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ANTITRUST AND THE STATE ACTION DOCTRINE: AN ANALYSIS OF RECENT SUPREME COURT AND ELEVENTH CIRCUIT CASES

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I. INTRODUCTION

Federal antitrust laws protect free market competition by prohibiting illegal restraints of trade.[1] State regulation of economic activity, however, often imposes or permits anticompetitive restraints of trade for some articulated purpose in furtherance of public health, safety, or welfare. Due to these two competing goals, the United States Supreme Court has recognized immunity from federal antitrust liability for the anticompetitive conduct of private parties or governmental entities that act in furtherance of a state's articulated policy goals.[2] The Court has fashioned a test for determining antitrust immunity

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1. Sherman Act, 15 U.S.C. §§ 1-7 (1989); Clayton and Robinson-Patman Act, 15 U.S.C. §§ 12-27 (1989); Federal Trade Commission Act, 15 *U.S.C.A.* §§ 41-45 (1989).

2. *See infra* notes 4 & 9.

called the state action doctrine.[3] This doctrine shields the state-authorized and state-supervised actions of private parties and the state-authorized actions of governmental entities.

This article examines current developments regarding the state action immunity doctrine and its application to the anticompetitive conduct of private parties and governmental entities. The article further discusses recent precedents from both the United States Supreme Court and the Eleventh Circuit Court of Appeals. Over the past fifteen years, the Supreme Court has issued approximately one opinion per term related to the development of the state action doctrine.[4] Because the doctrine is based on shifting concepts of federalism and states' rights, the Court's efforts in recent years to refine the doctrine's parameters have not resulted in clearly-defined tests or immutable principles. Instead, the Court has shaped the doctrine to accommodate economic competition in a national economy versus parochial state economic regulations.

In recent years, the Eleventh Circuit Court of Appeals has become a forerunner in the state action area because it has addressed a number of novel state action immunity issues. The court's review of these state action cases *en banc* indicates both the importance of the doctrine and the struggle among the court's members to accommodate federal and state interests.

II. STATE ACTION DOCTRINE: BACKGROUND

Antitrust scholars agree that a primary purpose of the federal antitrust laws is to safeguard economic competition.[5] In contrast to

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3. The antitrust state action doctrine is distinct from, and should not be confused with, the state action concept used in constitutional analysis. The former is based on principles of federalism and accordingly reflects that state involvement and control of otherwise illegal anticompetitive conduct is accorded immunity from the antitrust laws. The latter concept, which is not limited to only state interests, is more appropriately termed the "governmental action" doctrine used to determine under what circumstances federal constitutional principles apply. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1688 n.2 (2d ed. 1988).

4. City of Columbia v. Omni Outdoor Advertising, Inc., No. 89-1671, 111 S. Ct. 1344 (1991); Patrick v. Burget, 486 U.S. 94 (1988); Liquor Corp. v. Duffy, 479 U.S. 335 (1987); FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986); Fisher v. City of Berkeley, 475 U.S. 260 (1986); Southern Motor Carriers Rate Conference, Inc. v. U.S., 471 U.S. 48 (1985); Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985); Hoover v. Ronwin, 466 U.S. 558 (1984); Rice v. Norman Williams Co., 458 U.S. 654 (1982); Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978); Bates v. State Bar of Arizona, 433 U.S. 530 (1977); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

5. E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND

this federal goal, many state regulations and state-authorized private agreements are designed to restrain or eliminate competition in furtherance of state interests. For example, state medical boards license health care practitioners to protect the public from unqualified medical professionals. Cities impose rent controls, ostensibly to ensure affordable housing. State public utility commissions regulate the electric power industry to protect against monopolistic rates. Each of these regulatory systems restrains free economic competition for some articulated state interest.

Ordinarily, the supremacy clause of the United States Constitution operates to preempt state law provisions that are inconsistent with federal law.[6] The United States Supreme Court, however, has carved out an exception to this principle for state laws that regulate various types of economic activity in furtherance of public safety, health or welfare.[7] The exception, termed the state action doctrine, is the Supreme Court's attempt to accommodate the federal interest in promoting nationwide competition and the parochial interests of the states in restricting competition in their traditional areas of regulation.[8]

A. *The State Action Immunity Test: Its Requirements*

The United States Supreme Court has established a two-part test for determining antitrust immunity which distinguishes between the anticompetitive conduct of private parties and governmental entities. The Court's state action immunity doctrine[9] provides that anticompetitive conduct of private parties is immune from antitrust liability if the state: 1) has clearly articulated and affirmatively expressed a state policy to displace competition with regulation; and 2) actively super-

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ITS ECONOMIC IMPLICATIONS 1-2 (1988); ROGER D. BLAIR & DAVID L. KASERMAN, ANTITRUST ECONOMICS 58-58 (1985); ROBERT H. BORK, THE ANTITRUST PARADOX 50-77 (1978).

6. U.S. CONST. amend. VI, cl. 2. *See* Swift & Co. v. Wickham, 382 U.S. 111 (1965)(noting that if a state measure conflicts with a federal requirement, the state provision must give way); United States v. Brown, 552 F.2d 817 (8th Cir.), *cert. denied*, 431 U.S. 949 (1977)(stating that federal legislation necessarily overrides conflicting state laws).

7. Parker v. Brown, 317 U.S. 341 (1943). *See infra* note 9 and accompanying text.

8. *See* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 668, 669 (1991); Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 499-501 (1987).

9. The doctrine is also termed the *Parker* doctrine based on Parker v. Brown, 317 U.S. 341 (1943), the seminal case in which the Supreme Court upheld the actions of a state commission that set prices and restricted the output of raisin growers.

vises the private anticompetitive conduct.[10] This legal test, known as the *Midcal* test,[11] immunizes private anticompetitive conduct if the conduct is carried out pursuant to a "clearly articulated" state policy and is "actively supervised" by the state. When a state or one of its political subdivisions engages in anticompetitive conduct, only the first part of the state action test is considered (i.e., whether a clearly articulated and affirmatively expressed state policy exists).[12] In the governmental realm, the active state supervision part of the test is not considered because private anticompetitive conduct is generally not involved.[13]

The Supreme Court's recent precedents have made the "clearly articulated state policy" part of the test easier to satisfy and the "active state supervision" part more difficult.[14] This trend reflects the Supreme Court's increased willingness to defer to a state's political process as long as the state does not delegate the power to restrain competition. The "clear articulation" prong of the state action test is met if a state explicitly authorizes private parties or a governmental entity to engage in the anticompetitive conduct.[15] A state policy that neither permits nor contemplates the particular anticompetitive actions is not sufficient.[16] State policies which are neutral to anticompetitive

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10. Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985). The Court has displaced the "active supervision" prong of the test with an "active control" requirement. *See infra* note 42 and accompanying text.

11. *See* California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). The state action doctrine may operate to bar state antitrust claims as well. For example, Florida's antitrust laws provide that "[a]ny activity or conduct exempt under Florida statutory or common law or exempt from the provisions of the antitrust laws of the United States is exempt from the provisions of this chapter." FLA. STAT. § 542.20 (1991). Florida and federal cases discussing the state action doctrine's application under Florida's antitrust laws have applied the federal state action immunity test. *See, e.g.*, Sebring Utils. Comm'n v. Home Sav. Ass'n, 508 So. 2d 26 (Fla. 2d DCA 1987) (application of test to municipality).

12. Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985); Hoover v. Ronwin, 466 U.S. 558 (1984) (committee established by state supreme court to grade bar exams immune from antitrust liability); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (state supreme court's restraint on attorney advertising is immune from federal antitrust attack).

13. In some instances, governmental officials or agencies may be alleged to be in a conspiracy with private parties in restraint of trade. The Supreme Court, however, recently ruled that a "conspiracy" exception to the state action immunity doctrine is not available in such situations. *See infra* notes 30-34 and accompanying text.

14. *See infra* note 42 and accompanying text of *Southern Motor Carriers*.

15. *See, e.g.*, Todorov v. DCH Healthcare Auth., 921 F.2d 1438 (11th Cir. 1991).

16. Community Communications Co. v. City of Boulder, 455 U.S. 40, 55-56 (1982) (municipality exercising its general home rule powers not immune because no clearly articulated and affirmatively expressed state policy).

actions are also insufficient.[17] State compulsion of the challenged conduct, however, is not required. In *Southern Motor Carriers Rate Conference, Inc. v. United States*,[18] the Supreme Court considered whether express statutory authority compelling the anticompetitive conduct was necessary. The Court ruled that the absence of compelled conduct does not necessarily doom a claim of antitrust immunity.[19]

In *Southern Motor Carriers*, the Mississippi public service commission actively encouraged collective ratemaking among competing common carriers. This encouragement was in the form of a state statute that authorized the commission to establish "just and reasonable" rates for the intrastate transportation of commodities.[20] In reviewing the "clearly articulated" prong of the test, the Supreme Court held that the private ratemaking activities were state-authorized and therefore immune.[21] The Court stated:

> A private party acting pursuant to an anticompetitive regulatory program need not "point to a specific detailed legislative authorization" for its challenged conduct. As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied.[22]

This relaxed standard greatly defers to state regulatory interests, making it easier to establish antitrust immunity even though the challenged conduct is not compelled. The United States Supreme Court has yet to consider whether conduct that is ostensibly state-authorized but unnecessary to achieve a statute's expressed regulatory purpose meets the "clearly articulated" prong of the state action test.

The active state supervision requirement also requires that the state exercise ultimate control over the state-authorized anticompetitive conduct of private parties.[23] This requirement ensures that private

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17. *Id.* at 55.

18. 471 U.S. 48 (1985). The United States charged that the collective ratemaking activities of private rate bureaus composed of motor common carriers violated Section 1 of the Sherman Act. *Id.* at 50.

19. *Id.* at 58-59. The Court reversed the lower court's (en banc) majority. The case was carried over from the Fifth Circuit when the Eleventh Circuit was created. The case therefore is identified as a Fifth Circuit case. 672 F.2d 469 (5th Cir. Unit B 1982), *vacated*, 702 F.2d 532 (5th Cir. Unit B 1983) (en banc), *rev'd* 471 U.S. 48 (1985).

20. *Southern Motor Carriers*, 471 U.S. at 63.

21. *Id.* at 64.

22. *Id.* at 64.

23. *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988).

parties will act consistent with state policy rather than pursuant to their own economic interests. The United States Supreme Court's refusal to extend immunity to private actors under a number of regulatory structures due to the lack of active state supervision of the anticompetitive acts of private parties demonstrates that state action immunity is increasingly difficult to establish.[24]

For example, in *Patrick v. Burget*[25] the Court made the "active state supervision" prong of the state action test more difficult to meet. In holding that an Oregon medical peer review statute did not provide immunity, the Court clarified the meaning of the active state supervision requirement by stating that:

> The requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. To accomplish this purpose, *the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct. The mere presence of some state involvement or monitoring does not suffice.* The active supervision prong . . . requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.[26]

The emphasized language indicates that "active supervision" requires more than mere state involvement in or monitoring of the private parties' conduct. Instead, the state must "exercise ultimate control" over the anticompetitive conduct. This requirement makes the second

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24. *See id.* (insufficient state supervision of hospital peer-review process); *see also* Liquor Corp. v. Duffy, 479 U.S. 335 (1987) (no active state supervision of resale price maintenance system); FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) (anticompetitive collusion among dentists regarding provision of x-rays to insurers not immune because no active state supervision); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (insufficient state involvement in price-setting system). The Court is also considering another case involving the active state supervision part of the test in its 1991-92 term. *See infra* notes 77-86 and accompanying text.

25. 486 U.S. 94 (1988). For an overview of medical peer review immunity in light of *Patrick*, *see generally* F.M. Langley, *Does Medical Peer Review Immunity Exist After* Patrick v. Burget? *A Review of the Legal Fundamentals*, 2 U. FLA. J.L. & PUB. POL'Y 137 (1988-89).

26. *Patrick*, 486 U.S. at 100-01 (emphasis added).

part of the *Midcal* test more difficult to satisfy by ensuring that states have significant control over the anticompetitive actions of private parties before immunity is available. The more stringent requirements also protect the federal interest in assuring economic competition in markets where the state's interest could be subverted through private parties' self-motivated conduct.

B. *Omni Outdoor Advertising*

The United States Supreme Court's 1991 opinion in *City of Columbia v. Omni Outdoor Advertising, Inc.*[27] further eases the requirements of the "clearly articulated" prong of the state action immunity test and signals more deference to the sometimes anticompetitive results of the political process. In *Omni Outdoor Advertising*, a Columbia, South Carolina billboard advertising company with substantially all of the local billboard advertising market had very close relations with the city's political leaders and officials. The company successfully lobbied these city officials to enact zoning ordinances restricting further billboard construction. Because these ordinances severely hindered a rival billboard company's ability to enter the market and compete, the rival company sued both the city and the dominant billboard company claiming violations of the federal and state antitrust laws.

The plaintiffs claimed that the city officials and the dominant billboard company had engaged in an anticompetitive conspiracy that stripped them of whatever state action immunity they may have otherwise had. A jury returned a verdict for the plaintiff, but the trial court granted judgment notwithstanding the verdict to the defendants. The appellate court, in a split decision, reversed and reinstated the jury's verdict.[28]

On appeal, the Supreme Court considered for the first time whether a "conspiracy" exception to the state action immunity doctrines existed. The Court's majority rejected the exception based on the impracticability of defining and identifying what constitutes an illegal "conspiracy" between government officials and their constituents.[29] The court explained that if a "conspiracy" means nothing more than an agreement to impose the regulation in question, the "exception

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27. No. 89-1671, 1991, 111 S. Ct. 1344 (1991). Justice Scalia wrote the majority in which Chief Justice Rehnquist and Justices Blackmun, O'Connor, Kennedy and Souter concurred. Justice Stevens wrote a dissenting opinion joined by Justices White and Marshall. *Id.*

28. *Id.* at 1348.

29. *Id.* at 1355-56.

would virtually swallow up the *Parker* rule" because "[a]ll anticompetitive regulation would be vulnerable to a 'conspiracy' charge."[30]

The *Omni Outdoor Advertising* Court similarly rejected the rival company's argument that there should be an exception to immunity in instances of governmental "corruption." The Court based this holding on the inherent difficulties in determining what would constitute "corruption" for purposes of the exception.[31] First, if "corruption" was defined as "not acting in the public interest," it would be impractical to determine whether an official acted in the "public interest" or in his or her own "private interest." Second, if "corruption" were defined as some unlawful activity under federal or state law (such as bribery), the purposes of the antitrust laws would not be furthered by prohibitions on such activities. Finally, if "the invalidating 'conspiracy' is limited to some element of unlawfulness (beyond mere anticompetitive motivation), the invalidation would have nothing to do with the policies of the antitrust laws."[32] In summary, the Court held that the policies of the antitrust laws do not impose a code of ethics on public officials or private parties.[33]

An important issue in *Omni Outdoor Advertising*, though somewhat relegated to a battle in the opinion's footnotes, was whether the "clearly articulated" part of the state action test had been met.[34] In finding that this prong was satisfied, the majority opinion held that broad delegations of powers to municipalities to regulate for the general welfare bestow antitrust immunity. The court held this immunity valid even though the delegated powers do not specifically authorize economic regulation of a specific industry. The statute at issue in *Omni Outdoor Advertising* granted municipalities the authority to regulate buildings and other structures "[f]or the purpose of promoting health, safety, morals or the general welfare of the community."[35] The statute, however, did not specifically authorize the regulation of billboards.

Nevertheless, the majority considered the statute sufficiently broad to protect "existing billboards against some competition from newcomers."[36] The Court stated "[i]t is enough . . . if suppression of competition

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30. *Id.* at 1351. The *Parker* rule is synonymous with the antitrust state action immunity doctrine. *See supra* note 9.

31. *Omni Outdoor Advertising*, 111 S. Ct. at 1352.

32. *Id.* at 1356.

33. *Id.* at 1353.

34. *Id.* at 1350 n.4.

35. *Id.* at 1349 n.3.

36. *Id.* at 1350.

is the 'foreseeable result' of what the statute authorizes."[37] Because a "municipality need not 'be able to point to a specific, detailed legislative authorization' in order to assert a successful [state action] defense to an antitrust suit," the lack of specific authority in the statute did not lessen or eliminate the city's immunity.[38] The Court in *Omni Outdoor Advertising*, therefore, held that the scope of the "clearly articulated" prong of the state action test is flexible and expansive enough to include most delegations of regulatory authority, whether exercised by municipalities or private parties. The Court's holding effectively replaces the "clearly articulated" prong of the state action test with a more deferential "clearly delegated" standard.[39]

III. Recent Eleventh Circuit Case Law

The Supreme Court's precedents on antitrust immunity issues leave unanswered many important questions. For instance, is judicial supervision of challenged private conduct sufficient? Can a state immunize private anticompetitive agreements by ratifying them legislatively? Is active state supervision necessary in such instances? In recent years, the Eleventh Circuit has addressed a number of these interesting state action immunity issues. These decisions involved anticompetitive conduct by both private parties and governmental entities.

A. *Private Anticompetitive Conduct*

While the Supreme Court eased the requirements of the first part of the *Midcal* test in *Omni*, the Eleventh Circuit's decision in *Bolt v. Halifax Hospital Medical Center*[40] demonstrates that there is no immunity for anticompetitive conduct that the state legislature did not foresee. The court analyzed whether Florida's medical peer review statute satisfied the first part of the state action test. A physician alleged that a hospital district, the hospital and its staff had conspired to boycott his services and to deny him staff privileges. The hospital district claimed antitrust immunity and asserted that Florida's peer review statute satisfied the first part of the *Midcal* test.[41]

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37. *Id.* (citations omitted) (citing *Town of Hallie*, 471 U.S. at 42).

38. *Id.* at 1350 n.4 (quoting *Town of Hallie*, 471 U.S. at 39, and *City of Lafayette*, 435 U.S. at 415).

39. *See* Garland, *supra* note 8, at 501 (state action test is "an effort to control delegation" and seeks to "bar delegation to private parties of the power to restrain competition").

40. 891 F.2d 810 (11th Cir. 1990), *on remand from*, 874 F.2d 755 (1989) (en banc), *reinstating in part and vacating in part*, 851 F.2d 1273 (1988).

41. *Id.* at 823. The court analyzed only the "clearly expressed state policy" part because

After considerable appellate proceedings,[42] the Eleventh Circuit determined that in authorizing medical peer review the Florida legislature clearly articulated a policy to displace competition. The legislature could foresee that hospital districts would rely upon recommendations made by a physician's peers in exercising their "virtually unreviewable power" to hire (or not hire) physicians.[43] Nonetheless, the court stated, "[W]hile the Florida legislature must have foreseen that [the medical district] would engage in anticompetitive conduct based on recommendations of the physician's peers, nothing indicates that the legislature should have foreseen the type of anticompetitive conduct alleged in this case [i.e., a conspiracy to boycott]."[44]

The court in *Bolt* held that the hospital district was without immunity because "its conduct constitutes anticompetitive conduct that is not a foreseeable result of [the hospital district's] enabling legislation" and is inconsistent with the district's requirement to act in the "public good."[45] The excluded physician therefore properly alleged an unauthorized and unforeseeable conspiracy of which the hospital district was purportedly a member.[46]

Two other recent opinions from the Eleventh Circuit illustrate the difficulty in satisfying the active state supervision prong of the *Midcal* test. Consistent with recent Supreme Court precedents,[47] these opinions indicate that active state control of challenged conduct is required before antitrust immunity will attach. In *Shahawy v. Harrison*,[48] the district court held that Florida's peer review system immunized a hospital board from federal antitrust liability. The Eleventh Circuit reversed, however, because it held Florida's peer review system "fails to actively supervise the hospital board's decisions."[49] Although Florida

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it found the hospital district sufficiently similar to a municipality thus requiring only the single prong test of *Town of Hallie*. *Id.* at 824.

42. The original panel opinion held that the "active supervision" part of the test had been met through judicial oversight of Florida's regulatory system. 851 F.2d 1273 (1988). The court then voted to hear the case *en banc*. At oral argument, however, the appellants withdrew their state action immunity claims. 874 F.2d 755, 756 (1989) (en banc). Thus, the court did not resolve the issue of whether judicial oversight can constitute "active state supervision." The United States Supreme Court has not yet resolved this issue.

43. *Bolt*, 891 F.2d at 825.

44. *Id.*

45. *Id.*

46. *Id.* Thus if the physician can prove his allegations. The conduct of the hospital district will not be exempt from liability for antitrust violations. *Id.*

47. *See Patrick* and other cases cited in note 24, *supra*.

48. 875 F.2d 1529 (11th Cir. 1989).

49. *Id.* at 1535. The court stated that because the active state supervision prong was not met, it did not need to address the clear articulation prong of the test. It appears, however,

enacted a "comprehensive scheme regulating health care" and delineated the scope of state involvement, the critical element of state supervision was lacking. In particular, the court noted that "no state official reviews specific peer review board decisions regarding clinical privileges to determine whether such decisions comport with state policy."[50] The hospital board, therefore, had no antitrust immunity.

In a highly controversial case, *Consolidated Gas Co. v. City Gas Co.*,[51] the Eleventh Circuit affirmed a district court's finding that territorial agreements entered by natural gas utility companies and approved by the Florida Public Service Commission (FPSC) were not immune from antitrust liability. The *en banc* court reinstated the panel opinion and held that Florida law did not provide a clearly articulated state policy of permitting such agreements nor was there active state supervision.[52] Although the Supreme Court accepted certiorari, the parties settled their dispute during the pendency of the appeal.[53]

Although the parties' settlement on appeal vacates the lower court opinions, a review of the Eleventh Circuit's analysis is nevertheless informative. The reinstated panel opinion of *Consolidated Gas* recited the relaxed standard articulated in *Southern Motor Carriers* that a "statute need not explicitly state what conduct is and is not permissible in order for that conduct to be undertaken pursuant to a clearly articulated state policy."[54] Nonetheless, the court rejected the argument that the "clearly articulated" part of the *Midcal* test was satisfied

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that the court's analysis was improper because the defendant hospital board in *Shahawy* was a *public* rather than private entity. The court therefore should not have addressed the second prong. *Town of Hallie*. Instead, it should have determined only whether the first prong was met. Nevertheless, its analysis of the second prong is instructive.

50. *Id.*

51. 880 F.2d 297 (11th Cir.), *reh'g granted and opinion vacated*, 889 F.2d 264 (1989), *on reh'g*, 912 F.2d 1262 (11th Cir. 1990) (en banc) (per curiam opinion reinstating panel opinion), *cert. granted and judgment vacated as moot*, No. 89-1671, 1991 U.S., 111 S. Ct. 1300 (1991), *on remand*, 931 F.2d 710 (11th Cir. 1991)(remanded to trial court with instructions to vacate and dismiss action with prejudice). Ten judges, including two judges who were on the panel opinion, participated in the *en banc* proceedings. A majority of seven judges agreed to affirm the judgment of the district court. Two of these judges, however, were unwilling to affirm the holding of the district court and panel opinion finding no antitrust immunity. Thus, five of the ten *en banc* judges dissented on the ground that the state action immunity doctrine should apply to the facts at issue. Because the *en banc* court was equally divided on the state action immunity issue, the panel opinion's holding prevailed. The Eleventh Circuit's opinion and the trial court's order, however, were vacated as moot following the parties' settlement of the suit. 931 F.2d at 711.

52. *Consolidated Gas*, 912 F.2d at 1265.

53. *Consolidated Gas*, 111 S.Ct. 1300 (1991).

54. *Consolidated Gas*, 880 F. 2d at 302.

even though the Florida Supreme Court had previously concluded that the FPSC had authority to approve these agreements.[55] The Eleventh Circuit stated that the determination of whether the "clearly articulated" prong of the test is satisfied is "ultimately a question of *federal* antitrust law."[56] The court therefore undertook its own inquiry and found persuasive the fact that other utilities (such as electric utilities) had express authority to enter territorial agreements while natural gas utilities did not.[57] It therefore concluded that "no *clearly* articulated state policy authorized this agreement."[58]

The court also held that active state supervision did not exist because: (a) the FPSC had no express authority to develop standards for creating or reviewing such agreements on a regular basis,[59] and (b) *judicial* supervision over the territorial agreements was insufficient to meet the "active supervision" prong of the test.[60] The court stated "the Supreme Court has consistently contemplated a more vigorous, probing supervision than mere acquiescence. This is at bottom an agreement entered by private parties, in pursuit of their own economic interests, that is neither authorized by the State, nor closely monitored by it."[61]

In another electric utility case, *Municipal Utilities Board of Albertville v. Alabama Power Co.*,[62] thirty municipal and public corporations that own and operate electric distribution facilities sued twenty-two rural electric cooperatives, a rural electric association, and a private electric power company. The plaintiffs alleged that these defendants illegally agreed to horizontally divide electric service territories.

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55. Twenty-seven years ago, the Florida Supreme Court issued its opinion in City Gas Co. v. Peoples Gas System, 182 So. 2d 429 (Fla. 1965).

56. *Consolidated Gas*, 880 F.2d at 303.

57. *Id.* at 302. The Florida Statutes expressly grant electric utilities such authority but is silent as to natural gas utilities. The court found this "compelling evidence that the Legislature in fact did not intend for natural gas utilities to also enjoy exclusive territorial agreements." *Id.* In addition, the FPSC had itself expressed doubt regarding its authority in a 1985 tariff filing. In this action, however, the FPSC urged the court to find that antitrust immunity existed. *Id.* at 301-02.

58. *Id.* at 303.

59. *Id.* The court also noted that this agreement was the only one of its kind in Florida.

60. *Id.* (emphasis added). The Eleventh Circuit had addressed this issue before. *See* Bolt v. Halifax Hosp. Medical Center, 874 F.2d 755, 756 (11th Cir. 1989) (en banc). Although the panel opinion in *Bolt* held that judicial supervision can satisfy the active supervision test, the plaintiff abandoned its argument on this point at the en banc argument. *Id.*

61. *Consolidated Gas*, 880 F.2d at 303.

62. 934 F.2d 1493 (11th Cir. 1991).

The plaintiffs also contended that the defendants conspired with the Alabama legislature to ratify and thereby immunize existing, though otherwise illegal, territorial agreements through legislative action. The general provisions of the Alabama acts in question assigned service territories ("legislatively-assigned" territories) to private and municipal electric suppliers for the stated purpose of limiting wasteful duplication of transmission facilities.[63] In addition, "special rules" in the acts incorporated private territorial agreements previously reached by electric suppliers.[64] The trial court dismissed the antitrust claims based on the state action and *Noerr-Pennington* doctrines.[65]

The Eleventh Circuit, in *Municipal Utilities*, addressed whether the legislatively-assigned and the privately-assigned service territories were shielded from antitrust scrutiny under the state action immunity doctrine. The court concluded that the legislatively-assigned territories met the two-part state action test. First, the Alabama legislature had clearly articulated a policy to displace competition in the retail electric service market, and second, active state supervision was provided through strict state control over the assignment of such territories.[66] Moreover, the court determined that the legislature controlled all of the decisions regarding the division of these service territories, and that private parties exercised no regulatory authority over the challenged restraints.[67] The court could not determine, however, whether there was active state supervision of the privately-assigned agreements. Consequently, the court remanded the case for consideration of whether the private agreements qualified for state action immunity under the active supervision prong.[68]

The court's decision, therefore, further demonstrates the stringent requirement of active state control of a challenged anticompetitive restraint under the second part of the *Midcal* test. In light of *Omni Outdoor Advertising*, the court held that the plaintiffs' arguments in favor of a "public co-conspirator exception" to the state action doctrine were foreclosed.[69] The court also rejected the plaintiffs' argument that

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63. *Id.* at 1496.

64. *Id.* at 1497.

65. *Id.* at 1498. The *Noerr-Pennington* doctrine, which is based on the petition clause of the First Amendment, immunizes the anticompetitive actions of private parties undertaken in a genuine attempt to influence government. *See* Scott Makar, *Anticompetitive Actions in the Administrative Forum: Antitrust and State Law Remedies*, 65 FLA. B.J. 33, 34-36 (1992).

66. *Municipal Utilites*, 934 F.2d at 1503-04.

67. *Id.*

68. *Id.* at 1504-05.

69. *Id.* The court in its previous opinion had permitted the plaintiffs to amend their complaint to allege facts supporting such an exception. *Municipal Utils. Bd.*, 925 F.2d at 1395.

the Alabama legislature merely "ratified" private anticompetitive agreements among the defendants by enacting the general provisions contained in the service territory acts.

The *Municipal Utilities* court stated that a fundamental principle of antitrust law is that a state cannot immunize private anticompetitive activities by merely passing a law declaring them legal or authorizing them.[70] The court held, however, that a "ratification" exception is unavailable when the requirements of the *Midcal* test are met. This is because, by definition, the state actively supervises the state-authorized private anticompetitive conduct.[71] Thus, the court rejected the plaintiffs' "ratification" argument as to the general provisions of the Acts. The court remanded consideration of the private agreements to the district court.

B. *Anticompetitive Governmental Conduct*

In the Eleventh Circuit's recent decision in *Todorov v. DCH Healthcare Authority*,[72] a hospital organized as a health care authority under Alabama law excluded a neurologist from the medical staff. The neurologist sued the hospital for federal antitrust violations. The hospital claimed antitrust immunity based on the Alabama Health Care Authority Act. The Act authorized hospitals to establish themselves as health care authorities and empowered such authorities to "select and appoint medical and dental staff members and others licensed to practice the healing arts."[73] Based upon its analysis of the Act, the Eleventh Circuit concluded that the hospital had antitrust immunity.[74]

The *Todorov* court first held that the Act clearly authorized the challenged conduct (i.e., regulation of staff privileges). Second, the court found that the Act made clear that the state's policy was to displace competition in the health care field. Finally, the court noted that the Act made it explicit that such conduct, even if deemed to be anticompetitive and violative of the state or federal antitrust laws, was authorized pursuant to state authority. Based upon the state's clear delegation of power to health care authorities and the state's clear statement of its public policy in displacing competition, the *Todorov* court held that "this case involves a statute that *expressly*

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70. *Municipal Utils.*, 934 F.2d at 1504 (citing *Midcal*, 445 U.S. at 106, and *Omni Outdoor Advertising*, 111 S. Ct. at 1353).

71. *Id.* at 1505.

72. 921 F.2d 1438 (11th Cir. 1991).

73. *Id.* at 1460.

74. *Id.*

authorizes anticompetitive conduct."[75] The court, therefore, held that antitrust immunity was mandatory because the hospital, as a health care planning authority, was a "political subdivision" of the state.[76]

IV. TICOR TITLE INSURANCE AND THE FUTURE OF STATE ACTION

The United States Supreme Court is currently reviewing a state action immunity case arising from a Federal Trade Commission (FTC) challenge to the conduct of six national title insurance companies.[77] The case, *FTC v. Ticor Title Insurance Co.*,[78] provides the Court with the opportunity to further refine the active state supervision part of the state action test. The case also may provide additional insight into the current Supreme Court's perspective on how much deference should be given to state political and regulatory interests.

In 1985, the *Ticor Title Insurance* litigation began when the FTC issued an administrative complaint charging six of the largest national title insurance companies with conduct constituting unfair methods of competition. The challenged conduct involved the companies' practice of collectively agreeing to set the rates they charged for their title search and examination services.[79] An administrative law judge held that the companies had committed violations in two states, Connecticut and Wisconsin, because these states provided no supervision of the collective rate-setting and therefore did not meet the active supervision requirement.[80] The administrative law judge ruled, however, that the insurance companies established the state action immunity defense in five other states, Arizona, Idaho, Montana, New Jersey, and Pennsylvania, because these states authorized and actively supervised the companies' rate-setting activities.[81]

The FTC then conducted an independent review of the matter and rejected the insurance companies' state action defense for six of the states.[82] The FTC ruled that in New Jersey and Pennsylvania the state statutes did not articulate a policy to displace competition with

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75. *Id.* at 1462.

76. *Id.*

77. *See Supreme Court Hears Argument on Extent of Immunity for Title Insurer Ratemaking*, 62 Antitrust & Trade Reg. Rep. (BNA) No. 1548, at 33 (January 16, 1992).

78. 922 F.2d 1122 (3d Cir. 1991), *cert. granted* 60 U.S.L.W. 3217 (Oct. 8, 1991)(No. 91-72).

79. *Id.* at 1125.

80. *Id.* at 1126.

81. *Id.*

82. *Id.* at 1126-27.

regulation.[83] In Arizona, Connecticut, Montana, and Wisconsin, the FTC held that the active state supervision requirement was not met.[84] The FTC therefore ordered the title insurance companies to cease and desist from using rating bureaus in those six states for the purpose of setting rates.[85]

The Third Circuit later vacated the FTC's cease and desist order with respect to New Jersey and Pennsylvania based on its determination that these states clearly articulated a state policy of displacing competition in title insurance rate-setting activities.[86] The court further held that the regulatory systems in Arizona, Connecticut, Montana, and Wisconsin met the active state supervision part of the state action immunity test.[87] The court based its holding on a four factor test established by the First Circuit in a rate-setting case, *New England Motor Rate Bureau v. FTC*.[88] This test evaluates whether any of the following four factors (which are indicators of active state supervision) exist in the state's regulatory system: 1) whether the state establishes the rates; 2) whether the state reviews the reasonableness of the rates; 3) whether the state monitors market conditions; and 4) whether the state has engaged in any "pointed reexamination" of its program.[89]

The court in *Ticor Title Insurance* applied the test, finding that the absence of two of the four factors was not fatal to the establishment of the active state supervision requirement.[90] The court found active state supervision in Arizona, Connecticut, Montana, and Wisconsin based solely on evidence of the first two factors (i.e., whether the state establishes the rates and reviews their reasonableness). In the court's view, the lack of the latter two factors (i.e., no state system that monitors market conditions and no "pointed reexamination" of the state's regulatory program) was insufficient to override the importance of the first two factors.[91]

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83. *Id.* at 1126.

84. *Id.*

85. *Id.* at 1127. One of the six original respondent-companies had subsequently settled the action in a consent agreement and was not affected by the FTC's final order. *Id.* at 1125 n.2.

86. *Id.* at 1129-35. The FTC had stipulated that New Jersey and Pennsylvania met the active state supervision requirement. *Id.* at 1129.

87. *Id.* at 1135-40.

88. 908 F.2d 1064 (1st Cir. 1990).

89. 922 F.2d at 1135. The court derived the four factors from the Supreme Court's opinions in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) and *Liquor Corp. v. Duffy*, 479 U.S. 335 (1987).

90. *Ticor*, 922 F.2d at 1136.

91. *Id.* at 1137.

The Supreme Court's resolution of the active state supervision issue in *Ticor Title Insurance* will provide an indication of whether the Court places greater weight on state regulatory convenience or national economic competition. The relaxed standard that the lower appellate court applied permits states to provide passive or "negative" monitoring[92] of otherwise state-authorized conduct by private parties. A reduced level of state oversight and control of the private conduct permits the ostensibly regulated parties to engage in a greater degree of unauthorized, anticompetitive conduct. As a result, greater deviation from the national interest in economic competition could result. The Court must also consider whether a standard that is overly deferential towards state interests may, in addition to undermining the federal interest in competition, actually restrict states' regulatory options. For instance, a state may decide to forego new regulatory programs because of its concern that private parties may engage in a level of anticompetitive conduct beyond that the state can afford to control or supervise. This concern is particularly acute during periods when state budgets are severely constrained. States may also have apprehension that because private parties would only have to prove a low level of state supervision, antitrust immunity may extend to activities the state did not intend to immunize. For instance, a state may enact a regulatory regime, although not intending to immunize private conduct from antitrust scrutiny, that nonetheless meets the lower threshold standards for active state supervision. Private parties might successfully argue that they are entitled to state action immunity in these instances despite only a meager amount of state oversight.

Private parties, however, favor a reduced, deferential standard for the active state supervision requirement because it would lessen the ability of courts to substitute their judgement for that of state regulators. Their concern is that the uncertainty regarding the appropriate level of state supervision should be resolved in favor of antitrust immunity. Thus, a deferential standard would provide some safeguard against judicial second-guessing in situations where private parties act pursuant to a regulatory system and the state fails to provide (or diminishes) that level of its control or supervision necessary to establish immunity. In these situations, private parties will be less willing to participate in such programs if they can later be subject to antitrust

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92. The "negative" monitoring option refers to situations in which the state does not engage in any active review of the market place and does not undertake a "pointed reexamination" of its regulatory system on a systematic basis. *See Supreme Court Hears Argument on Extent of Immunity for Title Insurer Ratemaking*, *supra* note 77.

liability because a court determines that the supervision provided is inadequate. Thus the key question in *Ticor Title Insurance* is the degree of involvement, monitoring, and control that is necessary for a state regulatory system to safeguard the federal interest in competition without unduly imposing onerous regulatory requirements on the states.

V. CONCLUSION

Over the past years, the United States Supreme Court has continually refined the contours of the state action immunity doctrine. The *Ticor Title Insurance* case will provide an indication whether the 1991-92 Court will continue to defer to state regulatory interests or will revitalize the federal interest in national economic competition. Like the Supreme Court, the Eleventh Circuit has recently decided a number of important and novel state action issues. The *Bolt, Shahawy, Consolidated Gas,* and *Alabama Power Company* opinions indicate the Eleventh Circuit's reluctance to find antitrust immunity in the absence of explicit legislative authority for, and active state control of, the challenged private anticompetitive conduct. The Eleventh Circuit mandates a clear showing of state authorization of the challenged conduct and a substantial degree of active and continuous state supervision and control over the private actors in order to establish antitrust immunity. The court's decision in *Todorov* indicates the lesser burden of establishing antitrust immunity for governmental entities under the first part of the *Midcal* test. Consistent with the Supreme Court's recent decision in *Omni Outdoor Advertising,* the Eleventh Circuit has generally deferred to a state's regulatory interests and recognized antitrust immunity where a governmental entity acts within its delegated authority.

Author's Note: Near the end of its 1991-92 term, the United States Supreme Court issued its opinion in *FTC v. Ticor Title Insurance Co.*, 60 U.S.L.W. 4515 (U.S. June 12, 1992) (No. 91-72). Consistent with the trend in its prior ruling (as discussed in this article), the Court made the active state supervision prong of the *Midcal* test more difficult to establish. In reversing the Third Circuit, the Court stated:

> The purpose of the active state supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates and prices have been established as a product of deliberative state intervention, not simply by agree-

> ment among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.[93]

Based upon this statement of purpose, the Court held that title insurers in Wisconsin and Montana failed to establish active state supervision, and that the regulatory schemes in Connecticut and Arizona would have to be reconsidered on remand.[94]

The Court made clear that the "mere potential for state supervision is not an adequate substitute for a decision by the State."[95] In situations where private parties initially set prices, the "party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratre-setting scheme."[96] Because rates in Wisconsin and Montana were only checked for mathematical accuracy (or in some instances not checked at all), the requisite degree of state involvement was lacking.

Justice Kennedy's majority opinion was joined by five other Justices, including Justice Scalia who wrote a short concurrence. Although he agreed with the majority's legal conclusions, he believed that private parties will be less willing to participate in state programs because of the fear of antitrust liability. Private parties simply will not know until after they have participated in a state program whether the state's supervision will have been "active" enough to establish immunity.[97]

Chief Justice Rehnquist and Justice O'Connor wrote separate dissents that elaborated further on the unmanagability and ambiguity of the Court's active state supervision standard. Chief Justice Rehnquist believed it was unwise to place federal courts in the "position of determining the efficacy of a particular State's regulatory scheme."[98] Such an inquiry requires a court to make normative judgment about whether a state's supervision is vigorous enough to establish immunity.[99] Similarly, Justice O'Connor, in a dissent joined by Justice Thomas, decried

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93. *Id.* at 4518-19.
94. *Id.* at 4520.
95. *Id.* at 4519.
96. *Id.*
97. *Id.* at 4520.
98. *Id.* at 4522.
99. *Id.*

the reduction in states' regulatory flexibility "by creating an impossible situation for those subject to state regulation."[100] The majority's imposition of "after-the-fact" evaluation of a state's regulatory system "is extremely unfair to regulated parties."[101] Further, the majority's requirement that the state play a "substantial role" in determining the specifics of regulatory policy creates an ambiguous and counterproductive standard. Finally, the majority's standard will now require that state regulators "serve as witnesses in civil litigation and respond to allegations that they did not do their job."[102]

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100. *Id.*
101. *Id.*
102. *Id.*