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Trucking Deregulation and Florida's New Antitrust Act

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TRUCKING DEREGULATION AND THE FLORIDA ANTITRUST ACT OF 1980

INTRODUCTION

Regulation of transportation industries originated in Florida and on the federal level in 1887.[1] As the economy grew and developed, this early regulatory scheme evolved into a comprehensive system, controlling industry entry, designated market areas and service levels, and setting permissible rates.[2] Although carriers and shippers alike were initially enthusiastic about regulation,[3] its continued efficacy has recently been questioned.[4] While some find regulation necessary to prevent cutthroat competition and industry instability,[5] opponents claim that regulation has created an expensive and inefficient system of transporting people and goods by chilling competitive commercial activity.[6]

The motor carrier industry was ignored in the Transportation Act of 1920,[7] which regulated only rail carriers.[8] Left to operate unencumbered, the number

1. An act to regulate commerce, ch. 104, 24 Stat. 379 (1887). This act, now known as the Interstate Commerce Act, applied "to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water." Section 1 of the Act specifically provided that the Act would not apply to transportation "wholly within one State." Four months after the Interstate Commerce Act was approved on February 4, 1887, Florida passed the Act of June 7, 1887, 1887 Fla. Laws, ch. 3746. Both the federal and Florida legislation is summarized by the lengthy title of the latter, "An Act to Provide for the Regulation of Railroad Freight and Passenger Tariffs in this State, to Prevent Unjust Discrimination in the Rates Charged for Transportation of Passengers and Freights [*sic*] and to Prohibit Railroad Companies, Corporations and Lessees in this State from Charging other than Just and Reasonable Rates, and to Punish the Same and Prescribe a Mode of Procedure and Rules of Evidence in Relation thereto, and to Appoint Commissioners and to Prescribe their Powers and Duties in Relation to the same."

2. FLORIDA HOUSE OF REPRESENTATIVES COMMITTEE ON REGULATORY REFORM, FLORIDA'S REGULATION OF SURFACE TRANSPORTATION: A STUDY OF ISSUES 1 (July 24, 1979) [hereinafter cited as REGULATORY REFORM STUDY].

3. FLORIDA SENATE COMMERCE COMMITTEE, A REVIEW OF CHAPTER 323, FLORIDA STATUTES [:] MOTOR CARRIERS AND FREIGHT FORWARDERS 6 (January 1980).

4. *See, e.g.*, Anderson, Jerman, & Constantin, *Railroad Versus Motor Carrier Viewpoints on Regulatory Issues*, 45 ICC PRAC. J. 294 (1978); Krutter, *Judicial Enforcement of Competition in Regulated Industries*, 12 CREIGHTON L. REV. 1041 (1979); Steinfeld, *Regulation Versus Free Competition — The Current Battle Over Deregulation of Entry into the Motor Carrier Industry*, 45 ICC PRAC. J. 590 (1978).

5. *See, e.g.*, Farris, *The Case Against Deregulation in Transportation, Power, and Communications*, 45 ICC PRAC. J. 306 (1978); Ogborn, *The Impact of Deregulation of the Trucking Industry*, 10 MEM. ST. U.L. REV. 1 (1979).

6. *See, e.g.*, Gellhorn, *The Commission's Deregulatory Philosophy*, 48 A.B.A. ANTITRUST L.J. 541 (1979); Hewins, *The Case for Unrestricted Entry into the Household-Goods Moving Industry*, 45 ICC PRAC. J. 453 (1978). A comprehensive list of the major arguments advanced on each side of the trucking deregulation issue is contained in J. MILLER, THE PROS AND CONS OF TRUCKING REGULATION (American Enterprise Institute Reprint No. 95, 1979), *reprinted in* REGULATORY REFORM STUDY, *supra* note 2, at XV-XX.

7. Transportation Act of 1920, ch. 91, 41 Stat. 456.

8. Jacobs, *Regulated Motor Carriers and the Antitrust Laws*, 58 CORNELL L. REV. 90, 90-91 (1972).

of trucks in commercial service increased from 86 thousand in 1914 to almost 3.5 million in 1930.[9] Because industry entry was unrestricted, a large number of owner-operated,[10] undercapitalized trucking firms appeared. In this overcrowded market, ruthless competition created a high failure rate.[11]

In the absence of federal legislation, many states responded to this situation by enacting statutes regulating motor carriers.[12] While typically aimed at both intrastate and interstate trucking,[13] these statutes failed to provide a rational and effective regulatory scheme.[14] By 1932, the inadequacy of state regulation became apparent to Congress.[15]

In an effort to stabilize the interstate trucking industry,[16] Congress enacted the Motor Carrier Act of 1935.[17] This Act, as amended by the Transportation Act of 1940,[18] vested the Interstate Commerce Commission (ICC) with the authority to fully regulate all common[19] and contract[20] motor carriers moving in interstate or foreign commerce.

The first sign of erosion in the federal regulatory framework occurred in 1978 when Congress deregulated the airline industry.[21] In 1980, this erosion culminated in the partial federal deregulation of the trucking industry;[22] simultaneously, Florida completely deregulated trucking.[23] Although truckers

9. Magnuson, *The Motor Carrier Act of 1935: A Legislator Looks at the Law*, 31 GEO. WASH. L. REV. 40 (1962).

10. In 1934 only one percent of trucking firms owned more than two trucks. *Id.*

11. *Id.* at 40-41.

12. *See, e.g.*, Act of June 15, 1931, 1931 Fla. Laws, ch. 14764.

13. The Florida act, however, was specifically not applicable to interstate commerce. *Id.* §29.

14. Magnuson, *supra* note 9, at 41-42.

15. *Id.* at 43 & n.35.

16. Ogborn, *supra* note 5, at 2-3. In *American Trucking Ass'ns v. United States*, 344 U.S. 298, 312 (1953), the Supreme Court noted that prior to the passage of the Motor Carrier Act "the industry was unstable economically, dominated by ease of competitive entry and a fluid rate structure. And as a result, it became overcrowded with small economic units which proved unable to satisfy even the most minimal standards of safety or financial responsibility" (footnote omitted).

17. Motor Carrier Act of 1935, ch. 498, 49 Stat. 543. This act added Part II to the Interstate Commerce Act.

18. Transportation Act of 1940, ch. 722, 54 Stat. 898.

19. A common motor carrier was a motor carrier which undertook to transport passengers or property for the general public in interstate or foreign commerce for compensation. Motor Carrier Act of 1935, ch. 498, §203(a)(14), 49 Stat. 543.

20. A contract motor carrier was a motor carrier that, pursuant to individual contracts, transported passengers or property in interstate or foreign commerce. *Id.* §203(a)(15).

21. Although the air cargo industry was deregulated by the Act of Nov. 9, 1977, Pub. L. No. 95-163, 91 Stat. 1278, regulation in the airline industry as a whole was relaxed by the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C.).

22. Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (to be codified in scattered sections of 49 U.S.C.).

23. The Regulatory Reform Act of 1976 (current version at FLA. STAT. §11.61 (1979)) automatically repeals those statutes which authorize the state to regulate various professions, occupations, and industries. The intent of the legislature is "[t]hat the state shall not regulate a profession, occupation, industry, business, or other endeavor in a manner which will un-

gained new freedom to schedule routes and establish rates, they lost many of the exemptions from antitrust liability they had enjoyed under regulation.

Shortly before trucking was deregulated, the Florida legislature enacted the Florida Antitrust Act of 1980.[24] Although this Act accords generally with federal statutory and case law, its prospective applicability to, and effect on, recently deregulated industries is unclear. A key issue concerns the extent to which anticompetitive conduct by trucking firms is exempt from antitrust liability.[25]

This note will attempt to identify those antitrust exemptions which remain available to Florida truckers and their effect on Florida's trucking industry. Federal and Florida antitrust regulation will be examined in light of the purposes and policies underlying the regulation of trucking. After examining the scope of available antitrust exemptions, this note will study those problems which the recent legislative reforms may have inadvertently created. The confluence of partial federal and complete state trucking deregulation with federal antitrust law and Florida's new, untested antitrust legislation has created, at the very least, uncertainty. Finally, this note will conclude that antitrust laws will fill the regulatory vacuum created by deregulation, largely by modifying the scope of available antitrust exemptions.

TRUCKING REGULATION

Federal Trucking Regulation: The Motor Carrier Acts of 1935 and 1940

The federal Motor Carrier Act of 1935[26] and the Transportation Act of 1940[27] regulated all interstate trucking, including common and contract motor

reasonably adversely affect the competitive market." FLA. STAT. §11.61(2)(b) (1979). In furtherance of this intent, FLA. STAT. §11.61(4) provides that the legislature shall consider the following six criteria in determining whether to reestablish a program or function: (1) whether absence of regulation would significantly harm or endanger the public health, safety, or welfare; (2) whether there is a reasonable relationship between the exercise of the police power and the protection of the public health, safety, or welfare; (3) whether a less restrictive method of regulation is available; (4) whether the regulation has the effect of directly or indirectly increasing the cost of the goods or services involved; (5) whether the increase in cost is more harmful than the absence of regulation; (6) whether all facets of the regulatory process have, as their sole purpose and primary effect, the protection of the public. Pursuant to 1976 Fla. Laws, ch. 76-168, §3(2)(h), FLA. STAT. ch. 323, relating to motor carriers and freight forwarders, was repealed July 1, 1980, thereby effecting the complete deregulation of intrastate trucking in Florida.

24. Fla. H.R. 701 (Reg. Sess. 1980, introduced by Rep. Moffitt) was passed by the Florida House of Representatives on May 5, 1980, by a vote of 107 to 0. The next day it was passed by the Florida Senate by a vote of 38 to 1. It was approved by the Governor on May 20, 1980 as the Florida Antitrust Act of 1980, 1980 Fla. Laws, ch. 80-28. The Florida Antitrust Act, which became effective on October 1, 1980, creates FLA. STAT. §§542.15-.32 and §§542.35-.36, renumbers FLA. STAT. §542.12 and §542.13 as §542.33 and §542.34 respectively, and repeals FLA. STAT. §§542.01-.11 (1979).

25. The Florida Antitrust Act, FLA. STAT. §542.20, provides 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."

26. Motor Carrier Act of 1935, ch. 498, 49 Stat. 543.

27. Transportation Act of 1940, ch. 722, 54 Stat. 898.

carriers.[28] Exemptions were made for specific types of motor vehicles such as taxicabs, farm trucks, and trollies.[29] Several sections of the Interstate Commerce Act control activities which would be actionable under the antitrust laws. Among these are prohibitions against the pooling or division of traffic without ICC approval[30] and controls on consolidations, mergers, and the acquisition of control of a carrier.[31] Antitrust immunity is provided to carriers participating in ICC-approved transactions.[32]

The antitrust immunity conferred by the 1935 and 1940 Acts is illustrated by *McLean Trucking Co. v. United States*.[33] In *McLean*, the plaintiff motor carrier filed suit to set aside an ICC order authorizing the consolidation of several of its competitors.[34] In approving the consolidation,[35] which created the nation's largest motor carrier,[36] the ICC had announced its intention to encourage consolidations in the trucking industry. This policy would conform trucking regulation to the railroad industry, a model with which the ICC had decades of experience.[37]

The United States Supreme Court construed plaintiff's argument as an allegation that the merger violated the Sherman Act and that the ICC was therefore powerless to approve it.[38] Although the Court was aware that the historical considerations which guided administrative authorization of railroad

28. See notes 19 and 20 *supra*.

29. Motor Carrier Act of 1935, ch. 498 §203(b), 49 Stat. 543 (current version at 49 U.S.C. §10526(a) (1976)).

30. Transportation Act of 1940, ch. 722, §7, 54 Stat. 898 (current version at 49 U.S.C. §11342(a) (1976)). The current version provides that the ICC may approve an agreement to pool or divide traffic if it will be in the public interest and it will not unreasonably restrain competition.

31. *Id.* (current version at 49 U.S.C. §11343 (1976)). The current version provides that mergers, consolidations, and acquisitions of control may be effected only with the approval and authorization of the ICC, except that no such approval is required if the only parties to the transaction are motor carriers already subject to ICC jurisdiction and the aggregate gross operating revenues of the carriers are not more than $300,000 annually.

32. 49 U.S.C. §11341(a) (1976) provides that "[t]he authority of the Interstate Commerce Commission under this subchapter is exclusive . . . . A carrier, corporation, or person participating in [a transaction approved by the ICC] is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction."

33. 321 U.S. 67 (1944).

34. *Id.* at 69. In the original litigation, Associated Transport, Inc., applied to the ICC to obtain control of eight motor carriers. Although the application was opposed by the Secretary of Agriculture, the Antitrust Division of the Department of Justice, the National Grange, four associations of fruit growers, and a motor carrier, the application was approved. McLean Trucking, a competitor of some of the carriers involved in the merger, then brought suit to have the ICC's order approving the application set aside. After the suit was begun the ICC modified its order to exclude one of the eight motor carriers. *Id.* at 68-70.

35. Associated Transport, Inc. — Control & Consolidation — Arrow Carrier Corp., 38 M.C.C. 137 (1942).

36. 321 U.S. at 70.

37. Associated Transport, Inc. — Control & Consolidation — Arrow Carrier Corp., 38 M.C.C. at 162-63.

38. 321 U.S. at 77.

mergers differed from those relevant to motor carrier mergers,[39] it chose to ignore this distinction. The Court found competition among carriers to be of value primarily as it aids the achievement of national transportation policy objectives.[40] Although noting that Congress had anticipated the anticompetitive effects of motor carrier consolidation,[41] the Court assumed a noninterventionist stance in concluding that the ICC, through its knowledge and expertise, was best equipped to assess the commercial impact of the merger on industry competition.[42]

Motor carriers quickly realized the value of the Court's pro-consolidation stance. After the *McLean* decision, the ICC approved a previously denied application for the consolidation of 325 household goods movers.[43] The Antitrust Division of the Department of Justice had previously filed a Sherman Act complaint and obtained a consent decree prohibiting most of the carriers from entering into any combination with each other.[44] Nevertheless the ICC cited *McLean* for the proposition that, if the consolidation were approved, section 5(11) of the Interstate Commerce Act[45] would immunize the consolidating parties from antitrust liability.[46] Thus, the tension between comprehensive regulation and robust competition was resolved in favor of regulation.

Many of the strict regulatory policies of the 1935 and 1940 Acts were relaxed by the Motor Carrier Act of 1980.[47] This Act, which has as its stated purpose the reduction of unnecessary federal regulation,[48] amends the national trans-

39. *Id.* at 85 n.22. The Court had earlier noted that the reason for exempting rail consolidations from antitrust restrictions was "in order to rehabilitate a broken down industry," a consideration which did not apply to motor carriers. *Id.* at 78. The impetus behind the original movement to regulate the railroads derived from predatory business practices which the railroads were able to engage in because of the lack of competition, while precisely the opposite situation, cutthroat competition, applied to the trucking industry. See note 33 and text accompanying notes 106-14 *supra*.

40. *Id.* at 85-86 (footnote omitted). The national transportation policy in effect at the time is found in the Transportation Act of 1940, ch. 722, §1, 54 Stat. 898 (current version at 49 U.S.C. §10101(a) (1976)). The policy acknowledges that three of the goals of regulation of transportation are: the promotion of "safe, adequate, economical, and efficient transportation;" the encouragement of "sound economic conditions in transportation;" and the encouragement of "the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices." 49 U.S.C. §10101(a) (1976).

41. 432 U.S. at 86 (footnote omitted).

42. *Id.* at 87.

43. Allied Van Lines, Inc. — Purchase — Evanston Fireproof Warehouse, 40 M.C.C. 557, 607-08 (1946). In the earlier case, Allied Van Lines, Inc. — Pooling, 39 M.C.C. 287 (1943), a group of 362 household goods movers had applied to the ICC pursuant to §5(1) of the Interstate Commerce Act (current version at 49 U.S.C. §11342 (1976)) for authority to pool their businesses and appoint Allied Van Lines as their agent. The ICC, finding the record unpersuasive that the proposal would be consistent with the public interest, denied the application. *Id.* at 309.

44. Allied Van Lines, Inc. — Purchase — Evanston Fireproof Warehouse, 40 M.C.C. at 585-86.

45. Current version at 49 U.S.C. §11343 (1976).

46. Allied Van Lines, Inc. — Purchase — Evanston Fireproof Warehouse, 40 M.C.C. at 587.

47. Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793.

48. *Id.* §2 (to be codified in 49 U.S.C. §10101).

portation policy to include the promotion of competitive and efficient transportation services.[49] One of the Act's most important provisions increases opportunities for new carriers to enter the industry, and for established carriers to expand their routes, by modifying the traditional public convenience and necessity test.[50] Formerly, the applicant bore the burden of establishing that its proposed service met rigorous standards of public convenience and necessity. Under the revised test, the ICC must grant an operating certificate if the applicant can show its fitness, willingness, and ability to provide a useful public service.[51] Furthermore, the opponent of the application must show that the proposed service is inconsistent with the public convenience.[52]

Of significance from the standpoint of antitrust liability is section 19, which reflects congressional concern that individual state requirements imposed upon interstate motor carriers are "confusing, lacking in uniformity, unnecessarily duplicative, and burdensome."[53] This section directs certain state officials and agencies to develop recommendations directed toward providing a more efficient system of state regulations for interstate motor carriers by December 31, 1981.[54]

Florida Trucking Regulation: 1929-1980

Florida began to regulate trucking in 1929, when the legislature enacted the state's first trucking regulation statute.[55] After this statute was declared unconstitutional by the United States Supreme Court,[56] the 1931 session of the Florida legislature enacted a new motor carrier regulation scheme.[57] The 1931 statute, which remained in force for almost half a century, required that motor carriers obtain a Certificate of Public Convenience and Necessity.[58] Court decisions have consistently emphasized that the certificate requirement is designed to avoid congestion of the highways and to insulate motor carriers from excessive competition.[59]

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49. *Id.* §4 (to be codified in 49 U.S.C. §10101).

50. *Id.* §5(a) (to be codified in 49 U.S.C. §10922).

51. *Id.* While the Act itself retains the phrase "public convenience and necessity" as a condition to ICC certification, the House Report indicates unequivocally that Congress intended to modify this former restrictive certification standard. H.R. REP. No. 96-1069, 96th Cong., 2d Sess. 27, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 4109, 4111.

52. *Id.* In addition, application protests are limited and the test is eliminated altogether for carriers of certain specified commodities. *Id.*

Other sections of the 1980 act provide for the future elimination of regulations which prevent carriers from travelling by the most direct routes and from making intermediate stops, *id.* §6 (to be codified in 49 U.S.C. §10922); provide pricing reform by giving carriers greater feedom to set rates in response to market fluctuations, *id.* §11 (to be codified in 49 U.S.C. §10708); and address matters such as service to small communities, *id.* §28, intermodal transportation, *id.* §34, and regulatory lag, *id.* §25 (to be codified in 49 U.S.C. §10322).

53. *Id.* §19.

54. *Id.*

55. Act of July 1, 1929, 1929 Fla. Laws, ch. 13700.

56. Smith v. Cahoon, 283 U.S. 553 (1931).

57. Act of June 15, 1931, 1931 Fla. Laws, ch. 14764.

58. *Id.* §2.

59. *See, e.g.*, Central Truck Lines v. Railroad Comm'n, 146 Fla. 521, 1 So. 2d 470 (1941).

Until recently, intrastate motor carriers in Florida were regulated by the Florida Public Service Commission.[60] The full burden of regulation fell upon common carriers,[61] who were subject to regulation of entry,[62] rates,[63] safety,[64] bonding, and insurance,[65] and were required to pay a road tax.[66] Other types of carriers were subject to less stringent regulation,[67] while others were subject to no regulation at all.[68]

This comprehensive regulatory scheme was abandoned for complete deregulation in 1980.[69] It would appear, therefore, that the recommendations produced by section 19 of the Motor Carrier Act of 1980[70] will not apply to Florida insofar as the Florida act applies only to intra-Florida trucking. However, the Florida act is non-uniform in that, unlike other states, it imposes no additional requirements on interstate truckers operating within the state.[71] The question then arises whether Congress could, pursuant to the recommendations proposed under section 19, mandate a certain base level of state trucking regulation. While Congress arguably possesses the power to impose such a requirement,[72] a more feasible alternative would be the requirement that state regulation of trucking not exceed some minimal level. Although forced partial state deregulation of the trucking industry would be vehemently opposed by industry trade groups,[73] it would comport with the federal deregulatory trend.

60. FLA. STAT. §323.07 (1979) (repealed 1980).

61. A common carrier was defined as "any person engaged in motor carrier transportation of persons or property for compensation over the public highways of this state who holds his service out to the public and provides transportation over regular or irregular routes." *Id.* §323.01(19) (repealed 1980).

62. *Id.* §323.03 (repealed 1980).

63. *Id.* §323.08 (repealed 1980).

64. *Id.* §323.13 (repealed 1980).

65. *Id.* §323.06 (repealed 1980).

66. *Id.* §323.15 (repealed 1980).

67. These carriers were divided into four types: (1) Contract carriers: those who transport persons or property under contract for one or more shippers on a continuing basis (subject to full regulation; however, barriers to entry were somewhat lower); (2) Carriers exempt from rate regulation: road building and construction aggregate haulers, armored cars, charter busses, and carriers transporting newspapers; (3) Permit carriers: carriers under contract to the federal government, livestock, seafood, and agricultural carriers, transportation incidental to primary business of maintenance, and transportation of houses (permit issued as a matter of right; no rate regulation); (4) Registered interstate carriers (certificate of registration granted automatically; subject to safety and insurance requirements and, in some cases, the road tax).

68. FLA. STAT. §323.29 (1979) (repealed 1980) listed eleven types of motor vehicles which were completely exempt from Public Service Commission registration. Examples are schoolbusses, certain agricultural and horticultural carriers, hearses, and wreckers.

69. See note 23 and accompanying text, *supra*.

70. See text accompanying notes 53-54 *supra*.

71. See note 23 and accompanying text, *supra*.

72. Under the commerce clause, U.S. CONST. art. 1, §8, cl. 3, Congress has been granted broad powers to regulate matters which affect interstate commerce.

73. A recent newspaper article notes that Florida truckers "lobbied furiously" to oppose deregulation. *State Limits on Trucking End; U.S. Eases Controls*, Gainesville Sun, July 2, 1980, §A, at 1, col. 1. Another article points out that some local truckers "are steaming mad" about deregulation. *Moving Firms Fuming Over Deregulation*, *id.*, col. 2.

As the leader in state deregulation, Florida will be closely watched by both lawmakers and trade groups.[74]

The simplification of the regulatory scheme in Florida gives rise to a complex set of legal problems. After a summary of the development of relevant antitrust exemptions, these problems will be considered in light of the Florida Antitrust Act of 1980. Of key importance is the scope of antitrust exemptions which remain available to the Florida trucking industry.

FLORIDA AND FEDERAL ANTITRUST ACTS

Before the first Florida antitrust act[75] was passed in 1915, courts relied on common law principles to censure anticompetitive behavior. At common law, however, anticompetitive agreements were unenforceable but not unlawful.[76] Therefore, the first Florida antitrust act was passed in an effort to render anticompetitive conduct unlawful and thus punishable.[77] In an early case,[78] however, the Florida supreme court reverted to common law principles. The court found a pooling arrangement in violation of the act,[79] but it refused to assess any penalty and dismissed the complaint.[80] In another early case,[81] a cooperative marketing contract was challenged as being in restraint of trade.[82] The court upheld the contract, employing a rule of reason analysis[83] to determine that the contract did not unreasonably restrain trade.[84] This rule of reason approach has been followed by Florida courts until the present time, despite the case of *United States v. Trenton Potteries Co.*[85] in which the United States Supreme Court declared uniform price-fixing a per se violation of the Sherman Act regardless of the reasonableness of the prices.[86] As a result of such restrictive interpretation, the 1915 act did little to advance Florida antitrust law beyond common law limitations.[87]

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74. The ICC has allotted $200,000 to study the effects of Florida's experiment in deregulation. *State Limits on Trucking End; U.S. Eases Controls*, *supra* note 73, §A, at 1, col. 1.

75. Act of June 4, 1915, 1915 Fla. Laws, ch. 6933.

76. Brock v. Hardie, 114 Fla. 670, 676-77, 154 So. 690, 693 (1934).

77. Act of June 4, 1915, 1915 Fla. Laws, ch. 6933. The title of this legislation, "An Act to Define Trusts, Provide for Penalties and Punishment of Corporations, Persons, Firms and Associations of Persons Connected With Them, and to Promote Free Competition in the State of Florida," summarizes its purposes. The act provided for a fine of $50 to $5,000, or imprisonment for one to ten years, or both. *Id.* §5(5). In addition, the act authorized a fine of $50 for each day of violation. *Id.* §9.

78. Ricou v. Crosland, 81 Fla. 574, 88 So. 380 (1921).

79. *Id.* at 579, 88 So. at 381.

80. *Id.*

81. Lee v. Clearwater Growers Ass'n, 93 Fla. 214, 111 So. 722 (1927).

82. *Id.* at 219, 111 So. at 723. Curiously, the contract was challenged under the Constitution rather than the Florida antitrust act or the Sherman Act.

83. The "rule of reason" imposes antitrust liability only if the conduct complained of unreasonably restrains trade. See note 90 *infra*.

84. Lee v. Clearwater Growers Ass'n, 93 Fla. at 214, 219, 111 So. at 723.

85. 273 U.S. 392 (1927).

86. *Id.* at 398.

87. *See, e.g.*, Hardrives Co. v. East Coast Asphalt Corp., 166 So. 2d 810, 811 (Fla. 2d D.C.A. 1964).

Both before and after the 1915 Florida act, several other states attempted to prohibit monopolies and similar competition-restricting devices via constitutional[88] or statutory[89] provisions. The states, however, lacked authority to regulate corporations engaged in interstate commerce.[90] Realizing that effective regulation could be achieved only at the federal level,[91] Congress passed the

88. One authority lists 14 states with pre-Sherman Act constitutional anticompetition provisions: Arkansas, 1874; Connecticut, 1818; Georgia, 1877; Idaho, 1889; Kentucky, 1850; Maryland, 1865; Massachusetts, 1780; Montana, 1899 (correct date is 1889); North Carolina, 1776 and 1868; North Dakota, 1889; Tennessee, 1870; Texas, 1845 and 1876; Washington, 1889; Wyoming, 1889 (the Wyoming constitution was ratified in 1889 but did not become effective until statehood was granted on July 10, 1890, eight days after passage of the Sherman Act). M. FORKOSCH, ANTITRUST AND THE CONSUMER 412-16 (1956). Another authority lists Arkansas, Connecticut, Georgia, Indiana, Kentucky, Maryland, Montana, North Carolina, North Dakota, South Dakota, Tennessee, Texas, Washington, and Wyoming. H. THORELLI, THE FEDERAL ANTITRUST POLICY 155 n.194 (1955). However, the historical note to the South Dakota anti-monopoly provision, S.D. CONST. art. XVII, §20, states that "[t]he 1895 proposal, adopted in 1896, added this section to the Constitution." 1 S.D. CODIFIED LAWS ANN. 515 (1978 Rev.).

89. Iowa, 1888; Kansas, 1887; Kentucky, 1890; Maine, 1889; Michigan, 1889; Mississippi, 1890; Missouri, 1889; Nebraska, 1889; North Dakota, 1890; South Dakota, 1890; Tennessee, 1889; Texas, 1889. M. FORKOSCH, *supra* note 30, at 417-27. Thorelli lists Iowa, Kansas, Kentucky, Maine, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, South Dakota, Tennessee, and Texas. H. THORELLI, *supra* note 30, at 155 n.195. In reviewing the history of the North Carolina antitrust law, the supreme court of that state noted that the first such provision was enacted well after the passage of the Sherman Act. Shute v. Shute, 176 N.C. 462, 465, 97 S.E. 392, 393 (1918).

90. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 246 (1956); 1 E. KINTNER, FEDERAL ANTITRUST LAW 130 (1980).

91. Letwin, *supra* note 90, at 246-47; 1 E. KINTNER, *supra* note 90, at 130.

Although the Interstate Commerce Act was enacted in 1887 to meet the need created by gross anticompetitive business practices that arose after the Civil War, prohibitions against restraints on trade date back to the earliest days of the common law. Ancient Anglo-Saxon custom, later included in the laws of the Norman kings, sought to eliminate the middleman in order to facilitate trade. 1 E. KINTNER, *supra* note 90, at 41. Common law prohibitions against forestalling and engrossing, which were codified as early as the mid-sixteenth century in 5 & 6 Edw. VI, c.14 (1552) (3 Statutes at Large 588 (1911)), were eventually made the basis for §2 of the Sherman Act, which prohibits monopolizing. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 384 (1954). Nevertheless, monopolistic practices flourished at early common law and no serious pressure was brought to bear on them until the growth of the industrial revolution. Jones, *Historical Development of the Law of Business Competition* (pt. 1), 35 YALE L.J. 905, 937-38 (1926).

In the period following the Civil War, Americans witnessed unprecedented economic growth. The expansion of the railroads and the accelerated industrialization of the northeastern United States caused fabulous wealth to be concentrated in the hands of a few captains of industry. Limbaugh, *Historic Origins of Anti-Trust Legislation*, 18 MO. L. REV. 215, 232 (1953). Unscrupulous business practices gradually eliminated both competition and competitors from the market. *Id.* at 230-42. Finally, reaction against the railroads by the Granger movement and by farmers who were charged discriminatory shipping rates emphasized the need for federal regulation of the railroads. Note, *Reviving State Antitrust Enforcement: The Problems With Putting New Wine in Old Wine Skins*, 4 J. CORP. L. 547, 551-52 (1979).

The Interstate Commerce Act was enacted in 1887 to meet this need. It provided that all charges should be just and reasonable, prohibited rate discrimination, required that charges

Sherman Act on July 2, 1890.[92] In its present form,[93] section 1 declares illegal all contracts, combinations, or conspiracies in restraint of trade.[94] Section 2 prohibits monopolization and attempts to monopolize any part of trade or commerce.[95] These two provisions, which survive in very nearly their original form,[96] are sufficiently broad to include virtually every type of anticompetitive behavior.[97]

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for short hauls not be greater than charges for long hauls, prohibited pooling arrangements, required the posting of rate charges, and created the Interstate Commerce Commission. By its own terms, however, the Act was restricted to transportation service performed wholly or partly by railroad. See note 1 *supra*.

92. An act to protect trade and commerce against unlawful restraints and monopolies, ch. 647, 26 Stat. 209 (1890). The legislative history of the Sherman Act is thoroughly explored in 1 E. KINTNER, *supra* note 90, at 125-242 and 1 E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 7-363 (1978). Shorter treatments may be found in Letwin, *supra* note 90, and Limbaugh, *supra* note 91.

93. 15 U.S.C. §§1-7 (1976).

94. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." 15 U.S.C. §1 (1976).

95. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." 15 U.S.C. §2 (1976).

96. Amendments to the original Sherman Act have been minor. The Act of July 7, 1955, ch. 281, 69 Stat. 282, increased the maximum fines for violations of §§1, 2, or 3 from $5,000 to $50,000. The Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, §3, 88 Stat. 1708, made violations of the Sherman Act a felony and established the present penalties. See notes 94 & 95 *supra*. A statutory exemption for resale price maintenance agreements by trademark owners, where permitted under state fair-trade laws, was added by the Miller-Tydings Act of 1937, ch. 690, tit. VIII, 50 Stat. 693, and repealed by the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801. Jurisdiction was changed from the United States circuit courts to the federal district courts by the Act of March 3, 1911, ch. 231, §291, 36 Stat. 1167. The title "district attorneys of the United States" in §4 was changed to read "United States Attorneys" by the Act of June 25, 1948, ch. 646, §501, 62 Stat. 909. The original §7 of the Sherman Act, which authorized private treble-damage actions, was repealed by the Act of July 7, 1955, ch. 283, §3, 69 Stat. 283. An identical provision is contained in §4 of the Clayton Act, 15 U.S.C. §15 (1976), so this repeal had no substantive effect. The original §8 of the Sherman Act is now codified at 15 U.S.C. §7 (1976).

97. Legislation which amended the Sherman Act is listed in note 96 *supra*. The balance of the federal antitrust legislation was principally provided by four acts. The first of these, the Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified at 15 U.S.C. §41 *et seq.* (1976)), was enacted in the wake of the Supreme Court's announcement of the "rule of reason" in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). This decision, which declared that only activity which unreasonably restrains trade would be subject to Sherman Act liability, introduced uncertainty as to which trade practices were illegal and which were not. To remedy this uncertainty, the act established a permanent administrative agency, the Federal Trade Commission, to supervise enforcement of the antitrust laws.

ANTITRUST EXEMPTIONS

The regulation of the trucking industry necessitated adjustments in the application of the antitrust laws. Accordingly, truckers were exempted from antitrust liability in some instances of anticompetitive conduct. An examination of these exemptions under regulation is useful in analyzing the extent to which the antitrust laws have filled the vacuum left by the deregulation of motor carriers.

Exemption by Legislative Action

A 1945 Georgia case precipitated major legislative action to exempt trucking from antitrust liability. In *Georgia v. Pennsylvania Railroad Co.*,[98] the state of Georgia alleged that several railroads had combined to form rate bureaus that established discriminatory rates in violation of the Sherman Act.[99] After stating flatly that the carriers were subject to the antitrust laws,[100] the Court observed that Congress had not authorized the ICC to exempt rate-fixing combinations from the reach of the antitrust laws,[101] and held that Georgia had properly alleged a cause of action under the Sherman Act.[102] In response, Congress passed the Reed-Bulwinkle Act in 1948.[103] This act legalized carrier rate associations formed for the purpose of collective ratemaking and exempted them from the antitrust laws, provided the associations were approved by the ICC.[104]

Over the years an extensive system of rate bureaus developed to take advantage of Reed-Bulwinkle's antitrust immunity.[105] Rate bureau activities include processing general carrier rate increases, processing single-line and joint-line rate proposals,[106] and publishing tariffs.[107] The major advantage of the rate bureau system is the predictability it brings to the rate structure. It is

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The Clayton Act, ch. 321, 38 Stat. 730 (1914) (codified in scattered sections of 15, 18, 29 U.S.C.), was enacted to fill several gaps in the antitrust laws. The two major provisions prohibited price discrimination (§2) and certain corporate mergers which would have the effect of substantially lessening competition (§7). The Robinson-Patman Act, ch. 592, 49 Stat. 1526 (1936) (codified at 15 U.S.C. §§13-13b, 21a (1976)), rewrote the price discrimination provisions of §2 of the Clayton Act. Finally, the antimerger provisions of §7 of the Clayton Act were made more restrictive by the Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950) (codified at 15 U.S.C. §§18, 21 (1976)).

98. 324 U.S. 439 (1945).

99. *Id.* at 443-44.

100. *Id.* at 456.

101. *Id.*

102. *Id.* at 462.

103. Reed-Bulwinkle Act, ch. 491, 62 Stat. 472 (1948) (codified at 49 U.S.C. §10706 (1976)).

104. If the rate bureau agreement is approved by the Commission, "the antitrust laws . . . do not apply to parties and other persons with respect to making or carrying out the agreement." 49 U.S.C. §10706(b) (1976).

105. H.R. REP. No. 96-1069, 96th Cong., 2d Sess. 27, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 4109, 4135.

106. A single-line rate is a rate offered by a motor carrier of property that applies throughout its route structure and does not involve the services of any other carrier. A joint-line rate, however, does involve the services of other carriers.

107. U.S. CODE CONG. & AD. NEWS, *supra* note 105, at 4135.

also a system with which shippers and truckers are familiar. The system's major disadvantage is its tendency to generate rate schedules that adequately compensate even the least efficient participating carrier, thus minimizing price competition.[108] On the other hand, the publication of tariffs facilitates wide dissemination of rate information, a service of great public value.

When the House Committee on Public Works and Transportation debated the Motor Carrier Act of 1980, the most controversial issue was whether the Reed-Bulwinkle Act should continue in force.[109] In its final form, the Act eliminated antitrust immunity for discussion or voting on single-line rates effective January 1, 1984.[110] This provision, which is a compromise between predictability and efficiency, will effectively require individual carriers to independently determine their own cost structures and optimum rates. The result will be an increase in price competition and, hopefully, a corresponding improvement in industry service and efficiency.[111]

Exemption by Judicial Action

The Sherman Act, in both its original and present forms, contains no exemptions or exceptions.[112] In an early case,[113] the Supreme Court refused to find an exemption in the absence of a specific statutory provision.[114] Subsequently, courts came to recognize that, where the state affirmatively commands certain economic activity, the affected industry should be exempt from liability for resulting antitrust violations.[115] Accordingly, the judge-made state action doctrine was developed as a recognition of the integrity of state sovereignty.[116]

Although an early decision[117] established that the Sherman Act, by its terms, is inapplicable to the states,[118] the modern state action doctrine appeared in

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108. *Id.*

109. See note 105 *supra.*

110. U.S. CODE CONG. & AD. NEWS, *supra* note 105, at 4136.

111. *Id.* at 4137. Prohibition of collective ratemaking under zone of rate freedom is to be codified at 49 U.S.C. §10708(d); rates for limited liability are to be codified at 49 U.S.C. §10730(b).

112. An exemption for resale price maintenance agreements was added in 1937, but was repealed in 1975. See note 96 *supra.*

113. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 296 (1897).

114. Noting that it was "asked to hold that the [Sherman Act] . . . excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception," *id.* at 340, the Court refused to "interpolate an exception into the language of the act, and to thus materially alter its meaning and effect." *Id.*

115. See text accompanying notes 119-126 *infra.* The state action doctrine derived from antitrust law should be distinguished from the state action doctrine which courts apply to determine whether the protections of the fourteenth amendment of the United States constitution are applicable. *See, e.g.*, Flagg Bros. Inc. v. Brooks, 436 U.S. 149 (1978).

116. Rogers, *The State Action Antitrust Immunity*, 49 U. COLO. L. REV. 147, 151 (1978).

117. Lowenstein v. Evans, 69 F. 908 (C.C.D.S.C. 1895).

118. The fledgling state action doctrine was expanded and clarified in *Olsen v. Smith*, 195 U.S. 332 (1904), in which a group of licensed harbor pilots sought to enjoin unlicensed pilots from plying their trade without first obtaining a state license. The unlicensed pilots challenged the constitutionality of the Texas statute, arguing, *inter alia*, that the statute restricted

1943 when *Parker v. Brown*[119] was decided. In *Parker*, a raisin producer asserted that a California agricultural protection law[120] designed to support farm prices violated the Sherman Act.[121] In rejecting this argument, the United States Supreme Court relied both on statutory history and language, and on considerations of federalism. Although willing to assume that the California scheme would violate the Sherman Act if it was accomplished solely by a combination or conspiracy of private individuals or corporations,[123] the Court found "no hint"[124] in either the Sherman Act or its legislative history that the Act was intended to restrain state action.[125] Also concerned about implications of federalism, the Court concluded that California imposed the restraint of trade as an act of government, which was therefore not prohibited by the Sherman Act.[126]

As a complement to the state action doctrine, courts have held immune from antitrust liability competitors who join together in an attempt to persuade legislative or administrative bodies to enact a law or take action which would otherwise be anticompetitive in nature. This principle, known as the *Noerr-*

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competition and conferred a monopoly on the licensed pilots in violation of the federal antitrust laws. In upholding the statute against the antitrust attack, the Supreme Court found that Texas had the plenary power to regulate the trade of harbor pilotage in the absence of Congressional preemption and noted that no monopoly can arise merely because individuals comply with anticompetitive mandates of the state.

The decision in *Olsen* must be considered in light of a restriction announced in *Northern Securities Co. v. United States*, 193 U.S. 197 (1904). Defendants, charged with forming an unlawful merger which violated the Sherman Act prohibition of combinations in restraint of trade, argued that they were immune from prosecution because the merger had been effected through the formation of a holding company which New Jersey had allowed to be incorporated. The Supreme Court noted in passing that there were no indications that New Jersey intended, by approval of the firm's incorporation, to condone an anticompetitive combination. But nevertheless it concluded that federal law will preempt state law which purports to authorize unsupervised private action which is violative of the antitrust laws.

A distinction must be made between state laws which merely authorize anticompetitive practices and those which compel such behavior. It has been noted that federal law preempts the former but not the latter. 1 P. AREEDA & D. TURNER, ANTITRUST LAW 61 (1978).

119. 317 U.S. 341 (1943).

120. The California Agricultural Prorate Act of June 5, 1933, ch. 754, 1933 Cal. Stats. 1969 (current version at CAL. AGRIC. CODE §§59501-60015 (West)). The California Supreme Court had previously sustained the constitutionality of the act under both the federal and California constitutions in *Agricultural Prorate Comm'n v. Superior Court*, 5 Cal. 2d 550, 55 P.2d 495 (1936).

121. 317 U.S. at 348-49. The plaintiff also alleged violations of the Federal Agricultural Marketing Agreement Act of 1937 and the commerce clause of the Constitution. *Id.*

123. *Id.* at 350.

124. *Id.* at 351. However, the Court carefully avoided making a broad pronouncement of immunity for any activity that might be approved by the state by citing *Northern Securities* for the proposition that "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." *Id.* See note 118 *supra.*

125. *Id.*

126. *Id.* at 352, citing *Olsen* and *Lowenstein.* Some commentators are of the opinion that *Parker* dealt more with federalism than the scope of a state agency's authority. *See, e.g.*, Smith, *Antitrust Immunity for State Action: A Functional Approach*, 31 BAYLOR L. REV. 263, 267 (1979).

Pennington doctrine, had its genesis in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[127] In that case, forty-one trucking firms brought an action against twenty-four railroads, charging that the railroads had mounted an intensive publicity campaign to promote laws destructive to the trucking industry.[128] The trucking firms maintained that this activity constituted a conspiracy to monopolize and restrain trade in the long-distance freight industry in violation of sections 1 and 2 of the Sherman Act.[129] The Supreme Court stated that a Sherman Act cause of action could not be predicated solely upon attempts to influence the passage or enforcement of laws.[130] The Court held that the Sherman Act does not prohibit people from acting together to elicit particular legislative action that may produce a restraint or a monopoly.[131] The Court found two considerations dispositive. First, a contrary holding would permit the Sherman Act to regulate political activity as well as business activity.[132] Second, Congress could not have meant to restrict the first amendment right of petition.

The *Noerr* holding was expanded in *United Mine Workers v. Pennington*,[133] which interpreted *Noerr* as immunizing from antitrust liability "a concerted effort to influence public officials *regardless of intent or purpose.*"[134] The resulting *Noerr-Pennington* doctrine renders the antitrust laws inapplicable to conspiratorial attempts to influence public officials. This immunity exists regardless of the conduct's anticompetitive purpose[135] and regardless of whether it is part of a larger scheme that violates the Sherman Act.[136]

An exception for sham appeals to government action, recognized in the *Noerr* opinion itself,[137] was firmly established in *California Motor Transport Co. v. Trucking Unlimited.*[138] The defendants were charged with monopolizing trade by instituting court proceedings to defeat applications by competitors for operating rights,[139] and they asserted immunity under the *Noerr-Pennington* doctrine. The Court observed that misrepresentations, although condoned in the political arena, are not immunized when used in the judicial process.[140] The Court stated that a violation of the antitrust laws could be established if plaintiffs could prove that defendants had, "by massive, concerted, and purpose-

127. 365 U.S. 127 (1961).
128. *Id.* at 129.
129. *Id.*
130. *Id.* at 135.
131. *Id.* at 136.
132. *Id.* at 137.
133. 381 U.S. 657 (1965).
134. *Id.* at 670 (emphasis added).
135. *Id.*
136. *Id.*
137. Although noting that no sham was involved in that case, the *Noerr* court stated that there could be situations where "a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U.S. at 144.
138. 404 U.S. 508 (1972).
139. *Id.* at 509.
140. *Id.* at 513.

ful activities,"[141] deterred their competitors from having free and unrestricted access to the courts.[142] Thus, *California Motor Transport* established that the sham exception to the *Noerr-Pennington* doctrine applies where the appeal to a court or governmental agency is intended to harass or interfere with a competitor's business, rather than to achieve a valid judicial or quasi-judicial result.[143]

Unfortunately, the need for antitrust exemptions was not anticipated in the original Florida antitrust act.[144] A 1925 amendment[145] exempted agricultural and horticultural non-profit cooperative associations by expressly providing that such organizations would not be deemed trusts, combinations in restraint of trade, monopolies,[146] or other prohibited combinations.[147] Certain covenants not to compete were exempted in 1953.[148] Although the Florida legislature had considered numerous bills that would have clarified Florida statutory antitrust exemptions,[149] it was not until 1980 that both the house and senate could

141. *Id.* at 515.

142. *Id.*

143. These principles were applied in *New Motor Vehicle Bd. v. Fox*, 439 U.S. 96 (1978), when the Court noted that dealers who in good faith protested the location of a proposed dealership and persuaded the state agency to find no good cause for permitting the proposed dealership would be immune from Sherman Act liability by virtue of *Noerr-Pennington*. 439 U.S. at 110. However, a dealer who put forth a mere sham protest would be subject to antitrust liability under *California Motor Transport*. 439 U.S. at 110 n.15.

144. This and other problems are discussed in Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 653, 733-42 (1974).

145. Act of May 13, 1925, 1925 Fla. Laws, ch. 10283.

146. *Id.* §1 (repealed 1980).

147. *Id.* §2 (repealed 1980).

148. Act of May 27, 1953, 1953 Fla. Laws, ch. 28048, §§2, 3 (current version in Florida Antitrust Act, *supra* note 24, §542.33).

149. *See, e.g.*, Fla. S. 1253 (Reg. Sess. 1979, introduced by S. Dunn and others) (would have created Florida Antitrust Act, §542.22 of which provided for exemption of agricultural cooperatives, labor organizations, and actions permitted by the state); Fla. H.R. 360 (Reg. Sess. 1979, introduced by Rep. Crawford and others) (would have provided for exemption of trademark licensee-licensor noncompete arrangements); Fla. S. 710 (Reg. Sess. 1978, introduced by S. Dunn) (would have created Florida Antitrust Act, §542.22 of which provided for exemption of labor and agricultural organizations, regulated public utilities, joint insurance underwriting arrangements, activities of securities dealers, banks, savings and loan associations, eleemosynary organizations, rural electric cooperatives, and other activities required or regulated by the state); Fla. H.R. 1399 (Reg. Sess. 1978, introduced by Rep. Becker and others) (would have created Florida Antitrust Act of 1978, §542.22 of which was identical to S. 710 (1978) *supra*); Fla. S. 887 (Reg. Sess. 1977, introduced by S. Dunn) (would have created Florida Antitrust Act, §542.22 of which was identical to S. 710 (1978) *supra*); Fla. H.R. 391 (Reg. Sess. 1977, introduced by Rep. Becker) (would have created Florida Antitrust Act of 1977, §542.22 of which was identical to S. 710 (1978) *supra*); Fla. S. 1244 (Reg. Sess. 1976, introduced by S. Dunn) (would have created Florida Antitrust Act, §542.22 of which was identical to S. 710 (1978) *supra*); Fla. H.R. 209 (Reg. Sess. 1976, introduced by Rep. Andrews and others) (would have created Florida Antitrust Act of 1976, §542.22 of which provided for exemption of labor and agricultural organizations, regulated public utilities, joint insurance underwriting arrangements, activities of securities dealers, banks, savings and loan associations, and eleemosynary organizations); Fla. S. 1266 (Reg. Sess. 1975, introduced by S. Dunn) (would have created Florida Antitrust Act of 1975, §542.22 of which provided for exemption of labor and agricultural organizations, regulated public utilities, joint insurance underwriting arrange-

agree.[150] The Florida Antitrust Act of 1980 creates antitrust exemptions that potentially may be construed very broadly.[152] After discussion of the development and present status of trucking regulation, the effect of the Florida antitrust exemptions will be considered in some detail.

ANTITRUST AND FLORIDA TRUCKING DEREGULATION

The deregulation of trucking in Florida presents a unique opportunity to examine the role of antitrust law in filling the resulting regulatory void. As the complete deregulation of trucking in Florida removes the command of the state from the regulatory scheme, the state action exemption is unavailable to the Florida trucking industry. However, an even broader ground for the unavailability of the state action doctrine exists.[153] The Florida Antitrust Act of 1980 defines "person" to include "any . . . governmental entity, including the State of Florida, its departments, agencies, political subdivisions and units of government."[154] The Florida act, like the Sherman Act, states that "[i]t is unlawful for any person"[155] to monopolize or attempt to monopolize trade. Thus, there is a possibility that the state itself may be liable for antitrust law violations. From this it is argued that there is no state action immunity from antitrust actions brought under the Florida act.[156]

Although the state action exemption no longer protects Florida truckers from federal or Florida antitrust liability,[157] the scope of the complementary *Noerr-Pennington* doctrine has not been addressed in an unregulated con-

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ments, activities of securities dealers, banks, savings and loan associations, eleemosynary corporations, and activities permitted under the Florida Fair Trade Law); Fla. H.R. 1697, as amended (Reg. Sess. 1974, introduced by Rep. Dubbin and others) (would have created Florida Antitrust Act of 1973, §542.21 of which would have provided for exemption of labor and agricultural organizations, regulated utilities, and collective bargaining agreements); Fla. H.R. 1697 (Reg. Sess. 1973, introduced by Rep. Dubbin and others) (would have created Florida Antitrust Act of 1973, §542.21 of which provided for exemption of labor and agricultural organizations, actions regulated by the state, and collective bargaining agreements).

150. Bills that have been passed, *e.g.*, Fla. S. 265 (Reg. Sess. 1977, introduced by S. Thomas), Fla. H.R. 4198 (Reg. Sess. 1976, introduced by Committee on Judiciary), have had nothing whatever to do with antitrust exemptions.

151. See note 24 and accompanying text, *supra*.

152. See note 25 *supra*.

153. Ross, Milbrath, & Litchford, *The Florida Antitrust Act of 1980—Part I*, 54 FLA. B.J. 605, 610 (1980).

154. Florida Antitrust Act, FLA STAT. §542.17(3).

155. Florida Antitrust Act, FLA. STAT. §542.19.

156. Ross, Milbrath, & Litchford, *supra* note 153, at 610.

157. It should be noted that anticompetitive activity which is conducted in connection with intrastate transportation could violate both the Florida and federal antitrust laws. As the federal antitrust laws, particularly the Sherman Act, have been broadly interpreted to cover anticompetitive activities which have an indirect economic effect on interstate commerce as well as those which impact solely on interstate commerce, a Florida trucker whose anticompetitive activity substantially affected interstate commerce could find himself subject to both state and federal antitrust liability. ASSOCIATED INDUSTRIES OF FLORIDA, EMPLOYERS' HANDBOOK ON THE NEW FLORIDA ANTITRUST LAW 24-25 (1980) [hereinafter cited as EMPLOYERS' HANDBOOK].

text.[158] It has been suggested that *Noerr-Pennington* is inapplicable to a deregulated industry.[159] However, as the doctrine is based on the right to freely petition the government, a situation may be posited where the *Noerr-Pennington* doctrine should have continued validity. Suppose, for example, that a group of truckers form an association for the purpose of attempting to persuade the legislature to re-enact the former regulatory scheme. It can scarcely be argued that the former scheme, with its pervasive controls over industry entry, route selection, and rates,[160] would not be in restraint of trade within the meaning of both section 1 of the Sherman Act[161] and its Florida counterpart.[162] The truckers would clearly be exempt from Sherman Act liability under the *Noerr* decision itself.[163] Furthermore, there is no reason why liability should be imposed under Florida law, in view of both the policy of freedom of petition and the provision in the Florida act's provision exempting "any activity or conduct . . . [which is] exempt from the provisions of the antitrust laws of the United States."[164]

Assuming that the truckers would be immune from antitrust liability under *Noerr-Pennington,* the next issue concerns the permissible scope of their lobbying efforts. Suppose some shippers vocally opposed the attempt to reinstitute regulation, and the trucker's association in retaliation, refused to serve those shippers. Although the refusal to serve a class of customers would be a per se violation of both the Florida and federal antitrust laws,[165] the issue arises whether *Noerr-Pennington* would exempt the truckers from liability. Most likely, because this anticompetitive conduct was not part of the truckers' petitioning process, it is not within the scope of protection contemplated by *Noerr-Pennington.* Further, the *Noerr-Pennington* doctrine, by protecting the right of petition of one interest group, should not be permitted to prevent other interest groups from likewise petitioning the government. Finally, it has been held that the use of the courts as part of a larger plan to restrain competition does not confer *Noerr-Pennington* immunity.[166]

The extent of the Reed-Bulwinkle exemption presents different considerations. On the federal level, an independent commission will be established to study collective ratemaking and the need, if any, for continued antitrust immunity. Because Reed-Bulwinkle immunity has already been partially eliminated, it is anticipated that this act will be of limited utility to the interstate trucking industry in the future. A state antitrust exemption similar to the Reed-

158. The operation of the *Noerr-Pennington* doctrine is well defined in the regulated context. See text accompanying notes 127-143 *supra.*

159. EMPLOYERS' HANDBOOK, *supra* note 157, at 24.

160. See notes 60-68 and accompanying text, *supra.*

161. See note 94 *supra.*

162. Florida Antitrust Act, FLA. STAT. §542.18 provides that "[e]very contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful."

163. See text accompanying notes 130-132 *supra.*

164. Florida Antitrust Act, FLA. STAT. §542.20.

165. EMPLOYERS' HANDBOOK, *supra* note 157, at 25.

166. *See* Woods Exploration and Producing Co. v. Aluminum Co. of America, 509 F.2d 784 (5th Cir.), *cert. denied,* 423 U.S. 833 (1975); United States v. Otter Tail Power Co., 360 F. Supp. 451 (D. Minn. 1973), *aff'd without opinion,* 417 U.S. 901 (1974).

Bulwinkle Act may, however, prove desirable in Florida.

Suppose a trucker's association attempted to persuade the legislature to enact a law requiring truckers to form a rate association, ostensibly for the purpose of achieving rate stabilization. If the contemplated rate association required that rates be determined consensually by the member companies, such an arrangement would be in clear violation of both the Sherman Act[167] and the Florida act. The effect of the former Florida antitrust statute[168] on the establishment of rate organizations has been considered by the Florida Attorney General.[169] The Attorney General concluded that an agreement among carriers to set only one rate, or to establish a minimum rate, would violate the Sherman Act absent state regulation.[170] The present absence of state regulation, taken by itself, seems to compel the conclusion that such an agreement would now be illegal.

Another, more plausible, situation would be the formation of a non-profit rate reporting association, which would then publish rates periodically. Although such a compilation of rates would be valuable in keeping shippers and the general public informed of current rates, it could also induce a form of price uniformity in that, if a price leader emerged, all other trucking firms would have to "follow the leader" to compete effectively. One of the major criticisms of deregulation is that, without the rate publication requirement, shippers lack adequate information upon which to base their selection of a carrier and truckers do not know what their competitors are charging.[171] The more relevant question, however, is whether rate publication constitutes price-fixing under Florida law. Although no Florida case addresses this question, a Florida Attorney General opinion[172] referring to a rate organization under a regulatory regime stated that if "individual access to the [Public Service Commission] is guaranteed, the membership agreement among participating carriers would be of no concern unless shown to unavoidably and necessarily result in uniformity of rates."[173] By analogy this conclusion indicates that no antitrust liability would lie without a showing of unavoidable, foreseeable rate uniformity absent an express agreement to establish uniform rates.

Such reasoning, however, fails to take into account the doctrine of conscious parallelism. This doctrine states that a finding of conspiracy under

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167. *See* United States v. United States Gypsum Co., 438 U.S. 422 (1978) (exchanges of current price information, although not per se violations of the Sherman Act, will support criminal conviction under Sherman Act if undertaken with knowledge of probable consequences and actual effect is anticompetitive); United States v. Container Corp. of America, 393 U.S. 333 (1969) (exchange of price information which has effect of reducing price competition violates §1 of Sherman Act).

168. FLA. STAT. §542.01-.13 (1979) (repealed 1980).

169. In Opinion 078-53 the Attorney General considered whether the practice of price-fixing which was encouraged by the Public Service Commission and engaged in by several Florida motor carriers was violative of the then applicable state antitrust law. [1978] FLA. ATT'Y GEN. ANNUAL REP. 123.

170. *Id.* at 127.

171. J. MILLER, *supra* note 6, at 3.

172. [1978] FLA. ATT'Y GEN. ANNUAL REP. 123.

173. *Id.* at 127 (emphasis added).

section 1 of the Sherman Act can be inferred when several firms, each aware of the activities of the others, act in the same way. The leading case for the proposition that an agreement can be inferred from commonality of conduct is *Interstate Circuit v. United States*.[174] In that case, two affiliated chains of motion picture exhibitors attempted to weaken their competition by advising several motion picture distributors that they would only purchase films if the distributors accepted certain pricing constraints.[175] Although there was no direct evidence that the distributors had actually agreed among themselves to meet these demands,[176] the Court upheld the lower court's finding of a conspiracy among the distributors.[177] Application of the doctrine in both *Interstate Circuit* and its progeny,[178] however, has depended largely on whether other facts indicate that the decisions of the supposed conspirators were interdependent.[179] The central question thus becomes whether the participants constituted a group acting together, or whether they merely happened to be doing the same thing at the same time.[180]

Such an argument also conflicts with the 1980 Act's requirement that it "be liberally construed to accomplish its beneficial purpose" of fostering "effective competition."[181] This tension between the policies of robust competition and the dissemination of price information to consumers in a free market economy is resolved by reference to neither statutory nor common law. To resolve this tension properly, a liberal construction of the statute should be employed to prevent this "non-agreement" to, in effect, induce price uniformity. However, such a decision would probably injure the consuming public, the very people the antitrust laws are designed to protect. For example, even if an entirely independent rate organization was established, there would be no practical method of preventing price leading; indeed, the attempt itself would be contrary to the policy of robust competition.

Florida might choose to remove this uncertainty by enacting a "little Reed-Bulwinkle Act," which would establish an independent state-chartered rate organization to compile and periodically publish tariffs. The regulatory character of the organization could be minimized by financing it either from the general highway trust fund or through subscriptions to the tariffs. Although membership in the organization could be strictly voluntary, the Act would

174. 306 U.S. 208 (1939).

175. *Id.* at 215-17.

176. *Id.* at 226.

177. *Id* at 232.

178. *See, e.g.*, United States v. Paramount Pictures, 334 U.S. 131, 142 (1948) ("It is not necessary to find an express agreement in order to find a conspiracy"); C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489, 497 (9th Cir. 1952), *cert. denied*, 344 U.S. 892 (1952) (the "question is not whether identical prices throughout the industry *in and of itself* establishes a conspiracy") (emphasis in original); Pevely Dairy Co. v. United States, 178 F.2d 363, 369 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950) (mere uniformity of prices in the sale of a standardized commodity is not in itself evidence of Sherman Act violation).

179. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 658 (1962).

180. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 317 (1977).

181. Florida Antitrust Act, FLA. STAT. §542.16.

provide Reed-Bulwinkle type immunity to members of the organization. This provision would encourage maximum industry participation and, more importantly, would clarify the extent to which members of a rate association are immune from antitrust liability.

CONCLUSION

The statement that the trucking industry in Florida has been completely deregulated is true only in a limited sense. In reality, the industry will be regulated by both the market and the antitrust laws. It has been said that regulating trucking solely by means of the antitrust laws would substantially reduce competition.[182] This assertion ignores the pro-competition purpose of the antitrust acts.[183] Further, it is of especially dubious validity in Florida because of the inapplicability of the state action doctrine to Florida truckers.[184] As the number and scope of antitrust exemptions decrease, *a fortiori* the strength and scope of the antitrust laws must become greater. The United States Supreme Court has recognized the principle that the relative pervasiveness of a regulatory scheme determines the existence of antitrust exemptions.[185] This suggests that the trucking industry will be regulated by a combination of regulatory acts and the antitrust laws. To the extent that one recedes, the other will expand to fill the vacuum. Thus, as trucking regulation has receded on both the state and federal levels, the antitrust laws have filled the void, largely by changes to the scope of antitrust exemptions. This effect may become more pronounced in the future if the Reed-Bulwinkle Act is repealed.

Therefore, the importance of antitrust exemptions to the Florida trucking industry lies not in the specific exemptions themselves, but in the way they define the reach of the antitrust laws. One need only look to the Sherman Act, basically unchanged since its enactment 90 years ago,[186] to realize that the Act was modified to accommodate the needs of an emerging industrial society by the creation of the Reed-Bulwinkle, *Noerr-Pennington*, and other exemptions, rather than by revision of the statute itself. Antitrust exemptions have thus served as the "revisers" of the basic antitrust laws. Accordingly, decisions by the Florida legislature on whether to create, for example, a "little Reed-Bulwinkle Act," will play a critical role in determining the extent to which Florida truckers will be subject to antitrust liability for anticompetitive behavior.

This note has briefly reviewed the major federal and Florida law pertaining to antitrust exemptions for the trucking industry. Although much of this legislation is new and untested, the Florida legislature's decision to deregulate

182. Ogborn, *supra* note 5, at 16.

183. For example, the express purpose of the Florida Antitrust Act of 1980 is "to complement the body of federal law prohibiting restraints of trade or commerce in order to foster effective competition." Florida Antitrust Act, FLA. STAT. §542.16.

184. See text accompanying notes 153-156 *supra*.

185. *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (rejection by Congress of pervasive regulatory scheme for electric power industry supports rejection of claim of antitrust exemption); United States v. Borden Co., 308 U.S. 188 (1939) (federal regulation of milk industry not pervasive, hence, no antitrust immunity).

186. See note 96 *supra*.

trucking and simultaneously enact a new antitrust law should stimulate competition in the Florida trucking industry. While problems undoubtedly will arise, precise tailoring of the reach of exemptions to the Florida Antitrust Act of 1980 will likely minimize the need for re-regulation while providing efficient, low-cost service to Florida shippers.

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