

State Action Immunity and the Compulsion Requirement: Joint Ratemaking in Intrastate Trucking

Traditionally, members of the intrastate¹ trucking industry² have set rates jointly under the auspices of rate bureaus.³ Even the strongest proponents of rate bureaus concede that the bureaus' collective ratemaking activities represent a form of potentially illegal price

1. This Comment deals with *intrastate* as opposed to *interstate* ratemaking activities of the trucking industry. See *infra* text accompanying notes 8-14.

2. Trucking is a subset of the common carrier industry. Common carriers include motor carriers, railroads, oil pipelines, water carriers, airlines, and freight forwarders. TRANSPORTATION REGULATION: A PRAGMATIC ASSESSMENT 6 (G. Davis ed. 1976). A common carrier offers to the public generally to transport persons or property, for compensation. A common carrier may be liable for refusing without a valid excuse to carry for all who apply. 13 AM. JUR. 2D *Carriers* § 2 (1964). In contrast, contract carriers do not undertake to carry for all persons indiscriminately, but transport for only particular persons, either gratuitously or for hire. *Id.* § 8. Truckers can be common carriers or contract carriers.

3. The rate bureaus discussed in this Comment are associations comprised of members of the trucking industry. The rate bureaus provide a forum for members of the trucking industry to discuss and vote upon uniform rates. As of 1981, rate bureaus were setting trucking rates in Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin. NAT'L ASS'N OF REGULATORY UTIL. COMM'RS, ANNUAL REPORT ON UTILITY AND CARRIER REGULATION 740 (1981). These rates are typically submitted to state public service commissions for approval. Rate bureaus frequently base their rate increases on the average costs incurred by a sample of carriers. Statement of D. Breen, FTC Staff Economist, before the Public Service Commission of West Virginia at 23 (Oct. 19, 1979), *In re* Middle Atl. Conference, M.C. Case Nos. 20376 & 20377 (on file with the *California Law Review*).

In addition to setting rates for truckers, the rate bureaus publish the rates and offer legal services to member carriers. In the majority of the states where rate bureaus operate, a rate bureau member can choose to subscribe to the rates established by the rate bureau or to file an independent rate. In fact, a recent report that examined ratemaking procedures in all 50 states indicated that collective ratemaking is neither explicitly authorized nor required in most state codes. W. Allen, An Examination of Intrastate Versus Interstate Motor Carrier Rates for Comparable Movements § 4 (FTC Preliminary Report July 1982) (unpublished manuscript on file with the *California Law Review*). But see Order Establishing Guidelines, Rules & Regulations for Collective Ratemaking, *In re* Maxwell, No. 27926, at ¶¶ 5, 7 (Corp. Comm'n Okla. Nov. 1, 1982) ("Title 17 Oklahoma Statutes Annotated, Section 180.5C provides that . . . the Commission shall establish a collective rate-making procedure for all commodities for which it has heretofore prescribed rates. . . . Nothing herein shall be construed to preclude an individual carrier from petitioning the Commission to order or authorize its individual proposal for publication in connection with commodities for which the Commission has heretofore prescribed rates.").

fixing.⁴ Nevertheless, these ratemaking activities have continued to exist on the assumption that they are shielded from antitrust prosecution by the doctrine of state action immunity. This doctrine, first articulated by the United States Supreme Court in 1943,⁵ is designed to shield from federal antitrust prosecution anticompetitive activities carried out under the "legislative command" of a state.⁶ Since the rates established by the rate bureaus are customarily approved by state agencies before they are implemented, members of the trucking industry have assumed that their collective ratemaking activities were carried out under appropriate legislative command.

Recent Supreme Court decisions have cast doubt on this assumption. These decisions can be interpreted as requiring the activities of private parties to be "compelled," not merely "approved," by the state in order for the legislative command requirement to be met. To date, the majority of states have not compelled private truckers to establish their rates jointly or to abide by the rates set by the rate bureaus. Therefore, it is questionable whether the trucking industry's jointly set rates are protected by the doctrine of state action immunity.

This Comment argues that recent Supreme Court cases should be interpreted to require that a state must "compel" private parties' anticompetitive activities in order for these activities to receive state action immunity. This compulsion requirement creates a stricter test for private parties than for public parties.⁷ This Comment further argues that the ratemaking activities of private trucking industry members are vulnerable to antitrust prosecution because they do not now and will not in the future be able to satisfy this compulsion requirement. Part I of this Comment briefly traces the relation of antitrust laws to the trucking industry. Part II discusses the Supreme Court's recent efforts to articulate state action immunity standards. Part III outlines current trends toward deregulation and concludes that states are unlikely to compel joint ratemaking activities among intrastate truckers.

I

ANTITRUST LAWS AND THE TRUCKING INDUSTRY

The Sherman Antitrust Act⁸ declares that every contract, combination, or conspiracy "in restraint of trade" is illegal. The courts have

4. *E.g.*, J. FRIEDMAN, COLLECTIVE RATEMAKING IN TRUCKING: THE PUBLIC INTEREST RATIONALE 16 (1977).

5. *Parker v. Brown*, 317 U.S. 341 (1943).

6. *See infra* text accompanying notes 37-39.

7. *See infra* text accompanying notes 31-36.

8. 15 U.S.C. §§ 1-7 (1976).

acknowledged that this Act applies to the trucking industry.⁹ The effect of the Sherman Act on interstate trucking is mitigated by the Reed-Bulwinkle Act,¹⁰ which permits interstate motor carriers to discuss and agree upon uniform rates without the threat of antitrust prosecution. The federal government reserves to the states the regulation of intrastate motor carrier rates, even where such rates affect interstate commerce.¹¹ Therefore, the Reed-Bulwinkle Act does not protect intrastate trucking from prosecution under the Sherman Act.

The majority of states have passed statutes modeled after the Reed-Bulwinkle Act, hoping to assure federal and state antitrust immunity to the joint ratemaking activities of intrastate motor carriers.¹² If the state statutes are inadequate to provide federal antitrust immunity, the collective ratemaking activities of truckers become subject to federal antitrust prosecution because these activities have a "direct and substantial effect on interstate commerce."¹³ Intrastate truckers have recently attempted to avoid prosecution under the Sherman Act by relying on the doctrine of state action immunity.¹⁴

II

STATE ACTION IMMUNITY FROM ANTITRUST PROSECUTION

A. The Development of the State Action Immunity Doctrine

The Supreme Court's first articulation of the relationship between the state's command and federal antitrust immunity came in 1943. In *Parker v. Brown*,¹⁵ the Court determined that an anticompetitive raisin marketing program that would have violated the Sherman Act had it been instituted solely by private persons was immune from antitrust

9. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

10. Ch. 491, 62 Stat. 472 (1948) (codified as amended at 49 U.S.C. § 10706 (Supp. V 1981)).

11. Pub. L. No. 95-473, 92 Stat. 1337, 1362 (1948) (codified as amended at 49 U.S.C. § 10521(b) (Supp. V 1981)).

12. Beginning in 1984, the antitrust protection afforded the collective ratemaking activities of interstate truckers will be substantially reduced due to the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) (codified at 18 U.S.C. § 1114 (Supp. V 1981) and in scattered sections of 49 U.S.C. (Supp. V 1981)). The Act prohibits collective ratemaking for certain types of interstate trucking rates. *Id.* § 14(a), 94 Stat. at 804 (codified at 49 U.S.C. § 10706(b)(3)(b)(i) (Supp. V 1981)). In addition, the Act allows interstate carriers the freedom to charge lower insurance fees on commodities of low value, *id.* § 12, 94 Stat. at 802 (codified at 49 U.S.C. § 10730(b)(1) (Supp. V 1981)), and prohibits rate bureaus from protesting or complaining about independent ratemaking done by motor carriers. HOUSE COMM. ON PUBLIC WORKS AND TRANSPORTATION, MOTOR CARRIER ACT OF 1980, H.R. REP. NO. 1069, 96th Cong., 2d Sess. 30 (1980).

13. 15 U.S.C. §§ 1-7 (1976).

14. *United States v. Southern Motor Carriers Rate Conference, Inc. (SMCRC)*, 672 F.2d 469 (5th Cir. Unit B 1982), *aff'd on reh'g*, 702 F.2d 532 (5th Cir. Unit B 1983). In *SMCRC*, the government brought suit against the rate bureaus on the grounds that their joint ratemaking activities were a form of illegal price fixing.

15. 317 U.S. 341 (1943).

prosecution because "[i]t derived its authority and its efficacy from the legislative command of the state."¹⁶ This determination that the legislative command of the state could immunize anticompetitive actions from antitrust prosecution became known as the doctrine of state action immunity.¹⁷

The doctrine of state action immunity lay dormant for many years, but it has recently been the focus of several Supreme Court decisions.¹⁸ These decisions have attempted to clarify the degree to which anticompetitive action must be sanctioned by the state in order to qualify for state action immunity. In *Goldfarb v. Virginia State Bar Association*¹⁹ the Court strongly supported but vaguely defined the compulsion requirement. In *Goldfarb*, the Court struck down a minimum fee schedule issued by a private county bar association. When the county bar claimed that its activities had been prompted by the state and therefore deserved state action immunity, the Court responded that "[i]t is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign."²⁰

The Court articulated a somewhat different approach five years later, in *California Retail Liquor Dealers Association v. Midcal Aluminium Inc.*²¹ There, the Supreme Court again attempted to clarify the standards an antitrust defendant must meet in order to avail itself of state action immunity. In *Midcal*, however, the defendant was a public agency—the California Department of Alcoholic Beverage Control. The Court determined that the agency's price-fixing activities did not qualify for state action immunity. When making this determination, the Court reviewed its prior state action immunity decisions, quoting the compulsion language in *Goldfarb*.²² The Court then noted that its prior decisions established two standards for use in determining whether a restraint of trade deserved state action immunity. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively super-

16. *Id.* at 350.

17. See *United States v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469, 472 (5th Cir. Unit B 1982), *aff'd on reh'g*, 702 F.2d 532 (5th Cir. Unit B 1983).

18. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 48-56 (1982); *California Retail Liquor Dealers Ass'n v. Midcal Aluminium, Inc.*, 445 U.S. 97, 103-06 (1980); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109-10 (1978); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 408-13 (1978); *Bates v. State Bar*, 433 U.S. 350, 359-63 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-95 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-92 (1975).

19. 421 U.S. 773 (1975).

20. *Id.* at 791.

21. 445 U.S. 97 (1980).

22. *Id.* at 104.

vised' by the State itself."²³ The Court found that the agency's activities did not meet the second standard, because the state merely approved prices set by private parties rather than engaging in any "pointed reexamination."²⁴

Thus, the Court in *Midcal* mentioned the compulsion requirement; however it did not literally incorporate compulsion into the *Midcal* standards. This led cases and commentators to ask whether a compulsion requirement ever existed.²⁵

A post-*Midcal* Supreme Court decision, *Community Communications Co. v. City of Boulder, Colorado*,²⁶ also involved a public defendant, the City of Boulder. In *City of Boulder* the Court applied the *Midcal* formulation and did not specifically refer to the compulsion requirement. The *City of Boulder* majority did note that "[i]t may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government."²⁷

In light of this language in *City of Boulder*, and of the *Midcal* Court's reference to the *Goldfarb* compulsion language,²⁸ it appears that the Court developed the *Midcal* standards for use with public defendants such as the Department of Alcoholic Beverage Control in *Midcal*, and the city government in *City of Boulder*. At the same time, the Court contemplated that private defendants such as the bar association in *Goldfarb*, and the trucking industry that is the focus of this Comment, should satisfy the compulsion requirement as well as the

23. *Id.* at 105.

24. *Id.* at 106.

25. Several leading authorities reject compulsion as a necessary ingredient of state action immunity. See, e.g., P. AREEDA, ANTITRUST LAW ¶ 212.5, at 60 (Supp. 1982) ("[A] literal compulsion policy would be inconsistent with federalism's respect for state regulation."); Handler, *Antitrust-1978*, 78 COLUM. L. REV. 1363, 1384 (1978) (The compulsion requirement is "an overreaction to Stone's caveat in *Parker* that a state cannot 'authorize' private parties to violate the antitrust laws. This may be true if the state's involvement stops at that point; however, authorization, approval, or permission if coupled with a valid regulatory purpose and other measures which ensure against unbridled anticompetitive decisionmaking by private parties should normally be enough to bring *Parker* into play.") (footnote omitted). See also *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 823 n.8 (9th Cir.) ("It appears that the statement in *Goldfarb* regarding compulsion refers to a combination of the criteria that there be both a clear articulation of state policy and active supervision by the state itself. . . . In *Goldfarb* neither was present, and the opinion did not specifically separate the criteria."), *cert. denied*, 456 U.S. 1011 (1982). Proponents of joint ratemaking activities tend to argue that the compulsion requirement is weak, or insist that no such requirement exists.

26. 455 U.S. 40 (1982). The city's actions were held not to be protected by state action immunity. Colorado was "neutral" in the face of the city's acts but did not support affirmatively the city's acts as required by the *Midcal* standards. *Id.* at 55.

27. 102 S. Ct. at 843 n.20 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 417 n.48 (1978)).

28. 445 U.S. at 104. See *supra* text accompanying notes 20 & 22.

Midcal standards in order to qualify for state action immunity. The great majority of post-*Midcal* decisions by district and circuit courts have required private defendants to demonstrate that their activities were compelled by the state in order to qualify for state action immunity.²⁹

The existence of separate state action immunity standards for public and private defendants reflects important practical considerations. The Sherman Act was designed to eliminate contracts, combinations, or conspiracies of both public and private parties.³⁰ But since the activities of private persons are less open to public scrutiny than the activities of public agencies or cities, a private party's claim that it is acting as an agent of the state and therefore is deserving of state action immunity must pass stricter scrutiny than a similar claim made by a public party.

B. *Two Phases at Which the Compulsion Requirement Must be Applied*

Judicial decisions as to the applicability of state action immunity can be analyzed by dividing the conduct under consideration into two phases: the development phase of the anticompetitive conduct, and the implementation phase. This dual phase analysis can be applied to both private and public antitrust defendants. For example, in *California Retail Liquor Dealers Association v. Midcal Aluminium Inc.*,³¹ the

29. See *United States v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469 (5th Cir. Unit B 1982) ("We hold that compulsion is required of private parties . . ."), *aff'd on reh'g*, 702 F.2d 532 (5th Cir. Unit B 1983); *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1180 (8th Cir. 1982) ("[T]he private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision."), *cert. denied*, 103 S. Ct. 814 (1983) (quoting *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 593 (1976)); *Grandcl's Den, Inc. v. Goodwin*, 662 F.2d 88, 100 (1st Cir. 1981) (The State action doctrine is "germane only when 'anticompetitive conduct is compelled by direction of the state.'"); *New York State Elec. & Gas Corp. v. Federal Energy Regulatory Comm'n*, 638 F.2d 388, 399 (2d Cir. 1980) ("'anticompetitive activities must be compelled by direction of the State acting as sovereign'"), *cert. denied*, 454 U.S. 821 (1981); *Virginia Academy of Clinical Psychologists v. Blue Shield*, 624 F.2d 476, 482 n.10 (4th Cir. 1980) ("[T]he State certainly does not compel the defendants to exclude psychologists from direct coverage. The application of the State action exemption in this case is thus precluded . . ."), *cert. denied*, 450 U.S. 916 (1981); *Affiliated Capital Corp. v. City of Houston*, 519 F. Supp. 991, 1026-27 (S.D. Tex. 1981) ("Any assertion that Gulf Coast would have made regarding the applicability to it of [state action] immunity clearly would have been foreclosed by the requirement that a private party must show that anticompetitive activities were 'compelled by direction of the State acting as a sovereign.'"), *rev'd on other grounds*, 700 F.2d 226 (5th Cir. 1983). *But see* *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 823 n.8 (9th Cir. 1982), *cert. denied*, 102 S. Ct. 2308 (1982) ("*Goldfarb* does not preclude a finding of state action immunity merely because of the presence of some private decisionmaking pursuant to a clearly articulated state policy that is actively supervised by a state entity even though the supervision does not rise to the level of compulsion.").

30. See L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 3, at 13-14 (1977).

31. 445 U.S. 97 (1980). See *supra* text accompanying notes 21-23.

Supreme Court held that the development of the challenged anticompetitive restraint should respond to a "clearly articulated and affirmatively expressed state policy."³² In addition, while the anticompetitive action is being implemented, it must be actively supervised by the state.³³

One commentator recently suggested that when the *Midcal* standards are applied to private antitrust defendants these standards should be strictly enforced.³⁴ Her analysis appears to replace the *Midcal* development phase requirement that the challenged restraint respond to a "clearly articulated and affirmatively expressed policy" with the requirement that the challenged anticompetitive activities be "compelled by the state acting as sovereign."³⁵ She concurred with the *Midcal* test's requirement of "active supervision and a clear statement of intent to regulate the alleged anticompetitive activity" during the implementation phase.³⁶

In view of the difficulties inherent in interpreting a standard as vague as the "active supervision" requirement articulated in the above tests, this Comment proposes an even stricter test. This test is designed for use with private antitrust defendants and emphasizes the importance of the compulsion requirement at the development and the implementation phases of the program in question. First, the state must compel a private party to initiate anticompetitive conduct. Then, once the private party has developed a plan for initiating the conduct, the state must stand firmly behind the plan by compelling the private party to implement the plan. During this implementation phase, active state supervision is a necessary, but not a sufficient, condition to qualify the anticompetitive activity for state action immunity. To qualify for state action immunity, the private party must be unable to retreat from the compelled conduct without the state's permission.

This strict interpretation of the compulsion requirement is in accord with the holdings in two key antitrust cases involving state action immunity from the Sherman Act. In *Parker v. Brown*,³⁷ the Supreme Court's first state action immunity decision, the Court examined California's regulation of private raisin producers. In *Parker*, one of these producers challenged the anticompetitive raisin marketing agreements

32. 445 U.S. at 105.

33. *Id.*

34. Gross, *A Plaintiff's View of Potential Carrier Antitrust Violations: Personal and Corporate*, 1980 TRANSP. L. INST. 229, 246. Gross' formulation relies heavily on the circuit court's holding that compulsion was required in *United States v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469 (5th Cir. Unit B 1982), *aff'd on reh'g*, 702 F.2d 532 (5th Cir. Unit B 1983).

35. Gross, *supra* note 34, at 246.

36. *Id.*

37. 317 U.S. 341 (1943).

developed by other producers under the state's Agricultural Prorate Act. The Supreme Court found that these anticompetitive marketing agreements were protected from antitrust prosecution by the doctrine of state action immunity since these activities were carried out under "state command."

The anticompetitive marketing program at issue in *Parker* met phase one of the compulsion analysis proposed here, as the state compelled regulated private parties to formulate the anticompetitive program at issue. Specifically, after considering the requests for help initiated by the private raisin producers, the State Director of Agriculture selected a committee from among nominees chosen by the producers and "required" the committee to formulate a proration marketing program.³⁸

The anticompetitive raisin marketing program also satisfied phase two of the compulsion analysis proposed in this Comment. Under phase two, the state indicated that it sanctioned the program developed by the committee by compelling all private raisin producers to follow the program. Specifically, the State Director of Agriculture was required to institute the program and to enforce it with penal sanctions.³⁹

A more recent Supreme Court case, *Cantor v. Detroit Edison Co.*,⁴⁰ also supports this Comment's dual phase compulsion requirement. The question in *Cantor* was whether a light bulb giveaway program initiated by a regulated private utility deserved state action immunity.⁴¹ In order to operate in Michigan, Detroit Edison, a private utility, was compelled by the state to obtain consent to provide electrical power from the municipalities it wished to serve.⁴² The electrical power franchise granted by the municipalities to Detroit Edison was also subjected to the "control and supervision" of the Michigan Public Service Commission, a state agency.⁴³ The Court determined that under this regulatory scheme, Detroit Edison was protected from antitrust prosecution as long as it operated in the domain reserved for it by the state. This domain was specifically described by the municipal franchise agreements and the state Public Service Commission to include the setting of electrical power rates, but it did not specifically include the development of the light bulb giveaway program that was at issue in *Cantor*.⁴⁴ Therefore, while Detroit Edison's electrical power rate set-

38. *Id.* at 347.

39. *Id.*

40. 428 U.S. 579 (1976).

41. The lightbulb giveaway program was anticompetitive in that it endangered the market of those selling light bulbs. *See id.* at 584.

42. MICH. COMP. LAWS § 460.503 (1967).

43. *Id.* § 460.552.

44. 428 U.S. at 584.

ting activities were compelled by the state, its light bulb giveaway program was not. Consequently, the light bulb giveaway program did not satisfy the first, development phase of the compulsion analysis proposed in this Comment.

Detroit Edison's rate setting and light bulb giveaway program activities did satisfy the second, implementation phase of the compulsion analysis proposed by this Comment. Detroit Edison's rates, including the omission of any charge for light bulbs, had been approved by the commission and could not be changed without the commission's further approval. Thus, Detroit Edison was compelled to continue the light bulb program until the Commission decided otherwise. The Court held that satisfaction of this second phase of the compulsion requirement could not, by itself, qualify the light bulb giveaway program for state action immunity.⁴⁵

If the state had required Detroit Edison to submit proposals for stimulating electrical consumption, the results of this case probably would have been different. Under such hypothetical facts, Detroit Edison's submission of a plan to encourage the use of electricity by instituting a light bulb giveaway program would have met the first phase of the compulsion requirement, for the state could then be said to have compelled Detroit Edison to develop this anticompetitive program.

The dual phase compulsion analysis applied above to the *Parker* and *Cantor* facts is equally applicable to the joint ratemaking activities of intrastate truckers. For these joint ratemaking activities to qualify for state action immunity, the truckers would first have to establish that the state compelled them to set joint rates. Just as Detroit Edison in *Cantor* failed to satisfy this first phase of the compulsion requirement because it was not compelled by the state to establish a light bulb giveaway program, so too intrastate truckers also fail to satisfy the first phase because most states have not compelled their carriers to set trucking rates jointly.⁴⁶

Even if the states were to compel truckers to set their rates jointly so as to satisfy the first phase of the compulsion requirement, the states' acceptance of the truckers' rates would not satisfy the second phase of the compulsion test because most states do not compel their truckers to abide by the rates established by the rate bureaus.⁴⁷ In the majority of states where rates are jointly set by rate bureaus, truckers may also file for independent rates.⁴⁸

45. *Id.* at 591-92.

46. *See supra* note 3.

47. *See supra* note 3.

48. *See supra* note 3.

Since the ratemaking process followed by the truckers satisfies neither phase one nor phase two of the compulsion requirement, the joint ratemaking activities of the trucking industry are not protected by state action immunity and are consequently vulnerable to antitrust prosecution. Moreover, it is unlikely that states will begin to compel intrastate truckers' joint ratemaking activities so as to remove these activities from scrutiny under federal antitrust laws. Regulation of trucking rates is undesirable from the consumer's viewpoint, and recent trends in the industry indicate a shift away from regulation.⁴⁹

III

THE CHANGING VIEW OF THE PUBLIC INTEREST: CONSUMER PROTECTION AND TRENDS TOWARD DEREGULATION

This Comment argues that neither the trucking industry nor consumers need the protection of uniform rates. The trucking industry's joint ratemaking activities began during the Depression, a period of industry instability and market disorganization.⁵⁰ During the Depression, economic conditions lowered the trucker's ability to tolerate financial pressures. Today, despite the problems stemming from rising fuel and labor costs and the recent economic downturn,⁵¹ trucking is a relatively stable industry.⁵²

Indeed, joint ratemaking activities no longer serve the consumer's interest, notwithstanding claims by supporters that joint ratemaking leads to certain social benefits. Thus the current deregulatory trends in the trucking industry are in the consumer's interest.

A. The Effect of Joint Ratemaking Activities on Market Efficiency from the Consumer's Perspective

From the consumer's perspective, truckers' joint ratemaking activities are inefficient. In competitive markets, consumers benefit from the lower prices charged by efficient firms. If inefficient firms cannot compete, they are driven out of business. In contrast, collective ratemaking protects inefficient carriers. Instead of passing on their lower costs to consumers, the efficient firms retain higher profits. This is because the rate bureaus set their rates based on an average of costs incurred by a

49. See *supra* note 12; *infra* notes 50-77 and accompanying text.

50. McFadden, *Competitive Rate Making*, 1979 TRANSP. L. INST. 71, 73; Dempsey, *The Experience of Deregulation: Erosion of the Common Carrier System*, 1980 TRANSP. L. INST. 121, 156.

51. *Oversight—Motor Carrier Act of 1980: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 97th Cong., 2d Sess. 276 (1982) (statement of ICC chairman R. Taylor).

52. *Id.*

select group of truckers. One criterion in the calculation is the costs of the least profitable and least efficient member of the bureau.⁵³ If truckers were forced to compete, consumers would benefit because the truckers would have an incentive to be cost efficient. In fact, where rate bureaus do not set intrastate trucking rates, rates are generally lower.⁵⁴

In the states where rate bureaus operate, rate bureau members can choose to subscribe to the rates established by the bureaus, or to file independent rates.⁵⁵ In fact, the latter rarely occurs. There is evidence that rate bureaus have harassed and coerced individual truckers who have proposed rate changes.⁵⁶ Precluded from price competition, truckers have resorted to "service competition."⁵⁷ However, service competition is merely another inefficient byproduct of joint ratemaking activities. This substitution of service competition for price competition has forced all customers to pay high rates for premium service in spite of the fact that many customers would prefer reduced service at lower rates.⁵⁸

In addition, recent experience has shown that competitive pricing in the trucking industry results in simplified rate schedules. In Florida, the rate bureaus' joint ratemaking activities were eliminated in 1980 as part of a deregulation of the state's trucking industry. Subsequently, two Florida trucking firms established simplified rate schedules that ignored the traditional practice of charging different rates for transporting similar products the same distance. Both companies now advertise a rate schedule under which shippers are charged a fixed fee per shipment supplemented by a fixed charge per pound and a fixed charge per piece.⁵⁹ Simplified rate schedules benefit consumers by facilitating

53. D. Breen, *supra* note 3, at 23-24.

54. In Florida, where trucking regulation, including the joint ratemaking activities of rate bureaus, expired on July 1, 1980, truckload rates have been reduced while small shipment prices have increased somewhat to reflect the actual cost of small loads. One Florida shipper reported in March 1981 that he was "moving freight for 11-31 percent less than [on] July 1, 1980." Letter from Daniel C. Bolger, Anchor Hocking Corporation, to Tom McNamara, Transportation Industry Analyst, Interstate Commerce Commission Office of Policy (Mar. 18, 1981) (on file with the *California Law Review*).

55. See *supra* note 3.

56. Miller, *Collective Ratemaking Reconsidered: A Rebuttal*, 11 TRANSP. L.J. 291, 297-98 (1980) (coercive nature of rate bureaus renders independent action ineffective).

57. "Service competition" occurs when individual truckers are unable to compete for additional business by rate-cutting, or "price competition." See, e.g., A. FRIEDLAENDER, THE DILEMMA OF FREIGHT TRANSPORT REGULATION 98-99 (1969). In these circumstances, truckers compete by offering extra services such as daily pick up and delivery. Other commentators have argued that even when prices are fixed, competition exists through "innovative price options" under "keen competition." McFadden, *supra* note 50, at 81-82.

58. SENATE COMM. ON COMMERCE, SCIENCE AND TRANSPORTATION, 95TH CONG., 2D SESS., THE IMPACT ON SMALL COMMUNITIES OF MOTOR CARRIAGE REGULATORY REVISIONS 118 (Comm. Print 1978).

59. OFFICE OF POLICY & ANALYSIS, INTERSTATE COMMERCE COMMISSION, INITIAL CAR-

comparison between prices charged by trucking firms. The creation of simplified rate schedules also allays the fears of those who believe that the abolition of joint ratemaking activities would force each trucking firm to establish thousands of separate rates.⁶⁰ Thus, the ratemaking activities of intrastate truckers have a detrimental effect on consumers. However, it is not universally believed that such activities are detrimental.

B. Social and Political Aspects of Trucking Regulation

Proponents of joint ratemaking in the trucking industry claim that, in addition to supporting the economic welfare of the industry, joint ratemaking provides noneconomic benefits to consumers. This Comment argues that these claimed benefits are illusory.

Proponents of joint ratemaking activities claim that these activities are an administrative convenience.⁶¹ This argument is a tempting justification for joint ratemaking, as the rate requests submitted by truckers to the state regulatory commissions contain thousands of separate rates and the commissions do not have the resources to investigate the validity of each.⁶² The commissions therefore rely heavily on the rate bureaus' proposed rates.⁶³

The state commissions' reliance on these rates is an inappropriate justification for joint ratemaking activities. First, rather than creating an administrative nightmare, competitive pricing may in fact lead to simplified rate schedules as it did in Florida.⁶⁴ Moreover, if administrative convenience were to be used as a rationale for condoning price fixing, then under the guise of convenience any industry could circumvent the antitrust laws by convincing the state that collective ratemaking would ease administrative burdens.

Another justification set forth by proponents of joint ratemaking centers on the destructive potential of predatory pricing. Under this view, a powerful firm may attempt to eliminate its competition by set-

RIER AND SHIPPER RESPONSES TO INTRASTATE TRUCKING DEREGULATION IN FLORIDA 6-7 (June 1981) (on file with the *California Law Review*).

60. Snow, *The Problem of Motor Carrier Regulation and the Ford Administration's Proposal for Reform*, in REGULATION OF ENTRY AND PRICING IN TRUCK TRANSPORTATION 3, 35-36 (P. MacAvoy & J. Snow eds. 1977).

61. N. GLASKOWSKY, B. O'NEIL & D. HUDSON, MOTOR CARRIER REGULATION 58-59 (1976).

62. At a recent hearing in West Virginia, the evidence demonstrated that the rates set by rate bureaus for 23 carriers could result, with individual tariff filings, in as many as 78,000 separate rates. Hearing Examiner's Recommended Decision at 11 (Public Serv. Comm'n W. Va. June 6, 1980), *In re* Middle Atl. Conference, M.C. Case Nos. 20376 & 20377.

63. See, e.g., Miller, *supra* note 56, at 296. As a practical matter, rate bureaus fix trucking rates in the states in which they operate.

64. See *supra* text accompanying notes 59-60.

ting prices at a low level, thereby taking away its competitor's customers. Theoretically, after eliminating its competition, a firm could then raise its prices and earn monopolistic profits.⁶⁵ However, most commentators reject the possibility of predatory pricing in the trucking industry.⁶⁶ The industry lacks the basic opportunities that could lead to predatory pricing,⁶⁷ and actual experience in deregulation indicates that such anticompetitive activity has not occurred.⁶⁸

Recent experiences with trucking deregulation have refuted dire predictions that trucking service would decline if the joint ratemaking activities in the trucking industry were abolished. Interstate Commerce Commission studies of Florida's experience with trucking deregulation indicated that service, as measured by on time performance, availability, service options, and freight loss and damage did not change after deregulation occurred.⁶⁹ Indeed, other studies have generally supported this conclusion.⁷⁰ In addition, studies have addressed the issue of service to small communities.⁷¹ Based on predictions and past experience in other deregulated industries, these studies predicted that service to small communities might be adversely affected.⁷² However, the

65. Johnson & Harper, *The Potential Consequences of Deregulation of Transportation*, 51 LAND ECON. 58, 63-64 (1975), reprinted in TRANSPORTATION REGULATION: A PRAGMATIC ASSESSMENT 106, 111-112 (G. Davis ed. 1976); Kenworthy, *Motor Carrier Ratemaking Standards Under the Antitrust Laws*, 1980 TRANSP. L. INST. 303, 307.

66. See Johnson & Harper, *supra* note 65, at 63-64, reprinted in TRANSPORTATION REGULATION: A PRAGMATIC ASSESSMENT 111-12 (G. Davis ed. 1976); Kenworthy, *supra* note 65, at 310; Snow, *supra* note 60, at 38-39.

67. These opportunities come from: (1) power to control prices; or (2) power to exclude competition. Kenworthy, *supra* note 65, at 309. The opportunities are nonexistent in the trucking industry because truckers have little control over their market. First, they have an obligation to accept all traffic tendered, and thus have to accept business even beyond the point where their marginal costs equal marginal revenue. Second, the demand for transportation is inelastic, as it is derived from the goods to be transferred. Thus, "the demand curve for transportation of property is considered to be essentially flat," which is a condition faced by perfectly competitive firms, rather than monopolistic firms. *Id.* at 310.

68. Snow, *supra* note 60, at 38.

69. Between 9% and 19% of the ICC survey respondents indicated that service had improved, while only 1% to 4% indicated that service had declined, depending on the type of service being considered. *Oversight—Motor Carrier Act of 1980: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 97th Cong., 2d Sess. 269 (1982) (statement of ICC chairman R. Taylor).

70. Freeman, *Motor Carrier Deregulation in Florida: A Preliminary Analysis*, 1981 TRANSP. L. INST. 133, 135; Freeman & Beilock, *An Analysis of Arizona and Florida Motor Carrier Deregulation and the Implications for State Regulatory Change*, 1982 TRANSP. L. INST. 13, 36-44.

71. See, e.g., *Oversight—Motor Carrier Act of 1980: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 97th Cong., 2d Sess. 267-69 (1982) (statement of ICC chairman R. Taylor); R.L. Banks & Assocs., *Service to Small Communities*, in REGULATION OF ENTRY AND PRICING IN TRUCK TRANSPORTATION 139 (P. MacAvoy & J. Snow eds. 1977); Dempsey, *supra* note 50, at 158-60.

72. See, e.g., Dempsey, *supra* note 50, at 158; studies cited *id.* (various House and Senate reports on the potential decline of service).

Florida experience indicates a contrary result. When rates became competitively established, service to small Florida communities continued at the same level.⁷³

Thus, the justifications propounded by the advocates of joint ratemaking in the trucking industry are weak. This is one reason why states are moving away from the regulation of trucking.⁷⁴

C. Current State and National Deregulation Trends

On the national level, the trend toward interstate trucking deregulation has been well documented.⁷⁵ The passage of the Motor Carrier Act of 1980 signaled a major step toward deregulation.⁷⁶ To the extent that intrastate trucking regulation has historically followed interstate trends, these recent developments indicate a shift away from continued state protection of the trucking industry.⁷⁷

Indeed, there is a growing trend among states toward trucking deregulation, especially in the area of joint ratemaking.⁷⁸ In fact, "deregulation has proceeded more smoothly" than many of its opponents had anticipated.⁷⁹ As one study concluded, "[T]he states may well rally behind federal policy by placing greater emphasis on competition and less on regulation."⁸⁰ If states are not motivated to increase their support of

73. See *supra* note 71 and accompanying text.

74. LEGISLATIVE AUDIT BUREAU, STATE OF WISCONSIN, EVALUATION OF THE WISCONSIN TRANSPORTATION COMMISSION 41-44 (1981) (on file with the *California Law Review*).

75. See, e.g., Dempsey, *supra* note 50; Augello, *A Prospectus for Motor Carrier Claims Law*, 1980 TRANSP. L. INST. 177, 177-78; McFarland, *Motor Carrier Contracts in the 1980s—A Shift in Emphasis?*, 1981 TRANSP. L. INST. 1.

Furthermore, federal government interest in deregulation has not been limited to the trucking industry. Proponents of deregulation have focused on the railroad industry, see, e.g., T. KEELER, RAILROADS, FREIGHT, AND PUBLIC POLICY 103-05 (1983), and airline deregulation and its effects have been subjected to intensive scrutiny for several years, see, e.g., Strickler, *Regulation vs Deregulation*, in TRANSPORTATION REGULATION: A PRAGMATIC ASSESSMENT 200 (G. Davis ed. 1976).

76. See *supra* note 12.

77. See Freeman & Beilock, *supra* note 70, at 26-35. Note however, the authors' qualifications that "[a]lthough the majority of states have made no major changes to their laws since the Motor Carrier Act of 1980, many have administratively loosened entry requirements, exempted certain segments of the transportation sector from regulation, or are actively considering transportation reform." *Id.* at 26.

78. Although most states have continued traditional regulatory policies toward the trucking industry, "[i]n general, it appears that many states are moving to ease regulatory burdens, if ever so slightly, on the transportation community, and a few states are showing signs of falling in line behind federal deregulation initiatives." Freeman & Beilock, *supra* note 70, at 13.

"In Colorado, while there is no move toward entry reform, the commission seems to be allowing greater rate flexibility and is moving away whenever possible from prescribed uniform rates. Several bills are under consideration in Louisiana including one which would deregulate common carriers." Freeman & Beilock, *supra* note 70, at 27. "Idaho, Wisconsin and New York are also considering substantive changes in the statutes governing motor carrier regulation." W. Allen, *supra* note 3, § 4, at 7.

79. Freeman, *supra* note 70, at 135.

80. Freeman & Beilock, *supra* note 70, at 26.

joint ratemaking activities, state action immunity will not be available to protect these activities from federal antitrust prosecution.

CONCLUSION

This Comment has argued that the Supreme Court should not grant state action immunity from antitrust prosecution to private parties unless their activities satisfy the strict dual phase compulsion analysis set forth herein. Under this analysis, the state first must compel a private party to initiate anticompetitive conduct. Once the private party has developed a plan for initiating the conduct, the state then must stand firmly behind the plan by compelling its implementation by the private party. Since the ratemaking practices followed by the truckers satisfy neither phase of this analysis, the joint ratemaking activities of the truckers do not qualify for state action immunity.

Moreover, since joint ratemaking in the trucking industry is economically inefficient and generally disadvantageous to the public interest, and since the national trend is toward deregulation, state legislatures are unlikely to compel joint ratemaking. Consequently, the truckers' activities are not likely to qualify for state action immunity from antitrust prosecution in the near future.

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