Note

Interlocutory Appeals of Orders Denying Claims of State Action Antitrust Immunity

I. Introduction

When a state or its subdivision acts in a manner perceived as violating the Sherman Antitrust Act,[1] and a lawsuit results, the state may attempt to invoke the doctrine of state action antitrust immunity and move for summary judgment. If successful, the immunity shields the state from suit regarding the antitrust issue.[2] However, the trial court may deny the state action antitrust immunity. In this case, the state may desire to appeal the denial immediately. If the court denies the motion for summary judgment, it might deprive the state of deserved immunity from trial, only to be reversed at a later time, thereby wasting precious judicial resources. Conversely, if the trial court improperly grants the state's motion for summary judgment, it may deprive the opposing party of the right to resolve the dispute as to the alleged antitrust violations. To avoid these results, parties attempt to seek interlocutory review of the immunity issue.[3]

Two conflicting responses to such requests have emerged in the federal courts of appeals. In *Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority*,[4] the Eleventh Circuit allowed an immediate review of a denial of the state action antitrust immunity, holding that such a denial is an appealable collateral order. Meanwhile, the Sixth Circuit, in *Huron Valley Hospital, Inc. v. City of Pontiac*,[5] using the same criteria in its decision, held that such denials are not collateral orders, and thus not immediately appealable. This Note attempts to resolve this conflict by examining the standards used and interests involved when a claim of state action antitrust immunity is asserted and denied. Part II examines the origins of state action antitrust immunity. Part III examines the final judgment rule and interlocutory appeals. Part IV examines the appealability of a denial of state action antitrust immunity in light of the collateral order doctrine developed by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*[6] Parts V and VI consider the *Huron Valley* and *Commuter Transportation* decisions in light of the foregoing principles. This Note concludes that the denial of summary judgment regarding state action antitrust immunity should be immediately appealable.

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1. 15 U.S.C. §§ 1–7 (1982).

2. *See, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Parker v. Brown, 317 U.S. 341 (1943).

3. This note does not address the issue of the appealability of a *grant* of state action antitrust immunity. In such case, the plaintiff would desire to appeal the ruling that the defendant is immune from suit, for without such an appeal, the plaintiff would be without redress for the defendant's actions. The granting of an immunity from the antitrust laws based on state action is clearly different from a denial of the same. The grant of the immunity constitutes a final judgment for purposes of appeal, because it effectively ends the litigation. Therefore, the *Cohen* analysis would not apply because the finality of the litigation would be assured by the order, from which appeal may generally be taken. The district court in Wall v. City of Athens, 663 F. Supp. 747 (M.D. Ga. 1987) found substantial questions of law and fact permitting interlocutory appeal arising from its decision to partially grant state action antitrust immunity to the city of Athens, Georgia.

4. 801 F.2d 1286 (11th Cir. 1986).

5. 792 F.2d 563 (6th Cir.), *cert. denied*, 107 S. Ct. 278 (1986).

6. 337 U.S. 541 (1949).

II. The Origins of State Action Antitrust Immunity

The purpose of the federal antitrust laws is to prohibit unreasonable interference with market competition in interstate commerce.[7] This policy is generally embodied in the Sherman Antitrust Act,[8] which was enacted in 1890 as a response to monopolistic or near-monopolistic behavior of large corporations.[9] The Sherman Act explicitly forbids anticompetitive behavior by *corporations* and *persons*, but no mention is made of the anticompetitive actions of a state.[10] Furthermore, the Supreme Court has held that there was no congressional intention to "restrain state action or official action directed by a state."[11] Many state and federal statutes regulate markets within the state to serve state goals or to protect the interests of state residents.[12] While Congress may generally use its power under the commerce clause to supersede any state laws that affect interstate commerce,[13] the Sherman Act does not supersede all state laws that regulate competition.[14] Often a state eliminates or restricts competition to serve a rational state objective. Provided interstate commerce is not overburdened, and the decision making process regarding the anticompetitive behavior is publicly supervised, then the Sherman Act may be superseded by state law.[15] This concept is judicially created and is known as the state action doctrine or the state action antitrust immunity.[16]

In *Parker v. Brown*,[17] the Supreme Court created the state action antitrust immunity by granting immunity from the strictures of the Sherman Act to a California state raisin marketing program.[18] The program was designed to avoid potentially dangerous competition in the raisin industry by limiting raisin production and adopting price floors below which no raisins could be sold.[19] This prompted the plaintiff, a private producer of California raisins, to sue the state under the Sherman Act, alleging that the state program illegally interfered with and unduly burdened interstate commerce.[20] The Court emphasized federalism notions in reasoning that the Sherman Act was directed toward private anticompetitive conduct, rather than state regulatory conduct.[21] The Court observed that "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to

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7. Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 Harv. L. Rev. 435, 436 (1981) [hereinafter Areeda].

8. 15 U.S.C. §§ 1–7 (1982).

9. A. Stickells, Antitrust Laws 49 (1972). For an alternate view, see D. Armentano, Antitrust and Monopoly 5–6 (1982).

10. 15 U.S.C. §§ 1–7 (1982).

11. Parker v. Brown, 317 U.S. 341, 351 (1943).

12. *See* Weschler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954).

13. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

14. Areeda, *supra* note 7, at 436.

15. *Id.*

16. *See, e.g.*, Note, *Antitrust Immunity*, 65 Neb. L. Rev. 330 (1986) [hereinafter Note].

17. 317 U.S. 341 (1943).

18. *Id.* at 344–45.

19. *Id.* at 348.

20. *Id.* at 344.

21. *Id.* at 351–52.

Congress."[22] Thus, the Sherman Act allows a state to regulate commerce within its borders.[23] Provided the state actively supervises the private anticompetitive conduct pursuant to "the legislative command of the state,"[24] the state regulation is classified as state action not subject to the federal antitrust laws.[25]

The *Parker* decision created the impression that all state and political subdivisions and agencies were exempt from the federal antitrust laws.[26] This impression was eliminated by subsequent Supreme Court decisions that clearly limited the state action doctrine.[27] In *Goldfarb v. Virginia State Bar*,[28] the plaintiffs challenged the validity of the minimum fee schedules of a county bar association, which were promulgated by the Virginia Bar Association, an administrative agency of the Virginia Supreme Court.[29] Lawyers charging less than the prescribed minimum prices were subject to disciplinary proceedings.[30]

The Court rejected the bar association's claim of immunity from the federal antitrust laws.[31] Critical to this decision was the fact that while the Supreme Court of Virginia was empowered to regulate the practice of law, the court did not require or prescribe the attorney fee schedules.[32] In effect, the state did not specifically mandate the minimum fee schedules. The United States Court reasoned that "[i]t is not enough that . . . anti-competitive activity is prompted by state action; rather, anti-competitive activities must be compelled by direction of the State acting as a sovereign. . .",[33] for state antitrust immunity to exist. The *Goldfarb* case thus limited the *Parker* immunity as applied to the anticompetitive acts of a state agency.

The next Supreme Court limitation on state action antitrust immunity emerged from the plurality opinion in *Cantor v. Detroit Edison Co.*[34] Here again, the lack of state agency involvement or supervision in the allegedly anticompetitive behavior was the crucial issue.[35] The plaintiff, a retail druggist selling lightbulbs, sued pursuant to the Sherman Act to enjoin Detroit Edison's policy of providing so-called "free" lightbulbs to its residential consumers while recovering the cost of the lightbulbs through higher electrical rates.[36] The plaintiff argued that Detroit Edison

22. *Id.* at 351.
23. *Id.* at 352.
24. *Id.* at 350.
25. *Id.* at 350–52.
26. *See, e.g.*, Note, *supra* note 16, at 335–37. This impression likely emerged from the context of the following phrase: "[w]e have no question of the state or its municipality becoming a participant in a private agreement . . . ." Parker v. Brown, 317 U.S. 341, 351 (1943). While there is no explicit statement, the treatment of *municipality* as the equivalent of *state* in the context of the immunity discussion probably gave rise to the impression.
27. *See, e.g.*, Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985); Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978).
28. 421 U.S. 773, *reh'g denied*, 423 U.S. 886 (1975).
29. *Id.* at 776. The petitioners sought to purchase a house in Fairfax County, Virginia. They had to obtain title insurance which required a title examination that only a member of the Virginia State Bar could legally perform. After a fruitless search to find an attorney who would perform the search for less than the minimum fee prescribed by the Virginia State Bar, the petitioner brought suit under, *inter alia*, § 1 of the Sherman Act.
30. *Id.* at 777–78.
31. *Id.* at 792.
32. *Id.* at 790–91.
33. *Id.* at 791.
34. 428 U.S. 579 (1976).
35. *Id.* at 590–92.
36. *Id.* at 582–83.

effectively used its monopoly in the electricity business to restrain competition in the lightbulb business.[37] The Court refused to equate the state public service commission's neutrality on the issue of whether Detroit Edison should sell lightbulbs with state action sufficient to allow Detroit Edison to claim immunity from the federal antitrust laws.[38] In effect, state neutrality did not rise to the level of state action. This was the same approach taken in *California Liquor Dealers v. Midcal Aluminum*,[39] where the Supreme Court found that a California system for wine pricing which was merely authorized by the state, (the state simply enforcing the prices established by private parties), was not enough to establish immunity under the state action antitrust immunity doctrine.[40] Immunity existed, therefore, if (1) the restraint was clearly articulated and affirmatively expressed and (2) the restraint was supervised by public authorities.[41]

A year later, the Court resolved a challenge to Arizona's prohibition of attorney advertising in *Bates v. State Bar of Arizona*.[42] In this case, however, the Court eventually held that the claim of immunity was valid, and the antitrust laws did not apply, despite the resulting restraint of trade.[43] Unlike the *Goldfarb* and *Cantor* cases, the Arizona rules at issue in *Bates* were administered by a state bar association that was under "continuous supervision" by the Arizona Supreme Court.[44] The Court found that since Arizona's policy was clearly expressed and actively supervised, the state action was sufficient to justify an immunity.[45] Therefore, the state "as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit . . ."[46] by omitting any reference to state action.

In *City of Lafayette v. Louisiana Power & Light Co.*,[47] the first case using the *Parker* analysis to examine the actions of a state's political subdivisions, the plurality opinion stated that municipalities were not sovereigns in and of themselves, and that this status presumptively placed cities within the purview of the Sherman Act.[48] The municipalities were treated as persons for purposes of Sherman Act analysis; their status as political subdivisions of the state were not sufficient to justify an exemption from the Sherman Act.[49] In fact, state action antitrust immunity applied only when the anticompetitive conduct occurred "pursuant to [a] state policy to displace competition with regulation or monopoly public service."[50] Thus, according to the plurality in *Lafayette*, while the municipalities' specific anticompetitive conduct need

37. *Id.* at 581.
38. *Id.* at 585.
39. 445 U.S. 97 (1980).
40. *Id.* at 105.
41. P. AREEDA, ANTITRUST ANALYSIS ¶ 181 (3d ed. 1981 & Supp. 1986).
42. 433 U.S. 350 *reh'g denied*, 434 U.S. 881 (1977).
43. *Id.* at 363.
44. *Id.* at 361.
45. *Id.* at 362.
46. *Id.* at 359 (quoting Parker v. Brown, 317 U.S. 341, 352 (1943)).
47. 435 U.S. 389 (1978), *overruled in part by* California Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97 (1980).
48. *Id.* at 412.
49. *Id.* at 397.
50. *Id.* at 413.

not be the subject of express, detailed state authorization, the state must have "contemplated the kind of action complained of . . ."[51] by the plaintiff. Later, a majority of the Supreme Court in *Town of Hallie v. City of Eau Claire*,[52] held that "the active state supervision requirement should not be imposed in cases in which the actor is a municipality."[53] Thus, "active state supervision is not a prerequisite to exemption from the antitrust laws where the actor is a municipality."[54] Therefore, the Court effectively expanded the scope of the state action antitrust immunity.

The force of these cases, though, has been superseded by the enactment of the Local Government Antitrust Act of 1984,[55] which generally prohibits recovery of damages and costs against municipalities. This effectively puts municipal immunity on a par with that enjoyed by states and the federal government.

Generally, there can be no *Parker* state action antitrust immunity without (1) adequate public supervision and (2) a clear state purpose to displace antitrust law.[56] Professor Areeda[57] notes that while the involvement of a governmental agency is not automatically enough to invoke the *Parker* immunity, its presence is a minimal requirement.[58] State-mandated compulsion to conform to the anticompetitive behavior, while also not a guarantee of immunity, may further evidence a state's intention to substitute regulation for competition, a situation entitling the state to antitrust immunity.[59] Without delving into the more intricate details of the state action antitrust immunity doctrine, it is sufficient to say that the limits of this immunity will continue to be a subject of intense litigation.[60] This Note discusses whether appeals from denials of state action antitrust immunity claims may be immediately pursued in the federal courts.

III. The Final Judgment Rule and Interlocutory Appeals

The concept of "finality" governs when an appeal can be taken in the federal courts. The requirement that a judgment must be final before an appeal may be taken is not new; it was first embodied in the Judiciary Act of 1789.[61] This concept, the final judgment rule,[62] allows an appeal only from a decision where all the issues in the litigation have been decided by the trial court.[63] The decision must be one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[64] The rationale is that litigation should not be piecemeal and that numerous appeals could cause unreasonable delays and waste precious judicial

51. *Id.* at 415 (quoting City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976)).
52. 471 U.S. 34 (1985).
53. *Id.* at 46.
54. *Id.* at 47.
55. 15 U.S.C. § 34 (Supp. 1986).
56. P. Areeda, Antitrust Analysis ¶ 181 (3d ed. 1981).
57. Phillip Areeda is the Langdell Professor of Law at Harvard University.
58. P. Areeda, Antitrust Analysis ¶ 181 (3d ed. 1981).
59. *Id.*
60. *Id.*
61. Ch. 20, § 22, 1 Stat. 73, 84 (codified at 28 U.S.C. § 1291 (1982)).
62. 28 U.S.C. § 1291 (1982).
63. *Id.*
64. Catlin v. United States, 324 U.S. 229, 233 (1945).

resources.[65] Furthermore, appellate review of each court order potentially subject to reversal may be pointless if an appeal is rendered moot by the disposition of the case in the trial court.[66] The crucial distinction is between an order that is final as to the particular issue and an order that is a final decision on the merits. The latter are final orders within the meaning of the final judgment rule and therefore may be immediately appealed.[67] The former orders, however, are interlocutory decisions. An interlocutory decision, which is generally defined as an order deciding some issue in the suit that is not determinative of the final outcome of the litigation,[68] fails to meet the requirements of the final judgment rule.[69] Interlocutory decisions generally affect only an intervening matter that is collateral to the central issue of the case and do not affect the merits of the action.[70] These are the sorts of decisions that evoked the concerns which led to the final judgment rule: avoiding piecemeal review and crowded dockets.[71] As the dockets of courts of appeals became increasingly crowded, the Supreme Court turned to the finality requirement as a partial solution.[72] Thus, interlocutory orders are ultimately reviewable, but are not immediately appealable.

The Supreme Court eventually noted that "overly rigid insistence upon a 'final decision' for appeal"[73] might not serve the best interests of the parties involved in the litigation.[74] Situations may arise where the lack of an immediate appeal could irreparably damage a party's rights.[75] In such a situation, the concerns of judicial efficiency which underpin the final judgment rule give way to the goal of achieving justice. Both the Court[76] and Congress[77] have created exceptions that allow the appeal of interlocutory decisions. The most notable exception to the final judgment rule, created to protect the interests of litigants whose rights would be unduly jeopardized without immediate review, is the collateral order doctrine.[78]

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65. Note, *Interlocutory Appeals of Orders Granting or Denying Stays of Arbitration,* 80 MICH. L. REV. 153, 156 (1981).

66. *Id.*

67. 28 U.S.C. § 1291 (1982).

68. Beebe v. Russell, 60 U.S. (19 How.) 283, 285 (1857).

69. 28 U.S.C. § 1291 (1982).

70. United States v. Nixon, 418 U.S. 683, 690 (1974).

71. Beebe v. Russell, 60 U.S. (19 How.) 283, 285 (1857).

72. *See* Crick, *The Final Judgment as a Basis for Appeal,* 41 YALE L.J. 539, 550–51 (1932). The Court has created practical tests for identifying whether or not a judgment is final. *See, e.g.*, DiBella v. United States, 369 U.S. 121, 124, 129 (1962); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949); Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 69 (1948); Market Street Ry. v. Railroad Comm'n, 324 U.S. 548, 552 (1945); Cobbledick v. United States, 309 U.S. 323, 326 (1940). *But see* United States v. Schaefer Brewing Co., 356 U.S. 227, 232 (1958); Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 212 (1952).

73. Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 746 (1976).

74. *Id.*

75. *See, e.g.*, Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848); Sekaquaptewa v. MacDonald, 575 F.2d 239 (9th Cir. 1978).

76. *See, e.g.*, Abney v. United States, 431 U.S. 651 (1977).

77. 28 U.S.C. 1292(a)(1) (1982), which permits appeals of various types of interlocutory orders from certain United States courts.

78. *See infra* notes 79–127 and accompanying text.

IV. The Collateral Order Doctrine

The collateral order doctrine derives from the Supreme Court's decision in *Cohen v. Beneficial Industrial Loan Corp.*,[79] a diversity case involving a shareholder derivative action. Because of the small number of shares that the plaintiff shareholder owned, he was required under New Jersey law to pay the defendant corporation's expenses and attorney fees, if his suit was unsuccessful.[80] In light of this law, the defendant corporation moved that the plaintiff be required to post bond of $125,000.[81] The motion was denied by the district court on the grounds that the New Jersey statute did not apply in a diversity suit.[82] This issue of posting bond was held to be an interlocutory order because it was a matter collateral to the central issue in this case.[83] The Supreme Court stated that the interlocutory appeal fell "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[84]

The Court thus created a new exception to the final judgment rule which requires that (1) the trial court's decision involve an issue that is collateral to the rights involved in the case;[85] (2) the trial court's decision must "conclusively determine the disputed question,"[86] as opposed to being a "tentative, informal, or incomplete"[87] answering of the question;[88] (3) the collateral order must affect an "important" right of one of the parties, one that is "too important to be denied review;"[89] and (4) a risk must exist that the party's important right will be damaged or lost beyond repair if an immediate appeal is not granted regarding the interlocutory decision.[90]

Since *Cohen*, the Supreme Court has allowed immediate appeals of collateral orders with increasing frequency.[91] Far from liberalizing the strictures of the final judgment rule, these decisions were a natural outgrowth of the *Cohen* analysis and its requirements for the immediate appeal of collateral orders.[92] In all of these cases, the

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79. 337 U.S. 541 (1949).

80. *Id.* at 544–45.

81. *Id.* at 545.

82. *Id.*

83. *Id.* at 546.

84. *Id.*

85. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). This generally means that the issue must be severable and distinct from the central issue being decided in the litigation. Mitchell v. Forsyth, 472 U.S. 511, 529 n.10 (1985).

86. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

87. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). A decision that merely defers resolution of an issue is not sufficient to invoke the collateral order doctrine. Thill Sec. Corp. v. New York Stock Exch., 469 F.2d 14 (7th Cir. 1972).

88. Thill Sec. Corp. v. New York Stock Exch., 469 F.2d 14 (7th Cir. 1972).

89. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

90. *Id.*

91. *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511 (1985) (qualified immunity); Nixon v. Fitzgerald, 457 U.S. 731 (1982) (absolute immunity); Abney v. United States, 431 U.S. 651 (1977) (double jeopardy); Stack v. Boyle, 342 U.S. 1 (1951) (excessive bail).

92. *See supra* notes 85–91 and accompanying text.

Court examined the practical effect of allowing or disallowing appeals from collateral orders and strictly followed the *Cohen* requirements.[93]

After the 1949 *Cohen* decision, it took only two years for the next application of the collateral order doctrine to emerge. In *Stack v. Boyle*,[94] the defendants were held for violating the Smith Act[95] and their bail was set at $50,000 each, an amount they argued was excessive.[96] The Supreme Court, rejecting the defendants' eighth amendment habeas corpus claim,[97] relied on the *Cohen* doctrine to assure the defendants that their motion for reduction of bail, if unsuccessful upon remand to the district court, would be immediately appealable.[98] The Court, citing *Cohen*, reasoned that "[a]s there is no discretion to refuse to reduce excessive bail, the order denying the motion to reduce bail is appealable as a 'final decision.'"[99]

Twenty-six years later the Court, in *Abney v. United States*,[100] was faced with a district court denial of the defendants' motion to dismiss an indictment for violating the Hobbs Act.[101] The motion, made on the grounds that the retrial would subject the defendants to double jeopardy, was denied.[102] Until that time, numerous courts of appeals had held that a pretrial denial of a motion to dismiss an indictment on double jeopardy grounds was immediately appealable under the collateral order doctrine of *Cohen*.[103] Other courts of appeals had held just the opposite.[104] The Court found that each *Cohen* requirement was met. First, a claim of double jeopardy was by its nature collateral to the primary issue in the case.[105] The second requirement, that the order be a conclusive determination of the disputed question, was met because such denials are a "complete, formal, and . . . final rejection" of the double jeopardy claim.[106] Third, the double jeopardy claim involved an important right secured by the fifth amendment guarantee against being twice tried for the same offense.[107] Finally, the double jeopardy immunity could be "irretrievably lost" if an immediate appeal was denied, because such a wrong cannot be redressed.[108] There is no way to "untry" a case.

In *Nixon v. Fitzgerald*,[109] a decision which closely parallels the *Cohen* analysis,

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93. *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731, 742–43 (1982); Abney v. United States, 431 U.S. 651, 658–62 (1977).

94. 342 U.S. 1 (1951).

95. 18 U.S.C. §§ 371, 2385 (1982). These two sections deal with conspiracy to commit an offense against the United States, and advocating the overthrow of the United States, respectively.

96. Stack v. Boyle, 342 U.S. 1, 3 (1951).

97. *Id.* at 6–7.

98. *Id.* at 6.

99. *Id.*

100. 431 U.S. 651 (1977).

101. 18 U.S.C. § 1951 (1982). This section deals generally with the interference with commerce by threats or violence.

102. Abney v. United States, 431 U.S. 651, 662 (1977).

103. *See, e.g.*, United States v. Barket, 530 F.2d 181 (8th Cir. 1975), *cert. denied*, 429 U.S. 917 (1976); United States v. Becherman, 516 F.2d 905 (2d Cir. 1975); United States v. Lansdown, 460 F.2d 164 (4th Cir. 1972).

104. United States v. Young, 544 F.2d 415 (9th Cir.), *cert. denied*, 429 U.S. 1024 (1976); United States v. Bailey, 512 F.2d 833 (5th Cir.), *cert. dismissed*, 423 U.S. 1039 (1975).

105. Abney v. United States, 431 U.S. 651, 659 (1977).

106. *Id.*

107. *Id.* at 660–61.

108. *Id.* at 660–62.

109. 457 U.S. 731 (1982).

the Court extended the collateral order doctrine to cover an appeal from an interlocutory order denying the President of the United States' claim of absolute immunity from suit.[110] This case is noteworthy, as it further established the Court's treatment of orders denying claims of absolute immunity.[111] The *Nixon* decision, which permitted the immediate appeal of orders denying presidential absolute immunity, was the third such decision with regard to orders denying claims of absolute immunity.[112] The decision seemed to indicate that when a claim of absolute immunity is denied, the Court will allow an appeal. The Court stated: "At least twice before this Court has held that orders denying claims of absolute immunity are appealable under *Cohen*."[113]

Even in the case of qualified immunity from trial, as opposed to absolute immunity, the Court has allowed the immediate appeal of orders denying such immunity. In *Mitchell v. Forsyth*,[114] the plaintiff, a Vietnam War protester, sued Attorney General John Mitchell under both the fourth amendment and Title III of the Omnibus Crime Control and Safe Streets Act[115] for warrantless wiretapping.[116] The defendant claimed that he possessed a qualified immunity from suit which, once denied by the district court, was immediately appealable.[117] In agreeing with the defendant on this point, the Court delved into the "essential attributes" of immunities by rhetorically asking whether an immunity is "in fact an entitlement not to stand trial under certain circumstances."[118] The Court had already answered that question in the affirmative regarding absolute immunity in its *Abney*[119] and *Nixon*[120] decisions, and did the same with qualified immunity in this situation.[121] Because the decision to disallow an immunity, whether absolute or qualified, is effectively unreviewable on appeal from a final judgment,[122] the Court decided, *inter alia*, that orders denying an alleged qualified immunity are immediately appealable.[123]

Since the *Cohen* decision, the Supreme Court has restated the basic *Cohen* test in *Coopers & Lybrand v. Livesay*.[124] In *Coopers & Lybrand*, the Court basically combined the first and third *Cohen* standards into the requirement that the order "resolve an important issue completely separate from the merits of the action."[125] The *Cohen* requirements that the order "conclusively determine" the disputed issue

110. *Id.* at 741–43.

111. *Id.* at 742.

112. The two previous decisions were Helstoski v. Meaner, 442 U.S. 500 (1979) (claim of immunity under speech and debate clause) and Abney v. United States, 431 U.S. 65 (1977). *See supra* note 101–09 and accompanying text (claim of immunity under the double jeopardy clause).

113. Nixon v. Fitzgerald, 457 U.S. 731, 742 (1982). This trend is crucial to this Note's later analysis of the appealability of orders denying motions for dismissal based on state action antitrust immunity.

114. 472 U.S. 511 (1985).

115. 18 U.S.C. §§ 2510–20 (1982) (This section authorizes a civil cause of action for victims of wiretapping).

116. Mitchell v. Forsyth, 472 U.S. 511, 515 (1985).

117. *Id.* at 515–16.

118. *Id.* at 520.

119. *See supra* notes 100–08 and accompanying text.

120. *See supra* notes 109–13 and accompanying text.

121. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

122. *Id.* at 525.

123. *Id.* at 530.

124. 437 U.S. 463 (1978).

125. *Id.* at 468.

and that the order "be effectively unreviewable on appeal from a final judgment" remained as distinct prongs of the test.[126] Thus, the Supreme Court has referred to the original four-part *Cohen* test as the three-part *Coopers & Lybrand* test.[127] Despite the new label, the substantive content of the test remains essentially unchanged. Regardless of the test label, the Court's tendency to find pretrial orders denying immunities immediately appealable under the collateral order doctrine[128] will be the basis of analysis in section VII.

V. THE *HURON VALLEY* DECISION

Using the *Cohen* standard, the Sixth and Eleventh Circuits reached opposite conclusions in recent factually similar cases. In *Huron Valley Hospital, Inc. v. City of Pontiac*[129] the Sixth Circuit held that a denial of summary judgment, sought under the state action antitrust immunity doctrine, is not immediately appealable.[130] In that case, the Huron Valley Hospital attempted to construct a hospital in Oakland County, Michigan.[131] Pursuant to state and federal law, Huron Valley applied for a certificate of need from the Michigan Department of Public Health.[132] This request was denied twice administratively while an existing facility in the county was granted such a certificate.[133] After exhausting all administrative avenues, Huron Valley filed suit in the Oakland County Circuit Court, which reversed the prior decisions and ordered the Department of Public Health to issue a certificate of need to Huron Valley.[134] The Michigan Court of Appeals affirmed the trial court's finding, holding that the Department of Health had based its decision on unpublished criteria that favored the other applicant[135] and that the use of such unpublished criteria was a violation of the statutory limitations on the Department's discretion.[136] Huron Valley thus was deprived of an impartial review of its application, which violated its right to due process.[137] The court of appeals ordered the issuance of the certificate of need.[138]

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126. *Id.*

127. Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 431, *reh'g denied*, 474 U.S. 808 (1985).

128. Just as significant as the tendency of the Supreme Court to grant immediate appeal of orders denying an immunity, is the line of cases which disallow immediate appeal of orders involving attorney disqualification. In Richardson-Merrell Inc. v. Koller, 472 U.S. 424, *reh'g denied*, 474 U.S. 808 (1985), Flanagan v. United States, 465 U.S. 259 (1984), and Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981), the Court held that a denial of immediate appeal would not be permanently injurious of litigants' rights. This seems to indicate a greater value placed by the Court on claims of immunity than on other claims.

129. 792 F.2d 563 (6th Cir.), *cert. denied*, 107 S. Ct. 278 (1986).

130. *Id.* at 567–68.

131. *Id.* at 564.

132. *Id.*

133. *Id.* at 565.

134. Huron Valley Hosp., Inc. v. Michigan State Health Facilities Comm'n, No. 80-200439-AA (Oakland County Div. Ct. Mar. 27, 1981).

135. Huron Valley Hosp., Inc. v. Michigan State Health Facilities Comm'n, 110 Mich. App. 236, 312 N.W.2d 422, 425–27 (1981).

136. *Id.* at 243–44, 312 N.W.2d at 425.

137. *Id.* at 243–46, 312 N.W.2d at 425–27.

138. *Id.* at 251, 312 N.W.2d at 428.

Further problems ensued when the Department of Health authorized capital expenditures which were later adjudged insufficient.[139] Necessary federal approval for the project was granted, withdrawn, and later reinstated after a lawsuit.[140] Eventually, Huron Valley brought suit, claiming that numerous defendants conspired to violate the antitrust laws by preventing Huron Valley from entering the Oakland County health care market.[141] The defendants, relying on *Parker* state action antitrust immunity, moved for summary judgment.[142] The court eventually denied the motion and found, *inter alia*, that the "defendants could not claim qualified immunity or the state action antitrust exemption."[143]

The Sixth Circuit found that the denial by the district court of the immunity defense did "not satisfy the three requirements necessary for an appeal under the collateral order doctrine."[144] Apparently, the court here referred to the three *Coopers & Lybrand* standards,[145] which required the order to "conclusively determine the disputed question,"[146] "resolve an important decision completely separate from the merits of the action,"[147] and "be effectively unreviewable on appeal from a final judgment."[148]

First, the court held that "the exemption is not an 'entitlement' of the same magnitude as a qualified immunity or absolute immunity, but rather is more akin to a defense to the original claim."[149] The court's use of the term 'exemption' when referring to state action antitrust immunity allowed the contrast between the holding in *Huron Valley* and the Supreme Court's approach to the appeals of immunities in general.[150] Second, the court found it "doubtful that the exemption is lost if immediate appeal is denied."[151] The court observed that "[r]eview of the denial on direct appeal after further development of the record certainly affords the necessary protection if the defense is valid."[152] Finally, the court held that the state action antitrust "exemption" did not satisfy the requirement of the collateral order doctrine that the claim be totally separable from the merits of the original claim:

> [T]he claim is that the defendants conspired and acted to prevent Huron Valley from entering the appropriate health care market in violation of the Sherman Act. The analysis necessary to determine whether clearly articulated or affirmatively expressed state policy is involved and whether the state actively supervises the anticompetitive conduct overlaps the analysis necessary to determine whether the defendants have violated the rights of Huron Valley. This is not a simple conclusion that the law is clearly established as is necessary with

139. Huron Valley Hosp., Inc. v. Michigan State Health Facilities Comm'n, No. 80-200439-AA (Oakland County Div. Ct. Oct. 21, 1982).
140. Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563, 565 (6th Cir. 1986).
141. Huron Valley Hosp., Inc. v. City of Pontiac, 612 F. Supp. 654, 660–61 (E.D. Mich. 1985).
142. *Id.*
143. Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563 (6th Cir.), *cert. denied*, 107 S. Ct. 278 (1986).
144. *Id.* at 567.
145. *See supra* notes 124–28 and accompanying text.
146. Huron Valley Hosp., Inc. v. City of Pontiac, 792 F. 2d 563, 567 (6th Cir.), *cert. denied*, 107 S. Ct. 278 (1986).
147. *Id.*
148. *Id.*
149. *Id.*
150. *See supra* notes 91–127 and accompanying text.
151. Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563, 567 (6th Cir.), *cert. denied*, 107 S. Ct. 278 (1986).
152. *Id.*

> qualified immunity. It is a determination that affirmatively expressed state policy is involved and that the state actively supervises the anticompetitive conduct.[153]

The Sixth Circuit also noted that the Supreme Court has granted immediate appeals of collateral orders in very few situations.[154] The court relied on the reasoning of Justice Brennan in his dissent in *Mitchell v. Forsyth* in which he stated:

> We have always read *Cohen*'s collateral order doctrine narrowly, in part because of the strong policies supporting the . . . final judgment rule. The rule respects the responsibilities of the trial court by enabling it to perform its function without a court of appeals peering over its shoulder every step of the way.[155]

In adopting this reasoning, the court declined to extend the right of immediate appeal any further than the Supreme Court already had.[156]

VI. THE *COMMUTER TRANSPORTATION* DECISION

The restrictive *Huron Valley* approach to the *Cohen* collateral order doctrine as applied to state action antitrust immunity is at variance with a more recent decision by the Eleventh Circuit Court of Appeals. In *Commuter Transportations Systems, Inc. v. Hillsborough County Aviation Authority*,[157] the state action at issue involved an airport authority created by the Florida legislature to develop and administer public airports, which also had the authority to limit and prohibit competition viewed as destructive of commerce and tourism.[158] The authority regulated the number of limousine operators allowed to pick up unreserved passengers.[159] Upon failing to win a contract as one of the approved limousine operators, the plaintiff brought suit alleging that the authority conspired with the plaintiff's competitors to exclude it from the contract, in violation of the Sherman Act.[160] After almost five years, the authority moved for summary judgment on the grounds of state action antitrust immunity. The trial judge denied the motion, relying upon the existence of factual disputes.[161]

Like the *Huron Valley* court, the Eleventh Circuit applied the *Coopers & Lybrand* standard, but with different results. First, the court found that the immunity contemplated by the state action doctrine was "immunity from suit" rather than a "mere defense to liability."[162] Thus, the first requirement—that a decision denying immunity be an effective denial of review on appeal from a final judgment—was satisfied.[163] This facet of the court's holding is derived from the state action doctrine of *Parker v. Brown*.[164] Pursuant to *Parker*, official conduct was immune from federal

153. *Id.*
154. *Id.* at 568.
155. *Id.* at 568 (quoting Mitchell v. Forsyth, 472 U.S. 511, 543–44 (1985) (Brennan, J., dissenting)).
156. *Id.* at 568.
157. 801 F.2d 1286 (11th Cir. 1986).
158. *Id.* at 1288.
159. *Id.*
160. *Id.*
161. *Id.* at 1289.
162. *Id.*
163. *Id.*
164. 317 U.S. 341 (1943).

antitrust scrutiny if the type of activity complained of was authorized and enforced by the state legislature.[165] The aviation authority in the instant case was allowed to negotiate contracts with businesses as it deemed necessary to promote commerce and tourism.[166] Since this activity was contemplated by the legislature, and was precisely the type of disputed activity involved in this case, the court found that the authority's actions were immune under *Parker*.[167]

The court also found the second *Coopers & Lybrand* requirement—that the court order finally and conclusively determine the disputed question—was met.[168] Quoting *Mitchell v. Forsyth*,[169] the court stated that there were "simply no further steps that can be taken in the district court to avoid the trial the defendant maintains is barred."[170] This conclusion required the court to place state action immunity on a par with absolute or qualified immunity from suit, as in the *Mitchell*,[171] *Nixon*,[172] and *Abney*[173] decisions.

Finally, in order to meet the third *Coopers & Lybrand* standard, the order must involve a collateral issue, one which is completely separate from the merits of the action.[174] The court noted that the "claim of immunity is conceptually distinct from the merits of the plaintiff's claim."[175] This conclusion was logical, given the differences between a claim of immunity and the plaintiff's action for antitrust violations by the authority. The Supreme Court stated in *Mitchell* that "a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test."[176] The Eleventh Circuit, in *Commuter Transportation*, noted that the immunity applied in the instant case with the same force, so that the issue was separate from the merits of the litigation and the third requirement of *Cohen* was met.[177]

VII. Resolution

Huron Valley and *Commuter Transportation* involved similar problems, and were evaluated under the same standards of analysis, but were resolved differently. The difference in outcome is attributable to the different substantive analyses employed by the courts. While the *Commuter Transportation* decision is attuned to the policies of the final judgment rule requirements, the *Huron Valley* analysis is form-oriented and, as a result, strays from the objectives of the final judgment rule. These objectives are to avoid piecemeal litigation and to achieve judicial economy

165. *Id.* at 352.
166. Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth., 801 F.2d 1286, 1288 (11th Cir. 1986).
167. *Id.* at 1289.
168. *Id.* at 1290.
169. 472 U.S. 511, 527 (1985) (quoting Abney v. United States, 431 U.S. 651, 659 (1977)).
170. Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth., 801 F.2d 1286, 1289 (11th Cir. 1986).
171. *See supra* notes 114–23 and accompanying text.
172. *See supra* notes 109–13 and accompanying text.
173. *See supra* notes 100–08 and accompanying text.
174. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).
175. Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth., 801 F.2d 1286, 1290 (11th Cir. 1986) (quoting Mitchell v. Forsyth, 472 U.S. 511, 527 (1985)).
176. Mitchell v. Forsyth, 472 U.S. 511, 528–29 (1985).
177. Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth., 801 F.2d 1286, 1290 (11th Cir. 1986).

and efficiency.[178] Generally, this means that it is better to deal with all of an appellant's objections in one appeal rather than in a piecemeal fashion.[179] To allow appeals from every decision that a district court makes in the course of a trial would prove enormously wasteful of time and judicial resources. However, when a defense is denied that would, if allowed, obviate the need for trial, judicial economy and efficiency are best served by allowing an appeal of such a collateral order. This is the logical foundation of *Cohen* and its progeny, which set forth the requirements of the collateral order doctrine.

Of the three requirements for an appeal under the collateral order doctrine, the *Huron Valley* court found none of them met by the facts of that case, whereas the *Commuter Transportation* court found all of the requirements met. Beginning with the requirement that the court order be "effectively unreviewable" on appeal after trial, the *Huron Valley* court held that "[r]eview of the denial on direct appeal after further development of the record certainly affords the necessary protection if the defense is valid."[180] What this stark analysis ignores is the purpose of the immunity itself. The immunity exists based on Congress' decision that the immune party will not have to endure a lawsuit because of certain characteristics upon which Congress has decided to grant immunity. If the litigation continues, and the party asserting the immunity defense later is found immune by law, then the right of the immune party not to endure suit is irretrievably lost. There is no way to "untry" the case. If trial occurs, this right to avoid trial, therefore, is not afforded the "necessary protection" mandated by *Cohen*.

As stark as the Sixth Circuit's analysis was, the Eleventh Circuit's analysis was no more detailed. After noting that cases allowing immunity "provide '*immunity from suit* rather than a mere defense to liability'," [181] the *Commuter Transportation* court found that the order denying immunity is therefore effectively unreviewable on appeal from a final judgment.[182] While the *Commuter Transportation* decision never refers to the *Huron Valley* decision that predated it by five months, the analysis clashes directly with the *Huron Valley* holding that the antitrust immunity is merely a defense to the original claim, rather than an immunity from suit altogether.[183] This view directly contravenes the Supreme Court decisions finding that the state action antitrust immunity, when present, is an immunity from suit.[184] The *Huron Valley* court refers to the immunity as an "exemption" throughout the opinion, language which may make this distinction without a difference facially more distinctive.

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178. DiBella v. United States, 369 U.S. 121, 126 (1962).

179. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

180. Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563, 567 (6th Cir.), *cert. denied*, 107 S. Ct. 278 (1986).

181. Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth., 801 F.2d 1286, 1289 (11th Cir. 1986) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis in original)).

182. *Id.*

183. Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563, 567 (6th Cir.), *cert. denied*, 107 S. Ct. 278 (1986).

184. *See, e.g.*, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Parker v. Brown, 317 U.S. 341 (1943).

The Sixth Circuit further noted that immediate appeals of collateral orders have been permitted in very few situations, and listed the situations in which review had been both allowed and disallowed.[185] The focus should be on the types of cases in which collateral appeals have been allowed. In almost every case permitting collateral appeals, a form of immunity has been at issue, be it a double jeopardy immunity,[186] a qualified immunity,[187] or even an absolute immunity from suit.[188] In all of these situations, the nature of the immunity defense is the factor which militated towards appealability, because there is no way to correct an erroneous decision once the immune defendant is put through a trial.[189] Thus, the *Cohen* concerns established by the Supreme Court seem best served by the *Commuter Transportation* interpretation of the collateral order doctrine in the context of state action antitrust immunity.

The Sixth and Eleventh Circuits also disagreed as to whether a denial of summary judgment premised on state action antitrust immunity is collateral in nature.[190] Clearly, the issue of immunity from suit is important in any lawsuit, and the *Huron Valley* and *Commuter Transportation* courts did not bother to state this obvious proposition. As to the separateness of the claim of immunity from the merits of the case, the Sixth Circuit found the claim that the defendants violated the Sherman Act and the possibility that the defendants enjoyed a state action antitrust immunity to be "intimately intertwined."[191] This conclusion was based on the courts' view that in this case "[t]he analysis necessary to determine whether clearly articulated or affirmatively expressed state policy is involved and whether the state actively supervises the anticompetitive conduct overlaps the analysis necessary to determine whether the defendants have violated the rights of *Huron Valley*."[192]

The Eleventh Circuit, conversely, followed *Mitchell* and held that the immunity claim "is conceptually distinct from the merits of the plaintiff's claim."[193] The Supreme Court recognized in *Mitchell* that a "question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test."[194] While *Mitchell* dealt with qualified immunity, that type of immunity is comparable to the claim of state action antitrust immunity for purposes of applying the *Cohen* doctrine. Again, the *Commuter Transportation* court found that the immunity claim is a collateral issue.[195] The logic of this finding is clear, as the issue of the illegality of behavior is patently distinct from a defendant's immunity from suit regarding such allegedly illegal behavior. To view one issue as collateral to the other requires no great leap of logic. Rather, it is the recognition of two separate and distinct legal issues, such that one may be collateral to the other in a lawsuit.

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185. Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563, 568 (6th Cir.), *cert. denied*, 107 S. Ct. 278 (1986).

186. Abney v. United States, 431 U.S. 651 (1977).

187. Mitchell v. Forsyth, 472 U.S. 511 (1985).

188. Nixon v. Fitzgerald, 457 U.S. 731 (1982).

189. *See supra* notes 100–23 and accompanying text.

190. *See supra* notes 153, 174–77 and accompanying text.

191. Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563, 567 (6th Cir.), *cert. denied*, 107 S. Ct. 278 (1986).

192. *Id.*

193. Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth., 801 F.2d 1286, 1290 (11th Cir. 1986) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

194. Mitchell v. Forsyth, 472 U.S. 511, 528–29 (1985).

195. Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth., 801 F.2d 1286, 1290 (11th Cir. 1986).

The final requirement for appealability as a collateral order is that the order must conclusively determine the disputed question.[196] The *Huron Valley* opinion is unclear as to whether the order denying state action antitrust immunity is "conclusive,"[197] but the view that the order is not conclusive emerges from two assertions. First, the court stated that the state action antitrust "exemption" was not an "entitlement" of the same magnitude as either qualified or absolute immunity, but was more akin to a defense of an original claim.[198] Second, the court stated that this "exemption" would not be lost if an immediate appeal was denied.[199] From these statements it can therefore be inferred that the court found the "conclusiveness" test was not met.

Conversely, the Eleventh Circuit again relied on the Supreme Court's analysis in *Mitchell*, wherein the Court noted that "[t]here are simply no further steps that can be taken in the district court to avoid the trial that the defendant maintains is barred,"[200] and held the order was conclusive.[201] The Eleventh Circuit's analysis is more persuasive. First, it is logical; once immunity is denied, a disputed question *is* conclusively determined. Second, the *Huron Valley* analysis of the conlusiveness requirement is unclear. The use of the term "exemption" allows the apparent contrast with immunity analysis, but this contrast is an artificial one.[202] The Supreme Court has uniformly treated state action antitrust immunity, within its peculiar parameters, the same as any other immunity. Once the immunity is established, it is an absolute right to be free from suit.

Third, the issue of conclusiveness is never directly addressed in the *Huron Valley* opinion, which frustrates precise analysis. Conversely, the *Commuter Transportation* court found that a "court's denial of summary judgment finally and conclusively determines the defendant's claim of right not to stand trial on the plaintiff's allegations, because '[t]here are simply no further steps that can be taken in the district court to avoid the trial the defendant maintains is barred.'"[203]

The Sixth Circuit's reluctance to extend the right of immediate appeal any further than the Supreme Court already has is reflective of the Supreme Court's role as the final arbiter of the issue. Nonetheless, the criteria exist for an analysis of the issue that allows one to conclude that the right of immediate appeal should be extended to cover denials of a claim of immunity under the state action antitrust doctrine.[204] This is the approach properly taken by the Eleventh Circuit in its analysis of the issue. After comparing the factual situation in *Commuter Transportation* with the factual situations in those cases that, according to the Supreme Court, met the

196. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

197. Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563, 567 (6th Cir.), *cert. denied*, 107 S. Ct. 278 (1986).

198. *Id.*

199. *Id.*

200. Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth., 801 F.2d 1286, 1289 (11th Cir. 1986) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

201. *Id.* at 1290.

202. Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563, 567 (6th Cir. 1986).

203. Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth., 801 F.2d 1286, 1290 (11th Cir. 1986) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

204. *See supra* notes 79–127 and accompanying text.

Cohen requirements, the Eleventh Circuit decided that appealability of collateral orders should be extended to the denial of claims of state antitrust immunity.[205]

VIII. Conclusion

Based on the foregoing examination, the *Commuter Transportation* decision better satisfies the *Cohen* requirements as clarified in the *Coopers & Lybrand* decision than does the *Huron Valley* decision. Aside from meeting judicial requirements for a final judgment rule exception, other goals are served by allowing the immediate appeal of collateral orders denying a claim of state action antitrust immunity. First, the rights of the parties are protected by reasonable exceptions to the final judgment rule, such as the collateral order doctrine. A rigid, uncompromising rule may cause more injustice than it prevents, by forcing a genuinely immune party to go through a trial. The collateral order doctrine is a limited but necessary exception to the general rule, and best serves the interests of all parties to a suit; it is an attempt to do things right the first time, rather than to create an irredressable wrong. Second, the nature of an immunity demands that potential immunities be treated seriously, for once a trial begins, an injustice has been done to the genuinely immune litigant, in the name of the final judgment rule. Because the issue of state action antitrust immunity is so crucial to any case in which the issue is raised, the appealability of a decision as to that immunity should not be hindered by the wooden application of an otherwise valuable doctrine.

The Supreme Court did not create the collateral order doctrine to override the policies of the final judgment rule. Rather, the doctrine authorizes interlocutory appeals only of orders that meet the requirements of *Cohen*. Plainly, the denial of state action antitrust immunity is such an order, as it may subject a truly immune state defendant to litigation from which it is actually immune. Consequently, federal courts should permit interlocutory appeals of denials of state action immunity under the collateral order doctrine of *Cohen*.

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205. Commuter Transp. Sys., Inc. v. Hillsborourgh County Aviation Auth., 801 F.2d 1286, 1290 (11th Cir. 1986).