Approved April 10, 1985
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Robert Frey at
Chairperson

10:00 a.m./p.m. on March 25, 1985 in room 514-S of the Capitol.

All members were present except: Senators Frey, Hoferer, Feleciano, Gaines, Langworthy, Parrish, Talkington, Winter and Yost.

Committee staff present:

Mary Torrence, Office of Revisor of Statutes
Mary Sue Hack, Office of Revisor of Statutes
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Representative Bob Wunsch
Lowell Smithson, The Electric Companies Association of Kansas
Chris McKenzie, League of Kansas Municipalities
Fred Allen, Kansas Association of Counties
Mayor Jack Reardon, Mayor of Kansas City, Kansas
Tom Glinstra, Olathe City Attorney
Kim Dewey, Sedgwick County
Olin Tapley, Sedgwick County Emergency Medical Service
Tim Owens, City of Overland Park Councilmember
Phil Harness, Johnson County Board of County Commissioners
Joe Zima, Shawnee County Counselor
Rosalys Rieger, Riley County Commissioner
Gary Flory, McPherson County Counselor
Hannes Zacharias, City of Lawrence
Louis Stroup, Jr., Kansas Municipal Utilities, Inc.

House Bill 2016 - Municipal antitrust liability; immunity.

Representative Bob Wunsch stated he was a member of the interim committee this past summer that considered this bill. He presented background to the bill and urged the committee to pass the bill as drafted. He stated this is a cities bill. The insurance premiums of cities will go up to protect from liability.

Lowell Smithson appeared on behalf of The Electric Companies Association of Kansas in opposition to the bill. A copy of a statement on behalf of The Electric Companies Association is attached (See Attachment I). He stated he would like to make four basic points. The Association believes immunity should not be extended to municipalities when they engage in their particular enterprise; therefore, this is why they believe the bill should be amended as on page 10 of the above mentioned handout. He stated the municipality can be properly absolved in trebled damages. This bill needs to be considerably reworked to avoid validity under the supremacy clause. If what is desired is to absolve cities of treble damage liability, the government has already done that.

Chris McKenzie, League of Kansas Municipalities, appeared in support of the bill. He stated the league strongly believes that this piece of legislation will contribute significantly to preserving good government at the local level in Kansas. A copy of his testimony with the proposed amendment is attached (See Attachments II).

Fred Allen, Kansas Association of Counties, appeared in support of the bill. He stated his organization is in total agreement with remarks made by the League.

House Bill 2016 continued

Mayor Jack Reardon, Mayor of Kansas City, Kansas, appeared in support of the bill. He asked the committee to consider recommending this bill to the full Senate so local units of government in Kansas can get back to their business of providing services and operating in their regulatory role without fear of antitrust litigation. A copy of his testimony is attached (See Attachment III).

Tom Glinstra, Olathe City Attorney, appeared in support of the bill. He stated the payment of treble damages comes from the taxpayer. The City of Olathe has an antitrust case brought against their cemetery. They will settle the case because of the cost of attorneys fees.

Kim Dewey, Sedgwick County, appeared in support of the bill. A copy of his statement is attached (See Attachment IV).

Olin Tapley, Sedgwick County Emergency Medical Service, appeared in support of the bill. He stated he hoped that this committee would look favorably upon this bill to help those of us in local government provide adequately for our citizens without the fear of an unwarranted antitrust action. A copy of his testimony is attached (See Attachment V).

Tim Owens, City of Overland Park Councilmember, appeared in support of the bill. A copy of his testimony is attached (See Attachment VI).

Phil Harness, Johnson County Board of County Commissioners, testified in support of the bill. Following his remarks, he stated he would forward a copy of his testimony at a later date.

Joe Zima, Shawnee County Counselor, appeared in support of the bill. He stated he supports the previous comments he has heard. They need the protection that this bill affords.

Rosalys Rieger, Riley County Commissioner, appeared in support of the bill. She stated the reason for asking for support of the bill is we believe when we and other elected officials and staff act in good faith in exercising normal legislative, regulatory, executive, administrative or judicial powers in providing traditional public services, it is crucial that we be accorded immunity from antitrust liability for monetary damages as provided in the eight areas included in this bill. A copy of her testimony is attached (See Attachment VII).

Gary Flory, McPherson County Counselor, testified in support of the bill. He stated if the bill is not enacted, it is my belief that counties such as mine must either remain exposed to antitrust actions or, if insurance is even available, purchase specialized coverage at high prices. A copy of his testimony is attached (See Attachment VIII).

Hannes Zacharias, City of Lawrence, appeared in support of the bill. A copy of his testimony is attached (See Attachment IX).

Louis Stroup, Jr., Kansas Municipal Utilities, Inc., appeared in support of the bill. He stated his organization agrees with the testimony presented by the League of Kansas Municipalities. A copy of his statement is attached (See Attachment X).

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./pxm. on March 25, 1985

House Bill 2016 continued

A copy of a letter from Mrs. Joan Hrenchir, Member, Airport Master Plan Committee, is attached in opposition to the bill (See Attachment XI).

The chairman announced some people will be given an opportunity to testify tomorrow because the hour of adjournment had arrived.

The meeting adjourned.

Copy of the guest list is attached (See Attachment XII).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-25-85

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
JAROLD HARRISON	525 N. Main Wichita, Ks 67203	Sedgwick County
OLIN TAPLEY	535 N. MAIN WICHITA KS 67203	Sedgwick County
Rosalyn M. Rieger	1907 Blue Hills Rd. Manhattan, Ks 66502	Co. Comm. Pottawatomie
Kim C. Neary	WICHITA	SEDGWICK CO.
D. WAYNE ZIMMERMAN	TOPEKA	THE ELECTRIC COs ASSOC. OF KS.
LOWELL L. SMITHSON	KANSAS CITY, MO	"
Tom Glinstra	Olathe	City of Olathe
Louis Stroup Jr.	McPherson	Kansas Mun Utilities
GEORGE G. LONG	LEAWOOD	CITY OF OLATHE
Kelli Lipson	Olathe	City of Olathe
STEVEN R. ZIEBER	OLATHE	OLATHE LEGAL DEPT.
Leonard Hall	Olathe	City of Olathe
THOMAS C. (Tim) OWENS	OVERLAND PARK	City of Overland Park
Gerry Ray	Olathe	Johnson County
Phil Harness	Olathe	Johnson County
Steve Humphreys	Topeka	KMHF
Randy Barleson	Columbus	Empire District Electric Co
Jack Brandon	One Civic Plaza KCK 66101	Mayor KCK
Scott Lombard	CITY OF OP	CITY OF O.P.
MaryAnn Baumgartner	Lawrence	Sen. Burke-intern
JANET STUBBS	Topeka	KBAK
Kristy Cannon	CITY OF OTTAWA	CITY OF OTTAWA
GARY L. FLOREY	MCPHERSON COUNTY	CO. COUNSELOR
HAINES ZACHARIAS	City of Lawrence	City of Lawrence
DENNIS SHOCKEY	CITY OF KCK	CITY OF KCK

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GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-25-85

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Richard Malm	Valley Falls	Jefferson County
Fred Allen	Topeka	K.A.C.
Wayne Hundley	"	A.G.
Mike Slothy	Lawrence	Eastern Sen Parrish
Joseph W. Zima	Topeka, KS	Shawnee County, Ks
Ron Smith	"	Ks Bar Assn
Clifford Hawk	Oskaloosa, KS.	Comm.
Robin Clark	Meriden "	Comm
Leslie F. Rieger	Manhattan "	—

Attach. XII

3-25-85

STATEMENT

ON BEHALF OF

THE ELECTRIC COMPANIES ASSOCIATION OF KANSAS

TO THE

SENATE JUDICIARY COMMITTEE

HB 2016

March 25, 1985

This statement first submitted to the
House Local Government Committee
January 30, 1985

The Electric Companies Association is a trade association with membership consisting of the six investor-owned electric utilities serving Kansas. They are: The Kansas Power & Light Company, Kansas City Power & Light Company, Kansas Gas and Electric Company, The Empire District Electric Company, Western Power Division of Centel and Southwestern Public Service Company.

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STATEMENT

OF

THE ELECTRIC COMPANIES ASSOCIATION OF KANSAS

TO

SENATE JUDICIARY COMMITTEE

HB 2016

March 25, 1985

Mr. Chairman, and Members of the Committee:

We appreciate the opportunity to submit a written statement to the Senate Judiciary Committee presenting our recommendations as to House Bill No. 2016.

In summary, the Association believes it is sound social policy for the state to declare that its antitrust immunity does extend to municipalities engaged in official governmental action directed and properly supervised by the state, but such immunity should not be extended to municipalities while engaged in the operation or franchising of proprietary enterprises such as water utilities, gas utilities, and electric utilities. Such proprietary enterprises, freed from the surveillance of the antitrust laws, possess the inherent capacity for economically disruptive anti-competitive effects. These enterprises, though conducted by municipalities, are not essentially different from other entrepreneurial endeavors in the economic community. Such a municipal enterprise, as does every business enterprise, operates in the furtherance of its own goals to assure benefits for its community constituency--not for the broader interests of a state, an economic region, or of the nation. The same may be said of

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investor-owned water, gas, or electric utilities, but such are at least subject to extensive state regulation for the protection of state, regional and national concerns. In short, there is no realistic justification for broadly immunizing the city enterprise to engage in tying agreements and other anti-competitive conduct violative of federal and state antitrust policy while not so immunizing their investor-owned counterparts, especially since a limited immunity, restricted to governmental activities, as opposed to proprietary conduct, would provide an adequate measure of protection for local government officials and instrumentalities Finally, the bill as drafted probably would be held invalid as in conflict with the Supremacy Clause of the United States Constitution. For a state, or instumentality thereof, to be immune from federal antitrust laws according to the Supreme Court, the following must exist:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy;" second, the policy must be "actively supervised" by the State itself.

Cal. Retail Liquor Dealers Ass'n v. Midcal Alum., 100 S.Ct. 937 (1980), emphasis supplied. No such supervision or regulation is provided in the proposed bill.

The Chief Justice of the United States in The City of Lafayette, et al., v. Louisiana Power & Light Co., 435 U.S. 389 (1978), delineated the fundamentally identical nature for antitrust purposes of the municipal utility enterprise and the in vestor-owned utility enterprise. Both are engaged in a business

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activity in which a profit or return on investment is sought. Both have the inherent capacity for anti-competitive action and effects. Both can be competitors in the same market (e.g., outside and inside city limits). Both can inflict and suffer a litany of economic woes. Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983), cert. granted 52 U.S.L.W. 3885 (U.S. June 12, 1984). Both may have a parochial regard for their own customers or constituents in conflict with or disruptive of the economy locally, regionally, and nationally. In City of Lafayette, for example, it was alleged that the municipal enterprise was outside its city limits engaging in unlawful tying conduct--agreeing to serve customers with city gas and water service only on condition that such customers also purchased electricity from the city and not from the competing investor-owned electric utility. The same type of abuse could occur within the city limits of a municipality harmful to an investor-owned utility franchised for all or a portion of the area within a municipality. The Chief Justice in City of Lafayette used, and we here use, the term "proprietary" only to illustrate or focus attention on the fact that municipal utilities and investor-owned utilities are or can be in a competitive relationship such that each should be constrained by federal and state antitrust laws. 435 U.S. at 422. In short, Kansas should not create a situation in which these municipal enterprises could complain of antitrust injury while boldly asserting that any similar harms they might unleash upon competitors or on the economy are absolutely beyond the

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purview of federal and state antitrust law. Such a situation would, as our Chief Justice notes, ". . . inject a wholly arbitrary variable into a 'fundamental national economic policy'". 435 U.S. at 419. Thus, where a municipality acts in essentially a commercial capacity, immunizing its conduct from all antitrust liability serves no rational policy objective. See Note, the Antitrust Liability of Municipalities under the Parker Doctrine, 57 B.U.L. Rev. 368, 386 (1977).

Congress, concerned about proliferation of antitrust suits against municipalities and the awarding of ruinous treble damages, recently reexamined the extent to which it believed it appropriate, under modern conditions, for the antitrust laws to be applied to municipalities. The result was the Local Government Antitrust Act of 1984, P.L. 98-544. That law, adopted October 24, 1984, granted a limited immunity from antitrust liability for municipalities. In balancing the interests of states and municipalities in their governmental activities against the fundamental federal policy favoring free competition, the Congress provided that municipalities were exempt from the damage provisions of the antitrust laws (including trebling); however, municipalities remain subject to the awarding of injunctive relief. Thus, the potential for the exaction of ruinous damages was eliminated while still retaining for society the protection of the antitrust laws in the form of the availability of injunctive remedies. This Association has no quarrel with such a limited exemption, but a blanket grant of immunity to all municipalities regardless of how egregious they may act or how much

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damage they may inflict both distorts the balance Congress sought to achieve and significantly hobbles healthful competition.

The majority of the Court in City of Lafayette, supra, in harmony with the Chief Justice, touched upon the following points of pertinence to this Special Committee's deliberations:

1. A municipality utility's contention that its goal is not private profit is not significant or determinative as every business enterprise, public or private, operates its business in the furtherance of its own goals. A municipally owned utility will make economic choices to assure benefits for its community constituency. These choices are not inherently more likely to comport with the broader interests of regional and national economic well being than are the decisions of an investor-owned utility seeking to further the interests of its customers, organization, and share holders (435 U.S. at 403.)

2. If a municipal utility engages in tying practices, the typical antitrust ills of the increase in cost of the frustrated service seeking competition with the tied service is an economic ill to a region, to customers of the injured competing utility, and to the injured utility which may be forced to abandon or lose existing equipment from the unfair competition. (435 U.S. at 404.)

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3. A tying practice, while providing some benefits for the constituents of the municipality, would still have and inflict the typical tying antitrust injury--i.e., upon the tied customer whose economic freedom is restricted as well as upon the seller of the product in competition with the tied product. Further, decisions to displace existing service in favor of the tied service, rather than being made on the basis of efficiency of the distribution of services, may be made or forced by the municipality in the interest of realizing benefits to itself and without regard to extraterritorial impact in regional efficiency. (435 U.S. at 404.)

4. Other harmful antitrust activity may be sham and frivolous litigation by a city against an investor-owned utility for the purpose and with the effect of delaying approval and construction of electric generating plant facilities. While such activity may seemingly benefit citizens of the municipality by "eliminating a competitive threat to expansion of the municipal utilities . . .", such activity may impose enormous and unnecessary costs on the existing or potential customer of the proposed generating facility both within and beyond a city's proposed area of expansion. It may further cause significant injury to the investor-owned utility by interfering with its ability to provide expanded service. (435 U.S. at 405.)

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5. It is really no answer that persons affected by abusive acts of municipal utilities may seek redress through the "political process." For example, injured parties residing outside the municipality would have no political recourse. A claim that such parties outside the municipality could complain to the legislature, is not deemed by the Supreme Court or by this Association to be sound. The same argument may be made regarding anti-competitive activity of an investor-owned corporation--yet the Sherman Act would still be applicable. (435 U.S. at 406.) A swift injunction may be needed to keep a lawful business from perishing. Action by the legislature may well be far too slow.

6. The Supreme Court noted that municipal monopolies could engage in a variety of harmful anti-competitive conduct such as predatory pricing (pricing below cost) in an effort to drive a competing investor-owned utility out of business. (435 U.S. at 405.) The court wrote:

> "When these bodies act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the

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efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender." (435 U.S. at 408.)

Egregious forms of anti-competitive conduct in which municipalities may potentially engage are too numerous to list exhaustively. Yet, based on existing case law and perceptions of muncipalities' self-interest, certain forms of anti-competitive behavior, if immunized, are quite likely. For example, even within its own bounds, a garbage pick-up business could be completely destroyed if a municipal water company, for instance, refused to sell water to those who did not also buy garbage pick-up services from the city or even if coupons for free city garbage pick-up service were distributed with water purchases. Indeed, some of the victims of unbridled municipality predation could well be other municipalities. See, Town of Hallie, supra. A city with the only sewage treatment plant in the vicinity might condition use of that plant on neighboring cities' agreement to abandon their own proprietary services and buy them from the city with the sewage treatment monopoly--for a handsome price. Moreover, without the restraining influence of the antitrust laws, there would be nothing to prevent municipalities from ganging up, for instance, on investor-owned utilities operating adjacent regions.

As this Committee will recall the Supreme Court of the United States held in City of Lafayette that the cities there involved were not, simply because they were cities, exempt or

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immune from the application of antitrust laws. As the Supreme Court noted, the "pole star" of the Sherman Act, sometimes called the Twenty-Fifth Amendment to the United States Constitution, is competition, and immunity from this fundamental national policy should not be lightly inferred. And we add, nor should it be lightly granted -- as is the case with House Bill No. 2016 as it now reads.

Finally, quite apart from the policy concerns outlined above, House Bill 2016, as presently written, has a serious legal deficiency. To the extent the bill attempts to nullify the federal antitrust laws (going beyond the limits of the Local Government Antitrust Act of 1984) without specifically articulating kinds of conduct and local conditions for which the legislature believes a regime of economic regulation other than competition is more appropriate and without establishing a framework of state supervision, the bill's provisions will be preempted (made a nullity) by federal law. Without such an articulation of state policy and without a supervisory framework, the bill amounts to little more than a state pronouncement that whatever a municipality decides to do is lawful under both state and federal antitrust laws. As Justice Stone noted in Parker v. Brown, supra,:

> A state does not give immunity for those who violate the Sherman Act by authorizing them to violate it or by declaring that their action is lawful or by becoming a participant in a private agreement or combination by others for restraint of trade.

Id., at 317 U.S. 351.

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The foregoing considerations suggest that, if immunity for local governmental officials or instrumentalities is to be conferred, then:

(i) There must be a clearly articulated and affirmatively expressed statement of the legislature's policy choice favoring specific state supervision over a regime of competition in limited spheres of activity;

(ii) The provision of appropriate state supervision or regulation of specific categories of activity or conduct must be established;

(iii) A provision should be added to Section 1 of the bill to the effect that "any immunity granted or extended hereunder shall not extend to or include immunity from any injunctive or equitable relief"; and

(iv) Subsection (c) of Section 1 of the bill should be amended to read (words dashed out would be omitted and words in brackets, added):

(1) ~~Franchising and~~ Supervising the operations and activities of public utilities;

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

(3) ~~franchising and~~ Supervising operations and activities of cable television businesses;

(4) ~~providing and~~ Supervising ambulance and emergency medical services;

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(5) formulating comprehensive plans for the development of municipalities and regulating land use through the adoption and administration of zoning and subdivision regulations;

(6) ~~operating~~ [Supervising] sanitary sewerage and storm drainage systems; or

(7) ~~operating municipal airports and~~ Enforcing airport zoning regulations.

With the foregoing suggested changes, the social policy deemed best in the long range interest of the state could probably be preserved.

Thank you very much.

Prepared by The Electric Companies Association of Kansas Legal Committee for filing by D. Wayne Zimmerman, Director.

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FIRST ADDENDUM to the January 30, 1985 Statement of The Electric Companies Association provided to the House Committee on Local Government submitted by The Electric Companies Association of Kansas. The Statement dealt with House Bill No. 2016 as it existed prior to passage by the House. This Addendum is intended for presentation to the Senate Judiciary Committee and addresses the Bill as finally passed by the House of Representatives.

House Bill No. 2016 is fundamentally unfair in that it grants significant competitive and other advantages to one class of proprietary business institutions at the expense of other competing classes. In short, it gives practical license to municipalities to engage in anticompetitive conduct.

Providing a damage shield for local government from the cost of antitrust suits when engaged in their principal task of governing is a laudable objective. If the Bill simply did that, it would not be objectionable.

As presently written, however, it purports to extend blanket federal immunity to local governments when acting not only in the traditional governmental roles, but also when acting as proprietary business entities (e.g. ambulance, trash pickup, water, electric service, etc.) in competition with other municipalities, with rural electrical cooperatives, or with private investor-owned institutions. Not only does the Bill substantially immunize whatever anticompetitive scheme a municipality or group of municipalities may launch into the economy, but also it provides, in those limited instances in which restraints of trade may yet be challenged, significant advantages to the municipality in the courtroom. The chart below summarizes the unfair advantages this Bill gives to businesses operated by municipalities.

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Municipality	Private Operation
Complete federal antitrust immunity[1]	No federal immunity
Exemption from state law damages	No exemption from imposition of treble damages under state law
Immunity (probable) from payment of any of plaintiff's attorney's fees[2]	Potential liability for plaintiff's attorney's fees
Security against loss of attorney's fees by bond requirement	Court may require litigant who sues municipality to post bond to cover municipality's attorney's fees
As a plaintiff, no likelihood of ever being held liable for defendant's attorney's fees	As a plaintiff, possible liability for defendant's attorney's fees

Thus, not only may municipalities unleash all sorts of anti-competitive schemes upon the economy without fearing federal

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[1]The U.S. Congress in the Local Government Antitrust Act of 1984 exempted municipalities only from liability for treble damages, leaving them subject to suits for injunctive relief and to recovery of attorney's fees.

[2]A plaintiff successful in injunction against a municipality is not allowed attorneys fees under the present Section 4(c). Section 4(c) deals only with the generality of cases, while the last sentence of Section 4(b) specifically covers an injunction suit against a municipality and provides such are "subject to the provisions of Section 1"--which does not allow recovery of attorneys fees from a municipality by a successful injunction plaintiff. Nor does Section 2 provide such attorneys fees against a municipality as its generality is likewise specifically limited by the introductory phrase "Except as provided in Section 1...." Though it appears it was the laudable intent of the House to provide attorneys fees to a plaintiff successful in injunction against a municipality, to do so would, however, require adding at the end of Section 1(g) this sentence: "The Court shall allow reasonable attorneys' fees to a party obtaining an injunction against a municipality."

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liability (assuming House Bill No. 2016 is valid[3]), but in addition, they may do so with the knowledge that under state law the worst that can happen is that they may be told to stop. Further, state substantive antitrust law may well prove inapplicable to municipal defendants. No Kansas appellate decision has been found holding state substantive antitrust statutes restrain municipalities. The substantive statutes do not by their terms expressly apply to municipal defendants. As proposed, K.S.A. 50-801 is a remedial, not a substantive, statute. Thus, one must look to the antiquated substantive antitrust provisions, chiefly K.S.A. 50-101 to 50-120, to ascertain the substantive reach of Kansas antitrust law--and, as noted, none is itself expressly applicable to, and none has been held by a Kansas appellate court applicable to, a municipality. Moreover, even if the Kansas Supreme Court later ruled the substantive provisions did apply to municipal defendants, still, as against harmful anticompetitive conduct, the substantive provisions are a largely uninterpreted, puny patchwork of purported protection.[4] The damage these municipalities may

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[3]The Bill, however, would probably be held invalid under the Supremacy Clause and the Supreme Court Cases included in our initial January 30, 1985 Statement and in the Second Addendum thereto.

[4]The old Kansas antitrust statutes have rarely been interpreted and applied by Kansas appellate courts. They remain a largely unknown quantity. The do not provide protection against attempted monopolization, unlike the federal law. There is no adequately developed "per se" rule in Kansas thus imposing substantially greater burdens upon a private litigant against a municipality or any defendant under Kansas laws, than exists under the federal law. Aside from the quite possible

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inflict, the lawful businesses they may ruin, and the lives they may destroy will go unrecompensed. No deterrent exists! Injunction is an empty remedy if the plaintiff cannot recover attorneys fees. In antitrust cases such fees can be quite substantial.

Private litigants being squeezed out of the market place by municipal predation, tie-ins, or even group boycotts, under the Bill as presently written:

A. if ultimately successful in injunction, not only lose their likely substantial attorney's fees, but must suffer even severe economic losses and damages caused by the municipality prior to and during the suit's pendency before the injunction becomes effective;

B. if unsuccessful in their challenge, not only lose their own attorney's fees, but also may have to pay all the municipality's attorney's fees. Indeed, the plaintiff may have to post a bond to cover the municipality's attorney's fees.

inapplicability of such substantive statutes to municipal

Footnote 4 (Continued)

defendants, the same may be held inapplicable to the provision of cable TV or even electric energy, which was hardly beyond Edison's dream at the time these substantive antitrust statutes were enacted. The normally applicable Kansas three year statute of limitations is one year shorter than the federal four year statute of limitations. K.S.A. 60-512, 15 U.S.C. § 16(b). Arcane questions as to whether the Act of 1897 (K.S.A. 50-101 to 50-111) superceded the Act of 1889 (K.S.A. 50-112 to 50-120) may come alive. State v. Wilson, 73 Kan. 334, 80 P. 639 (1906). Without a well developed body of case law interpreting the Kansas antitrust statutes, of necessity the gray area of "not clearly illegal" anticompetive conduct will be much wider, than is the case under federal law, and lawful businesses protected under federal law could well be irreparably damaged while "pioneering" in litigation under Kansas law.

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Thus, while the municipality has "nothing to lose" by engaging in anticompetive conduct, the private litigant has everything to lose either by responding in kind or by seeking refuge through the courts. In "grey area" cases the municipality will not be sued, will get away with questionable and damaging practices, and will cause lawful businesses to recede or perish.

The ostensible purpose of the Bill is thus converted from a shield into a sword. If the Bill were reworked along the lines suggested in the original Statement (i.e., immunity from federal antitrust liability would only apply to nonproprietary conduct of municipalities) to which this document is an Addendum and if it were clearly to provide a successful injunction plaintiff his or her attorney's fees (but retaining the provisions relating to the enforcement powers of the Attorney General and county or district attorneys), the Bill would probably not prove objectionable in practice, though still subject to invalidation under the Supremacy Clause.

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SECOND ADDENDUM to the January 30, 1985 Statement of The Electric Companies Association provided to the House Committee on Local Government submitted by The Electric Companies Association of Kansas. The Statement dealt with House Bill No. 2016 as it existed prior to passage by the House. This Addendum is intended for presentation to the Senate Judiciary Committee and addresses the Bill as finally passed by the House of Representatives.

House Bill No. 2016, as passed by the House, purports to immunize Kansas municipalities both from federal and state liability for damages. In addition, it attempts to insulate Kansas municipalities even from injunctive relief for federal violations, contrary to the Local Government Antitrust Act of 1984, which only exempts municipalities from liability for treble damages, not injunctive relief.

The Supreme Court has carved out specific guidelines under which local governments will be covered by the state's immunity from federal antitrust laws. House Bill No. 2016 flagrantly exceeds those guidelines and to the extent it purports to provide local government immunity from federal law without observing those guidelines, it must fall under the Supremacy Clause of the U.S. Constitution.

The present Bill generally identifies eight spheres of activities which, when engaged in by municipalities, are purportedly cloaked with the state's immunity. The Bill provides that in engaging in such activities, "all immunity of the State of Kansas from the federal antitrust laws shall be extended to the governing body of such municipalities and the officers and employees thereof."

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It is clear from Supreme Court cases that federal antitrust immunity extends to municipalities only when there is both a "clearly articulated and affirmatively expressed" state policy favoring a discipline of economic regulation other than competition and the state actively "supervises"[1] that alternate discipline. The Supreme Court stated it this way in Cal. Retail Liquor Dealers Assn. v. Midcal Alum. 100 S.C. 937, 943(S.C.1980):

> These decisions establish two standards for antitrust immunity under Parker v. Brown. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. [Citations omitted.]

See also City of Lafayette v. Louisiana Power & Light Co. 98 S.C. 1123,1135 (S.C.1978).

The House Bill, as now written, does not express or contemplate any specific "restraint." All that is "clearly articulated" or "affirmatively expressed" is the legislature's desire to shield its municipalities from the reach of federal law.

The statute does not even pretend to extend any "active supervision." The statute merely mentions eight general spheres of activity wherein the municipalities have been authorized to act. The Supreme Court, however, requires "active supervision by

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[1]The fatal flaw under the Supremacy Clause of the U.S. Constitution is clearly evidenced by the Supplemental Note on House Bill No. 2016 which states that the Bill achieves the goal of immunity from federal law by "clearly articulating and affirmatively expressing" state policy. The active supervision required by the Supreme Court is not mentioned in the Supplemental Note and not provided by the Bill.

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the state itself." Self-regulation, because of the tendency on the part of a local municipality to favor its own specific interest in derrogation of the rights of those outside of its bounds, whether private competitors or other municipalities, is insufficient! See City of Lafayette, supra, and Town of Hallie v. City of Eau Claire 700 F.2d 376 (7th Cir. 1983), cert. granted 52 U.S.L.W. 3885 (U.S. June 12, 1984) (involving an allegation by one municipality that a competing municipality had engaged in unlawful tying arrangements.)

The Supreme Court has already held that home rule authority, by itself, is not enough to confer immunity. In Community Communications Co. v. City of Boulder, 102 S.Ct. 835 (1982), the power to regulate cable television distribution was exercised by the city pursuant to its home rule authority. This authority the Court held was insufficient to confer antitrust immunity.

There is no such thing as a sovereign city. The historic procompetition policy of our nation's antitrust laws is so strong that immunity therefrom is not easily inferred or granted. The strict standard of the previously cited Supreme Court decisions must be observed in any legislation seeking to confer such immunity. The House Bill, which proposes no state supervisory mechanism, leaves non-state supervised parties to their own devices, and thus cannot provide immunity. To the extent it purports to do so, it fails under the Supremacy Clause of the United States Constitution. The Supreme Court has already so held in Schwegmann Bros. v. Calvert Distillers, Corp. 71 S.Ct. 745 (S.C.1951), in which a state statute purporting to authorize re-

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sale price maintenance was held to be insufficient to immunize private parties acting pursuant to the terms of that state law.

Taking away the self-serving language in the Bill, it strips down to a naked attempt to bless and render lawful any anticompetitive scheme which Kansas municipalities may individually or collectively unleash upon the economy. As the Supreme Court made clear in Parker v. Brown 63 S.Ct. 307, 314 (S.C.1943):

> A state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . "

If the Bill were amended along the lines suggested in the Statement to which this document is an Addendum, but retaining the authority of the Attorney General and district county attorneys and all other persons to bring injunction suits against municipalities and clearly recover attorneys fees if successful,[2] the Bill would probably not prove objectionable in its operation. Its validity under the Supremacy Clause, as above noted, is very doubtful.

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[2]A plaintiff successful in injunction against a municipality is not allowed attorneys fees under the present Section 4(c). Section 4(c) deals only with the generality of cases, while the last sentence of Section 4(b) specifically covers an injunction suit against a municipality and provides such are "subject to the provisions of Section 1"--which does not allow recovery of attorneys fees from a municipality by a successful injunction plaintiff. Nor does Section 2 provide such attorneys fees against a municipality as its generality is likewise specifically limited by the introductory phrase "Except as provided in Section 1...." Though it appears it was the laudable intent of the House to provide attorneys fees to a plaintiff successful in injunction against a municipality, to do so would, however, require adding at the end of Section 1(g) this sentence: "The Court shall allow reasonable attorneys' fees to a party obtaining an injunction against a municipality."

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3-25-85

Outline of Remarks
Chris McKenzie, League of Kansas Municipalities
March 25, 1985

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 liabliity in actions for damages, injunctive relief, attorneys fees and costs in the eight enumerated areas
   (c) Creates an exemption from civil liability under the state antitrust laws in the same areas, except from private injunction actions.

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 civil or criminal prosecution for antitrust violations by the Attorney General

6. 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)

7. 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)

8. 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

9. 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

10. Pending cases
   (a) Town of Hallie v. City of Eau Claire

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Suggested Amendment by League of Kansas Municipalities

As Amended by House Committee

Session of 1985

HOUSE BILL No. 2016

By Special Committee on Local Government

Re Proposal No. 36

12-19

AN ACT concerning municipalities; relating to antitrust liability; providing immunity therefrom; **amending K.S.A 50-108, 50-115 and 50-801 and repealing the existing sections.**

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

Section 1. (a) When used in this ~~act~~ **section** "municipality" means any city, county, township or other political or taxing subdivision of the state.

(b) The legislature of the state of Kansas recognizes the importance and the necessity of providing and regulating certain services **and activities** by municipalities in order to serve and protect the public's general health, safety and welfare. Municipalities which are authorized specifically by statute or through the exercise of the municipalities' home rule power are urged to continue to provide and regulate such services **and activities**, and in doing so, all immunity of the state of Kansas from the provisions of the federal antitrust laws shall be extended to ~~the governing bodies of~~ such municipalities and the officers and employees thereof. **Except as provided in subsections (f) and (g),** such municipalities and the officers and employees thereof also shall be exempt from civil liability under the antitrust laws of the state of Kansas in article 1 of chapter 50 of the Kansas Statutes Annotated.

STRIKE

STRIKE

(c) Municipalities shall be immune and exempt from antitrust liability as provided by subsection (b) when:

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

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

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League of Kansas Municipalities

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

TO: Senate Committee on Judiciary
FROM: Chris McKenzie, Attorney/Director of Research
DATE: March 25, 1985
SUBJECT: Testimony in Support of 1985 H.B. 2016, As Amended

I sometimes believe that the Chinese expression "may you live in intersting times" was coined with 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

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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 officers 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 against two cities since the passage of the Act.

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 affect 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 injunctive relief, attorney's fees and costs in eight enumerated areas. Further, it creates a new exemption from civil liability for actual or treble damages under the state antitrust laws in the same areas. Finally, the bill preserves the antitrust enforcement powers of the attorney general (both civil and criminal) and clearly authorizes actions against a municipality for injunctive relief, including attorney's fees and costs.

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

First, H.B. 2016 does not expand or limit the authority of municipalities in the enumerated areas. Second, 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. The Kansas attorney general also retains all the civil enforcement powers of that office.

6. Other Statutory Remedies Still Available

In its report to the Special Committee on Local Government,

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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 authorizes 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 challlenge 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 state 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.

7. 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.

8. 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.

9. 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.

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Damage Claims in Federal Antitrust Lawsuits

CABLE TELEVISION REGULATION

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

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LAND USE AND ZONING

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

WASTE COLLECTION AND DISPOSAL

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

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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--11 (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

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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.

THE NATIONAL LAW JOURNAL

aper for the Profession MONDAY, DECEMBER 3, 1984

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-

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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)

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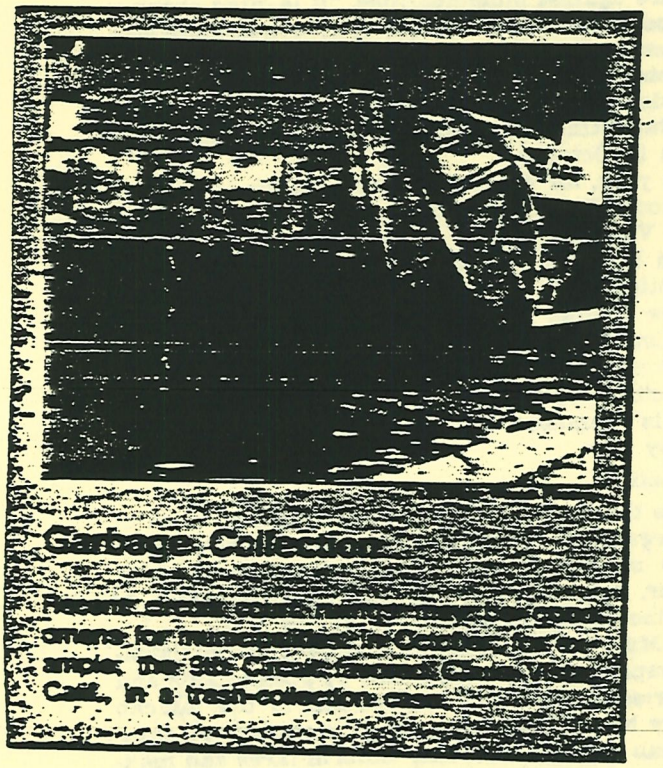
eral Trade Commission are pushing ahead with such complaints.

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



Garbage Collection

Recent [illegible] for municipalities. In Grayslake, for example, the 9th Circuit [illegible] Colton, Calif., 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.

'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, Alper & Dunham, the U.S. Conference of Mayors' general counsel.

"The anxiety is not as extreme as it used to be," adds Cynthia Pols, 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

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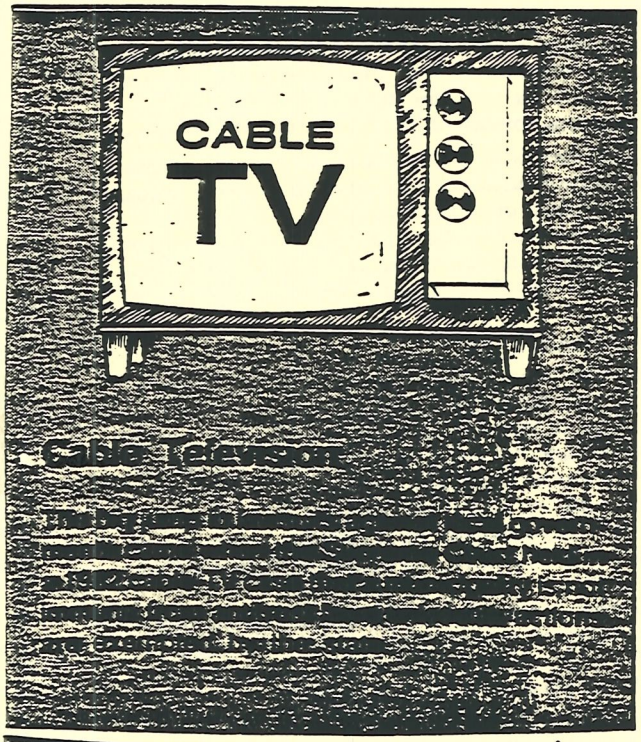
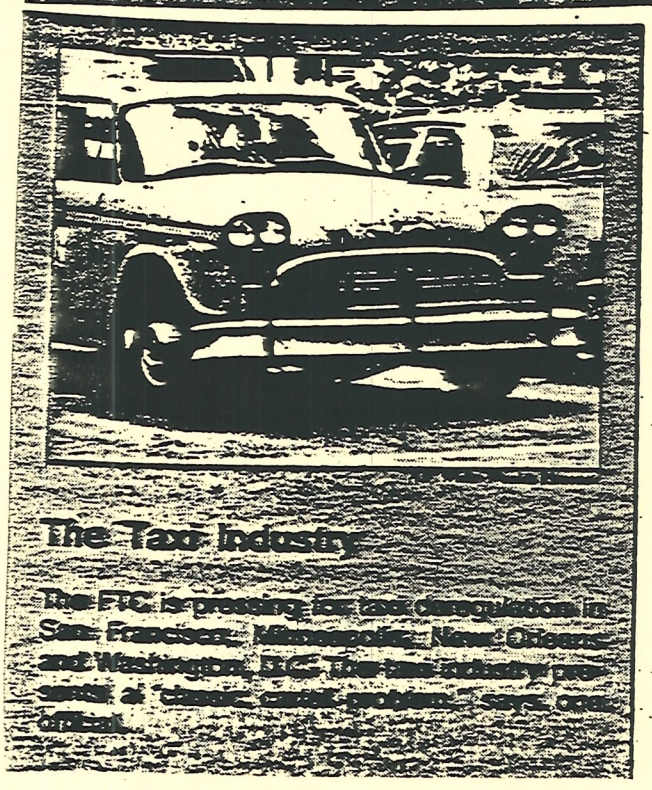
garbage collectors under contract to a local government [illegible] private parties will escape damage liability u[illegible] it is shown that their conduct is, in the words of the statute, "based on any official action directed by a local government, or official, or employee thereof acting in an official 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 municipal antitrust immunity last March. "For the fir time, Congress has expressly said that antitrust law 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

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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 transporation services. *Hallie 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. *Hallie 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 involving 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*, 83-6457.

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

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

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

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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 buffetted 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 entitites. 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-

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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 finding 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. ■

Attch. II

3-25-85

City of Kansas City, Kansas
John E. Reardon, Mayor

Executive Chamber
One Civic Center Plaza

Kansas City, Kansas 66101
Phone (913) 573-5010

March 25, 1985

Senator Robert G. Frey
Chairperson
Senate Judiciary Committee
State House
Topeka, Kansas 66612

Dear Senator Frey:

Please accept this as my testimony on HB 2016 regarding municipal anti-trust liability.

I support this legislation which grants Kansas local units of government immunity for federal anti-trust laws. 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. I urge that the Kansas Senate join the House to pass legislation in order to grant Kansas local units of government immunity from federal anti-trust actions.

This legislation is needed because since the Boulder Case, the United States Supreme Court has held that cities do not automatically share their states' federal anti-trust immunity simply by virtue of their status as political subdivisions of the state or because they were delegated broad home rule powers. Prior to 1978, municipalities were clearly immune. In two decisions since 1978, including Boulder, the Court held tht in order for a political subdivision of the state to qualify for "state action immunity" its alleged anti-competitive acts must have been undertaken pursuant to a clearly articulated and affirmatively expressed state policy. That is what HB 2016 attempts to do.

In conclusion, I ask you to consider recommending favorably this bill to the full Senate so local units of government in Kansas can get back to their business of providing sevices and operating in their regulatory role without fear of anti-trust litigation.

Sincerely,

John E. Reardon
Mayor

JER:jdh

3/25/85
Attch. III

3-25-85

SEDGWICK COUNTY, KANSAS

BOARD OF COUNTY COMMISSIONERS

DONALD E. GRAGG
CHAIRMAN
FIRST DISTRICT

BUD HENTZEN
CHAIRMAN PRO-TEM
THIRD DISTRICT

TOM SCOTT
COMMISSIONER
SECOND DISTRICT

COUNTY COURTHOUSE • SUITE 320 • WICHITA, KANSAS 67203-3759 • TELEPHONE (316) 268-7411

Senate Judiciary Committee
House Bill 2016
March 25, 1985

Testimony of Kim C. Dewey
Sedgwick County, Kansas

The Board of Sedgwick County Commissioners support the limited immunity from Federal antitrust action provided by House Bill 2016. The eight areas of governmental activity specified in the bill are among the most important and common involving local government.

It is important to keep in mind that House Bill 2016 merely represents a partial reinstatement of the status quo which existed for ninety years prior to the 1982 "Boulder Decision". Before 1982, all local units enjoyed the same innumity as State and Federal government. We are only asking for limited protection in specified areas.

Certainly, the public must be given adequate avenues for relief from oppressive or biased governmental activity. There is no question that these avenues exist today, and existed prior to the 1982 Supreme Court decision. It is not necessary to allow unlimited antitrust actions against local units of government to provide adequate avenues of relief.

The Committee should keep firmly in mind that it is not some faceless bureaucracy which is protected in part by the provisions of House Bill 2016. It is, in fact, the interest of the property taxpayers which is being protected,

3/25/85
Attch. IV

for they are the ones who will ultimately foot the bill for the potentially expensive and frivolous lawsuits which will occur if House Bill 2016 is not enacted as a clear statement of the Policy of the State of Kansas. The expense to the taxpayers will extend beyond the direct cost of the lawsuits to the increased cost of municipal liability coverage, and increased burden on our justice system and ultimately, a costly impediment to the ability of local units of government to carry out the necessary activities of local government specified in the most efficient and effective manner.

Attch. IV

3-25-85

ems
SEDGWICK COUNTY EMERGENCY MEDICAL SERVICE
538 N. MAIN WICHITA, KS. 67203 316/268-7994

COL. OLIN W. TAPLEY
DIRECTOR

LT. COL. THOMAS W. POLLAN
Assistant Director

ERNEST McCLELLAN, M.D.
Medical Director

Senate Judiciary Committee
House Bill 2016
March 25, 1985

Testimony of Col. Olin Tapley
Sedgwick County Emergency Medical Service

My name is Olin Tapley, Director of the Sedgwick County Emergency Medical Service. I am here today to speak in support of House Bill 2016 and the limited immunity from Federal antitrust action it provides.

Just over ten years ago a legislative committee, much like this one was hearing testimony in support of the Kansas Emergency Medical Services Act. Soon after it was enacted into law and has since caused a vast improvement in the level of care and service being provided to the citizens of Kansas.

Since that time many many, local governments have started providing ambulance service for their citizens just like they provide Police and Fire protection. The level of service has improved to the degree that Kansas is now considered by many to have an outstanding emergency medical service capability, most of which is provided by local government.

The problem, as I see it is that when your colleagues enacted the 1973 Kansas EMS Act they, like most of us probably felt local governments sharred the same immunity as did State and Federal Governments. The 1982 "Boulder Desision" however changed all that. We must therefore, take action now to ensure that limited immunity is available to local governments to protect all the public good that has resulted from the Kansas EMS Act.

In closing let me just say, in my opinion history clearly indicates the appropriacy of local government providing for public safety. Further, I belive that all one has to do is look back ten to twelve years to see the appropriacy of governmental EMS. I would therfore hope that this committee would look favorably upon this Bill so as to help those of us in local government provide adequately for our citizens without the fear of an unwarranted antitrust action.

3/25/85
Attch. V

3-25-8

REMARKS BY COUNCILMEMBER TIM OWENS
OF THE CITY OF OVERLAND PARK
TO THE SENATE JUDICIARY COMMITTEE
REGARDING HOUSE BILL 2016
MARCH 25, 1985

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, MY NAME IS TIM OWENS AND I AM A COUNCILMEMBER OF THE CITY OF OVERLAND PARK. 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.

3/25/85
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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.

Attch. VI

3-25-85

COMMISSIONERS
ROSALYS M. RIEGER
DARRELL WESTERVELT
MARJORIE J. MORSE

RILEY COUNTY
BOARD OF COUNTY COMMISSIONERS

Riley County Office Building
110 Courthouse Plaza
Manhattan, Kansas 66502
(913) 537-0700

March 25, 1985

Senator Frey and Members of the Senate Judiciary Committee:

I am Rosalys Rieger, County Commissioner from Riley County, and I appreciate your hearing our views in urging your support for HB 2016 which extends state immunity from federal antitrust actions to local jurisdictions. The bill appears to follow closely the Local Government Antitrust Act of 1984 passed by Congress last October 24.

Our reason for asking your support is that we believe that when we and other elected officials and staff act in good faith in exercising normal legislative, regulatory, executive, administrative or judicial powers in providing traditional public services, it is crucial that we be accorded immunity from antitrust liability for monetary damages as provided in the eight areas included in this bill.

Riley County is involved in nearly all of these--the operation of water, sanitary sewerage systems, solid waste disposal, ambulance services, and most sensitive of all--regulating land use through zoning and subdivision regulations.

Although we frequently make decisions concerning these issues which might be challenged, a particularly sensitive case comesto mind which occurred within the last five years. A developer requested rural rezoning in order to build a suburban mall outside the City of Manhattan. After lengthy discussion and consideration, we denied the request because we did not feel that this zoning was a proper use of the land nor, in view of a Downtown Mall being planned by the city commission, that short-term benefits justified long-term deterimental effects. At that time, we were aware of possible repercussions based on federal antitrust laws, but in all fairness to the people of Riley County, we couldn't have decided otherwise.

Fortunately, we are blessed with an extremely capable and experienced county counselor who provides us with guidance. However, despite his capability, the county could have been, and is presently subject to, litigation that in itself, could result in thousands of dollars in legal fees in defending our intent to promote the public safety, public health, morals, comfort, general welfare, and conserve the values of property throughout the county. (KSA 12-2901)

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Attch. VII

Should such a case be lost, the taxpayers could be liable for treble damages amounting to millions of dollars, e.g. Unity Ventures v. Lake County and the Village of Grayslake, Ill., $28.5 million. Imagine the situation then, in any number of other counties who have no county counselor to cope with the intricacies of antitrust litigation. The scenario is even worse in the least sophisticated of governmental entities--the townships.

A review of the history of the Sherman Anti-Trust Act of 1890 tells us that the Congress was responding to public opinion when state legislation proved unable to check the interstate manipulations of Standard Oil Trust who was eliminating competition. The federal law restrained large combinations which "threatened the old American ideals of individualism and freedom of competition."* It is highly unlikely that the law was intended to pose a threat to public treasuries and the taxpayers' pocketbooks.

This bill does not provide blanket immunity for local governmental units, but does, in fact, provide injunctive relief for antitrust violations.

As elected officials who have served in local government in some instances, you can understand the consciencious efforts we all make to deal as fairly and judiciously as we can with all issues concerning the general welfare.

We respectfully urge your support of HB-2016 so that we can do our work in a less threatening environment for the taxpayers.

Thankyou.

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* Encyclopaedia Britannica, 1958 ed., "The United States", Vol. 22, p. 823.

Attch. VII

LAW OFFICES
FLORY, KARSTETTER, FLORY & KLENDA
WALNUT AT MARLIN / P. O. BOX 1103
McPHERSON, KANSAS 67460
(316) 241-6900

GARY L. FLORY
TIM R. KARSTETTER
JOHN B. KLENDA

OF COUNSEL:
LOWELL FLORY

March 25, 1985

MEMORANDUM OF TESTIMONY

TO: Senate Judiciary Committee
Robert G. Frey, Chairperson

FROM: Gary L. Flory
McPherson County Counselor

RE: House Bill No. 2016

The McPherson County Commission is in favor of the passage of House Bill No. 2016.

McPherson County has just gone through a difficult period concerning county insurance. Two months after bidding out its insurance package, the carrier cancelled the entire state of Kansas. Re-bidding procedures which have just been completed demonstrated the extreme difficulty of obtaining insurance which I, as County Counselor, felt was necessary for proper protection of the County, including insurance for covering the County for situations which would be eliminated with the passage of this bill. McPherson County presently does not have, and it is my understanding cannot obtain, coverage for anti-trust litigation or violations.

If House Bill No. 2016 is not enacted, it is my belief that counties such as mine must either remain exposed to anti-trust actions or, if insurance is even available, purchase specialized coverage at high prices.

Attch VIII

3-25

City of Lawrence KANSAS

BUFORD M. WATSON, JR., CITY MANAGER

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

Statement by Hannes Zacharias
Management Analyst, Lawrence, Kansas

Presented to the Senate Judiciary Committee
March 25, 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.

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Attch IX

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

Attch. IX

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.

Attch. IX

3-25-85

KMU

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

Comments on: House Bill 2016
Before Senate Judiciary Committee
March 25, 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 to you by 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.

During the House hearings, there was some discussion by opponents that municipal utilities should not be included in the bill. This, of course, we would object to and I simply would like to point out that I see no way that, for example, cities could harm electric power companies. Their customers are protected by the Retail Electric Suppliers Act passed in 1976 by this Legislature; our gas distribution systems are not expanding and show no inclination to do so; and nearly all of the state's water entities already are municipally-owned and operated.

3/25/85
Attch. X

3-25-85

Mar. 22, 1985
Route 2, Box 190
Berryton, Kansas
66409

Senator Frey, Chairman
Senator Hoferer, Vice-chairman
Senate Judiciary Committee
Kansas State Senate
Topeka, Kansas

In re: H. B. 2016

Dear Mr. Chairman, Madame Vice-chairman and Members of the Committee:

I wish to protest the passage of H. B. 2016 as to zoning and subdivision regulations and enforcing airport zoning regulations and requiring aggrieved parties to give sureties in order to get injunctive relief.

There is an implication that zoning may involve anti-trust laws. Airports are told to purchase air easements and zone to relieve the federal government of liability and lawsuits when airports accept federal funding. In Shawnee County, the Airport Hazard Zoning Resolution uses "zoning" as a synonym for "transfer of rights of property owners" to the airports. As a result, a lawsuit is before the Kansas Supreme Court, which does not become affected by H. B. 2016.

The passage of the zoning contained in H. B. 2016 would effectively:

1. Allow zoning by municipalities to cross city, county, township and state lines. (i. e., Shawnee County Hazard Zoning would take in Osage and Jefferson Counties.)

2. Give more power to municipalities which are unelected bodies. (i. e., airport authorities and planning commissions.)

3. Punish those aggrieved of rights being taken by requiring them to post sureties and denying any damages.

4. Take in huge, undefined areas around more than 100 airports in Kansas, in which air easements should be purchased.

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Attch XI

As a committee member on the update of the master plans of Forbes Field and Philip Billard Airports (1983-1984), I found the airport plans to have noise overlay zoning, which changes each time the noise changes, ever expanding. If H. B. 2016 passes, millions of acres of privately owned land across Kansas will be put into the hands of airport owners, and aggrieved landowners will have to foot the bill for court.

There is federal funding for airports to purchase easements in the vicinity of airports. However, the local airport authority would only purchase 25 easements for $50,000, but if it costs more, they'd just "zone" it for nothing.

Federal rules also state zoning must be balanced with a mixture of land uses. The local airport authority, while encouraging industrial uses on the airport proper would:

1. Prohibit any land use but agricultural on private property around the airport for miles.

2. Propose noise zoning, requiring owners to install expensive insulation.

3. Prohibit mobile homes on certain private property near the airport.

4. Instruct county commissioners to deny utilities and roads to discourage development.

As to protection of the public investment in airports, there needs to be a new definition of "airport." When only 3% of the movements at Forbes Field are air carrier, and most landing fees come from commercial air lines using Forbes as a practice field, it is questionable as to whether or not the airport is a public investment to be protected.

I feel the passage of H. B. 2016 in regard to zoning would be punitive to landowners and create irresponsibility in government. I see no way to amend the bill. Just let it die.

Sincerely,

Mrs. Joan Hrenchir

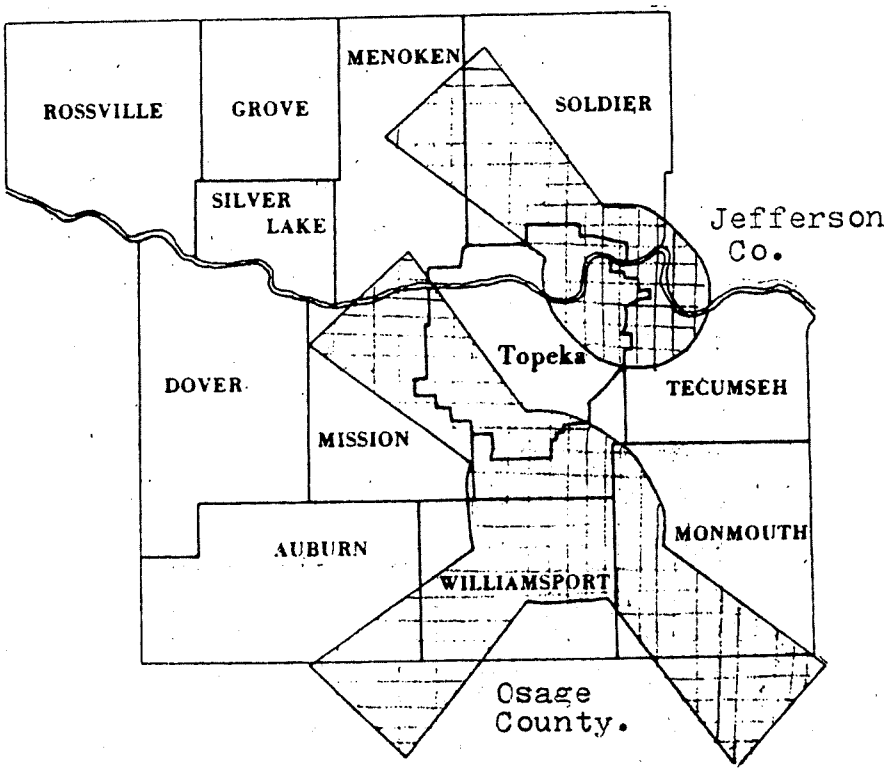
Mrs. Joan Hrenchir, Member
Airport Master Plan Committee

Attch. XI

3-25-

Shawnee County Airport Hazard Zone now before the Kansas Supreme Court.

Notice how it takes in Osage and Jefferson County areas also.



attch. XI