of Kansas Municipalities and the Kansas Association of Counties have experienced this recent change in the industry. The League and the KAC were recently informed that the insurance carriers which back our municipal liability insurance programs would no longer be offering the coverage due to the much higher costs than were anticipated when the programs were instituted.

10. Objective of H.B. 2016

Simply stated, the objective of the municipal organizations and officials supporting H.B. 2016 is to urge the legislature to limit excessive and recently-created municipal antitrust liability. We urge you to preserve existing remedies for parties who claim they have been harmed by local government decisions and the authority of the Kansas attorney general and county attorneys to police local government practices which are considered "unreasonable" restraints of trade. We strongly believe that this piece of legislation will contribute significantly to preserving good government at the local level in Kansas. We thank you for the opportunity to present our views on this matter, and we stand ready to work with the Committee and other parties in analyzing this proposal.

Damage Claims in Federal Antitrust Lawsuits

CABLE TELEVISION REGULATION

- | | | |
|-----|---|-----------------------|
| 1. | <u>Community Communications v. Boulder</u> , 102 S. Ct. 835
(January 13, 1982) | (unknown) |
| 2. | <u>Melhar Corp. v. City of St. Louis</u> , Civ. No. 82-1064-EM
(E.D. Mo. 1982) | \$72,000,000 |
| 3. | <u>William Danks v. City and County of Denver</u> , No. 82-CV-0484
(D.C. Colo. 1982) | (unknown) |
| 4. | <u>Hopkinsville Cable TV v. Pennyroyal</u> , 562 F. Supp. 543
(W.D. Ky. 1982) | (unknown) |
| 5. | <u>Affiliated Capital v. City of Houston</u> , 735 F. 2d 1555
(5th Cir. 1984) | (not claimed) |
| 6. | <u>Omega Satellite Products v. City of Indianapolis</u> , 694 F. 2d 119
(7th Cir. 1982) | (unspecified) |
| 7. | <u>TCI Cablevision v. Jefferson City</u> (cite unavailable) | (unknown) |
| 8. | <u>CTI v. Jefferson City, Mo.</u> , 589 F. Supp. 85
(W.D. Mo. 1984) | (unknown) |
| 9. | <u>Catalina Cablevision v. Tucson</u> , Civ. 82-459 TUC
(D. Arizona 1982) | (unknown) |
| 10. | <u>Universal Cable v. City of Los Angeles</u> , No. 82-5202
(C.D. Cal. 1982) | \$255,000,000 |
| 11. | <u>Century Cable v. City of San Buenaventura</u> , No. 82-5274
(C.D. Cal. 1982) | (unknown) |
| 12. | <u>Warner Amex Cable v. City of De Kalb</u> , No. 83-CH 17
(Ill. Cir. Crt.) | (damages unspecified) |
| 13. | <u>Preferred Communications v. Los Angeles</u> , CV-83-5846
(S.D. Cal. 1973) | (damages unspecified) |
| 14. | <u>Century Federal v. Cities of Palo Alto, Atherton, and Menlo Park
California</u> 579 F. Supp. 1553 (N.D. Cal. 1984) | (unknown) |
| 15. | <u>Pacific West Cable v. City of Sacramento</u> , No. 5-83-1034
(E.D. Cal. 1983) | (unknown) |
| 16. | <u>Liberty T.V. Cable v. City of San Bernardino</u> , No. 82-5432-WMB
(C.D. Cal. 1982) | (unknown) |
| 17. | <u>Matrix Enterprises v. Millington Telephone</u> , No. C-82-2343-H,
F.Supp. (W.D. Tenn. 1983) | (unknown) |
| 18. | <u>Acon CATV v. City of Duarte</u> , No. CV83-1018 R.G. (MCX)
(C.D. Cal. 1984) | (unknown) |
| 19. | <u>Video International v. City of Dallas and Warner-Amex Cable</u> ,
CA3-81-1772-R (N.D. Tex. 1981) | \$7,500,000 |
| 20. | <u>Cox Cable v. Marquette, Michigan, et al.</u> (citation omitted) | (unknown) |
| 21. | <u>Claremont Communications v. Claremont, California</u> , CV-83-3084
(C.D. Cal. 1983) | \$1000 |
| 22. | <u>Matrixvision v. Bedford Heights, Ohio</u> , No. C-84-2063
(N.D. Oh. 1984) | (damages unspecified) |
| 23. | <u>Daley v. Durham, New Hampshire</u> , 733 F.2d 4 (1st Cir. 1984) | (damages unspecified) |
| 24. | <u>Tennessee Cable Television v. Memphis Light, Gas, et al.</u>
No. 82-3946 (D.Tenn. 1982) | (damages unspecified) |
| 25. | <u>Committee for Open Media v. Minneapolis</u> , No. 4-82-816
(D.Minn. 1982) | (declaratory relief) |

LAND USE AND ZONING

26.	<u>Scott v. City of Sioux City</u> , 736 F.2d 1207 (8th Cir. 1984)	\$15,000,000
27.	<u>Westborough Mall v. City of Cape Girardeau</u> , 693 F.2d 733 (8th Cir. 1982)	\$180,000,000
28.	<u>Mason City Center v. City of Mason City</u> , 468 F. Supp. 737 (N.D. Ia. 1979)	(damages unspecified)
29.	<u>Miracle Mile v. City of Rochester</u> , 617 F.2d 18 (2d Cir. 1980)	\$49,200,000
30.	<u>Richmond Hilton v. City of Richmond</u> , C.A. No. 81-110R (E.D. Va. 1981)	\$240,000,000
31.	<u>Canal Square v. City of Richmond</u> , C.A. No. 81-1115 (E.D. Va. 1981)	\$15,000,000
32.	<u>Aspen Post v. Board of County Commissioners</u> , No. 81-1400 (D. Colo. 1981)	\$145,000,000
33.	<u>Jonnet Development v. City of Pittsburg</u> , 558 F.Supp. 962 (W.D. Pa. 1983)	(unknown)
34.	<u>English Road v. County of San Bernardino</u> , No. CU82-4497 TJH (C.D. Cal. 1982)	(unknown)
35.	<u>Ossler v. Norridge</u> , 557 F. Supp. 219 (N.D. Ill. 1983)	(unknown)
36.	<u>Omni Outdoor Advertising v. City of Columbia et al.</u> Civ. Act. No. 82-2872	\$2,000,000
37.	<u>Brontel Ltd. v. City of New York</u> , 571 F. Supp. 1065 (S.D.N.Y. 1983)	(damages unspecified)
38.	<u>Detyens v. Chaleston</u> , No. 82-2071-8 (D.S.C. 1983)	(damages unspecified)
39.	<u>Parks v. Watson</u> , 716 F.2d 646 (9th Cir. 1983)	(unknown)
40.	<u>Racetrac Petroleum v. Prince George's County</u> , No. R-83-3073 (D. Md. 1983)	\$10,400,000
41.	<u>Sporck v. Danbury, Connecticut</u> , No. B-800-2 (D. Ct. 1983)	\$40,000,000
42.	<u>LaPlace du Sommet v. Paradise Valley, Arizona</u> , (citation omitted)	\$48,000,000
43.	<u>4790 El Cajon v. San Diego, California</u> , No. 82-0509 (I.) (S.D. Cal. 1982)	(no damages claimed)
44.	<u>Calton Homes v. Township of Princeton, New Jersey</u> , No. 84-2013	\$5,000,000
45.	<u>Miami International Realty v. Mt. Crested Butte, Colorado</u> 579 F. Supp. 68 (D. Colo. 1984)	\$1,650,000
46.	<u>Auton v. Dade City, Florida</u> , No. 84-157-CIV-T-17 (S.D. Fla. 1984)	(injunctive relief only)
47.	<u>Traweek v. San Francisco</u> , No. C-83-5640-TEH (N.D. Cal. 1983)	\$100 million
48.	<u>Barton v. Riverside, California</u> , (citation omitted) (C.D. Cal. 1984)	(damages unspecified)
49.	<u>Hozz v. City and County of San Francisco</u> , No. 817-405 (S.F. Superior Court 1983)	\$2,000,000
50.	<u>Pet Prevent-A-Care v. San Jose</u> , C-83-20059 WAI (N.D. Cal. 1983)	\$1,000,000
51.	<u>Lawrence v. Minneapolis, et al</u> (citation omitted) (D. Minn. 1984)	(damages unspecified)

WASTE COLLECTION AND DISPOSAL

52.	<u>Hybud Equipment v. Akron</u> , No. 83-3306 (6th Cir. Aug. 24, 1984)	(unknown)
53.	<u>Central Iowa Refuse v. Des Moines</u> , 175 F.2d 419 (8th Cir. 1983)	(unknown)
54.	<u>Heille v. City of St. Paul</u> , 671 F.2d 1134 (8th Cir. 1982)	\$1,050,000
55.	<u>D.E.S. Waste Control v. City of Carrollton</u> , No. C82-10-N (N.D. Ga. 1982)	\$800,000
56.	<u>Asher v. Doniphan, Mo.</u> , Civ. Act. No. 482-00997C (E.D. Mo 1982)	(unknown)
57.	<u>City of Camarillo v. Spadys Disposal Service</u> , 2d Civil No. 6591 (Cal. App. 1983)	(damages unspecified)
58.	<u>A-1 Carting v. City of Albuquerque</u> , No. 83-07187B	(damages unspecified)
59.	<u>Ideal Waste Systems v. Provo City</u> , No. 82-082W (D. Ut. 1983).	(damages unspecified)

60. L & H Sanitation v. Lake City Sanitation, No. B-C-82-93 (E.D. Ark. 1983) (damages unspecified)
61. Windisch v. Acenbrack, No. 79-904-CIV-T-WC. (D. Fla.) (damages unspecified)
62. Hudson v. City of Chula Vista, No. 83-8151 (9th Cir.) (unknown)
63. Royal Refuse v. Springfield, Oregon, No. 83-6203-E (D. Or. 1983) \$37,000
64. Ideal Wste Systems v. Orem, Utah, No. C-83-0900-W (D. Ut. 1983) (damages unspecified)
65. Scay Brothers v. Albuquerque, New Mexico, CIV-83-0694 (D.N.M. 1983) (damages unspecified)

HOSPITALS AND AMBULANCE SERVICE

66. Capital Ambulance v. Columbia, South Carolina, C.A. No. 80-670-0 (D.S.C. 1980) (unknown)
67. Huron Valley Hospital v. City of Pontiac, 466 F.Supp. 1301 (E.D. Mi. 1979) (unknown)
68. United Pacific Ventures v. Mercy, Civ. LV. 80-163, RDF (D. Nev. 1981) \$1,260,000
69. Gold Cross v. City of Kansas City, Mo., 705 F.2d 1005 (8th Cir. 1983) (damages unspecified)
70. Professional Ambulance v. Hartford, No. H82-970 (D. Ct. 1982) and Trinity Ambulance v. Hartford, No. H82-969 (D.Ct. 1982) (unknown)
71. Springs Ambulance v. Rancho Mirage, Indian Wells, et al., No. 82-5917 (damages unspecified)
72. Feldman v. Jackson Memorial, 571 F.Supp. 1000 (S.D. Fla. 1983) (unknown)
73. Federal Ambulance v. Sioux Falls, South Dakota (D.S.D. 1983) \$165,000
74. Springs Ambulance v. Indio, California, (citation omitted) (damages unspecified)
75. PatientTransfer v. Little Rock, Arkansas, et al., No. LR-C-84-161 (E.D. Ark. 1984) \$150,000
76. Mercy Peninsula Ambulance v. County of San Mateo, 47 ATRR 469 (N.D.Cal. 1984) (unknown)

WATER AND SEWAGE SYSTEMS

77. Community Builders v. City of Phoenix, 652 F.2d 823 (9th Cir. 1981) \$1,536,000
78. Tuld v. City of Scottsdale and City of Phoenix, 665 F.2d 1054 (9th Cir. 1981) \$750,000
79. Shrader v. Horton, 626 F.2d 1163 (4th Cir. 1980), affirming 471 F. Supp. 1236 (W.D. Va. 1979) (unknown)
80. Howland Township v. City of Warren, C.A. No. 81-954 (N.D. Oh. 1981) \$1,890,000
81. Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983) (unknown)
82. Coral Ridge v. City of Margate, No. 83-62627 (S.D. Fla. 1983) \$30,000,000
83. LaSalle National Bank v. DuPage, Lisle, and Woodridge, No. 82-6517 (N.D. Ill. 1982) \$75,000,000
84. City of Northglenn v. City of Thornton, No. 83-1058 (D. Colo. 1983) (unknown)
85. Vickery Manor v. Mundelein, 575 F. Supp. 996 (N.D. Ill. 1983) (unknown)
86. LaSalle National Bank v. County of Lake, 579 F.Supp. 8 (N.D. Ill. 1984) \$15,000,000
87. Unity Ventures v. County of Lake, No. 81-C2745 (N.D. Ill. 1984) (\$28.5 million)

88. East Naples Water System v. Collier County, (citation omitted) (damages unspecified)
 89. Sanders v. Tuscaloosa, Alabama, No. CV-84-P-1709-W \$2,000,000
 90. Lewis Y El'honen v. County of Wayne and Twp. of Van Buren, Michigan, 78-71590 (E.D. Mich. 1978) \$3,000,000
 91. La Salle National Bank v. County of Lake, et. al. No. 81-C 3160 (N.D. Ill. 1981) \$60,000,000
 92. Lockary v. Kayfetz, 587 F. Supp. 631 (N.D. Cal. 1984) (unknown)

AIRPORT SERVICES AND CONCESSIONS

93. Pueblo Aircraft v. City of Pueblo. 679 F.2d 805 (10th Cir. 1982) (unknown)
 94. Greyhound v. City of Pensacola, 676 F.2d 1380 (11th Cir. 1982) \$1,500,000
 95. Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978) \$9,000,000
 96. B & W Aero Corp. v. Manchester Airport, Civ. No. 80-427-D (D.N.H. 1981) \$3,000,000
 97. Pinehurst Airlines v. Resort Sir Services, 476 F.Supp. 543 (M.D.N.C. 1979) (unknown)
 98. Guthrie v. Genessee County, 494 F.Supp. 950 (W.D. N.Y. 1980) (unknown)
 99. Independent Taxicab Drivers' Employees v. Greater Houston Transportation Corp. and City of Houston; Arrow Northwest, Inc. v. Greater Houston Transportation Co. and City of Houston, No. H-79-2285 and No. H-80-1630 (consolidated) \$114,000,000
 100. All-American Cab v. Metropolitan Knoxville Airport, 547 F.Supp. 509 (E.D. Tenn. 1982), affirmed No. 82-5612 (6th Cir. 1983) (unknown)
 101. Alphin Aircraft v. Henson, Civ. Act. B-81-227 (D.Md. 1981) (unknown)
 102. Transport Limousine v. Port Authority of New York and New Jersey, 571 F.Supp. 576 (E.D.N.Y. 1983) \$16,500,000
 103. Charley's Taxi v. Radio Dispatch, 562 F.Supp. 712 (D. Hawaii 1983) (unknown)
 104. Hill Aircraft v. Fulton County, 561 F.Supp. 667 (N.D. Ga. 1983) (unknown)
 105. Pontarelli v. City of Chicago, No. 83-C-6716 (N.D. Ill. 1983) (unknown)
 106. O'Hare Wisconsin v. Chicago, No. 84-C-0995 (N.D. Ill. 1984) \$7,100,000
 107. C.W. Limousine v. Chicago, No. 84-C-1232 (N.D. Ill. 1984) (damages unspecified)
 108. Falk v. Chicago, No. 84-C-2995 (N.D. Ill. 1984) (damages unspecified)
 109. Lorrie's Travel v. City and County of San Francisco, et a., No. C83-0666 TEH (N.D. Cal. 1983) \$13,000,000
 110. Alamo Rent-A-Car v. Sarasota Manatee Airport Authority, No. 82-836-Civ.-T-H (injunctive relief)
 111. Platt v. Easton, Md., No. HM 83-3104 (D. Md. 1983) (damages unspecified)
 112. F & L Flight, Inc. v. City of Dixon, Illinois, No. 82 C 20085 (N.D. Ill.) and Dixon Aviation v. City of Dixon, Illinois, No. 81C 20110 (N.D. Ill.) \$3,360,000
 113. Plaza Rent-a-Car v. City of McAllen, Texas, et al. No. B-83-2761 (S.D. Tex. 1983) \$6,000,000
 114. Commuter Transportation Systems v. Hillsborough County Aviation Authority, No. 81-152 CIV-T-K \$750,000

UTILITY SERVICES

115. Morrow v. Mrs. Smith, 540 F. Supp. 1104 (S.D. Oh. 1982) \$2,225,000
 116. City of Gainesville v. Florida Power & Light Co., 488 F. Supp. 1258 (S.D. Fla. 1980) (unknown)
 117. City of Groton v. Connecticut Light & Power Co., 497 F.Supp. 1980 (D. Del. 1980), modified, 662 F.2d 921 (2d Cir. 1981) (unknown)

118. City of Newark v. Delmarva, 497 F. Supp. 323 (D. Del. 1980) (unknown)
 119. Rural Electric v. Cheyenne, No. 82-0416 (D. Wyo. 1982) (unknown)

TOWING SERVICES

120. Sherrer v. City of Huntington Beach, No. CV-80-826-MML (C.D. Cal. 1981) (unknown)
 121. Shurtleff v. San Jose, 698 F.2d 1232 (9th Cir. 1983) \$3,000,000
 122. Kendrick v. Augusta, Georgia, C.A. No. 179-266 (S.D. Ga 1981) (unknown)
 123. Fryer's Wrecker, et al. v. Daytona Beach, Florida, No. 84-140-Civ-Orl--II (M.D. Fla. 1984) (damages unspecified)
 124. Mabe v. Galveston, Texas, No. G-83-302 (S.D. Tex. 1983) (damages unspecified)
 125. El Paso Wrecker v. El Paso, Texas, No. EP-82-CA-276 \$1,500,000

MASS TRANSIT

126. Crocker v. Padnos, 483 F. Supp. 229 (D. Mass. 1980) \$1,500,000
 127. City of North Olmstead v. Greater Cleveland Regional Transit Authority, 722 F.2d 1284 (6th Cir. 1983) (unknown)
 128. Monte Gibson, et al. v. Park City Municipal Corporation, et al., No. C-81-0823W (D. Ut. 1981) \$9,000,000

LICENSES AND CONCESSIONS

129. Cincinnati Riverfront v. City of Cincinnati, C.A. No. C-1-82-128 (S.D. Ohio) \$3,000,000
 130. Kurek v. Park District of Peoria, 557 F. 2d 580 (7th Cir. 1977), reinstated, 583 F.2d 378 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1979) (unknown)
 131. Contract Marine Carriers v. City of Richmond, No. 83-0231-R (E.D. Va.) \$15,000,000
 132. University Wines v. Boulder, No. 83-K-1199 (D. Colo. 1983) (unknown)
 133. William Mirshak v. Jeremiah Joyce, No. 83-C-6716 (N.D. Ill. 1983) \$3,000,000
 134. Pizza Inn v. Irving, Texas (citation omitted) \$6,000,000
 135. Kostick v. Minneapolis, No. 4-82-663 (D.Minn. 1982) (damages uncalculated)

CONTRACTS

136. Suttles v. City of Dayton, No. 76 1055 (Oh. Comm. Pls.) \$3,000,000
 137. Southwest Concerts, Inc. v. Arena Operating Co., et al., No. H-79-457 (S.D. Tex. 1979) \$1,500,000
 138. Englert v. City of McKeesport, 736 F. 2d 96 (3rd Cir. 1984) (unknown)
 139. Hoffman v. Glendale Heights, 581 F. Supp. 367 (N.D. Ill. 1984) \$375,000
 140. Shay v. City and County of San Diego, No. 83-2628I (S.D. Cal. 1983) \$800,000,000
 141. Phone Program v. New York Off Track Betting Corporation, et al., 83 CIV 1486 (S.D. N.Y. 1983) \$1,207,737
 142. Eastway Construction v. City of New York, 84 CIV 0690 (E.D. N.Y. 1984) \$1.2 billion
 143. Driscoll v. City of New York, 82 CIV 8497 (S.D. N.Y. 1982) \$20,000,000

TELEPHONE

144. Jackson v. Taylor, 539 F. Supp. 593 (D.D.C. 1982) (unknown)
145. Capital Telephone v. City of Schenectady, 560 F.Supp. 207 (N.D. N.Y. 1983) (unknown)

TAXICABS

146. Independent Taxi v. Kansas City, No. 81-0692-CV-W-4 (W.D. Mo. 1981) (unknown)
147. Golden State Transit v. Los Angeles, 726 F. 2d 1430 (9th Cir. 1984) (unknown)
148. Campbell v. City of Cicago, 557 F.Supp. 1166 (N.D. Ill. 1983) \$320,000,000
149. Bates v. Kansas City, Missouri, et al., No. 83-1311-CV-W-3 (W.D. Mo. 1983) (damages unspecified)
150. CAB Drivers v. San Diego, California, No. 505902 (Superior Court of California) (injunction only)
151. In the Matters of the City of Minneapolis, Federal Trade Commission, Docket No. 9180 (1984) (injunctive relief only)

PARKING

152. Corey v. Look, 641 F.2d 32 (1st Cir. 1981) (unknown)

POLICE POWER

153. Lucky Lady Card Room v. San Diego, California, et al., (citation omitted) (injunctive relief only)
154. Jim Fant Properties v. Virginia Beach, Virginia, No. CA-83-851-N (D. Va. 1983) \$2,500,000
155. Eshelman v. Culver City, California, No. CV-82-0840 AWT (C.D. Cal. 1982) (damages unspecified)
156. Johns Niagara Hotel v. Niagara Falls, New York, No. CIV-83-1448 (W.D. N.Y. 1983) \$15,000,000
157. Harrowgate String Bond v. Philadelphia New Year's Shootersk, et al., C.A. 84-2736 (E.D. Pa. 1984) (damages unspecified)

Text of 15 U.S.C.S. Sec. 26, Which Was Unaffected
by H.R. 6027, "Local Government Antitrust Act
of 1984"

15 USCS § 26

§ 26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this act [15 USCS §§ 13, 14, 18, and 19], when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven [49 USCS §§ 1 et seq.] in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

(As amended Sept. 30, 1976, P. L. 94-435, Title III, § 302(3), 90 Stat. 1396.)

Note: This section authorizes actions for injunctions, attorney's fees and costs for any violation of the federal antitrust laws, including the Sherman Antitrust Act, 15 U.S.C.S. Sec. 1 et seq. "Antitrust laws," as used in the Clayton Act, of which this section is a part, is defined in 15 U.S.C.S. Sec. 12 to include the Sherman Act.

*Municipalities Still Vulnerable***New Antitrust Act May
Do Little to Stem Suits**

BY MARTHA MIDDLETON

National Law Journal Staff Reporter

CONGRESS, acting in the waning days of its pre-election session, has set up a major impediment to antitrust suits against local governments — suits that became a torrent in the wake of Supreme Court rulings in 1978 and 1982.

The new law, the Local Government Antitrust Act of 1984, P.L. 98-544, prohibits all monetary recoveries from cities, towns and villages, as well as special-purpose political subdivisions. Plaintiffs also are prohibited from recovering money damages from any local government official, agent or employee acting in an official capacity.

But the law, passed Oct. 10 and signed by President Reagan Oct. 24, does not close the door completely. The legislation leaves open the question of whether it should be applied retroactively in hundreds of pending cases. It also permits suits for equitable relief against municipalities — including attorney fees for prevailing parties — and does not bar suits against private parties who allegedly engage in anti-

competitive conduct with local governments.

According to some observers, the net effect of the new law may be to abate large damage awards against municipalities, but it is likely to do little to stem the flood of lawsuits.

In cases involving officials and municipalities that were pending as of Sept. 24, local governments will have to prove to the court why, "in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act," the law should be applied retroactively.

Plaintiffs with pending cases against private parties sued in connection with the anti-competitive conduct do not face the retroactivity provision, and in future lawsuits they also may recover damages in some instances.

In addition, the law still allows attorneys to get their clients' complaints against municipalities into court, through requests for injunctions and what some call "creative pleadings."

And while officials at the Department of Justice say they will decline antitrust actions against municipalities, their counterparts at the Fed-

Continued on page 28

eral Trade Commission are pushing ahead with such complaints.

Finally, the Supreme Court may yet have the last word. In fact, a vehicle for new input by the justices on when a municipality is exempt from antitrust liability is now pending before the court.

Until just six years ago, municipalities had considered themselves, along with states, immune from antitrust liability under the "state action doctrine" enunciated by the Supreme Court in 1943. *Parker v. Brown*, 317 U.S. 341.

But after the high court in 1978 and 1982 narrowed the applicability of the doctrine, the number of such

'Up a Notch'

With that verdict, the issue of municipal antitrust liability moved "up a notch or two on the Richter scale," says William J. Althaus, a lawyer who is mayor of York, Pa., and who testified in favor of the new law on behalf of the U.S. Conference of Mayors.

The unprecedented award in federal court in Chicago, though not final, sent shivers throughout the country's about 3,100 counties, 35,700 cities, towns and villages and 38,000 other local government units.

The case was brought by a real-estate developer who sued not only the village, but also the county in which it is located, and three local officials, after being refused permission to connect a sewer line to a new development. *Unity Ventures v. County of Lake*, 81 C-2745.

It was the first jury verdict ever against a municipality in an antitrust challenge, and municipal authorities feared thousands more like it.

In seeking help from Congress, municipal officials noted not only that there was the possibility of huge verdicts — such as the one involving Grayslake — but also that the threat of such awards was undermining their decision-making and, at times, intimidating them into actions they may not have taken but for the threat of litigation.

Such powerful talk, following the Grayslake verdict and a step-up in antitrust activity against municipalities by the FTC, finally brought action by Congress.

Questions Remain

But antitrust practitioners warn that the legislative win for the cities does not answer all the questions, nor does it solve all the problems inherent in the balancing act between federal antitrust policy and the legitimate functions of municipalities.

"An awful lot of litigation will go on about the retroactivity," says Robert H. Freilich, professor of urban affairs at University of Missouri-Kansas City School of Law.

And antitrust injunctive suits against municipalities, their officials and private parties still are allowed under the act, and successful plaintiffs also will be able to recover attorney fees.

"You're going to go for an injunction, even if you can't get damages," predicts Thomas P. McMahon of Denver, a Colorado assistant attorney general, adding that he believes the act will have only a minimal impact on the amount of litigation. "You'll see creative pleadings" for one thing, he says.

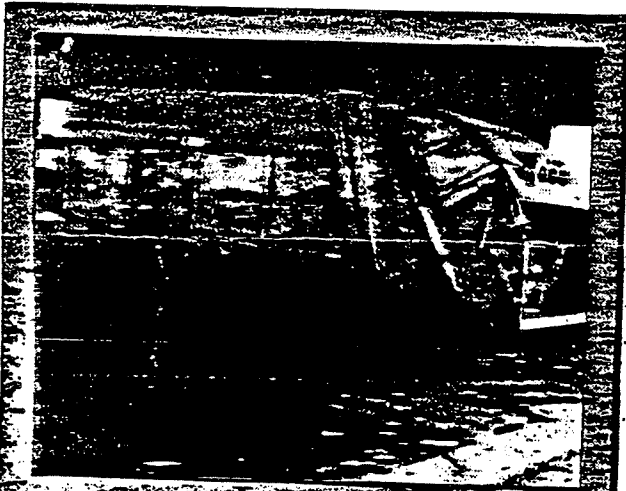
"Plaintiffs might say, 'OK, there's not the same kind of exemption in state antitrust law,'" and take their claims to state courts, Mr. McMahon adds. "If it does pose the possibility of a damage remedy," he predicts, "plaintiffs will at least think about this."

Anxiety Is Lessened

But municipal officials remain optimistic. "If courts — especially appellate courts — continue to be as sympathetic to us, only in the most egregious, anti-competitive, proprietary situations will you see injunctive relief going forward," says Stephen C. Chapple of Arlington, Va.'s Cohen, Gettings, Aiper & Dunham, the U.S. Conference of Mayors' general counsel.

"The anxiety is not as extreme as it used to be," adds Cynthia Poia, legislative counsel for the National League of Cities in Washington. "But we continue to worry as long as there is creative pleading."

Another possible entry point for litigation is the ability of plaintiffs to recover from such private party defendants as ambulance services, airports and



Garbage Collection

Recent Circuit Court rulings may be good omens for municipalities. In October, for example, the 9th Circuit ruled in *City of Boulder v. C&D*, in a trash-collection case.

actions skyrocketed. Currently nearly 300 antitrust suits are pending, according to officials of municipal organizations.

The Boulder Case

The suits cover nearly every conceivable activity — from zoning, franchising and licensing practices to land-use regulations and procurement practices. A survey by the National Institute of Municipal Law Officers found that the most frequent subjects of such suits are airport and sewer-system operations, garbage and waste-collection activities, hospitals and ambulance services.

The big jump in lawsuits came in 1982, after the Supreme Court decided a case involving cable-TV regulation by the city of Boulder, Colo. The court, in a 5-3 decision, held that a municipality is not immune from antitrust laws unless state legislation specifically exempts the anti-competitive activity.

The specific exemption, the court said, must be one in which the state policy is "clearly articulated and affirmatively expressed." *Community Communications Co. v. City of Boulder, Colo.*, 455 U.S. 40.

The Boulder decision spurred cities to march to Congress, urging it to pass legislation that would provide them with a blanket exemption from federal antitrust laws.

The drive received a major boost last January, when a federal jury in Illinois awarded a \$9.5 million antitrust verdict — trebled to \$28.5 million — against the tiny village of Grayslake, Ill.

garbage collectors under contract to a local government. But private parties will escape damage liability unless it is shown that their conduct is, in the words of the statute, "based on any official action directed by a local government, or official, or employee thereof acting in an official capacity."

And, says Jeffrey H. Howard of Washington, D.C.'s Davis, Graham & Stubbs, "virtually any plaintiff can allege that an official is acting beyond his official capacity, and they still can be sued for damages." Mr. Howard argued on behalf of the city in *Boulder*, both before the 10th U.S. Circuit Court of Appeals and the Supreme Court.

The new legislation also may have raised some new problems for municipalities by formally bringing them under federal antitrust laws, according to some observers.

"It is a major statement," contends William J. Hunter Jr. of the Washington firm of Howrey & Simon, who testified before Congress against municipi-

pal antitrust immunity last March. "For the first time, Congress has expressly said that antitrust laws do apply to the cities."

'Fat and Unresponsive'

Others agree and are glad that Congress affirmed that position. As Sen. Dave Durenberger, R-Minn., testified: "Whether it's garbage collection, public transportation, or health services, public sector monopolies tend to be inefficient — to grow fat and unresponsive."

"The best defense to an antitrust claim is good government," says Mr. Hunter. "Basically, that will avoid the principal problems."

Municipal officials, of course, disagree. They argue that antitrust suits can become a form of improper pressure against municipalities. "It is often cheaper for a local government simply to give in to those who threaten antitrust suits, even when that is not in the best interests of the locality's citizens," Charles F. Rule, deputy assistant attorney general in the Justice Department's Antitrust Division, said in a speech in October.

Last year, for example, a \$250-million lawsuit by Richmond Hilton Associates against the city of Richmond, Va., was settled out of court. The company alleged that the city violated the Sherman Act in attempting to block construction of a Hilton hotel because another hotel was being built in a nearby redevelopment district. *Richmond Hilton Associates v. Richmond*, 81-1100-R.

The city paid the plaintiffs more than \$2 million, and, it is estimated, more than \$900,000 for their own attorney fees.

FTC Action

While the new legislation would remove much of the bargaining leverage that plaintiffs have been able to muster to push such settlements, it does, however, open the way for certain other kinds of cases, including investigations by the FTC.

Last May, the commission charged in administrative complaints that regulations by Minneapolis and New Orleans eliminate competition in the taxicab industry by, among other things, limiting the number of cab licenses, adopting uniform fares and making them applicable to all companies and encouraging companies to agree on proposals for fair hikes.

"We never intended lots of suits," says Winston S. Moore, an assistant director in the FTC's Bureau of Competition. "We wanted to see taxi deregulation" in an industry he believes has presented "a classic cartel problem." The area is one on which the FTC apparently intends to keep a watchful eye.

In October, the commission sent a letter to the D.C. City Council commenting on a proposal to limit the number of licensed taxicabs in the city. Such a plan, the letter stated, "would directly hurt prospective job seekers, as well as consumers in general and especially poor, handicapped and elderly consumers."

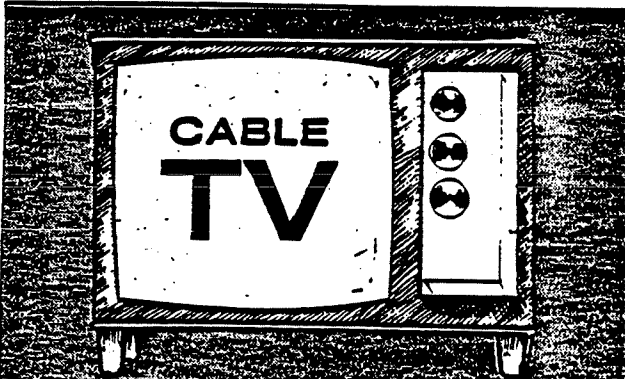
And in mid-November, the FTC testified before the San Francisco Police Commission, urging the city to allow more entry into the city's taxicab market by issuing more medallions.

Justice Won't Act

But another federal agency, the Justice Department, does not intend to bring any antitrust actions against municipalities.

"I can assure you that the Antitrust Division has no

Continued on following page



Cable Television

The FCC is pressing for deregulation in San Francisco, Minneapolis, New Orleans, and Washington, D.C. The new rules will...



The Taxi Industry

The FTC is pressing for deregulation in San Francisco, Minneapolis, New Orleans, and Washington, D.C. The new rules will...

Continued from preceding page

intention of launching enforcement efforts against local governments," Justice's Mr. Rule said in his speech in October before the National Association of Home Builders. "I have yet to see the case that warrants prosecutorial action against a local government."

Meanwhile, the standard for municipal liability that has evolved in Supreme Court decisions has been criticized by many who believe the direction is inappropriate for federal antitrust policy.

"The antitrust laws were never designed to regulate government conduct," Mr. Rule argued in his speech.

Many officials remain hopeful that sympathetic courts will allow relief only in really egregious proprietary situations.

Further, he contended, the laws "have been used — abused really — to coerce local governments and their officials."

Critics of the suits also point out that judgments ultimately must come from a city's general revenues, leaving taxpayers, in effect, with the bill.

In the Grayslake case, for example, Lake County State's Attorney Fred L. Foreman has testified that it would take the taxpayers 70 years to pay the judgment, and still provide necessary services to the citizens.

Lack of Uniformity?

Local government officials also complain about lack of uniformity if cities individually have to return to state legislatures to obtain immunity for their various activities.

"It is conceivable that a county official in Fairfax, Va., could be subject to liability and face personal liability for treble damages for which a Montgomery County, Md., official would enjoy total immunity," James C. Leventis of Columbia, S.C.'s Leventis, Ormand & Kamber told Congress, referring to two contiguous Washington, D.C., suburban jurisdictions.

While the debate continues, the high court has decided to take another look at the question. The justices will hear arguments this week in a case brought by four Wisconsin townships against the city of Eau Claire, alleging that the city violated the Sherman Act by using a monopoly over sewage-treatment services to gain monopolies in sewage

collection and transportation services. *Halle v. Eau Claire*, 82-1832.

The District Court and the 7th Circuit both decided in favor of Eau Claire. The appellate panel found that the city's conduct was immunized by a state policy.

"The only requirement for receiving immunity when a traditional municipal function is involved is that the challenged restraint must be in furtherance or implementation of clearly articulated and affirmatively expressed state policy," the panel said. *Halle v. Eau Claire*, 700 F.2d 376.

Pleading Their Case

But the townships say much more is required. Even if a state statute may permit a city to engage in conduct that under some circumstances may be anti-competitive in violation of the Sherman Act, a court should not assume the state contemplated such conduct and infer that the state condones it, the townships argue in their briefs to the court.

Finally, according to the petitioners, the court must decide if a municipality's anti-competitive conduct must be "actively supervised by the state," as one of its recent rulings has established in the case of private parties. *California Retail Liquor Dealers Association v. Midcal Aluminum Inc.*, 445 U.S. 97 (1980).

Those hoping that the court will follow the 7th Circuit's decision say they believe that other circuit court rulings in the last few years in favor of municipalities may be good omens. In October, for example, the 9th Circuit ruled in favor of cities in cases involv-

The new law does not solve all the problems in the balance between antitrust policy and the municipalities' functions.

ing cable-TV regulation, ambulance service and trash collection services. *Catalina Cablevision Associates v. Tucson*, 83-2460; *Springs Ambulance Service Inc. v. Rancho Mirage*, 84-5509; *Tom Hudson & Associates Inc. v. Chula Vista*, 83-4457.

"We're somewhat optimistic for *Halle*," said the League of Cities' Ms. Poba. "Courts will search long and hard for a way out of the liability question."

Mr. Chapple agrees: "If we win *Halle* and have damages [exemption], we're in reasonably good shape."



League of Kansas Municipalities

PUBLISHERS OF KANSAS GOVERNMENT JOURNAL/112 WEST SEVENTH ST., TOPEKA, KANSAS 66603/AREA 913-354-9565

TO: Special Committee on Local Government
 FROM: League of Kansas Municipalities
 DATE: November 15, 1984
 SUBJECT: Existing Legal Authority for Challenging Local Land Use Decisions

Following is a listing and explanation of the state and federal statutes granting persons the right to bring legal actions in state or federal courts to challenge the reasonableness or legal validity of a zoning or subdivision regulation decision by local units of government in Kansas.

State

1. Zoning

The following statutes provide that a person whose property is affected by the zoning decisions of local units of government may bring an action in the district court to have the reasonableness of such decisions determined:

K.S.A. 3-109 - airport zoning
 12-712 - city
 19-2913 - county/township
 19-2926 - county
 19-2954 - improvement districts
 L. 1984, ch. 96, § 9 - urban counties/townships

The following statutes provide for the appointment and operation of boards of zoning appeals for review of any decision involving the administration of zoning regulations:

K.S.A. 12-714 - city
 12-722 - joint boards (including city-county)
 19-2926a - county
 19-2934 - county within 3 miles of city limits
 L. 1984, ch. 96, § 7 - urban counties/townships

NOTE: In 1978 in the case of Golden v. City of Overland Park the Kansas Supreme Court concluded for the first time that a zoning amendment which affects a specific tract of property is a "quasi-judicial" decision and will be more carefully scrutinized by the Court. As a result, local units engaged in zoning have been required to shoulder a greater burden in proving the reasonableness of a local rezoning decision. An article on this case and its impacts appeared in the May 1984 Kansas Government Journal.

2. Subdivision Regulations

Affected landowners may challenge local platting decisions by either seeking a declaratory judgement under K.S.A. 60-1701 concerning the validity of a local subdivision regulation or by requesting a mandamus order under K.S.A. 60-801 to compel a local unit to perform a particular legal duty. (See Ventures in Property I v. City of Wichita, 225 Kan. 698 (1979) for further information.)

Federal

In addition to the state statutes authorizing appeals of local land use decisions in state court or before boards of zoning appeals, the federal Civil Rights Act also may be used to challenge the validity of such decisions.

42 U.S.C. § 1983 - Authorizes actions for damages or an injunction for violations of rights protected by the U.S. Constitution and federal statutes. Usual claims include violation of the First Amendment (i.e., free speech) and Fifth Amendment (i.e., taking of property without just compensation).
 42 U.S.C. § 1988 - Authorizes awards of attorneys' fees in § 1983 actions.

OCTOBER 8, 1984

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Liability market shrinking for public entities

By MEG FLETCHER

Public entities seeking to renew liability coverages are being buffeted by gale-force winds of change.

Seven insurers that wrote public officials and police professional liability coverages 18 months ago have left the market. And, the remaining insurers are raising rates anywhere from 15% to 400% on comprehensive general liability policies that include endorsements for public officials and police professional liability coverages.

In the last 90 to 120 days, there has been a 180-degree turn in the market for municipalities seeking a total liability package, says James W. Chapman, resident vp of the governmental programs division of Markel Service Inc., a broker and managing general agent in Richmond, Va.

And, the winds are not abating yet.

"There will be some real weeping and gnashing of teeth in the next two months," predicts D. Michael Enfield, managing director for broker Marsh & McLennan Inc. in San Francisco.

"I expect to see a continued erosion of the public entity liability insurance market through the first quarter of 1985," he adds.

Changes are generally being felt on the West Coast now, but the wind is blowing toward the East.

Feeding the storm are tighter reinsurance conditions that reduce direct insurers' capacity and increase their costs; growing underwriting losses on policies underwritten at rock-bottom rates; and legal decisions that have broadened the exposure of municipalities, sources say.

Several insurers have responded by pulling out of the public officials and police professional liability markets completely.

Two years ago, there were about 20 insurers in California that would underwrite low-layer liability coverage for public entities. Now there are fewer than seven, Mr. Enfield said.

In the last month, Ideal Mutual Insurance Co. of New York and Great Southwest Fire Insurance Co. of Scottsdale, Ariz., have stopped underwriting police professional and/or public officials lia-

bility coverage either as separate or combined policies or as endorsements to comprehensive general liability policies.

Last month, Ideal Mutual canceled all police professional liability policies midterm with a 30-day notice, said Daniel R. Varona, Ideal's vp, secretary and general counsel.

Ideal's exodus from the police professional liability market is part of an ongoing redirection of the insurer's priorities, he said. The company is moving out of the agency business and concentrating on writing large, direct accounts, he said (BI, May 21)

Those police professional liability policies that were canceled, some of which also covered public officials, generated \$3 million to \$5 million of the company's total 1983 premiums of \$200 million, he said. The loss ratio for this line was generally worse than the company's 71.5% loss ratio for all its liability lines in 1983, Mr. Varona said.

About 1½ years ago, Ideal changed its reinsurance arrangement so it was retaining more of the risks and, therefore, felt the losses more, he said.

Most of the police liability coverage was written in rural areas.

Great Southwest is letting the book run out on the vast majority of the public officials and police professional coverages it underwrites, said Eugene J. Keating Jr., chief operations officer. Although it is not canceling any existing coverage, it is notifying policyholders now that it is neither writing new coverage nor renewing existing coverage while evaluating its position.

"We just don't think we can make money on it," Mr. Keating explained.

Also this spring, Compass Insurance Co. decided to close its doors and is running off its business, including public entity business. The Cherokee Insurance Co., which has been in voluntary rehabilitation in Tennessee since July 17, also stopped writing all policies this spring, including a CGL policy with special endorsements for police and public officials. That municipal package generated \$300,000 to \$350,000 of Cherokee's \$24.8 million in direct written premiums in 1983, according to Billy Akin, senior vp and secretary.

The loss ratio for the municipal package was better than the company's 165.3% loss ratio for all liability lines, Mr. Akin said.

Another three insurers—Guaranty National Insurance Co., Canadian Indemnity Co. and United National Insurance Co.—have dropped out of the market since

spring of 1983.

And, Transit Casualty Co. has directed broker Bayly, Martin, & Fay International Inc. to stop writing all police and public officials liability coverage for it, according to George P. Bowie, chairman and general counsel. However, he said Transit Casualty will still consider insuring a municipality on a selected underwriting basis.

Transit Casualty's program had been endorsed by the International Assn. of Chiefs of Police, but that endorsement was given to Markel's program in September, according to Mr. Chapman. Markel is also forming a national advisory board on the topic of police liability.

A surplus lines insurer that dropped out of the market in January said its losses in the public entity liability market coverages were less than those in other liability lines, but it found it increasingly difficult to find municipalities that would accept policies written by non-admitted insurers because such policies are not protected by guaranty funds and are not subject to state rate and form regulations.

As a result, the insurer anticipated a problem in maintaining the necessary volume to keep reinsurance treaties that supported the program and decided to drop out of the market.

The exodus of these insurers has made it extremely difficult for public risk managers to get competitive bids on the coverage they need.

Getting competing bids for excess cover for his self-insured liability and property program was a problem for Allen Hyman, risk manager in Corpus Christi, Texas, and president of the Public Risk & Insurance Management Assn. He queried at least six potential insurers; half refused to quote and two others never responded.

"Two years ago people would jump at this business," said Mr. Hyman. "Now they are lying back. The tide is finally turning and it is going to become a seller's market instead of a buyer's market."

Brokers are also less interested in public entity accounts.

David Van Dyke, a partner in wholesale broker Charter House in Nashville, Tenn., said that since July 1 no competing brokers have shown up to bid on accounts that he has been interested in. Last year there would have been seven or eight others there, he said.

Meanwhile, the insurers remaining in the market are charging more for the coverage.

The city of Santa Ana, Calif., a community of fewer than 220,000 about 35 miles south of Los Angeles, was hit this year with a 220% increase in the premium for a CGL

policy that includes public officials and police professional liability coverage, said Risk Manager Jeff Stevens. He declined to name his insurer.

For the fiscal year beginning July 1, the city paid \$315,625 for \$60 million in coverage, up from \$97,250 for \$50 million in coverage the previous year.

The insurer also doubled the city's self-insured retention to \$200,000 from \$100,000.

Some increase in premium was expected because two non-police claims were settled earlier this year for a total in excess of \$1 million, he said. But, Mr. Stevens said he was surprised by the size of the increase and worked a month trying to find a better rate, but was unable to do so.

"Already my concern is what will happen next year," he adds.

And, when Corpus Christi did find excess liability coverage, its rates were up 35%, said the city's broker Gerald Michalak, area vp with Arthur J. Gallagher Co. in Dallas.

For the year beginning Oct. 1, the city is paying \$97,750—compared with \$72,335 last year—for \$25 million in liability coverage above the city's self-insured retention of \$250,000 for all casualty coverages, Mr. Michalak said.

Rates on comprehensive general liability policies that include police and public officials coverage are up anywhere from 15% to 400%, said M&M's Mr. Enfield said. The size of increase depends on the entity's loss experience and how underpriced the coverage was previously, he explained.

Markel's Mr. Chapman says rates are going up 50% to 300% for liability packages that include general liability, police and public officials, auto liability and third-party property coverages.

The market for public officials and police professional liability coverages written as separate policies is in "real distress and flux," said Mr. Enfield.

Police professional coverage in particular is becoming more restrictive and harder to find, adds Bob Bieber, director of client services for Ebasco Risk Management Consultants in New York.

Among the insurers most often identified as writing coverages for police professionals or public officials, as part of a CGL policy or separately, are National Casualty Co., Scottsdale Insurance Co., International Surplus Lines Insurance Co., Imperial Casualty & Indemnity Co., The Forum Insurance Co. and INAPRO, a CIGNA Corp. subsidiary that is the professional liability underwriting manager for CIGNA.

Mr. Chapman of Markel, which is the managing general agency for National Casualty and Scottsdale Insurance, expects average premium increases of 20% to 50% for public officials coverage and 20% to 40% for police professional coverage.

Markel generated \$1.25 million in premium volume for public officials coverages and \$4.25 million in premium volume for police professional coverages in 1983.

However, Robert M. Bryant, vp at Special Risks Inc., a wholesale broker in Virginia Beach, Va., that is the managing general agency for Imperial Casualty, said the national market is still competitive with increases of only 10% to 20% for police professional liability coverage.

In 1983, Imperial Casualty generated \$3.3 million of its \$86.9 million in premium volume from a separately written police professional policy. It generated an additional \$2 million to \$3 million in premium volume from comprehensive general liability policies that include endorsements for public officials and police liability coverages, according to Mel Epstein, Imperial Casualty's manager of property and casualty underwriting.

Forum Insurance, which generated \$6 million of its \$54 million in direct written premiums in 1983 from separately written public officials liability policies, may not increase rates that have remained the same for seven years for some policyholders, while others will get increases of up to 30%, according to Ted Padgett, assistant vp for commercial underwriting.

Forum did not cut rates over recent years to remain competitive, even though this cost the insurer business, says Mr. Padgett. Public officials coverages, which generated \$8 million in premium volume two or three years ago, will generate only \$4 million in premium volume this year, he said.

Premiums also have remained stable because Forum bases premiums on the public entities' budgets, which have been kept down through belt tightening and propositions to reduce taxes.

Forum's loss ratio on its public officials coverage was worse than its 91.7% loss ratio for its liability lines as a whole, Mr. Padgett said. Losses were greatest in industrial states and in states where the sovereignty of public entities has been eroded by state statute, he said.

Insurers are also tightening underwriting terms, especially by increasing deductibles and self-insured retentions. M&M's Mr. Enfield said insurers are gradually eliminating aggregate deductibles and stop-loss provisions on SIRs.

But, the dramatic tightening in the public entity liability market is most evident in Western states and does not seem to have hit the East Coast and Deep South yet. For example, rates are currently up only 10% to 20% for public entities on the East Coast, sources say.

Likewise, in the Mid- and Deep South, premiums for liability packages including coverage for police and public officials are up a moderate 10% to 15%, said Mr. Van Dyke of Charter House. The wholesale broker writes only regional business from offices in Kentucky, Tennessee, Georgia and Alabama.

One of the largest factors behind the tightening of the market is the extent to which public entity liability products were underpriced.

Two years ago, there was a lot of competition in the market, says Markel's Mr. Chapman. And, a lot of insurers didn't appreciate the exposures and underpriced the public officials and police professional liability coverages, he said.

"There are so few who understand the potential exposure of the business itself," Mr. Chapman said. "I think they all got burned."

"The biggest factor is the product has been terribly underpriced and poorly underwritten by most companies," agrees Jim Bliss, who is president of wholesale brokerage The Bliss Group Co. and president of the Governmental Interinsurance Exchange, a pool-like group based in Bloomington, Ill., that includes about three dozen cities and counties.

Mr. Chapman, however, says the biggest factor is the tightening of the reinsurance market. "The reason the market has collapsed is the lack of reinsurance," he says.

Reinsurers are increasing their rates on the contracts they renew this fall and will pull out of some classes of business entirely to stem their underwriting losses, which have hit historic highs this year (BI, Sept. 17).

The legal climate and specific court rulings also have broadened public entities' liability exposures, which has produced more claims and losses.

Municipalities are a special class among special classes when it comes to insurance, said Mr. Bliss. "The laws are unique, arcane and changing rapidly," he explained.

The frequency of lawsuits against public officials and law enforcement personnel is up 400% in the past five years, said Markel's Mr. Chapman.

And, the cost of defending suits is more than the insurance industry anticipated, Mr. Chapman said. Out of every \$4 paid out on lawsuits, \$3 goes to legal costs and only \$1 goes to the plaintiffs, he said. ■

1/23/85

REMARKS BY COUNCIL PRESIDENT ANDREW HAPPER
OF THE CITY OF OVERLAND PARK
TO THE HOUSE LOCAL GOVERNMENT COMMITTEE
REGARDING HOUSE BILL 2016
JANUARY 23, 1985

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, MY NAME IS ANDREW HAPPER AND I AM THE COUNCIL PRESIDENT OF THE OVERLAND PARK CITY COUNCIL. ON BEHALF OF OVERLAND PARK'S GOVERNING BODY, I WOULD LIKE TO EXPRESS OUR SUPPORT FOR HOUSE BILL 2016.

I REALIZE YOU HAVE BEEN BRIEFED ON THE LEGAL AND HISTORICAL ASPECTS OF THE ISSUE OF ANTITRUST IMMUNITY FOR LOCAL UNITS OF GOVERNMENT. THEREFORE, I WOULD LIKE TO BRIEFLY PRESENT A CURRENT SITUATION THAT INVOLVES THE CITIES OF OVERLAND PARK, LEAWOOD, OLATHE AND JOHNSON COUNTY ACTING IN THEIR OFFICIAL CAPACITIES ON A JOINT PLANNING PROJECT THAT COULD BE CONSTRUED AS AN ANTICOMPETITIVE ACTIVITY.

IN AN ATTEMPT TO DEVELOP A PROACTIVE POSITION FOR THE NEXT MAJOR CORRIDOR TO BE DEVELOPED IN EAST CENTRAL JOHNSON COUNTY, THE AFOREMENTIONED GOVERNMENTAL ENTITIES ARE WORKING TOGETHER TO DEVISE A COMPREHENSIVE DEVELOPMENT PLAN FOR THE K-150 CORRIDOR. THIS STUDY WILL BE USED TO ACHIEVE A COORDINATED AND COMPATIBLY DEVELOPED CORRIDOR.

THIS COOPERATIVE ACTION COULD BE VIEWED BY SOME AS ADVERSE TO THEIR INTERESTS, WHEN IN FACT OVER THE LONG TERM THE ACTION TAKEN IS IN THE BEST INTERESTS OF THE PROPERTY OWNER AND THE PUBLIC. THE SAME ARGUMENT COULD BE RAISED WITH REGARD TO THE RESULTS OF THE STUDY.

WE DO NOT BELIEVE THE FEDERAL ANTITRUST LAWS WERE INTENDED TO APPLY TO THIS SITUATION OR OTHER REGULATORY DECISIONS MADE BY LOCAL GOVERNING BODIES TO PROTECT OR ENHANCE THE HEALTH, SAFETY AND WELFARE OF THEIR CITIZENS.

THEREFORE, I URGE YOU TO SUPPORT HOUSE BILL 2016.

THANK YOU VERY MUCH.

1/23/85



CITY OF KANSAS CITY, KANSAS

ONE CIVIC CENTER PLAZA
KANSAS CITY, KANSAS 66101
(913) 573-5017

DENNIS M. SHOCKLEY
FEDERAL AND STATE AFFAIRS

January 23, 1985

Representative Ivan Sand
Chairman
House Local Government Committee
Kansas House of Representatives
State House
Topeka, Kansas 66612

Dear Representative Sand:

The City of Kansas City, Kansas supports the recommendations and conclusions of the Special Interim Committee on Local Government that the State of Kansas "should extend its federal antitrust immunity to all local units of government when engaged in certain key governmental activities".

The threat and cost of litigation resulting from anti-trust lawsuits will eventually have a serious and negative effect on the ability of City officials to govern and provide important and essential public services. Ever since the Boulder case of two years ago, local units have been at risk. The legislation should apply to a variety of areas and should apply retroactively. H.B. 2016 does just that, and we support it.

Please consider this my testimony in your hearing set for H.B. 2016 on January 23, 1985.

Sincerely,

Dennis M. Shockley
Federal & State Affairs

DMS:jdh

1/23/85



City of Lawrence KANSAS

BUFORD M. WATSON, JR., CITY MANAGER

CITY OFFICES 6 EAST 6th
BOX 708 66044 913-841-7722

CITY COMMISSION

MAYOR

ERNEST E. ANGINO

COMMISSIONERS

MIKE AMYX

HOWARD HILL

DAVID P.J. LONGHURST

NANCY SHONTZ

Statement by Hannes Zacharias
Management Analyst, Lawrence, Kansas

Presented to the House Committee on Local Government
January 23, 1985

Mr. Chairman, members of the Committee, I am Hannes Zacharias, Management Analyst with the City of Lawrence, representing the Lawrence City Commission in their support of HB 2016. We appreciate the opportunity to present a few comments on this important piece of legislation.

As you are well aware, since the U.S. Supreme Court's decision in the Boulder case, in 1982, local governments have become targets for anti-trust litigation. The statistics supporting this increased exposure have been well documented in the interim study conducted by this committee this last summer. In a large measure, the revisions by the Federal government in late 1984 removing treble damages in cases of anti-trust litigation against local governments, have reduced some of the risk in this area.

Local governments, however, must still protect themselves from such litigation and pay for legal defense in such matters; expenses that are picked up by the taxpayers.

While exposure on the national scene is somewhat reduced by recent Federal action, the exposure local governments face in Kansas remains the same. The prospect of treble damages can entice many groups to file invalid claims against many Kansas cities.

Invalid litigation can bring publicly approved projects to a halt, requiring expensive legal defenses, and add thousands to the project cost in delayed construction fees. All expenses again, financed by local taxpayers.

The exposure to anti-trust litigation is most apparent in large projects involving cities. The City of Lawrence is in the process of developing its downtown and hopes to aid in the construction of a major downtown shopping center. Since 1964, the City has adopted comprehensive plans stressing the importance of a strong Central Business District - a decision that has consistently been reaffirmed during the past 20 years. Recently the Lawrence City Commission extended a "Developer of Record" contract through January of 1987, for a downtown shopping mall. The project is expected to cost \$41 million, \$15 million of which will involve public dollars. Due to its long time efforts to maintain the downtown as the Central Business District, the City has continually refused zoning changes to allow for similar shopping developments in the suburban area. Major developers requesting such rezoning for suburban areas have used the threat of anti-trust litigation to force the City to approve such rezonings. The City of Manhattan

has a similar downtown project which is currently on hold due to such anti-trust litigation.

This bill, with amendments, if passed, would not make it possible for such large city approved projects to be delayed unnecessarily by invalid anti-trust litigation.

The City of Lawrence is exposed in many ways to anti-trust litigation. Major downtown development is only one of these areas of exposure.

We feel this bill should be favorably passed. It addresses a real need to provide necessary immunity to local governments.

Thank you.

BOARD OF COUNTY COMMISSIONERS
COUNTY OF SEDGWICK

1/23/85



DONALD E GRAGG
County Commissioner-First District

County Courthouse, 525 N. Main
Wichita, Kansas 67203 (316) 268-7411

January 21, 1985

Representative Ivan Sand, Chairman
House Committee on Local Government

Dear Representative Sand:

I will be unable to appear at the hearing on House Bill 2016 on January 23rd, but I wish to express my strong support for this legislation. The 1982 Supreme Court decision prompted a crisis in local government. The action at the Federal level has extended some protection to local property taxpayers, but this legislation is needed to adequately protect Kansas property taxpayers.

I urge your favorable action on this legislation and thank you and other members of the Special Committee for your work on this to date.

Sincerely,

A handwritten signature in black ink that reads "Don Gragg". The signature is written in a cursive, slightly slanted style.

Don Gragg, Chairman
Board of Sedgwick
County Commissioners

DG/mas

1/23/85

BOARD OF COUNTY COMMISSIONERS

COUNTY OF SEDGWICK



BUD HENTZEN

County Commissioner
Third District

COUNTY COURTHOUSE, WICHITA, KANSAS 67203 • TELEPHONE (316) 268-7411

January 21, 1985

Representative Ivan Sand, Chairman
House Committee on Local Government

Dear Representative Sand:

Wednesday is the meeting day for the Board of Sedgwick County Commissioners, consequently, I will be unable to attend the hearing on House Bill 2016. I do want you to be aware of my strong support for this legislation. Lawsuits against local governments are rapidly getting out of hand and draining more and more of the hard-earned dollars from the taxpayers. The 1982 Supreme Court decision opened a whole new area of liability, and only the Legislature can protect the taxpayers by limiting liability regarding anti-trust actions.

I urge your favorable action on House Bill 2016.

Sincerely,

A handwritten signature in black ink that reads "Bud Hentzen". The signature is written in a cursive style with a large, sweeping loop at the end.

Bud Hentzen,
Chairman Pro-Tem
Sedgwick County Commission

BH/mas

1/23/85

TOM SCOTT . . . COUNTY COMMISSIONER, 2nd DISTRICT

525 North Main Street

Phone (316) 268-7411

Wichita, Kansas 67203



January 21, 1985

Representative Ivan Sand, Chairman
House Committee on Local Government

Dear Representative Sand:

I will be unable to attend the hearing on House Bill 2016 due to the regularly scheduled meeting of the Board of Sedgwick County Commissioners. I am very supportive of this legislation, as I feel it will protect the local taxpayers from additional and unnecessary liability which was created by the 1982 Supreme Court decision. Your favorable consideration of this legislation will reflect your concern for the local property taxpayers.

Thank you, as always, for your efforts on behalf of local government.

Sincerely,

Tom Scott
Sedgwick County Commissioner

TS/mas



OFFICE OF THE MAYOR
CITY HALL — FIRST FLOOR
455 NORTH MAIN STREET
WICHITA, KANSAS 67202
(316) 268-4331

January 22, 1985

Representative Ivan Sand
Chairman, House Local Government Committee and
Members of the House Local Government Committee
State Capitol
Topeka, Kansas 66612

Dear Representative Sand and Members:

The Board of City Commissioners of the City of Wichita strongly urges the adoption of House Bill 2016 which provides local governments with immunity from antitrust liability.

The Committee is aware of the importance of this legislation from the Kansas League of Municipalities' report as well as the affect upon hundreds of municipalities and counties. Reasons for the timely passage of House Bill 2016 include the tradition of home rule decision power and the cost involved in lengthy antitrust litigation.

While there may be reasonable disagreements in the conduct of community business, certainly it is better to make public decisions in the political arena rather than use antitrust statutes which were never designed to attack governments in the courtroom. Favorable passage of House Bill 2016 is a vote of confidence for municipal and county officials which is in keeping with the tradition of home rule and local decision making. The cost of antitrust litigation allowed under current law is a concern for every governmental official and every taxpayer.

I urge favorable action on House Bill 2016.

Sincerely,

Bob Knight
Mayor

BK:jh

1/23/85

KMU

Kansas Municipal Utilities, Inc.
P. O. Box 1225
McPherson, Kansas 67460
316-241-1423

Comments on: House Bill 2016
Before House Local Government Committee
January 23, 1985

Mr. Chairman, members of the committee. I am Louis Stroup, Jr., executive director of Kansas Municipal Utilities, Inc., a statewide organization of municipally-owned and operated electric, gas and water systems.

My comments will be very brief -- we support HB 2016 and to avoid needless duplication of testimony, simply assert that we agree with the testimony presented by Chris McKenzie of the League of Kansas Municipalities.

KMU feels it is essential to protect the municipal utility operations of the cities which are operated for the general health, safety and welfare of the residents of our communities. Thus, we urge the passage of HB 2016.