Whether Counties That Provide and Administer Emergency Ambulance Services Pursuant To Cal. Welf. & Ins. Code § 17000 And The Lomita Cases Are Immune From Federal Antitrust Liability.

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This memorandum does not express any opinion as to any particular facts and circumstances, does not create an attorney-client relationship, should not be relied upon for legal advice, and is for informational purposes only.

I. QUESTION PRESENTED

If a county chooses to provide or administer exclusive emergency ambulance services pursuant to Welfare and Institutions Code section 17000 ("Section 17000"), would it be immune from federal antitrust liability under Parker v. Brown, 317 U.S. 341 (1943) and its progeny?

II. EXECUTIVE SUMMARY

Although there is no mandatory, controlling authority on point, a federal court would almost certainly hold that a county providing or administering emergency ambulance service would be entitled to state action antitrust immunity under Parker.

Parker and its progeny stand for the proposition that States and non-state actors carrying out States' regulatory programs are immune under the federal antitrust laws. Counties and other local government entities qualify for Parker immunity when they act pursuant to clearly articulated and affirmatively expressed State policy to displace competition with regulation or monopoly public service. The existence of a mandatory, statutory duty imposed on a county by the State suffices to establish the county's entitlement to Parker state action antitrust immunity.

As construed by City of Lomita v. Cnty. of L.A., 148 Cal.App.3d 671 (1983) ("Lomita I"), City of Lomita v. Superior Court, 186 Cal.App.3d 479 (1986) ("Lomita II"), and Fuchino v. Edwards-Buckley, 196 Cal.App.4th 1128 (2011) ("Lomita III") (collectively, "Lomita Cases"), Section 17000 imposes on a county the interrelated statutory duties to: (1) provide emergency ambulance service to all persons in the county; and (2) cover the costs of providing such service, in full or in part, to indigent county residents.

Counties are free to determine which providers they will use to provide such service, including county fire departments, county fire protection districts, and other county departments,

or by contracting with cities, local agencies, or private providers (or any combination of the above). Furthermore, counties have discretionary authority under statutes related to Section 17000 to provide emergency ambulance services on an exclusive basis and to designate exclusive providers of such services.

Because the California Supreme Court holds that Section 17000 duties are mandatory and that a "county acts as an agent of the state" when it administers or provides Section 17000 relief or services, counties providing emergency ambulance service under Section 17000 and the Lomita Cases would satisfy the requirements of Parker immunity.

In addition, federal courts have held that counties who administer their prehospital emergency medical services ("EMS") systems pursuant to the Emergency Medical Services System and Prehospital Emergency Medical Care Personnel Act of 1980 ("EMS Act") are entitled to Parker immunity. Entitlement to such immunity does not require compliance with the statutory processes for creation of exclusive operating areas ("EOAs") under Health and Safety Code section 1797.224 ("Section 224"), as counties need not show active state supervision of their activities to be immune under Parker and its progeny.[1]

A county that elects to hire ambulance providers through competitive bidding processes that do not comply with Section 224 would not expose itself or its selected providers to antitrust liability for several reasons. First, Parker immunity does not require compliance with state law.

[1] The U.S. Court of Appeals for the Ninth Circuit recently issued an unpublished memorandum opinion holding that various Orange County cities providing emergency medical systems pursuant to Health and Safety Code section 1797.201 ("Section 201"), a statute within the EMS Act, were entitled to Parker antitrust immunity. The Ninth Circuit concluded that Section 201 authorized the cities' allegedly anticompetitive exclusion of competing private providers and expressly rejected the plaintiff's argument that the cities were required to show active state supervision or comply with state law to be immune. See AmeriCare MedServices, Inc. v. City of Anaheim, No. 17-55565, 2018 U.S. App. LEXIS 24229, at *3-4 & nn.1-3 (9th Cir. Aug. 27, 2018).

Second, a public entity provider would itself be immune under Parker, while a private provider would share in the county's immunity. Third, a county cannot conspire with its vendors to violate the antitrust laws. Finally, joint-bidding by subcontracting providers is not anticompetitive.

III. ANALYSIS

This memorandum first discusses state-action antitrust immunity and the requirements for such immunity under Parker and its progeny. Second, it concludes that counties who provide and administer emergency ambulance services under Section 17000, related statutes, and the Lomita Cases are entitled to Parker immunity. Third, it concludes that counties are entitled to Parker immunity under the EMS Act, notwithstanding Section 224. Fourth, it concludes that counties who select exclusive ambulance providers without complying with Section 224 would not expose themselves or their providers to antitrust immunity.

A. Under Parker And Its Progeny, States And Non-State Actors Carrying Out The States' Regulatory Programs Are Immune Under Federal Antitrust Laws.

1. Parker Holds That The Sherman Antitrust Act Does Not Apply To States And Their Regulatory Programs.

In Parker v. Brown, 317 U.S. 341 (1943), the U.S. Supreme Court construed federal antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. At issue in that case was a state marketing program adopted for the 1940 raisin crop under the California Agricultural Prorate Act ("Prorate Act"). The Prorate Act's stated purposes were to "conserve the agricultural wealth of the State" and "prevent economic waste in the marketing of agricultural products." Id. at 346. To accomplish those ends, the

Prorate Act "authorize[d] the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers." Id.

Although such marketing program would be unlawful had it been undertaken by private parties, the U.S. Supreme Court held that the Sherman Antitrust Act did not apply to the program because it "derived its authority and efficacy from the legislative command of the state." Id. at 350. Relying on principles of federalism and state sovereignty, the Court explained that while "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," the Sherman Act prohibits "individual and not state action," and was not intended "to restrain a state or its officers or agents from activities directed by its legislature." Id. at 350-52. Thus, the Sherman Act did not apply to anticompetitive restraints of trade imposed by the States "as an act of government." Id. at 352.

The Court has subsequently explained that while federal antitrust laws serve to promote federal economic policy favoring free markets and competition, the States, "when acting in their respective realm, need not adhere in all contexts to a model of unfettered competition" and may "limit competition to achieve public objectives. If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate." N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1109 (2015).

In Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 105 (1980), the Court articulated a two-part test for Parker immunity: "First, the challenged [anticompetitive conduct] must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."

2. Local Government Entities (And Their Contractors) Carrying Out The States' Regulatory Programs Must Show Authorization By The State To Be Immune.

Prior to 1982, it was generally understood that local government entities were immune from federal antitrust laws under Parker. Report to the Senate Committee on the Judiciary on the Local Government Antitrust Act, S. Rep. No. 593, 98th Cong., 2d Sess. 1 (1984).

However, in Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40 (1982), the U.S. Supreme Court held that local government entities are not necessarily entitled to Parker immunity; they are immune only if their anticompetitive actions are in "furtherance or implementation of clearly articulated and affirmatively expressed state policy." Boulder, 455 U.S. at 52. However, Boulder left open the question of whether local government entities must satisfy the second prong of that test, i.e., whether a state must actively supervise their activities, to qualify for immunity. Id. at 51 n.14.

Subsequently, the Court determined that local government entities need only satisfy the first prong by showing that "their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service'" to be immune under Parker. Hallie v. Eau Claire, 471 U.S. 34, 39 (1985); FTC v. Phoebe Putney Health Sys., 568 U.S. 216, 226 (2013).

However, "state-law authority to act is insufficient to establish state-action immunity; the substate governmental entity must also show that it has been delegated authority to act or regulate anticompetitively." Phoebe Putney, 568 U.S. at 228. "Grants of general corporate power that allow substate governmental entities to participate in a competitive marketplace should be, can be, and typically are used in ways that raise no federal antitrust concerns. As a result, a State that has delegated such general powers 'can hardly be said to have 'contemplated'' that they will be used anticompetitively." Id.

Instead, "a state policy to displace federal antitrust law [is] sufficiently expressed where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." Id. at 229. "In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." Id.; e.g., City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 373 (1991) (exclusion of billboard advertiser was "foreseeable result" of municipal zoning ordinance authorized by state law).

A state law need not compel counties to act to satisfy Parker: "compulsion is simply unnecessary as an evidentiary matter to prove that [a local government entity's] challenged practice constitutes state action." Nevertheless, "compulsion affirmatively expressed may be the best evidence of state policy." Hallie, 471 U.S. at 45-46.

Furthermore, if a local government entity is immune, its private contractors engaged in the challenged activity are also immune because "Parker immunity exempts state action, not merely state actors." Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc., 810 F.2d 869,

878 (9th Cir. 1987). Thus, if a county's grant of a monopoly contract to a provider is immune, the provider "cannot be held liable for possessing that monopoly." Id. Otherwise, a plaintiff "could frustrate any [Parker protected state plan] merely by filing suit against the regulated private parties, rather than the state officials who implement the plan." Id. (quoting S. Motor Carriers Rate Conference v. United States, 471 U.S. 48, 56-57 (1985)); accord Zimomra v. Alamo Rent-A-Car, 111 F.3d 1495, 1500 (10th Cir. 1997); Cine 42nd St. Theater Corp. v. Nederlander Org., Inc., 790 F.2d 1032, 1047-48 (2d Cir. 1986).

3. Certain Private Parties And Certain Public-Private State Agencies Must Show Authorization And Supervision By The State To Be Immune.

In contrast, private parties that are not acting in connection with immune local governments must satisfy the "clearly articulated and affirmatively expressed" state policy and active state supervision requirements. Midcal, 445 U.S. at 105. The same requirements apply to "nonsovereign actor[s] controlled by active market participants," such as state regulatory boards and commissions that have private industry representatives. N.C. State Bd. of Dental Exam'rs, 135 S. Ct. at 1110. Active state supervision "is an essential condition of state-action immunity when a nonsovereign actor has 'an incentive to pursue [its] own self-interest under the guise of implementing state policies.'" Id. at 1113.

"[T]he inquiry regarding active supervision is flexible and context-dependent." N.C. State Bd. of Dental Exam'rs, 135 S. Ct. at 1116. It "need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide 'realistic assurance' that a nonsovereign actor's

anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.'" Id.

The Court has identified only a few constant requirements of active supervision: (1) the "supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; (2) "the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy"; (3) the "mere potential for state supervision is not an adequate substitute for a decision by the State"; and (4) "the state supervisor may not itself be an active market participant." Id. Otherwise, "the adequacy of supervision otherwise will depend on all the circumstances of a case." Id.

B. Counties Providing And Administering Emergency Ambulance Service Under Section 17000 And The Lomita Cases Qualify For Immunity Under Parker And Its Progeny.

1. Section 17000 And The Lomita Cases Impose A Mandatory Duty on Counties To Provide Emergency Ambulance Service And Authorize Various Ways And Means To Satisfy That Duty.

"Beginning in 1855, California imposed a legal obligation on the counties to take care of their poor." Cnty. of San Diego v. State of Cal., 15 Cal.4th 68, 111 (1997). "Since 1965, this obligation has been codified in" Section 17000.[2] Id. at 111-12.

[2] Section 17000 provides:

> Every county and every city and county shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions.

a. Section 17000 Imposes A Mandatory, Non-Delegable Duty On Counties To Provide Emergency Medical Care To Indigent Residents.

"Section 17000 imposes upon counties a mandatory duty to 'relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident,' when those persons are not relieved and supported by some other means." Hunt v. Superior Court, 21 Cal.4th 984, 991 (1999); Alford v. Cnty. of San Diego, 151 Cal.App.4th 16, 19 (2007) (Section 17000 "impos[es] a mandatory duty to provide a system of 'last resort' subsistence medical care").

"[I]ndividuals eligible for medical care under section 17000, but not under other specialized aid programs, [are] persons with insufficient means to pay for subsistence medical care." Hunt, 21 Cal.4th at 1013; see, e.g., Alford, 151 Cal.App.4th at 29 ("courts have long concluded, under both the common law and section 17000, that a county's obligation to provide subsistence medical care to the poor includes not only those with no ability to pay, but also those with a limited ability to pay, sometimes referred to as the 'working poor.'").

Thus, "[c]ounties have *no* discretion to refuse to provide medical care to 'indigent persons' within the meaning of section 17000 who do not receive it from other sources." Hunt, at 1012. Such medical care includes, but is not limited to, "medical services necessary for the treatment of acute life- and limb-threatening conditions and emergency medical services." Id. at 1014.

A related statute, Welfare and Institutions Code section 17001 ("Section 17001"), provides that counties "shall adopt standards of aid and care for the indigent and dependent poor of the county or city and county." Courts have construed Section 17001 to impose a mandatory

duty on counties to adopt such standards while conferring "upon the county a broad discretion 'to determine eligibility for, the type and amount of, and conditions to be attached to indigent relief.'" Mooney v. Pickett, 4 Cal.3d 669, 676 n.7, 678 (1971).

b. Counties Act As Agents Of The State In Providing Or Administering Section 17000 Relief.

"The counties alone are charged with the duty of furnishing relief to indigent residents" under Section 17000. Cnty. of Los Angeles v. Dep't of Soc. Welfare, 41 Cal.2d 455, 458 (1953). "The administration of [Section 17000] relief to indigents . . . is vested exclusively in the county supervisors who have discretion [under Section 17001], *without supervision by the state*, to determine eligibility for, the type and amount of, and conditions to be attached to indigent relief." Id. (emphasis added).

Nevertheless, the California Supreme Court holds that a "county acts as an agent of the state" when it administers or provides Section 17000 relief or services. Mooney, 4 Cal.3d at 679 (citing San Francisco v. Collins, 216 Cal. 187, 192 (1932)); accord Cnty. of San Diego v. State of Cal., 15 Cal.4th 68, 100 (1997).

c. The Lomita Cases Construe Section 17000 To Impose Mandatory Duties On Counties To Provide, And Pay For, Emergency Ambulance Services.

In Lomita I, 148 Cal.App.3d at 672-73, the appellate court held that counties are "statutorily liable to provide such emergency ambulance service to all indigent residents." Relying on case law interpreting Section 17000, the appellate court explained that counties have "the statutory duty . . . to provide hospital and medical services to all indigent [c]ounty residents." Id., at 673 (citing Cnty. of San Diego v. Viloria, 276 Cal.App.2d 350, 352-53 (1969)).

It reasoned that when an emergency requiring hospitalization occurs anywhere in the county, "it necessarily follows that the duty to provide medical care includes the duty to provide emergency transportation from the place where the indigent is to the hospital where he can receive care." Id. "The cost of providing that service is, by statute, a proper county charge." Id. (citing Cal. Gov't Code § 29606; Cal. Health & Safety Code § 1444).

After reviewing various statutes authorizing counties to provide, administer, and regulate ambulance services, the appellate court further explained that

> a County, obligated to provide emergency ambulance service to indigents, is free to select, for itself, the particular mode of compliance: it may operate its own services with its own ambulances; it may assign day-to-day operation to a sheriff, to a fire district, or setup some other department; or in lieu of providing ambulance service by its own employees, it may hire a city or other local agency or a private company to provide the service.

Lomita I, 148 Cal.App.3d at 673-74. "In any case, however, the cost of such services, no matter how or by whom provided, is a charge on the County to be met out of County funds." Id. at 674.

In Lomita II, 186 Cal.App.3d at 481-82, the Court of Appeal clarified the scope of counties' obligations and their options for complying with those obligations. First, Lomita II makes clear that counties have a duty "to provide emergency ambulance service for all 'residents' of the county in need of medical care." Id. at 481. "[R]esident" is "used broadly to include not only permanent county residents but any person found in the county in need of emergency ambulance care." Id.

Counties may satisfy this duty "in any one of four different ways or by any combination of such services.

(1) The county may create a separate county department to provide emergency ambulance service, equipping such department with the necessary vehicles and other equipment, as well as personnel in such department and pay the expenses of operating such department as it staffs and operates other county departments.

(2) It may assign the duty of providing emergency ambulance service to residents of the county to such existing county department as it may choose and provide that department with the necessary equipment and trained personnel.

(3) It may contract with the cities or local agencies located within the county to provide necessary emergency ambulance service to the residents of the county found within such city or cities; or,

(4) It may contract with private ambulance companies.

Id. at 481-82.

Second, Lomita II makes clear that counties must "bear the costs of [emergency ambulance] service for whatever method [their board of supervisors] may select." Id. at 482. Furthermore, a county must "provide immediate emergency service to all those found in the county who need it, since, in the nature of things, emergency ambulance service cannot be delayed to inquire into the financial status of the person for whom transportation is to be furnished." Id.; see also Cal. Health & Safety Code § 1317(b) ("In no event shall the provision of emergency services and care be based upon, or affected by, the person's . . . insurance status, economic status, [or] ability to pay for medical services").

"However, since the duties outlined in [Lomita I] apply only to 'indigent' 'residents' of [a] county," "the county may seek (by such means as it finds desirable) reimbursement from (or on behalf of) the nonindigent person transported in emergencies." Lomita II, 186 Cal.App.3d at

482. The appellate court explained that it used the word "may" because it did not want to impinge on "the discretion of [the county's] governing authority." Id. at 482 n.1.

Lomita III answered a question that was expressly left open by Lomita I and II: "which county must pay for emergency ambulance services provided to nonresident indigents"? Lomita III, 196 Cal.App.4th at 1131, 1139. The appellate court held that the indigent's county of residence is obligated "to cover the cost of the out-of-county emergency ambulance services." Id. at 1136. Under Section 17000, "[i]t is the responsibility of the county and the board of supervisors to support and provide medical and hospital care for the indigent sick *residents of the county*." Id. (quoting Chavez v. Sprague, 209 Cal.App.2d 101, 108 (1962)).

d. Statutes Related To Section 17000 Authorize Exclusive Services.

Under Welfare and Institutions Code section 16817 ("Section 16817"),[3] a county may enter into contracts and designate exclusive providers for Section 17000 medical services and is obligated to pay for such services if it has agreed to pay such services pursuant to a contract or specific authorization. See Union of Am. Physicians & Dentists v. Cnty. of Santa Clara, 149 Cal.App.3d 45, 52 (1983) (absent statute, contract, or county authorization, county cannot be

[3] Section 16817 provides, in pertinent part:

> Notwithstanding any other provision of law, a county may enter into contracts with selected providers to provide health care services in expending funds provided pursuant to [Section 17000]. The county may negotiate such reimbursement or payment arrangements it desires in such contracts. A county shall not be obligated to pay for health care services unless pursuant to a contract or the county has specifically authorized such services and agreed to payment. All such contracts shall be available for review by the department. A county may require county residents specified in [Section 17000] to use county facilities or county selected providers. This section may not be construed to limit a county's existing obligations to furnish health care. Any county may also elect to act jointly on a regional basis with other counties in assuming the program responsibilities.

compelled to pay private physicians for expenses incurred in providing emergency medical services to indigent residents).

In terms of emergency ambulance services, Section 16817 "provides a means by which a county may fulfill its section 17000 duties—through contracts with selected health care providers. . . . Under section 16817, a county is not obligated to pay a health care provider for services rendered outside the scope of agreement or authorization." Lomita III, 196 Cal.App.4th at 1140. Furthermore, "section 16817 indicates that a county may require an indigent to obtain health care from a provider with which it has contracted." Id. But since the statute expressly states that it "may not be construed to limit a county's existing obligations to furnish health care," Section 16817 cannot be read to "negate a county's duty vis-à-vis its indigent residents to furnish them with health care as required by section 17000." Id. at 1135-40.

2. Because Section 17000 And The Lomita Cases Impose A Mandatory Duty on Counties, The Requirements Of Parker Immunity Are Satisfied.

Counties who provide and administer emergency ambulance services under Section 17000 and the Lomita Cases are almost certainly entitled to Parker immunity because Section 17000 and the Lomita Cases evidence a "clearly articulated and affirmatively expressed" "state policy to displace competition with regulation or monopoly public service.'" Hallie, 471 U.S. at 39; Phoebe Putney, 568 U.S. at 225-26.

The State has imposed on counties, through Section 17000, the interrelated statutory duties to: (1) provide emergency ambulance service to all persons in the county; and (2) cover the costs of providing such service, in full or in part, to indigent county residents. Lomita I, 148

Cal.App.3d at 672-73; Lomita II, 186 Cal.App.3d at 482; Lomita III, 196 Cal.App.4th at 1138 & n.7.

Because counties (a) are obligated to pay the costs of providing such service, in full or in part, out of county funds, (b) have the discretionary right to recover the reimbursable costs of providing such services, and (c) are authorized by statute to determine which methods and providers to use to satisfy their obligations, Lomita I, 148 Cal.App.3d at 673-74; Lomita II, 186 Cal.App.3d at 481-82 & n.1, the displacement of competition with monopoly public service is the inherent, logical, or ordinary result of the exercise of authority delegated to counties by the State in Section 17000, Springs Ambulance Serv., Inc. v. Rancho Mirage, 745 F.2d 1270, 1273 (9th Cir. 1984) ("the exclusion of private ambulance companies is a necessary or reasonable consequence of providing subsidized municipal ambulance service"); see also United National Maint., Inc. v. San Diego Convention Ctr., Inc., 766 F.3d 1002, 1010-11 (9th Cir. 2014) (exclusion of competing cleaning companies was "ordinary result" of statute authorizing city to create a commission to manage convention center's use and generate profits for city); Cnty. of San Bernardino v. City of San Bernardino, 15 Cal.4th 909, 932 (1997) (given counties' duties under Lomita II, the legislature intended that counties should retain control over the "financial soundness" of their EMS systems).

Indeed, Section 16817 expressly authorizes counties to provide emergency ambulance services on an exclusive basis and to designate exclusive providers of such services. Lomita III, 196 Cal.App.4th at 1140. California courts have construed similar statutes as delegating to local governments the authority to "grant . . . ambulance business monopolies" and exclude existing

providers to ensure the economic viability of emergency ambulance services. Subriar v. City of Bakersfield, 59 Cal.App.3d 175, 206 (1976); Sievert v. City of National City, 60 Cal.App.3d 234, 236-37 (1976); Bell v. City of Mountain View, 66 Cal.App.3d 332, 339 (1977); see also Cal. Veh. Code § 2512(b); Cal. Welf. & Inst. Code §§ 14136(e), (f). A federal court would likely view Section 16817 as statutory authorization to displace competition with monopoly public service. Hallie, 471 U.S. at 41-45 (city's alleged abuse of monopoly power was immune because activity logically resulted from state law authorizing cities to limit municipal sewage service to surrounding areas and, as construed by state court, condition sewage services on the annexation of a neighboring town).

And since the California Supreme Court holds that Section 17000 duties are mandatory, Hunt, 21 Cal.4th at 1012-14; Alford, 151 Cal.App.4th at 29, and a "county acts as an agent of the state" when it administers or provides Section 17000 relief or services, Mooney, 4 Cal.3d at 679; accord Cnty. of San Diego, 15 Cal.4th at 100, counties' mandatory, statutory duties under Section 17000 and the Lomita Cases are the "best evidence of state policy" affirmatively authorizing anticompetitive conduct, Hallie, 471 U.S. at 45-46.

It is immaterial that the State does not supervise counties' provision or administration of Section 17000 relief or services because counties and their providers need not show active state supervision to be entitled to Parker immunity. Hallie, 471 U.S. at 38-40; Phoebe Putney, 568 U.S. at 224-27.

C. Counties Administering EMS Systems Under The EMS Act Qualify For Immunity Under Parker And Its Progeny.

1. The EMS Act Creates A Two-Tiered, State-County Regulatory System For EMS.

In 1978, the California Legislature began considering legislation to regulate, coordinate, and integrate EMS on a statewide basis. The result of this effort was the EMS Act, which sets forth a comprehensive statutory scheme regulating virtually every aspect of EMS in California. See Cal. Health & Safety Code §§ 1797.1, et seq. The EMS Act's overarching purpose "was to 'provide the state with a statewide system for [EMS]' and to 'ensure the provision of effective and efficient emergency medical care' to the people of California." Cnty. of Butte v. Emergency Med. Servs. Auth., 187 Cal.App.4th 1175, 1190 (2010) (quoting Cal. Health & Safety Code §§ 1797.1 ("Section 1"), 1797.6(a)). To achieve this desired coordination and integration of EMS, the Legislature opted for a two-tier system of regulation: EMSA occupies the first tier, while local emergency medical service agencies ("LEMSAs") occupy the second tier. San Bernardino, 15 Cal.4th at 915-16.

A LEMSA's[4] primary responsibility consists of planning, implementing, and evaluating a county-level EMS system in accordance with the EMS Act's requirements. Cal. Health & Safety Code § 1797.204 ("Section 204").

LEMSAs are also responsible for developing a local EMS plan in accordance with EMSA's guidelines and submitting the plan to EMSA for its approval on an annual basis. San

[4] The EMS Act provides that "[e]ach county may develop an emergency medical services program." If so, the county "shall designate a [LEMSA], which shall be": (a) the county health department; (b) an agency established and operated by the county; (c) an entity with which the county contracts for the purposes of local EMS administration; or (d) a joint powers agency. Cal. Health & Safety Code § 1797.200.

Bernardino, 15 Cal.4th at 916 (citing Cal. Health & Safety Code §§ 1797.250, 1797.254). A local EMS plan is "a plan for the delivery of [EMS] consistent with state guidelines," which addresses, among other things, transportation of emergency medical patients. Cal. Health & Safety Code §§ 1797.76, 1797.103(c).

Once a LEMSA implements its EMS system, "all providers of prehospital emergency medical services within its jurisdiction must operate within that system." San Bernardino, 15 Cal.4th at 916; see Cal. Health & Safety Code § 1797.178 ("No person or organization shall provide [EMS] unless that person or organization is an authorized part of the [LEMSA's EMS] system").

EMSA "is responsible for the coordination and integration of all state activities concerning [EMS]." Section 1; see also id. at § 1797.100. EMSA performs several functions relating to the statewide coordination of EMS, including:

(1) developing "planning and implementation guidelines for [EMS] systems" which address, among other things, transportation, id. at Section 103; and

(2) reviewing EMS plans submitted by local EMS agencies, id. at § 1797.105.

EMSA reviews the local EMS plans submitted to it by LEMSA pursuant to certain specific statutory criteria: whether the plans "effectively meet the needs of the persons served," and are "consistent with coordinating activities in the geographical area served" and consistent with "[EMSA's] guidelines or regulations." Id. at 1797.105(b) ("Section 105(b)").

EMSA may reject a local EMS plan if it determines that the plan does not satisfy the criteria in Section 105(b). Butte, 187 Cal.App.4th at 1199. Section 105(b) expressly provides

that a LEMSA may implement its local EMS plan "*unless [EMSA] determines that the plan*" does not satisfy Section 105(b). Butte, 187 Cal.App.4th at 1198.

2. Federal Courts Hold That Counties Operating Pursuant To The EMS Act Are Entitled To State-Action Antitrust Immunity.

By creating "a comprehensive system governing virtually every aspect of [EMS]," the EMS Act "'evidences an intent to 'displace unregulated competition' in a field where quality and cost control are vitally important state interests.'" San Bernardino, 15 Cal.4th at 915, 932 (quoting Mercy-Peninsula Ambulance, Inc. v. Cnty. of San Mateo, 592 F.Supp. 956, 963 (N.D. Cal. 1984)).

Among other things, the EMS Act "directs the counties to establish a plan for the provision and regulation of emergency medical services, including ambulance and paramedic services." Mercy-Peninsula Ambulance, Inc. v. Cnty. of San Mateo, 791 F.2d 755, 757 (9th Cir. 1986) (citing Section 204). "It requires the counties to license and certify qualified paramedic personnel," id. (citing Cal. Health and Safety Code §§ 1797.210, 1797.214), "and it specifically authorizes the counties to restrict and limit provision of paramedic services to persons or organizations who are 'an authorized part of the [EMS] system of the local EMS agency," which must be "based on public and private agreements," id. (quoting Cal. Health and Safety Code §§ 1797.204, 1797.178).

Thus, the EMS Act's "authorization for the counties to contract for paramedic services and to regulate those who can provide them, has a foreseeably anti-competitive effect which excludes some potential service providers." Mercy-Peninsula Ambulance, Inc., 791 F.2d at 758. Moreover, "the foreseeable and logical result of the EMS Act's authorization to counties to

develop local emergency services systems is to exclude some providers from the system." Id. Indeed, "[v]irtually any anti-competitive effect, including exclusive contracts with primary providers and elimination of backup ambulance services altogether, would appear to be well within [the EMS Act's] contemplation" and "'logically would result from [counties'] broad authority to regulate.'" Id.

3. Because They Do Not Need To Show Active State Supervision, Counties May, But Are Not Required To, Comply With Section 224 To Be Immune.

a. The State Enacts Section 224 To Ensure Providers Are Immune Following Confusion Created By Boulder.

In 1984, the California Legislature amended the EMS Act by enacting Health and Safety Code sections 1797.6 ("Section 6"), 1797.85 ("Section 85") and Section 224.

Section 6 provides:

> (a) It is the policy of the State of California to ensure the provision of effective and efficient emergency medical care. The Legislature finds and declares that achieving this policy has been hindered by the confusion and concern in the 58 counties resulting from the United States Supreme Court's holding in [Boulder], regarding local governmental liability under federal antitrust laws.
>
> (b) It is the intent of the Legislature in enacting this section and Sections 1797.85 and 1797.224 to prescribe and exercise the degree of state direction and supervision over emergency medical services as will provide for state action immunity under federal antitrust laws for activities undertaken by local governmental entities in carrying out their prescribed functions under this division.

Section 85 defines an EOA as "an EMS area or subarea defined by the emergency medical services plan for which a local EMS agency, upon the recommendation of a county, restricts operations to one or more emergency ambulance services or providers of limited advanced life support or advanced life support."

Section 224 provides, in pertinent part:

> A [LEMSA] may create one or more [EOAs] in the development of a local [EMS] plan, if a competitive process is utilized to select the provider or providers of the services pursuant to the plan. . . . A [LEMSA] which elects to create one or more [EOAs] in the development of a local plan shall develop and submit for approval to [EMSA], as part of the local EMS plan, its competitive process for selecting providers and determining the scope of their operations. This plan shall include provisions for a competitive process held at periodic intervals. . . .

The 1984 amendments to the EMS Act were made "for the purpose of authorizing [LEMSAs] to grant [EOAs] to private EMS providers such as ambulance companies." "Such authorization was necessary to immunize [LEMSAs] from liability under [Boulder] holding that local governments granting monopolies would not be exempt from antitrust laws unless they acted pursuant to 'clearly articulated and affirmatively expressed' state policy." San Bernardino, 15 Cal.4th at 917-18; Butte, 187 Cal.App.4th at 1191-92.

EOAs are essentially monopoly franchises in that they "permit[] local EMS agencies to offer [EMS] providers protection from competition in profitable, populous areas in exchange for the obligation to serve unprofitable, more sparsely populated areas." Valley Med. Transp., Inc. v. Apple Valley Fire Prot. Dist., 17 Cal.4th 747, 759 (1998). An EOA "is an important administrative tool for designing an EMS system," in that it "allows [LEMSAs] to plan and implement EMS systems that will meet the needs of their constituencies and at the same time ensure that the EMS providers with which they contract have a territory sufficiently populated to make the provision of these services economically viable." San Bernardino, 15 Cal.4th at 931. Given that counties are financially responsible for providing EMS to indigents under the Lomita Cases, "it is understandable that the Legislature vested in a county-affiliated agency the ability,

through the creation of EOA's, to ensure the financial soundness of EMS systems." San Bernardino, 15 Cal.4th at 932.

The 1984 amendments were introduced in the Assembly as AB 3153, at the request of the Northern California EMS Administrator's Association, which was concerned that LEMSAs and counties could be found liable for violating federal antitrust laws because of the Boulder decision. Assem. Health Com., Rep. on AB 3153 (1983-1984 Reg. Sess.) May 4, 1984 at 2.

By that time,[5] several LEMSAs had adopted the practice of managing their EMS systems by "designat[ing] subzones and/or exclusive providers within the zones or areas. They generally do so to avoid ambulance races to emergency scenes and to ensure that top quality providers serve the areas readily available to their ambulances." Id. While it made LEMSAs "responsible for planning, implementing and evaluating the EMS system," including "establishing policies which help determine how and by whom EMS will be rendered, and developing the financing arrangements essential for system operation," the EMS Act "[did] not specifically grant [LEMSAs] the authority to designate subareas or zones and/or exclusive providers within their EMS area." Id. at 1-2. As such, AB 3153 "was introduced to specifically authorize" the creation of EOAs by LEMSAs and thereby preclude antitrust liability against them. Id. at 2.

In its analysis of AB 3153, EMSA informed the Legislature that some LEMSAs had created and awarded EOAs through a competitive bidding process as part of their

[5] Counties and cities had been creating EOAs and exclusive municipal emergency ambulance services prior to the enactment of the EMS Act in 1980 or the 1984 amendments. See, e.g., Mercy-Peninsula Ambulance, Inc., 592 F.Supp. at 959-60 (county entered into exclusive agreements with providers in 1976, 1980, and 1982); Springs Ambulance Serv., Inc. v. Rancho Mirage, Case No. CV82-5917CBM (MCx), 1983 U.S. Dist. LEXIS 13356, at *2 (C.D. Cal. Sep. 27, 1983) (cities formed joint powers authority to provide exclusive service in 1982), aff'd in part and rev'd in part by 745 F.2d 1270 (9th Cir. 1984).

implementation of their EMS systems, while others had not chosen to adopt the practice. Cal. Emergency Med. Servs. Auth., Rep. on AB 3153 (1983-1984 Reg. Sess.) May 14, 1984 at 1. It noted that Contra Costa, San Mateo, Sonoma, and Riverside counties and the City of Stockton had either been sued or threatened with federal antitrust suits for creating EOAs. Id. According to EMSA, "AB 3153 would provide local governmental agencies protection from anti-trust liability when they designate [EOAs] by giving clear state direction in the matter." Id. at 1. The bill would do so by "adding a definition of an 'exclusive operating area' . . . and by statutorily allowing a [LEMSA] to grant an exclusive operating permit to an emergency ambulance service provided that a competitive process is used to select the ambulance providers." Id.

An analysis of AB 3153 by the Department of Finance elaborated on the need for the bill in light of existing EMS systems:

> Although most of the larger [LEMSAs] have been using an emergency medical services response system which eliminates ambulance company confusion and competition at the site of the emergency, those problems are beginning to occur in some of the smaller [LEMSAs]. In order to avoid that confusion and competition [LEMSAs] must designate which ambulance companies are to respond to medical emergencies within certain geographic zones. Because of [the Boulder case], State law must authorize the actions anticipated by the Sonoma County EMS Agency, which sponsored the bill. This bill provides that authority by supplementing existing law. The bill does not eliminate the requirement to prepare EMS plans, which must be approved by [EMSA].

Cal. Dept. of Fin., Rep. on AB 3153 (1983-1984 Reg. Sess.) June 15, 1984 at 1.

This legislative history makes clear that the Legislature was (a) acting to protect from antitrust liability those smaller LEMSAs that had created EOAs and (b) understood that the creation of EOAs designating "which [otherwise competing] ambulance companies" would respond "within certain geographic zones" was not necessarily required for the operation of a

viable EMS system, id., or for determining authorized providers in, and financing for, such a system, Assem. Health Com., supra, at 1-2.

b. Counties (And Their Providers) Are Immune Under Parker And Its Progeny, Notwithstanding Section 224.

The Ninth Circuit has held that counties who create EOAs and designate exclusive providers within such EOAs pursuant to Section 224 enjoy Parker immunity. Redwood Empire Life Support v. Cnty. of Sonoma, 190 F.3d 949, 953 (9th Cir. 1999); A-1 Ambulance Serv., Inc. v. Cnty. of Monterey, 90 F.3d 333, 336 (9th Cir. 1996).

However, compliance with Section 224 is not a necessary requirement for Parker immunity. In enacting Sections 85 and 224, the Legislature intended "to prescribe and exercise the degree of state direction and supervision over [EMS] as will provide for state action immunity" for local government entities operating under the EMS Act. Section 6(b). Yet, as discussed previously, local government entities and their providers need not show active state supervision to qualify for Parker immunity. Hallie, 471 U.S. at 38-40; Phoebe Putney, 568 U.S. at 224-27. Their entitlement to Parker immunity depends on whether "their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.'" Hallie, 471 U.S. at 39; Phoebe Putney, 568 U.S. at 226. Even in Section 224 cases, the Ninth Circuit looks solely to the authorization prong and has never conditioned Parker immunity on EMSA's active supervision. Redwood, 190 F.3d at 953; A-1 Ambulance, 90 F.3d at 336.

Moreover, the Ninth Circuit did not rely upon on Section 224 when it held in Mercy-Peninsula, 791 F.2d at 758, that "[v]irtually any anti-competitive effect," including a county's

entry into exclusive contracts and exclusion of providers from its EMS system, was the ordinary result of counties' broad authority to regulate under the EMS Act. It relied on other statutes in the EMS Act. Id. (citing Cal. Health and Safety Code §§ 1797.204, 1797.210, 1797.178, 1797.214). Notwithstanding that Sections 6, 85, and 224 had not yet been enacted or become effective when that lawsuit was filed, the Ninth Circuit cited Section 6 as evidence that the Legislature expressly understood "that the EMS Act reduces competition among providers of emergency medical services and might generate antitrust litigation." Id. at 757-58 & nn.1-2. It subsequently explained that Section 6 is an example of "statutes enacted after allegedly anticompetitive conduct [that] expressed pre-existing state policies to displace competition." Cal. Aviation, Inc. v. Santa Monica, 806 F.2d 905, 909 n.5 (9th Cir. 1986) (citing Mercy-Peninsula, 791 F.2d at 757 n.1, 758 n.2).

Nor is it possible to read Section 224 as somehow controlling federal courts' analysis of the immunity question. Parker is a *federal law doctrine* interpreting *federal antitrust statutes.* Omni, 499 U.S. at 374 (Parker's rationale is that "the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators"). Thus, federal courts applying Parker asks whether Congress intended for the Sherman Act to apply to allegedly anticompetitive conduct. Hallie, 471 U.S. at 38 ("[Parker] refused to construe the Sherman Act as applying to the anticompetitive conduct of a State acting through its legislature"). Resolving this question turns on "the objective standards set forth in Parker and authorities which interpret it." Traweek v. San Francisco, 920 F.2d 589, 592 (9th Cir. 1990). Because those objective standards require courts to ask "whether state law

authorizes the challenged action," every "question of Parker immunity necessarily involves construction or application of some state law." Nevertheless, the "resolution of this question is important only insofar as it determines the federal question of immunity." Kern-Tulare Water District v. City of Bakersfield, 828 F.2d 514, 517 (9th Cir. 1987). An argument that the Legislature intended that Parker immunity would only be available to counties through Section 224 (and only if EMSA approved counties' creation of EOAs) is inconsistent with Parker itself. Id., 317 U.S at 351 ("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"); see also FTC v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992) ("a State may not confer antitrust immunity . . . by fiat").

D. Counties Who Use Competitive Bidding To Select Ambulance Service And EMS Providers Do Not Lose Immunity If They Fail To Comply With Section 224.

1. Parker Immunity Does Not Require Compliance With State Law.

As noted, Parker and its progeny interpret the Sherman Act and apply federal law to determine the immunity question. The legality of counties' actions under state law is irrelevant: "The relevant question is whether the *state* intended the authorizing statute to have anticompetitive effects. Thus, what the [county] does to implement that statute, rightly or wrongly, reveals nothing about the state's intent." Traweek, 920 F.2d at 593.

To "prevent Parker from undermining the very interests of federalism it is designed to protect," federal courts apply the more expansive concept of authorization found in Parker and its progeny, rather than "determine the legality of the municipality's action under state law." Omni, 499 U.S. at 372. "If an allegation of agency error or other unauthorized action is enough

to deny antitrust immunity for public agencies, virtually every zoning decision, franchise grant, utility tariff ruling, or other routine governmental act will be subject to antitrust scrutiny." P. Areeda & D. Turner, Antitrust Law ¶ 212.3(b) (Supp. 1982).

Thus, any question about the lawfulness of counties' conduct under state law is a matter for state courts, and a would-be plaintiff "should not forego customary state corrective processes," if any, "in favor of federal antitrust remedies." Kern-Tulare, 828 F.2d at 522.

2. A County Cannot Conspire With Its Departments Or Its Vendors To Violate The Antitrust Laws.

It is well-established that "a violation of the letter or spirit of a competitive bid statute, unaccompanied by anticompetitive factors bearing upon the [procuring agency's] exercise of choice of product, does not create an antitrust problem." Sec. Fire Door Co. v. Cnty. of Los Angeles, 484 F.2d 1028, 1031 (9th Cir. 1973). "A purchaser is free to choose the product he desires without rendering himself an antitrust conspirator." Id. at 1030. In this context, the antitrust laws seek "only to assure that [procuring agency's] choice of product has been made freely under circumstances where the play of competition has been available rather than in response to anticompetitive factors such as coercion on the part of the supplier or agreements between suppliers not to compete with each other." Id. "If anticompetitive factors have foreclosed a free choice by the purchaser, [it] is not thereby converted into a conspirator. [It] is, instead, a victim." Id. at 1030-31.

Thus, absent coercive conduct that forecloses a county's purchasing decision, vendors do not violate the antitrust laws when they convince a county to prefer or require the use of their goods or services in the county's bid specifications. Id. (county, county architects, and

dumbwaiter manufacturer did not conspire to exclude competition on county hospital construction project where architects drafted bid specifications to require use of manufacturer's dumbwaiter); Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 522 (5th Cir. 1999) ("Courts that have considered whether attempts to convince independent government purchasers to adopt specifications in their favor prior to bidding are a violation of the antitrust laws have uniformly found such behavior not to be a violation.").

Furthermore, a county may not conspire with its own departments or dependent districts to violate antitrust laws. Section 1 of the Sherman Act[6] "applies only to concerted action that restrains trade." Am. Needle, Inc. v. NFL, 560 U.S. 183, 190 (2010). It does not apply to unilateral conduct or where alleged conspirators essentially function as a single economic decision maker. Id. at 195.

"The key is whether the alleged 'contract, combination . . . , or conspiracy' is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a 'contract, combination . . . , or conspiracy' amongst 'separate economic actors pursuing separate economic interests,' . . . such that the agreement 'deprives the marketplace of independent centers of decisionmaking,' . . . and therefore of 'diversity of entrepreneurial interests,' . . . and thus of actual or potential competition." Id. at 195.

In the private sector, a corporation and its divisions and wholly-owned subsidiaries are viewed as "a single enterprise for purposes of § 1 of the Sherman Act." Copperweld Corp. v.

[6] Section 1 of the Sherman Act prohibits "every contract, combination . . . , or conspiracy in restraint of trade." 15 U.S.C. § 1. Federal courts use courts use "contract," "combination," "conspiracy," and "agreement" interchangeably in this context. VI Areeda & Hovencamp, Antitrust Law ¶ 1403 (3d ed. 2010).

Indep. Tube Corp., 467 U.S. 752, 771 (1984). The corporation, its divisions, and its wholly-owned subsidiaries "have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one." Id. If they "do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests." Id. As such, a corporation, its divisions, and its wholly-owned subsidiaries are "incapable of conspiring with each other for purposes of § 1 of the Sherman Act." Id. at 777; Murray v. Toyota Motor Distribs., 664 F.2d 1377, 1379 (9th Cir. 1982) ("affiliated corporations cannot conspire with each other where they function as a single economic unit").

The same principles apply to other arrangements where entities effectively comprise a "common enterprise." See, e.g., Williams v. I.B. Fischer Nev., 999 F.2d 445, 447 (9th Cir. 1993) (fast-food franchiser and franchisee are insufficiently independent of each other to conspire); Mt. Pleasant v. Associated Elec. Coop., Inc., 838 F.2d 268, 276-78 (8th Cir. 1988) (rural electrical cooperative consisting of three tiers of cooperatives, with cooperatives at each tier jointly owning cooperatives at higher tier, constituted single entity for Sherman Act purposes).

By analogy, a county, its departments, agencies, and dependent districts[7] are a common enterprise under Copperweld because the different entities are not separate economic actors pursuing separate economic interests and the county board of supervisors essentially functions as a single economic decision maker.

[7] Cal. Gov't Code § 56032.5 ("'Dependent special district' . . . includes any special district that has a legislative body that consists, in whole or part, of ex officio members who are officers of a county. . . .").

3. Joint-Bidding By Subcontracting Providers Is Not Anticompetitive.

In recent years, California local governments have pioneered a new public-private partnership model for EMS delivery, known as the "Alliance Model," which has proven to be very successful, cost-effective, and deliver higher quality EMS and ambulance service. In this model, the public entity teams with a private EMS provider to submit a joint proposal in response to a county request for proposal ("RFP"). Such arrangements are legal and not anticompetitive.

The general rule is that a collusive bidding arrangement will void any resulting public work contract. Morgan v. Gove, 206 Cal. 627, 633-34 (1929). Well-established precedent provides, however, that the general rule does not apply to "situations where two contractors openly, in good faith, and with knowledge of the authority awarding the contract, combine to accomplish an object which neither could effect acting in his individual capacity." Id., at 634; Hyer v. Richmond Traction Co., 168 U.S. 471, 477 (1897).

Moreover, when "persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . such joint ventures [are] regarded as a single firm competing with other sellers in the market." Texaco Inc. v. Dagher, 547 U.S. 1, 6 (2006). To the extent that they team up to provide a service requested by the government that neither teammate could provide on its own, the teammates in an Alliance Model "function as essentially a single economic unit" for purposes of the RFP and are therefore incapable of conspiring in violation of the Sherman Act. See Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1053-54 (9th Cir. 1983) (remanding with instruction to consider whether teaming

arrangement by government contractors who functioned as single economic unit for production of fighter jet constituted single economic unit incapable of conspiracy).