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STATE ANTITRUST ENFORCEMENT AND STATE REGULATED INDUSTRIES

BILL L. BRYANT, JR.*
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INTRODUCTION

An important impetus to the deregulation of the trucking industry, and the current trend toward deregulation generally, is the perception that a byproduct of government regulation is wasteful anticompetitive activity. When deregulation occurs, state and federal antitrust laws can be fully inforced against anticompetitive practices within an industry. But in the absence of deregulation or in the case of partial deregulation, the extent to which state and federal antitrust provisions limit anticompetitive activity by state regulated industries is uncertain. Historically anticompetitive activity by state regulated industries has not been effectively controlled by either state or federal antitrust law. Federal antitrust enforcement of state regulated industries has been limited by the state action exemption. State antitrust enforcement has been hindered by inadequate resources and overreliance on federal enforcement.

State antitrust laws, however, can be effectively utilized to compliment the deregulation trend by providing more efficient maintenance of competition in those areas of the economy which remain subject to state regulation. After considering the need for state antitrust enforcement, this article will examine the federal regulated industries doctrinal framework as a potential model for applying state antitrust law to state regulated industries and will compare it with the approaches currently adopted by state courts. The article will demonstrate that the legitimate goals of both regulation and antitrust enforcement can be productively reconciled if the federal regulated industries analytical model is adopted by state courts in applying state antitrust laws to state regulated industry.

THE NEED FOR STATE ANTITRUST ENFORCEMENT WITH REGARD TO STATE REGULATED INDUSTRIES

The relationship between state antitrust enforcement and regulated industries raises timely and complicated issues. First, the growth of state antitrust activity is itself a recent phenomenon and, therefore, its many prospective manifestations are of interest.[1] Second, government regulation of economic ac-

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1. Fellmeth & Papageorge, *A Treatise on State Antitrust Law and Enforcement With Models and Forms*, ANTITRUST & TRADE REG. REP. (BNA), Dec. 7, 1978, pp. 6-7.

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tivity has reached a paradoxical stage where there is general agreement that the complexity of modern society will require regulation but, at the same time, increasing worry over the harmful side effects of careless and unnecessary over-regulation.[2] Since these two entities, state antitrust and government regulation, are both objects of current interest, their intersection has predictably led to speculation in the commentaries:[3]

> There would appear to be substantial reasons for allocating a significant portion of a state antitrust program to review of state and local economic regulation by occupational licensing laws, advertising and other restrictions upon ongoing business activities, the granting or denial of public franchises, state preference laws in public purchasing, public utility regulation, the proprietary activities of state and local government agencies, the delegation of public power to private groups to regulate group or industry behavior, and the bewildering array of other state intrusions into economic affairs in general or the activities of particular lines of business.

Indeed, this commentary proceeds to list four reasons for state antitrust scrutiny of state economic regulation:[4]

1) Less than satisfactory efforts by the federal courts to examine state regulation;
2) Domination of state regulatory agencies by members of the industries regulated, causing limitations on business entry and excessive licensing requirements;
3) State regulatory interference with competition resulting in higher prices;
4) Immunity of certain anticompetitive state practices from federal antitrust prosecution because of the "state action" principle.

Of course, the recent narrowing of the scope of the state action doctrine[5] in the federal courts has been widely noted.[6] Although examination of this exemption is outside the scope of this discussion, a brief consideration of its functions provides a convenient point of departure for exposition of the federal regulated industries doctrinal framework as an analytical model for applying state antitrust law to state regulated industries.

A Proposed Analytical Model for the Application of State Antitrust Law to State Regulated Industries

If a *state* regulatory scheme mandates cooperative activity among private producers of a certain commodity, and that activity is challenged under the

2. Flynn, *Trends in Federal Antitrust Doctrine Suggesting Future Directions For State Antitrust Enforcement*, 4 J. Corp. Law 479, 508 (1979).

3. *Id.* at 503.

4. *Id.* at 503-06.

5. *See, e.g.*, Almeda Mall, Inc. v. Houston Lighting & Power Co., 615 F.2d 343 (5th Cir. 1980) (state action defense found inapplicable to practices of power company regulated by municipality).

6. Note, *The State Action Doctrine and State Antitrust Laws — Thirty Five Years of Struggle*, 30 Mercer L. Rev. 1039, 1040 (1979).

federal antitrust statutes, the court may hold that the state action doctrine exempts the activity from antitrust scrutiny. The doctrine embodies a variety of concerns related to considerations of federalism. Authorities differ, however, as to whether it should be properly labeled an exemption from federal antitrust enforcement or a manifestation of the lack of federal intent to preempt state economic regulation.[7] The most common phraseology attending application of the doctrine is that sovereign acts of states were not meant to be included in the kinds of activities proscribed by the federal antitrust laws.[8]

But as state and local regulation has become more pervasive and complex, and more kinds of private economic activity thus regulated have sought exclusion from federal antitrust scrutiny under the umbrella of the state action rationale, federal courts have responded by narrowing the circumstances under which the doctrine would be found applicable. Where this narrowing evolution will lead is presently unclear; however, it is apparent that federalism concerns will probably limit the narrowing process and, therefore, the precision and efficacy with which federal courts can review the complex antitrust questions posed by state regulation. In effect, the state action exemption, however narrow, will remain too broad.[9]

Suppose, however, that the regulatory scheme in the hypothetical just posed was the product of a federal, rather than a state, agency, and the cooperative activity was interstate in nature. The state action doctrine would obviously not apply because of the absence of federalism concerns. Nevertheless, difficult problems remain in determining the extent to which regulation immunizes anticompetitive actions from antitrust attack and in deciding who should consider the factual and legal questions involved. Indeed, the problems raised in the intersection of regulation and antitrust are among the most difficult issues in antitrust law. A large body of federal case law, however, has produced an analytical framework for the application of federal antitrust law to federal regulated industries. This federal framework, suggested here as an analytical model for the application of state antitrust law to state regulated industries, consists of four related doctrines.

Several of these doctrines relate to the initial question of whether the regulatory scheme immunizes or exempts anticompetitive activity from antitrust challenge. Because the question of exemption is one of legislative intent, the issue of immunity is more easily resolved where Congress has expressly addressed the problem. The express agency jurisdiction doctrine applies where there is an express exemption from the antitrust laws in the statute empowering the regulatory authority.[10] If an express exemption is present, it serves as a complete defense to the antitrust claim.[11] The exclusive judicial jurisdiction doctrine applies where there is an express statutory provision preserving antitrust en-

7. 7 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION §46.03[1] (1969).

8. *Id.*

9. Flynn, *supra* note 2, at 501.

10. It should be noted that under the federal analysis statutory exemptions are strictly construed and therefore the challenged activity must be expressly covered by the statutory exemption. *See* Mt. Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687 (9th Cir. 1977).

11. *See, e.g.*, Hughes Tool Co. v. Transworld Airlines, Inc., 409 U.S. 363 (1973).

forcement. Under this doctrine there is full antitrust enforcement even if the challenged conduct has been approved by a regulatory agency.

The question of exemption is more difficult where there is no explicit statutory indication of legislative intent as to whether antitrust law should apply to federally regulated industries. The doctrine of exclusive agency jurisdiction has been developed to determine whether an exemption should be implied from the regulatory scheme.[12] In applying the exclusive agency jurisdiction doctrine, federal courts are reluctant to find an exemption except where necessary to allow the regulatory agency to function.[13] The courts determine the purposes and goals set forth by the regulatory scheme and then ascertain if the acts complained of are necessary to the furtherance of those purposes and goals.

If a court determines that there is no antitrust exemption based on the foregoing doctrines, or it is unclear whether the exclusive agency jurisdiction is present, the further question arises as to whether the doctrine of primary jurisdiction or "prior resort" is applicable. Under this doctrine, federal courts require "prior resort" to the appropriate agency for determination of facts within that agency's paticular competence.[14] An example of the application of the primary jurisdiction doctrine is *Ricci v. Chicago Mercantile Exchange*.[15] In *Ricci*, the plaintiff alleged that he was deprived of his membership on the Chicago Merchantile Exchange in violation of the Exchange's rules. The United States Supreme Court affirmed the seventh circuit's stay of antitrust action pending a determination by the Commodity Exchange Commission of whether its rules were in fact violated. The Supreme Court explained that such a determination would materially aid in deciding the ultimate issue of whether the Commodity Exchange Act exempted the Exchange's actions under the exclusive agency jurisdiction doctrine. The court stated that "[i]f the transfer of Ricci's membership was pursuant to a valid rule, the immediate question for the antitrust court is whether the rule itself and Ricci's exclusion under it are insulated from antitrust attack" whereas "if, as Ricci alleges, loss of his membership was contrary to exchange rules, the antitrust action should very likely take its normal course."[16]

These four doctrines, which comprise the federal regulated industries analytical framework, provide a detailed approach to reconciling antitrust and regulatory policies. In the absence of express legislative direction, the doctrine of exclusive agency jurisdiction avoids undue deference to regulatory agencies by implying exemptions only where they are found necessary to allow the regulatory scheme to function. Additionally, the doctrine of primary jurisdic-

12. *See, e.g.*, Silver v. New York Stock Exchange, 373 U.S. 341 (1963).

13. Recently, the Supreme Court appears to have retreated somewhat from the strict principle that repeal of the antitrust laws will be implied only if necessary to make the statute in question work and then only to the minimum extent necessary. *See* Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975); United States v. National Ass'n of Securities Dealers, 422 U.S. 694 (1975).

14. The distinction between claims for exemption and the doctrine of primary jurisdiction is explained in United States v. National Broadcasting Co., [1974-1] TRADE CASES (CCH) ¶74,885 (C.D. Cal. Oct. 29, 1973).

15. 409 U.S. 289 (1973).

16. *Id.* at 303.

tion further accomplishes a finetuned accommodation between antitrust policy and regulatory policy by recognizing the particular competence of agencies as to some questions of law and fact while reserving to the courts ultimate jurisdiction over the action.

Though the state action doctrine involves federalism issues absent in the federal regulated industries analysis just articulated, it is clear that the underlying principles are analogous. The Seventh Circuit, in *City of Mishawaka v. Indiana & Michigan Electric Co.*,[17] drew the analogy between state action and exclusive agency jurisdiction:

> First . . . as with state action, it may be unfair to hold the defendant accountable for actions ordered by a s sovereign, in this case the FPC. Second, it may have been the intention of Congress to exempt from the antitrust laws businesses subject to a potentially conflicting regulatory scheme.[18]

The evolution of the federal regulated industries doctrines has been, as well, analogous to that of state action.[19] Commentators, for example, were quick to warn that anything more than sparing invocation of the exclusive agency jurisdiction exemption and the primary jurisdiction doctrine would constitute a kind of judicial abdication on the part of the antitrust courts.[20] And, again, as the accretion of complex layers of federal regulation continued and additional private economic activity thus regulated sought exclusion from antitrust challenge under the procedural umbrella of exclusive agency jurisdiction and primary jurisdiction, the courts responded by finding only reluctantly that regulatory legislation had implied a repeal of the antitrust statutes, and then only to the extent necessary for the existence of the regulatory scheme, thus narrowing the applicability of the doctrine.

What has evolved is an efficient system for subjecting federally regulated activity to federal antitrust scrutiny. Unlike the state action doctrine, where federalism concerns mean that even a narrow state action exemption will always be too broad to allow precise and effective federal antitrust scrutiny of state regulation, the federal regulated industries analysis can be precisely tailored so that any anticompetitive activity not necessitated by federal regulation will fall before the federal antitrust statutes.

The increasing vitality of state antitrust activity now raises the possibility of replacing the ineffective federal antitrust scrutiny of state regulated activity with an effective state antitrust enforcement mechanism based on the above-described federal regulated industries analytical model.[21] The likely and im-

17. 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978).

18. 560 F.2d at 1319.

19. *See* City of Mishawaka v. American Elec. Power Co., 616 F.2d 976 (7th Cir. 1980), for similar narrowing of the Noerr-Pennington Doctrine. The court stated that the first amendment right to petition the government does not immunize abuse of the regulatory process from the antitrust laws.

20. *See* Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954).

21. For an exhaustive treatment of the federal cases see 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶221-29 (1978); 7 J. VON KALINOWSKI, *supra* note 7, at ch. 44A.

portant result will be that some activity now exempt from federal antitrust law under the state action exemption will be illegal under state antitrust law:

> Activity clearly or arguably within the state action exemption from federal antitrust, by virtue of its being compelled by a state agency acting within its "sovereign" capacity of a political subdivision exercising sovereign powers, may still be found to conflict wth state antitrust policy. Absent the concerns of federalism and vestigial federal court fears of a rebirth of substantive due process, many state and local regulatory activities could be analyzed by state enforcement officials and state courts in terms of primary jurisdiction notions much like the process developed at the federal level. Thus, even where federal courts may find state action immunity for federal antitrust purposes, the same activity viewed from a state antitrust perspective may not be immune from state antitrust policy absent a showing of a legislative intention to vest primary jurisdiction in a state or local regulatory authority, and then only to the extent necessary to achieve the regulatory goal. By developing and applying a primary jurisdiction jurisprudence at the state level in state courts, state antitrust policy may fill an important role in confining and limiting state and local regulation beyond that presently available under the federal antitrust laws because of the broader and different meaning for the state action exemption from federal antitrust policy.[22]

State antitrust enforcement of state-regulated industry should, therefore, utilize the federal regulated industries analytical model. This approach obviates any real repugnancy between regulatory and antitrust regimes, while allowing for unimpaired control by the latter of unnecessary anticompetitive activity. There are, however, problems attending state court adoption of this analytical model.

If, for example, federal antitrust litigation could be characterized as ocean-like in its vast extent, state antitrust litigation in comparison, especially with regard to regulated industries, has been a mere trickle. Furthermore, the state cases often fail to recognize or explicitly articulate the federal doctrines. Even where a state statute invokes federal precedent as with the new Florida Antitrust Act,[23] it might be difficult to bridge the gap between the matured particularity of the federal cases and the relative lack of precedent in the state cases. For example, we may determine from recent litigation the current status of exclusive agency jurisdiction or primary jurisdiction with regard to Federal Communications Commission regulated activities, but is that status realistically applicable to dissimilar state agencies, or even a similar state agency with its own unique legislative mandate? And how does one feed the accumulated subtleties of the various federal cases into a total state precedent of two cases? With these caveats in mind, we proceed to balance the discussion of what logically and probably should happen respecting state antitrust enforcement in state regulated industries with a brief survey of what in fact has happened.

STATE COURT ANALYSIS OF ANTITRUST CLAIMS AGAINST STATE REGULATED INDUSTRIES

State court decisions concerning state antitrust enforcement in state regu-

22. Flynn, *supra* note 2, at 506.
23. FLA. STAT. §542.27(2) (1980).

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lated industries reflect a variety of interpretive and philosophical approaches. Some state cases are not dissimilar in reasoning from the federal regulated industries analysis, although they do not adopt it explicitly. Other cases ignore the need to balance competing regulatory and antitrust policies, foregoing adequate judicial analysis and giving excessive deference to regulatory agencies.

Where strong statutory or constitutional expressions of antitrust policy are present, state courts closely examine regulatory action. Two 1964 Texas appellate cases illustrate courts upholding vigorous state antitrust enforcement against regulated industries. In *Woods Exploration & Producing Co. v. Aluminum Co. of America*[24] appellants charged that appellees had conspired to eliminate them from competing in the production of gas from the Appling field and to restrict production from their wells by filing false reports with the regulatory agency, the Railroad Commission of Texas, in violation of the Texas antitrust statutes. The appellate court disagreed with the trial court's finding that "the sole and exclusive jurisdiction of the matters in issue and controversy herein is vested first in the Railroad Commission of Texas." In overturning the exclusive agency jurisdiction finding of the trial court, the appellate opinion used strikingly clear language:

> We recognize . . . that the Railroad Commission of Texas is an administrative body having broad powers and discretion . . . . However, the Railroad Commission is not a court and does not have jurisdiction to entertain . . . a suit for damages brought under the antitrust laws of Texas. . . . [T]his is not a suit to test the validity of an order of the Railroad Commission. . . . Regardless of the outcome of this suit the orders of the Railroad Commission will remain unaffected.[25]

It is apparent that the appellate court overruled the trial court's finding of exclusive agency jurisdiction because of the strong disclaimer clause in the Railroad Commission statutes against any assumption that the Texas antitrust statutes were nullified. The statute read:

> It is especially provided that nothing herein shall in any manner affect, alter, diminish, change or modify the anti-trust and/or monopoly statutes of this State, and . . . that if any provision of this act shall be so construed . . . it is hereby declared null and void rather than the anti-trust and/or monopoly statutes of this state.[26]

Undoubtedly, such a statement is helpful to a court attempting to meet its antitrust enforcement responsibilities. In terms of the federal analytical model, the court found that exclusive judicial jurisdiction was mandated by the express statutory language where, as here, there was no repugnancy between antitrust and regulatory concerns.

In *Gerst v. Cain*[27] the plaintiff obtained an order directing the Savings and

24. 382 S.W.2d 343 (Tex. Civ. App. 1964).

25. *Id.* at 346-47. The parties were also litigating in federal court under the Clayton Act (15 U.S.C.A. §§15, 26). *Id.* at 347.

26. *Id.* at 346, n.3.

27. 379 S.W.2d 699 (Tex. Civ. App. 1964).

Loan Commissioner to grant them a charter to operate a savings and loan association in downtown Houston. The appellate court considered whether granting the charter would unduly injure any existing association in the area. After finding that the commissioner had no substantial evidence on which to deny granting the charter, and that entrance of the appellees' association would not produce overzealous, unfair, or ruinous competition,[28] the court cited the Texas Constitution in support of the following assertion: "The court and *every agency* of the state are duty bound to avoid the creation, establishment or protection of monopolies which are contrary to the genius of a free government and which should never be allowed."[29]

In effect, the court refused to trade its antitrust responsibilities for agency expertise. The court implied that it retained explicit antitrust jurisdiction over lapses in that regard by any regulatory agency in the state. Together, the *Gerst* and *Woods* cases are excellent examples of strong state antitrust enforcement in the regulatory context, characterized by a refusal to find exclusive jurisdiction in the agencies when no conflict between regulatory and antitrust regimes is apparent.

A number of state cases, although reasoned in a manner roughly similar to the federal regulated industries doctrinal analysis, fail to utilize the precision in analysis exhibited by the federal cases. In particular, state courts often fail to limit the scope of express or implied exemptions, giving broader than necessary deference to regulatory agencies. An Illinois Supreme Court case, *Local 777, Seafarers International Union v. Illinois Commerce Commission*,[30] considered the monopoly status of a bus and taxicab company whose application to the Illinois Commerce Commission for a certificate allowing it to provide transportation between "gold coast" hotels and airports was challenged on state antitrust grounds. The court noted that the Illinois antitrust statute exempted public utilities from its coverage to the extent their activities were subject to the jurisdiction of the commission.[31] In affirming dismissal of the charges, the court stated that "strict supervision and regulation, particularly with respect to rates charged and services provided, make an effective safeguard against the evils of monopoly at which antitrust laws are traditionally directed."[32] The court further noted that regulated activity was exempt from antitrust action regardless of the circumstances in which it occurred. The effect of the exemption was to place exclusive jurisdiction over the challenged activity in the commission without, unfortunately, setting limits on the extent of the exemption.

The Wisconsin Supreme Court used colorful language to delineate the antitrust/regulation issue in *Reese v. Associated Hospital Service, Inc.*,[33] com-

28. The court relied on the current and projected population growth of Houston as a basis for its decision. It did not restrict itself to consideration of past conditions and conditions at the time of application for the charter. *Id.* at 701-02.

29. *Id.* at 711.

30. 45 Ill. 2d 527, 260 N.E.2d 225 (1970).

31. Local 777 asserted the defendants actions were not protected by the antitrust act exemption because the regulated bus and taxicab company were controlled by the same nonregulated corporation. *Id.* at 530, 260 N.E.2d at 227.

32. *Id* at 535. 260 N.E.2d at 229.

33. 173 N.W.2d 661 (Wis. 1970).

monly known as the *Wisconsin Blue Cross* case. There, the three percent discount allowed Blue Cross on charges by hospitals was challenged by commercial insurers as a restraint of trade violative of the state antitrust statute. Since Blue Cross's right to contract with hospitals was authorized by state statute,[34] the trial court concluded that even if the discount restrained trade, the statute authorizing Blue Cross's right to so contract superseded any contrary policy expressed in the antitrust statute. The Wisconsin Supreme Court characterized this as "using a meat cleaver to carve out a broad area of near complete exemption from antitrust provisions where a scalpel can more effectively be used to permit a hospital service corporation to do exactly what the legislature has authorized, in fact required, it to do."[35] The court went on to explain that so long as Blue Cross operated within its statutory authority, any resulting restraint of trade must be non-violative of the antitrust statute under the rule of reason.[36] The problem is, of course, that this formulation conceivably results in as broad an exemption as the trial court's, though worded differently.[37] On the other hand, there is more sensitivity in it accorded the maxim that repeal of the antitrust statute is not to be implied lightly.[38]

The breakdown of an agreement to allocate territories led to the antitrust challenge in *Southwest Mississippi Electric Power Association v. Mississippi Power & Light Co.*[39] Two years after the 1954 agreement, the Mississippi Public Service Commission was granted exclusive jurisdiction over the intrastate business and property of public utilities. Though the original private agreement was challenged as a restraint of trade, the court held it immune because merged into and superseded by orders of the Mississippi Public Service Commission which acted within its statutory authority in approving it.[40] No antitrust boundary to this authority is apparent from this opinion.

34. WIS. STAT. §182.032 (1965) authorized the creation of nonprofit hospital service corporations to enable low or limited income individuals to provide for their own medical care. State financed services could then be reserved for those who were completely unable to pay for hospital care. Prior to selling to subscribers, the nonprofit corporations were required to contract with hospitals to provide medical care to subscribers.

35. 173 N.W.2d at 664.

36. *Id.* The legislature also granted tax-exempt status to nonprofit hospital service corporations. The court noted that although such status was not challenged in the instant action, the legislature acted within its power. Even if tax-exempt status was later found to be a restraint on trade, it would not be an unreasonable restraint. *Id.* at 664.

37. The legislature placed nonprofit insurance companies under the regulatory control of the state insurance department. WIS. STAT. §200.26(7) (1965). The insurance commissioner reviewed each company annually prior to renewing a certificate of authority. WIS. STAT. §201.045(1) (1965). The Commissioner was also empowered to petition the court to enjoin any practices considered unfair to competition. WIS. STAT. §207.09(2) (1965). The court noted that if the insurance commissioner was derelict in preventing unfair competitive practices the proper remedy was a writ to require his performance rather than an antitrust suit. 173 N.W.2d at 666.

38. 7 J. VON KALINOWSKI, *supra* note 6, at §44A.02(2), n.27.

39. 199 So. 2d 826 (Miss. 1967).

40. The court further noted that the territorial allocation contract on its own was not enforceable. The contract derived its validity from regulatory commission approval of its terms.

Other state cases adopt interpretive approaches less indicative of a reasoned accommodation of antitrust and regulatory policies. For example, an *Opinion of Attorney General of Arizona*,[41] judged an Arizona State Board of Accountancy rule forbidding competitive bidding for professional services nonviolative of the state antitrust statute. According to the opinion, the Arizona antitrust laws concern:

> Private persons combining in such a manner as to restrain or prevent competition. Actions by administrative agencies of the state are in no way affected by the laws of Arizona pertaining to combinations in restraint of trade. It has been uniformly held by the courts that federal antitrust laws are not applicable to monopolies which are created and controlled by a state.[42]

The attorney general apparently applied a state action rationale, based on an over-optimistic reading of federal precedent, to purport an exemption from state antitrust enforcement for activity in the shadow of state regulation.[43]

The leading Florida case in the state antitrust/regulation area, *Peoples Gas System, Inc. v. City Gas Co.*,[44] illustrates a state court judicial attitude of extreme deference to regulatory authority. In *Peoples Gas*, an agreement allocating territories as to the two public utility gas companies was approved by the Florida Public Utilities Commission. When one of the parties later challenged the agreement on antitrust grounds, the trial court held the agreement did violate the state antitrust statute. The court of appeals reversed, however, and the Florida supreme court affirmed the reversal. The Florida supreme court observed:

> We are aware that it has been reported that a majority of jurisdictions considering this question have held similar agreements violative of antitrust statutes. . . . However, we are of the opinion that the cases so holding have emphasized unduly the universal desirability of competition and have not shown sufficient awareness of the implications of the modern development of the regulated monopoly. We believe the more enlightened view to be that set out above.[45]

Undoubtedly, during a period of rising expectations about regulation, recognition of its potential might be considered appropriate. However, one can question the conclusion that the nurture of legitimate regulation must entail the nullification of effective antitrust enforcement. Indeed, it would not be rash to assert the possibility of a different result, were a case like *Peoples Gas* to be heard today, especially in view of the anomoly that the Public Utilities

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41. [1966] TRADE CASES (CCH) ¶71,880 (July 25, 1966).

42. *Id.* at 83,089-90.

43. The current status of similar professional regulation is reflected in United States v. Texas State Bd. of Pub. Accountancy, [1978-1] TRADE CASES (CCH) ¶62,039 (W.D. Tex. May 5, 1978), *aff'd as modified*, 592 F.2d 919 (5th Cir. 1979).

44. 182 So. 2d 429 (Fla. 1965).

45. *Id.* at 435.

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Commission later asked the court to rescind its approval of the territorial allocation on the grounds that it lacked the power originally to approve it.[46]

In terms of the federal regulated industries model and the exclusive agency jurisdiction doctrine discussed previously, it is insufficient for a court to conclude that in some instances regulation should replace competition or repeal the presumption in its favor. Rather, the court must decide whether the challenged anticompetitive conduct is necessary for the functioning of the regulatory scheme. If not, it must fall before the antitrust statutes. If necessary, on the other hand, it stands outside the jurisdiction of the antitrust court, but not merely because of a limitless exemption from scrutiny for all conduct in the shadow of state regulation.[47]

CONCLUSION

The few state cases which thus far have considered the antitrust/regulation interface encourage the hypothesis that the federal regulated industries analytical model can be utilized by state courts as state antitrust law develops generally. Because the state action doctrine is irrelevant, considerations of federalism and preemption will not complicate further the already considerable complexity of the antitrust/regulation relationship. However, given the complexity of the area, easily discernable patterns of results are no more likely to emerge at the state level than at the federal level. But even if the law unfolds on a case-by-case basis, the principles underlying the choices made can become relatively clear.

Thus, the court may:

1) try the challenged conduct under the antitrust laws where legislation expressly mandates that the state antitrust laws apply
2) defer to the exclusive jurisdiction of an agency when legislative intent mandates that procedure; or
3) defer, on primary jurisdiction grounds, to a regulatory agency while retaining ultimate jurisdiction over anticompetitive activity unnecessary for the functioning of the regulatory scheme.

Additionally, since primary and exclusive jurisdiction exemptions are narrower than those of state action, activities not exempt under state action will continue to be non-exempt. However, activities exempt from federal antitrust law under state action may not be exempt from state antitrust law.

46. *See* Peoples Gas Sys., Inc. v. Mason, 187 So. 2d 335 (Fla. 1966).
47. Flynn, *supra* note 2, at 506.

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