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Scott D. Makar

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ANTITRUST IMMUNITY UNDER FLORIDA’S CERTIFICATE OF NEED PROGRAM

SCOTT D. MAKAR*

ANTITRUST concerns may arise when health care companies that compete for certificates of need enter into agreements among themselves that limit such competition. A critical issue is whether Florida’s certificate of need program immunizes such agreements from the application of the federal and state antitrust laws under the state action doctrine or the first amendment Noerr-Pennington doctrine. This Article concludes that Florida’s certificate of need program satisfies the state action immunity test for only particular types of state-authorized and state-controlled conduct, thereby subjecting certain other unauthorized anticompetitive agreements to antitrust liability. First amendment petition clause immunity under the Noerr-Pennington doctrine, however, is much broader than state action immunity and may be available for legitimate “petitioning” activities in the legislative, administrative, and judicial forums.

I. Certificate of Need Regulation: Background

The question of antitrust immunity under Florida’s certificate of need program requires a detailed review of Florida’s certificate of need regulatory structure. This review is followed by a brief discussion of the purpose and efficacy of certificate of need regulations. As the next section explains, the regulatory structure of Florida’s certificate of need program has evolved over time but has specifically retained economic competition as one of its main objectives.

* Associate, Holland & Knight, Tallahassee, Florida; B.S., 1980, Mercer University; M.B.A., 1982; M.A., 1982; J.D. 1987; Ph.D. Candidate, University of Florida. The author expresses his appreciation to Steve Brannock, Christine Whitney, and Eleanor Joseph for their helpful suggestions. The views expressed in this Article, however, are solely those of the author.

1. A certificate of need is a “written statement issued by the department (Department of Health and Rehabilitative Services) evidencing community need for a new, converted, expanded, or otherwise significantly modified health care facility, health service, or hospice.” FLA. STAT. § 381.702(2) (1989).

2. See infra text accompanying notes 71-136.

3. See infra text accompanying notes 137-203.
A. The Regulatory Structure of Florida's Certificate of Need Program

Certificate of need programs impose extensive regulatory controls on entry into health care service markets and on investments in health care facilities.4 Until recently, almost all states operated certificate of need programs, primarily because the National Health Planning and Resources Development Act of 19745 (NHPRA) provided substantial federal funding for state and local health planning activities.6 The NHPRA required state certificate of need programs to conform to federal standards, which subjected a broad range of proposed health care facilities and projects to regulatory review and approval.7 The shift towards deregulation and increased reliance on free market incentives during the 1980s, however, led to the elimination of NHPRA's mandated certificate of need provisions in 1986.8 As a consequence, many states have modified or eliminated their certificate of need programs.

Florida, however, still retains a certificate of need program. Florida's first certificate of need program, enacted in 1972, regulated hospitals and nursing homes by requiring approval for addition of new bed capacity, construction of additional health facilities, and major alterations of facilities in excess of set financial limits.9 The Legislature revised the certificate of need program numerous times between 1972 and 1986, consistently expanding the range of health services and facilities subject to regulation as well as revising the program's administrative procedures.10 Despite the broadened range of services and fa-

7. See generally Simpson, supra note 4, at 1041-1061 (detailing the certificate of need requirements under NHPRA).
8. The certificate of need portion of the NHPRA was repealed by Pub. L. No. 99-660, § 701, 100 Stat. 3743, 3799 (1986).
10. See, e.g., Ch. 82-182, 1982 Fla. Laws 628 (creates local health councils and raises dollar amounts for capital expenditure and major medical equipment exemptions); Ch. 80-187, 1980
cilities subject to regulation, the Legislature intended the program to encourage the "strengthening of competitive forces in the health services industry." In 1987, after the elimination of the certificate of need program from federal law, Florida repealed its prior program and enacted an extensively modified certificate of need program pursuant to the Health Facility and Services Development Act. The Act provides that the Department of Health and Rehabilitative Services (HRS) shall review applications and issue certificates of need for health care facilities and services according to certain set criteria. The Legislature has amended the program since 1987 and is considering additional revisions in the 1991 legislative session.

Florida's revised certificate of need program prohibits free and unobstructed entry into health care markets by requiring that only licensed certificate holders may operate or provide approved health care facilities or services. Section 381.706, Florida Statutes, requires institutional health care providers, unless granted an exemption, to obtain state approval before they incur certain capital expenditures, change facilities' bed capacities, offer new or substantially different services, or acquire major medical equipment.

Fla. Laws 594 (expands Act to health care-related facilities and subjects more projects and facilities to program); Ch. 77-400, 1977 Fla. Laws 1684 (expands Act to include health services such as home health agencies and health maintenance organizations); Ch. 77-147, 1977 Fla. Laws 492 (transfers authority to Department of Health and Rehabilitative Services).


The Act, however, retained many aspects of the prior certificate of need program and its administrative procedures.

13. Id. § 381.705.

15. A "health care facility" is a "hospital, skilled nursing facility, or intermediate care facility. A facility relying solely on spiritual means through prayer for healing is not included as a health care facility." FLA. STAT. § 381.702(7) (1989).
16. "Health services" are "diagnostic, curative, or rehabilitative services and include[] alcohol treatment, drug abuse treatment, and mental health services." Id. § 381.702(9).
17. Hospitals, skilled and intermediate care nursing homes, home health agencies, hospices, and health maintenance organizations are all subject to certificate of need regulation for certain projects subject to review. Id. § 381.706.
18. Certain facilities and services are exempt from certificate of need regulation. Id. § 381.706(3). Examples include facilities not directly used for the provision of health services such as parking lots, meeting rooms, research buildings, and cafeterias. Id. Expenditures to replace major medical equipment or to replace or renovate part of a licensed nursing facility are exempt. Id. A number of other exemptions are also available.
19. Id.
types of facilities, services, or transactions requiring a certificate of need are numerous and include:

a) additions of beds by new construction or alteration;  
b) new construction or establishment of health care facilities;  
c) capital expenditures of $1 million or more;  
d) conversion from one type of health care facility to another;  
e) changes in licensed bed capacity;  
f) establishment of a home health agency or hospice, or the provision of such services;  
g) acquisitions by health care facilities or health maintenance organizations that would require review if made by purchase;  
h) establishment of or substantial changes in inpatient institutional health services by a health care facility;  
i) acquisition of an existing health care facility by any person;  
j) acquisition of major medical equipment by a health care facility or health maintenance organization;  
k) project cost increases (i.e., cost-overruns);  
l) changes in the number of psychiatric or rehabilitation beds;  
m) establishment of tertiary health services;  
n) transfer of certificates of need.

Under the current certificate of need program, HRS is responsible

20. *Id.* § 381.706(1)(a).  
22. *Id.* § 381.706(1)(c). The expenditure must be "on behalf of a health care facility or hospice for a purpose directly related to the furnishing of health services at such facility." *Id.* A certificate is not necessary for expenditures for outpatient health services or for some equipment. HRS must adjust this capital expenditure threshold annually according to an appropriate inflation index. *Id.*  
23. *Id.* § 381.706(1)(d). Conversions from one level of facility to another are also included. *Id.*  
24. *Id.* § 381.706(1)(e).  
25. *Id.* § 381.706(1)(f). The establishment or provision must be "by a health care facility or health maintenance organization for those other than the subscribers of the health maintenance organization." *Id.*  
26. *Id.* § 381.706(1)(g). Acquisitions at less than fair market value, if fair market value is greater than the capital expenditure threshold, are also included. *Id.*  
28. *Id.* § 381.706(1)(i). Review is not required if a person provides HRS with at least 30 days' written notice of the proposed acquisition and HRS does not determine that the services to be provided and the bed capacity will be changed. *Id.*  
29. *Id.* § 381.706(1)(j).  
30. *Id.* § 381.706(1)(k). The cost increase must exceed statutory limits or 10% of the originally approved cost of the project, whichever is less. A cost overrun less than $10,000 is not subject to review. *Id.*  
31. *Id.* § 381.706(1)(l).  
32. *Id.* § 381.706(1)(m).  
for planning all health care services in the state and preparing the state health plan.\(^3\) In order to fulfill these responsibilities, HRS maintains a health care data base that is used for certificate of need determinations.\(^3\) HRS acquires much of the information contained in this data base from health facilities and health service providers as HRS deems necessary.\(^3\) HRS must establish methodologies for determining the need for health services and facilities by considering population demographics, the population’s health status, service use, patterns and trends, geographic accessibility, and market economics.\(^3\)

HRS is the sole agency that issues, revokes, or denies certificates of need or exemptions from certificate of need review.\(^3\) In accordance with the plans of the local and statewide health councils,\(^3\) HRS issues, revokes, or denies a certificate of need application for facilities or services based on fourteen statutorily defined criteria.\(^4\) Notably, one criterion is the probable impact of the proposed facility or service on competition in the supply and delivery of health services.\(^4\) In fact, the

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34. Id. § 381.703(4)(a).
35. Id. § 381.703(4)(b).
36. Id.
37. Id. § 381.704(3).
38. Id. § 381.704(1).

39. Local health councils are public or private nonprofit agencies that serve counties with the 11 health care districts. Fla. Stat. § 381.703(1)(a) (1989). Each council is composed of members equaling one and one-half times the number of counties within the district or 12 members, whichever is larger. Id. Members are appointed by the county commission within the district for two-year terms. Id. These local health councils develop district health care plans according to uniform methodologies and elements HRS establishes. Id. § 381.703(1)(b). The Statewide Health Council acts as an advisory council to HRS on state health policy issues, state and local health planning activities, and state health regulation programs. Id. § 381.703(2)(a). Its membership includes the 11 chairpersons of the local health councils and six political appointees (two appointed by the Governor, two by the President of the Senate, and two by the Speaker of the House of Representatives). Id. § 381.703(2).

40. Id. § 381.705(1). In general, these criteria include (1) the need for the proposed facility or services in relation to the district and state health plans; (2) the availability, quality of care, efficiency, appropriateness, accessibility, extent of utilization and adequacy of like and existing facilities or services in the district; (3) the applicant’s ability to provide and record of providing quality of care; (4) the availability and adequacy of other health care facilities and services in the district; (5) the probable economies and improvements in service from the operation of joint, cooperative or shared resources; (6) the district’s needs for special equipment and services not reasonably and economically accessible in adjoining areas; (7) the need for research and educational facilities; (8) availability, accessibility, and adaptability of resources and services for certain uses; (9) the immediate and long-term financial feasibility of the proposal; (10) the special needs and circumstances of Health Maintenance Organizations; (11) the needs and circumstances of entities providing a substantial portion of their services or resources to individuals not residing in the entities’ district or adjacent districts; (12) the probable impact on competition in the supply and delivery of health services that foster competition and promote quality assurance and cost-effectiveness; (13) the costs and methods of the proposed construction; and (14) the applicant’s past and proposed provision of health care services to Medicaid patients and the medically indigent. Additional criteria for proposed capital expenditures for new inpatient health services must also be considered. Id. § 381.705(2).

41. Id. § 381.705(1)(b).
Certificate of need regulatory framework explicitly retains the goals of fostering competition, promoting quality assurance, and ensuring cost-effectiveness. Thus, not only must HRS rely, in part, upon market economics in establishing methodologies for determining needs, it also must consider the competitive impact of proposed facilities and services on health care markets.

Competition for certificates results from batches of applications processed at least twice each year. After applicants file their applications, staff recommendations are made and administrative hearings are held. The end result is that HRS reviews applications and then issues, denies, or revokes certificates for facilities throughout the state’s districts and subdistricts. After HRS issues a certificate of need, it monitors the certificate holder’s progress towards compliance with the certificate conditions until the project is completed with the assistance of local district health councils.

The types of conditions that HRS may impose are not statutorily set or limited. Typical certificate conditions include maintaining a certain number and type of beds and particular levels of Medicare patient days. HRS may penalize certificate holders who do not meet certificate conditions or do not meet project timetables in good faith. Certificates terminate one year after issuance unless certain standards are met (such as commencement of construction or the incursion of enforceable capital expenditures). Extensions are permissible under certain circumstances.

B. Certificate of Need Regulation: Consumer Boon or Boondoggle?

With the regulatory structure of Florida’s certificate of need program in mind, the question of whether the program serves its lauda-

42. Id.
43. Id. § 381.709(1).
44. Id. § 381.709(3)-(5). Proceedings requiring formal administrative hearings are assigned to the Department of Administrative Hearings. Following a formal hearing, the hearing officer issues a recommended order which HRS may adopt or modify in making its final order 45 days later. Id. § 381.709(5). Judicial review is available in the District Courts of Appeal. Id. § 381.709(6).
47. Fla. Stat. §§ 381.710(1)(b), (2)(a) (1989). Administrative fines up to $1,000 per failure per day and revocation of the certificate of need are potential penalties. Id.
48. Id. § 381.710(2).
49. Id.
tory purpose naturally arises. Without a doubt, the efficacy of certificate of need programs is a subject of considerable debate among health care economists, legal scholars, and public policy makers. Certificate of need proponents claim that owners of health care facilities have a tendency to engage in unnecessary expansion of facilities and services that free market forces cannot sufficiently restrain. Thus, they urge that the primary purpose of a certificate of need program is the avoidance of unnecessary duplication and expansion of health care facilities and services and the resulting potential for reducing health care costs. Certificate of need proponents also assert that regulation is necessary to prevent the construction of health care facilities that attract only paying clients, thereby disadvantaging facilities that treat financially needy patients. Consequently, another purpose of certificate of need regulation is to reallocate health services by requiring certificate holders to provide medical services to indigent citizens.

Opponents of certificate of need programs contend that certificate of need regulation is ineffective and possibly counterproductive in promoting efficient health care markets. For instance, Federal Trade Commission (FTC) studies have concluded that certificate of need regulation has resulted in higher hospital costs. The FTC Bureau of Competition and Consumer Protection and Bureau of Economics have concluded that certificate of need regulation interferes with com-

50. See Simpson, supra note 4, at 1028-29 n.16.

According to CON [certificate of need] proponents, overinvestment occurs in the health care industry because the marketplace does not control the supply of services. Several reasons have been cited for this market failure. First, consumers have no incentive to react to cost increases because they receive insurance reimbursement. Second, the cost-based method of reimbursement which private insurers and the federal government use to pay providers does not give any incentive to deliver services efficiently. Third, the competition for physicians encourages institutional health care facilities to lure physicians to their facilities by purchasing high technology equipment and offering sophisticated services without regard to projected utilization rates.

Fourth, insurance companies do not bargain with health care providers over prices. Gross, supra note 9, at 189; see also Anderson & Kass, Certificate of Need Regulation of Entry into Home Health Care v, 92 (1986) (Bureau of Economics Staff Report to the Federal Trade Commission).

51. See Ponsoldt, Immunity Doctrine, Efficiency Promotion, and the Applicability of Federal Antitrust Law to State-Approved Hospital Acquisitions, 12 J. Corp. L. 37, 40 (1986). An assumption underlying certificate of need legislation is that health care markets do not provide adequate incentives for cost containment primarily because consumers and health care providers do not directly confront actual medical costs due to health insurance payments. Simpson, supra note 4, at 1028-29, n.16. In addition, health care providers have traditionally competed on the basis of price rather than quality and have ethical proscriptions to expand the provision of services regardless of cost considerations.

52. See Ponsoldt, supra note 51, at 40.

petition and inhibits the rate of innovation in health care markets.\(^5\) Competition is lessened because the certificate of need process "imposes substantial costs on applicants, in terms of both the effort required to obtain regulatory approval and the delays occasioned by the regulatory process."\(^5\) The certificate of need regulatory process also protects incumbent firms from competition and innovation because new entrants have the burden of demonstrating that a current unfulfilled need exists in the marketplace. This burden "reduces the possibility of entry by more efficient firms which would provide higher quality and/or lower cost services and, possibly, replace the less efficient firms."\(^5\)

Certificate of need legislation also creates opportunities for incumbent firms to engage in nonprice predation, strategic business behavior designed to raise the operating costs of rival incumbent firms and potential entrants.\(^5\) An example is:

when a hospital seeks a certificate of need to enter a market. The existing hospitals might oppose this application in bad faith; they might join in opposing all such applications, exhausting all administrative and judicial appeals regardless of the merits; or they might file false or misleading information before the agency charged with evaluating the applications. In this way, they increase the costs and difficulty of entering their market.\(^5\)

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54. See, e.g., FTC Letter from John M. Mendenhall to the Honorable John F. Pressman and the Honorable Donald W. Snyder (Mar. 30, 1988) (WESTLAW, FABR-FTC database) (John M. Mendenhall is the Acting Director of the Federal Trade Commission's Cleveland Regional Office) [hereinafter FTC Letter].

55. Id. at 9.

56. Id. at 10. See Blair & Fesmire, Antitrust Treatment of Hospital Mergers, 2 U. FLA. J.L. & PUB. POL'Y 25, 54 (1988-1989) (noting that certificate of need requirements pose "very high entry barriers" that lessen the ability of hospitals to compete).


Nonprice predation has significant advantages over direct price competition. Nonprice predation is safer because a price predation strategy requires that the predator engage in below-cost pricing, thereby significantly sacrificing short-term profits. In addition, price predation is a risky undertaking because it assumes that rivals will be driven out of the marketplace and that entry barriers prohibit their immediate reentry, such that the predator will accrue future monopoly profits. The "price predator must sacrifice present dollars to reap future and uncertain monopoly rents." In contrast, nonprice predation is less expensive because legal expenses incurred to exclude a rival from the market through the administrative process are generally much lower than the short term profits sacrificed by an across-the-board price cut. Nonprice predation may also be less risky because it is more difficult to detect and, as discussed later, may be protected under the Noerr-Pennington doctrine.

Critics of certificate of need programs also point out that because entry into health care markets is difficult, incumbent companies are sheltered from competition. As a consequence, certificate of need "regulation can make it more likely that providers will exploit whatever market power they have, individually or collectively, to raise prices above (or reduce quality below) the competitive level." In addition, health care innovation becomes stifled because the certificate of need regulatory process cannot adequately respond to or account for changes in technology or market demand. Despite the efforts of health-planning agencies to predict and to provide guidance on future health care trends, reliance on market forces provides greater flexibil-

59. Id. at 299; see also E. SULLIVAN & J. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS, 253-62 (1988) (noting that predatory pricing strategies are expensive and risky endeavors).

60. Calvani & Averitt, supra note 57, at 299-300. The authors point out that such costs can be particularly low when groups of competitors join together and agree to share attorneys' fees. Id. at 300.

61. Id. at 300. See infra text accompanying notes 137-203.

62. Antitrust economists point out that certificate of need programs may insulate incumbent firms from the competitive realities of the free market.

Ordinarily, poor economic performance — excessive prices, low quality, poor service — provides an incentive for outsiders to enter or current rivals to expand. In the hospital industry, however, the expansion of supply is controlled by CON determinations. . . . Whenever a hospital requests de novo entry or expansion, hearings are held and the existing hospitals can intervene to oppose the new entry. Generally, the new entrant cannot use opportunity for greater profit as a basis for establishing the need for additional capacity. As long as there is sufficient capacity to handle the case load, the state will not permit new entry.

Blair & Fesmire, supra note 56, at 54.

63. FTC Letter, supra note 54, at 5.
ity in adapting to fluctuating market conditions. Finally, certificate of need regulation raises the price of health care services, thereby imposing a "hidden tax" on consumers of such services that is used to fund indigent care. Critics contend that this certificate of need "tax" is costly because it distorts the competitive process and falls disproportionately on consumers who are in poor health.

With this doctrinal debate in mind, it is clear that Florida's certificate of need regulatory scheme restricts the ability of health care companies to freely enter and serve various health care markets. These regulatory restrictions reduce many, but not all, forms of economic competition. As a consequence, some health care companies may enter otherwise anticompetitive agreements with their rivals, either because they believe such agreements are immune from antitrust scrutiny or because they feel pressure to limit competition for certificates of need under the administrative process. These agreements, which may be express or implied, may include market allocation or protection agreements such as agreements to oppose or not to oppose particular certificate of need applications or to apply for certificates of need only in particular districts. They may also include agreements to stagger competition for certificate of need applications in particular batches and agreements to share strategic information among competitors for certificates of need. Each of these types of agreements generally violates the antitrust laws. Whether health care companies who enter such agreements have immunity from antitrust liability is the focus of the remainder of this Article.

64. Id.
65. Id. at 6.
66. Id.
67. Because of latent hostility towards competitive change, "it is not surprising that a great many lawsuits brought under the antitrust laws involve the health care industry. This suggests that private collusive actions to curb competition are unlikely to disappear quickly." Greaney, Competitive Reform in Health Care: The Vulnerable Revolution, 5 Yale J. on Reg. 179, 189 (1988).
68. For purposes of this Article, strategic information refers to a company's confidential, nonpublic, strategic information related to business marketing, expansion, and planning.
70. This Article does not discuss the availability of implied antitrust immunity for anticom-
II. STATE ACTION IMMUNITY DOCTRINE

Federal and state antitrust laws, which protect free market competition, prohibit agreements between private parties that restrain trade. These antitrust laws, however, do not apply to the state-authorized and state-supervised actions of private parties. Over fifty years the United States Supreme Court has developed a test for determining when private anticompetitive conduct is exempt from the federal antitrust laws. Under this state action immunity doctrine, private anticompetitive conduct is immune from antitrust liability provided (a) the state has clearly articulated and affirmatively expressed a policy to

petitive conduct undertaken pursuant to the National Health Planning and Resources Development Act (NHRPRA) before its repeal of mandated certificate of need regulations in 1986. See National Gerimedical Hosp. & Gerontology Center v. Blue Cross, 452 U.S. 378 (1981). In National Gerimedical, the United States Supreme Court rejected implied antitrust immunity for a health care insurer's refusal to permit a hospital to become a member of its insurance plan even though the insurer's intent was to assist in the implementation of the NHRPRA. Despite the elaborate federal, state, and local regulatory planning structure, the Court concluded that the challenged conduct "was neither compelled nor approved by any governmental regulatory body." Id. at 389. In addition, the application of the antitrust laws to the challenged conduct would not frustrate the federal regulatory scheme or create a conflict with the orders of regulatory bodies. Id. at 390. The Court therefore rejected implied antitrust immunity both for the particular challenged conduct (i.e., refusal to deal) and for any private conduct undertaken in response to the health planning process. The Court concluded its analysis by noting that Congress intended that "competition and consumer choice" are to be favored wherever they "can constructively serve ... to advance the purposes of quality assurance, cost effectiveness, and access." Id. at 392-93 (citing 42 U.S.C. § 300k-2(a)(17)) (ellipsis in original); see also Huron Valley Hosp., Inc. v. City of Pontiac, 666 F.2d 1029, 1033-34 (6th Cir. 1981) (NHRPRA does not effect an implied repeal of the application of federal antitrust laws to hospital marketplace); cf. Hospital Bldg. Co. v. Trustees of Rex Hosp., 691 F.2d 678, 685 (4th Cir. 1982) (although NHRPRA does not contain an express antitrust exemption, a narrow and special "rule of reason" is necessary to permit private parties' participation in certain planning activities that might otherwise violate the antitrust laws), cert. denied, 464 U.S. 890, cert. denied, 464 U.S. 904 (1983).

This judicially-created doctrine is an accommodation between conflicting interests: state sovereignty and federal supremacy. Ordinarily, the supremacy clause requires that federal law supersede state or local laws. However, the notion that the federal antitrust laws override and nullify all state and local regulations that restrain competition is as untenable as the notion that such state and local regulations can trump valid federal statutes. Thus, the doctrine emerged as "an appropriate accommodation between the federal interest in fostering competition and the conflicting state interests in restricting competition by immunizing some, but not all, state-authorized or enforced restraints from antitrust scrutiny." Elhauge, The Scope of Antitrust Process, 104 HARV. L. REV. 668, 669 (1991).

The doctrine is also termed the Parker doctrine based on the seminal case of Parker v. Brown, 317 U.S. 341 (1943), in which the Supreme Court upheld the actions of a state commission which set prices and restricted the output of raisin growers. The Court in Parker made clear that a state could impose a restraint on competition based on principles of federalism and state sovereignty arising from the supremacy clause of the United States Constitution. Id.
displace competition with regulation, and (b) the state actively supervises and controls the private anticompetitive conduct.\(^7^4\) This two-part state action test is also termed the *Midcal* test.\(^7^5\) Both parts of the test must be met; a state cannot merely grant immunity to those persons who violate the federal antitrust laws or simply declare their actions lawful.\(^7^6\) Instead, the test requires that a state intend to displace competition with regulation and actively supervise and control the private parties' anticompetitive conduct.

**A. Part One: The "Clearly Articulated" Prong**

The first part of the *Midcal* test ensures that the federal antitrust interest in competition is not supplanted unless a state actually intends to displace economic competition. For instance, the first part is undoubtedly satisfied if a state statute explicitly authorizes private parties to engage in the challenged conduct or restraint.\(^7^7\) In contrast, a

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\(^{74}\) Patrick v. Burget, 486 U.S. 94, 100-101 (1988); Southern Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 57 (1985). When a state or other political subdivision, such as a municipality, engages in anticompetitive conduct, a court only considers the first part of the state action test, i.e., whether a clearly articulated and affirmatively expressed state policy exists.

\(^{75}\) See *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). The state action doctrine is also applicable under the Florida Antitrust Act of 1980, which provides that "[a]ny activity or conduct exempt under Florida statutory or common law or exempt from the provisions of the antitrust laws of the United States is exempt from the provisions of this chapter." FLA. STAT. § 542.20 (1989). Florida and federal cases discussing the state action doctrine's application under the Florida Antitrust Act have consistently applied the federal state action test. See, e.g., Sebring Util. Comm'n v. Home Sav. Ass'n, 508 So. 2d 26 (Fla. 2d DCA) (application of test to municipality), rev. denied, 515 So. 2d 230 (Fla. 1987).


\(^{77}\) See, e.g., Todorov v. DCH Healthcare Auth., 921 F.2d 1438 (11th Cir. 1991). In *Todorov*, a neurologist excluded from the medical staff of a hospital organized as a health care authority sued the hospital for federal antitrust violations. The hospital claimed state action immunity based on an Alabama statute, the Alabama Health Care Authority Act, that authorized hospitals to establish themselves as health care authorities and empowered such authorities to "select and appoint medical and dental staff members and others licensed to practice the healing arts." *Id.* at 1460. Based upon its analysis of the Act, the Eleventh Circuit had little difficulty in concluding that the hospital had immunity. First, the Act clearly authorized the challenged conduct (i.e., regulation of staff privileges). Second, the Act made clear that the state's policy was to displace competition in the health care field. Finally, the Act made explicit that such conduct, even if deemed to be anticompetitive and violative of the state or federal antitrust laws, is authorized pursuant to state authority. Based upon the state's clear delegation of power to health care authorities and the state's clear statement of its public policy in displacing competition, "this case involves a statute that *expressly* authorizes anticompetitive conduct." *Id.* at 1462. The court, therefore, held that antitrust immunity was mandatory.
state policy that is either neutral or does not permit or contemplate the specific anticompetitive conduct does not satisfy the test.\textsuperscript{78} In between these two extremes is a wide range of state statutes that articulate and delegate regulatory authority with various degrees of clarity and precision.

For instance, a difficult issue is whether the first part of the test is satisfied in the absence of express statutory authority either compelling or permitting the challenged conduct. In \textit{Southern Motor Carriers Rate Conference, Inc. v. United States},\textsuperscript{79} the Supreme Court held that the absence of compelled conduct does not necessarily doom a claim of antitrust immunity. The Mississippi statute at issue authorized the state public service commission to establish "just and reasonable" rates for the intrastate transportation of commodities. Because the commission exercised its discretion to actively encourage collective ratemaking among competing common carriers, the Court held such private ratemaking activity was state-authorized and therefore immune.\textsuperscript{80} The Court stated:

\begin{quote}
A private party acting pursuant to an anticompetitive regulatory program need not "point to a specific, detailed legislative authorization" for its challenged conduct. As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the \textit{Midcal} test is satisfied.\textsuperscript{81}
\end{quote}

This deference to a state's regulatory intentions makes it much easier to meet the "clearly articulated" prong and also eliminates any balancing of federal and state interests. Before \textit{Southern Motor Carriers}, the Supreme Court indicated that the state's interest in its regulation could be balanced against the federal antitrust interest. The Court had stated that it "has consistently refused to find that [state] regulation gave rise to an implied exemption without first determining that ex-

\textsuperscript{78} Community Communications Co. v. City of Boulder, 455 U.S. 40, 55-56 (1982) (municipality exercising its home rule powers not immune because no clearly articulated and affirmatively expressed state policy); Lancaster Community Hosp. v. Antelope Valley Hosp. Dist., Nos. 89-55167, 89-55347 (WESTLAW, ALLFEDS database) (9th Cir. July 15, 1991) (state authorization for local hospital districts to provide hospital services does not, by itself, provide immunity to district; state's general policy is to promote competition unless displaced with regulation).

\textsuperscript{79} 471 U.S. 48 (1985). The United States contended that the collective ratemaking activities of rate bureaus composed of motor common carriers violated federal antitrust laws.

\textsuperscript{80} \textit{Id.} at 64.

\textsuperscript{81} \textit{Id.} (citations omitted).
emption was necessary in order to make the regulatory Act work, ‘and even then only to the minimum extent necessary.’”

The Court in Southern Motor Carriers, however, foreclosed the argument that a state regulation must be necessary to fulfill the state’s regulatory purpose in order to acquire immunity. Instead, the Court created a “clear intent to displace competition” standard which greatly defers to state regulatory interests by eliminating any consideration of the federal antitrust interest in competition. This standard weakens the “clear articulation” prong but still leaves open the possibility that private anticompetitive conduct might fall outside of the range of conduct a state foreseeably and logically intended to regulate. In Town of Hallie v. City of Eau Claire, the Supreme Court rejected the argument that a state statute evidencing the state’s policy to displace competition must expressly mention the challenged anticompetitive conduct or that anticompetitive effects are intended. If the statutes at issue “clearly contemplate” that the challenged anticompetitive conduct will occur, that such conduct is a “foreseeable” result of the statutes, and that anticompetitive effects will “logically” result from such conduct, the first prong of the Midcal test is met. Although the Court in Town of Hallie determined that the challenged conduct at issue was foreseeable, lower courts have applied the “foreseeability” requirement and applied the antitrust laws to anticompetitive conduct that state statutes did not envision.

The Supreme Court’s recent decision in City of Columbia v. Omni Outdoor Advertising, Inc. further eases the requirements of the first part of the Midcal test. In Omni Outdoor Advertising, a Columbia,

82. Cantor v. Detroit Edison Co., 428 U.S. 579, 597 (1976) (quoting Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963) (public utility’s program of distributing free light bulbs to its customers not immune from antitrust laws because no state authorization for such program)).
83. 471 U.S. 34 (1985). At issue was whether a Wisconsin statute authorizing municipalities to construct and maintain sewage systems immunized a city from monopolization charges brought by neighboring unincorporated townships. The townships claimed that the city monopolized sewage services and would provide such services only if the townships were willing to be annexed. Id. at 36-37.
84. “It is not necessary . . . for the state Legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects.” Id. at 42.
85. Id.
86. See, e.g., Bolt v. Halifax Hosp. Medical Center, 891 F.2d 810, 825 (11th Cir. 1990) (hospital district did not have state action immunity because “nothing indicates that the Legislature should have foreseen the type of anticompetitive conduct alleged in this case”), on remand from, 874 F.2d 755 (11th Cir. 1989), reinstating opinion in part on reh’g from, 861 F.2d 1233 (11th Cir.), granting reh’g and vacating opinion from, 851 F.2d 1273 (1988), cert. denied, 110 S. Ct. 1960 (1990).
South Carolina billboard advertising company with ninety-five percent of the local billboard market and very close relations with city officials, successfully lobbied the city officials to enact zoning ordinances restricting further billboard construction. Because the city ordinances severely hindered a rival billboard company’s ability to compete, the rival sued the city and the dominant billboard company claiming violations of federal and state antitrust laws. The plaintiff’s theory was that the city officials and the dominant billboard company had engaged in an anticompetitive conspiracy that stripped them of whatever state action or Noerr-Pennington immunity they may have otherwise had. A jury returned a verdict for the plaintiff, but the trial court granted judgment notwithstanding the verdict to the defendants. The appellate court, in a split decision, reversed and reinstated the jury’s verdict.  

The primary issue before the Supreme Court in *Omni Outdoor Advertising* was whether a “conspiracy” exception to the state action and Noerr-Pennington immunity doctrines existed. An ancillary issue was whether the first part of the Midcal test had been met. The majority opinion held that broad delegations of power to municipalities to regulate for the general welfare bestow antitrust immunity even though such powers do not specifically authorize economic regulation of a specific industry. For instance, the statute at issue in *Omni Outdoor Advertising* granted municipalities the authority to regulate buildings and other structures “[f]or the purpose of promoting health, safety, morals or the general welfare of the community.” The statute did not specifically authorize the regulation of billboards. Nevertheless, the majority deemed the statute sufficiently broad to protect “existing billboards against some competition from newcomers.” The Court stated that “[i]t is enough . . . if suppression of competition is the ‘foreseeable result’ of what the statute authorizes.” Because a “municipality need not ‘be able to point to a specific, detailed legisla-

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89. The Supreme Court squarely rejected the application of a “conspiracy” exception to both the state action and Noerr-Pennington doctrines. See infra text accompanying notes 172-178. However, the Court, in dicta, left open the possibility of a “market participant” exception in situations where the government acts in a commercial, proprietary role. See also *Municipal Util. Bd. of Albertville v. Alabama Power Co.*, No. 90-7095 (11th Cir. July 5, 1991) (WESTLAW ALLFEDS database) (to be reported at 934 F.2d 1493) (rejecting “public co-conspirator” and “ratification” exceptions to state action doctrine).


91. *Id.* at 1349 n.3.

92. *Id.* at 1350.

93. *Id.* (citing *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985)).
tive authorization' in order to assert a successful [state action] defense to an antitrust suit,"' the lack of specific authority in the statute did not lessen or eliminate the city's immunity.94

The holding in Omni Outdoor Advertising involved the application of the state action immunity test to municipalities, not to private parties.95 The Court has not articulated different standards under the first prong of the Midcal test for political subdivisions versus private actors. Thus, read in conjunction with Southern Motor Carriers, which involved private party immunity, the inescapable conclusion of Omni Outdoor Advertising is that the Supreme Court has expanded the scope of the first part of the state action test to include most delegations of regulatory authority, whether exercised by municipalities or private parties. In effect, the Court has diluted the "clearly articulated" prong of the Midcal test to a "clearly delegated" standard.96

Although Southern Motor Carriers and Omni Outdoor Advertising have made the first part of the Midcal test easier to establish, courts may still be hesitant to imply antitrust immunity unless the challenged conduct is a foreseeable result of the state's regulatory scheme.97 For instance, in an Eleventh Circuit case98 decided before Omni Outdoor Advertising—Bolt v. Halifax Hospital Medical Center99—the Eleventh Circuit analyzed whether Florida's medical peer review statute satisfied the first part of the state action test. A physician alleged that a hospital district and a hospital and its staff had conspired to boycott his services and to deny him staff privileges. The hospital district as-

94. Id. at 1350 n.4 (quoting Town of Hallie v. City of Eau Claire, 471 U.S. at 34, 39 (1985), and City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415 (1978)).
95. As mentioned previously, only the first part of the Midcal test applies in analyzing whether political subdivisions of the state have antitrust immunity. Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985).
96. See Garland, Antitrust and State Action: Economic Efficiency and the Political Process, 96 YALE L.J. 486, 501 (1987) (state action test is "an effort to control delegation" and seeks to "bar delegation to private parties of the power to restrain competition").
97. Town of Hallie, 471 U.S. at 42 (applying foreseeability criterion).
98. The extent of state action immunity under Florida's certificate of need program depends upon both federal court and state court decisions applying the United States Supreme Court's precedents. Few Florida cases discuss the state action immunity doctrine at length, primarily because Florida's antitrust laws rely explicitly on federal judicial interpretations of federal antitrust provisions. FLA. STAT. § 542.32 (1989) (in construing Florida's antitrust act, the Legislature stated its intention that "due consideration and great weight be given to the interpretations of the federal courts relating to comparable federal antitrust statutes"). Because federal antitrust actions filed in Florida are bound by the decisions of the Eleventh Circuit Court of Appeals (and former Fifth Circuit cases), cases from the Eleventh Circuit are helpful in discussing the application of the state action doctrine to Florida's certificate of need program.
99. 891 F.2d 810 (11th Cir. 1990), on remand from, 874 F.2d 755 (11th Cir. 1989), reinstating opinion in part on reh'g from, 861 F.2d 1233 (11th Cir.), granting reh'g and vacating opinion from, 851 F.2d 1273 (1988), cert. denied, 110 S. Ct. 1960 (1990).
sserted that Florida's peer review statute satisfied the first part of the state action immunity test.100

The court initially determined that, in authorizing medical peer review, the Florida Legislature clearly articulated a policy to displace competition and that the Legislature could foresee that hospital districts would rely upon recommendations made by a physician's peers in exercising their "virtually unreviewable power to hire (or not hire)" physicians.101 Nonetheless, the court stated:

While the Florida Legislature must have foreseen that [the medical district] would engage in anticompetitive conduct based on recommendations of the physician's peers, nothing indicates that the Legislature should have foreseen the type of anticompetitive conduct alleged in this case [i.e. a conspiracy to boycott].102

The court therefore held that the hospital district did not have state action immunity for the challenged conduct. Thus, the hospital district was without immunity because "its conduct constitutes anticompetitive conduct that is not a foreseeable result of [the hospital district's] enabling legislation" and was inconsistent with the district's requirement to act in the "public good."103 The excluded physician therefore properly alleged an unauthorized and unforeseeable conspiracy in which the hospital district participated.104

As the foregoing discussion illustrates, the Supreme Court has increasingly construed the first part of the Midcal test as requiring only a clear delegation of authority from a state such that the challenged anticompetitive conduct is a foreseeable result of the delegation. This relaxation of the requirements of the first prong is an indication of the Court's greater deference to the states and their regulatory regimes. This deference, however, is not limitless. Unless the challenged anticompetitive conduct is a foreseeable result of the state's regulatory program, the first part of the test is not met. As the next section discusses, the Court has simultaneously tightened the second prong of the Midcal test so that private anticompetitive conduct, even if state-

100. The court only analyzed the "clearly expressed state policy" part because it found the hospital district sufficiently similar to a municipality, thus requiring only the single prong test of Town of Hallie. Id. at 825. See also Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1460-62 (11th Cir. 1991) (hospital organized as a health care planning authority pursuant to state statute is a "political subdivision" of the state).
101. Bolt, 891 F.2d at 825.
102. Id.
103. Id.
104. Id.
authorized and subject to state monitoring and scrutiny, is not entitled to immunity.

B. Part Two: The "Active State Supervision" Prong

Over the past decade, the United States Supreme Court has consistently refused to extend immunity to private actors under a number of different state regulatory structures due to the lack of active state supervision of the anticompetitive acts.\(^{105}\) Thus, although the first part of the *Midcal* test has become easier to meet, the second part of the test, active state supervision, has become increasingly more difficult to satisfy. In essence, the first prong of the state action test has evolved to protect the state interest in restraining competition, while the second prong has evolved to protect the countervailing federal interest in promoting competition. The first prong defers to the anticompetitive actions of public actors while the second prong closely scrutinizes the anticompetitive actions of private actors.

In *Patrick v. Burget*,\(^{106}\) the Court drastically reformulated the active supervision prong by requiring active state *control* of the challenged conduct. In holding that an Oregon medical peer review statute did not satisfy this requirement, the Court stated that "'[t]he active supervision requirement stems from the recognition that 'where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.'"\(^{107}\)

The requirement is designed to ensure that the state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. To accomplish this purpose, *the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct. The mere presence of some state involvement or monitoring does not suffice. The active supervision prong . . . requires that state officials have and exercise*


\(^{107}\) *Patrick*, 486 U.S. at 100 (quoting Town of Hallie v. City of Eau Claire, 471 U.S. 34, 47 (1985)).
power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.108

The Court's concern is that the "national policy in favor of competition [not] be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private [antitrust violation]."109 As a result, the Court held that mere state oversight of or involvement in private parties' anticompetitive conduct is insufficient to protect the federal interest in competition. Instead, active and ultimate control of the challenged anticompetitive activity by the state is necessary.

Two recent opinions from the Eleventh Circuit Court of Appeals illustrate the difficulty in satisfying the active state supervision prong. In Shahawy v. Harrison,110 the district court ruled that Florida's peer review system immunized a hospital board from federal antitrust liability. The Eleventh Circuit reversed because it held Florida's peer review system "fails to actively supervise the hospital board's decisions."111 Although Florida enacted a "comprehensive scheme regulating health care" and delineated the scope of state involvement, the critical element of state supervision was lacking. "[N]o state official reviews specific peer review board decisions regarding clinical privileges to determine whether such decisions comport with state policy."112 The hospital board, therefore, had no antitrust immunity.

In a highly unusual case, Consolidated Gas Co. of Florida v. City Gas Co.,113 the Eleventh Circuit affirmed a district court's finding that

108. Id. at 101 (emphasis added) (citations omitted).
110. 875 F.2d 1529 (11th Cir. 1989).
111. Id. at 1535. The court stated that because the active state supervision prong was not met, it did not need to address the clear articulation prong of the test. It appears, however, that the court's analysis was flawed because the defendant in Shahawy, the Sarasota County Public Hospital Board, was a public rather than private entity. The court therefore should have only determined whether the first prong of the Midcal test was met. Active state supervision of a public entity is not necessary. The court may therefore have reached an incorrect result because Florida's medical peer review statute, chapter 395, Florida Statutes, and the county hospital statute, chapter 155, Florida Statutes, appear to delegate to county hospitals significant regulatory powers related to hospital privileges. The court's proper focus should have been whether the conduct at issue in Shahawy was a foreseeable result of such delegated regulatory authority. Nevertheless, the court's analysis of the active state supervision prong, although unnecessary, appears correct.
112. Id.
113. 880 F.2d 297 (11th Cir. 1989), reh'g granted and opinion vacated, 889 F.2d 264 (1989), on reh'g, 912 F.2d 297 (11th Cir. 1990) (en banc) (per curiam opinion reinstating panel opinion),
territorial agreements entered into by natural gas utility companies and approved by the Florida Public Service Commission (PSC) were not immune from antitrust liability. The appellate court held that Florida’s statutes did not provide a clearly articulated state policy of permitting such agreements nor was there active state supervision of such agreements.114

At the outset, the panel opinion recites that a “statute need not explicitly state what conduct is and is not permissible in order for that conduct to be undertaken pursuant to a clearly articulated state policy.”115 Nonetheless, the panel rejected the argument that the first part of the Midcal test was satisfied simply because the Florida Supreme Court had previously concluded the PSC had authority to approve these agreements.116 Instead, the court stated that the determination of whether the first part is satisfied is “ultimately a question of federal antitrust law.”117 The court undertook its own inquiry and was persuaded by the fact that other utilities (such as electric utilities) had the express authority to enter territorial agreements while natural gas utilities did not.118 It therefore concluded that “no clearly articulated state policy authorized this agreement.”119

The court also held that active state supervision did not exist for two reasons. First, the PSC had no express authority to develop standards for creating or reviewing such agreements on a regular basis.120 Second, judicial supervision over the territorial agreements was insuf-

cert. granted and judgment vacated as moot, 111 S. Ct. 1300 (1991). Ten judges, including two judges who were on the panel, participated in the en banc proceedings. A majority of seven judges agreed to affirm the judgment of the district court. Two of these judges, however, were unwilling to affirm the holding of the district court and panel opinion finding no antitrust immunity. Thus, five of the ten en banc judges dissented on the ground that the state action immunity doctrine should apply to the facts at issue. Because the en banc court was equally divided on the state action immunity issue, the panel opinion’s holding prevails.

114. Consolidated Gas, 880 F.2d at 301-04.
115. Id. at 302 (citing Southern Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 63-64 (1988)).
117. Consolidated Gas, 880 F.2d at 303.
118. Chapter 366, Florida Statutes, expressly grants electric utilities such authority but is silent as to natural gas utilities. The court found this “compelling evidence that the Legislature in fact did not intend for natural gas utilities to also enjoy exclusive territorial agreements.” Consolidated Gas, 880 F.2d at 302. In addition, the PSC had itself expressed doubt regarding its authority in a 1985 tariff filing. In this action, however, the PSC urged the court to find that antitrust immunity existed. Id. at 301-02.
119. Consolidated Gas Co. of Fla. v. City Gas Co., 880 F.2d 297, 303 (11th Cir. 1989), reh’g granted and opinion vacated, 889 F.2d 264 (1989), on reh’g, 912 F.2d 297 (11th Cir. 1990) (en banc) (per curiam opinion reinstating panel opinion), cert. granted and judgment vacated as moot, 111 S. Ct. 1300 (1991).
120. Id. The court also noted that this agreement was the only one of its kind in Florida.
ficient to meet the second part of the test.\textsuperscript{121} The court stated: "[T]he Supreme Court has consistently contemplated a more vigorous, probing supervision than mere acquiescence. This is at bottom an agreement entered into by private parties, in pursuit of their own economic interests, that is neither authorized by the State, nor closely monitored by it."\textsuperscript{122} Needless to say, \textit{Consolidated Gas} has had a profound effect on the natural gas industry in Florida, and its state action immunity analysis has spawned considerable disagreement.\textsuperscript{123}

The \textit{Bolt}, \textit{Shahawy}, and \textit{Consolidated Gas} opinions indicate judicial reluctance to find antitrust immunity in the absence of explicit legislative authority for—and active state supervision of—the challenged conduct. In each case, the court refused to find antitrust immunity despite the existence of either a complex regulatory regime or a judicial opinion affirming the Legislature's intent to displace competition with regulation. In particular, the Eleventh Circuit requires a substantial degree of active and continuous state supervision in order to meet the second prong.\textsuperscript{124} The court's analysis supports the impor-

\textsuperscript{121} \textit{Id. See also} Bolt v. Halifax Hosp. Medical Center, 874 F.2d 755, 756 (11th Cir. 1989) (at oral argument before \textit{en banc} court the appellee hospitals and their medical staffs abandoned their argument that judicial supervision can satisfy active state supervision).

\textsuperscript{122} \textit{Consolidated Gas}, 880 F.2d at 303.

\textsuperscript{123} \textit{See Consolidated Gas}, 912 F.2d 1262, 1338 (11th Cir. 1990) (Johnson, J. and Tjoflat, C.J., dissenting).

\textsuperscript{124} This point is evident in another recent Eleventh Circuit electric utility case, Municipal Util. Bd. of Albertville v. Alabama Power Co., No. 90-7095 (11th Cir. July 5, 1991) (WESTLAW, ALLFEDS database) (to be reported at 934 F.2d 1493). Thirty municipal and public corporations that own and operate electric distribution facilities sued 22 rural electric cooperatives, a rural electric association, and a private electric power company alleging that these defendants illegally agreed to horizontally divide electric service territories. The plaintiffs also contended that the defendants conspired with the Alabama Legislature and government to ratify and thereby immunize existing illegal territorial agreements through legislative action. The general provisions of the Alabama acts in question assigned service territories to private and municipal electric suppliers for the stated purpose of limiting wasteful duplication of transmission facilities. In addition, "special rules" in the acts incorporated private territorial agreements previously reached by electric suppliers. The trial court dismissed the antitrust claims based on the state action and \textit{Noerr-Pennington} doctrines. \textit{Id.} at 2.

Among other issues, the Eleventh Circuit addressed whether the legislatively-assigned and the privately-assigned service territories were shielded from antitrust scrutiny under the state action immunity doctrine. The court concluded that the legislatively-assigned territories met the two-part \textit{Midcal} test because the Alabama legislature had clearly articulated a policy to displace competition in the retail electric service market and that active state supervision was provided through strict state control over the assignment of such territories. The court determined that the legislature controlled all of the decisions regarding the division of service territories and that private parties exercised no regulatory authority over the challenged restraints. The court could not determine, however, whether there was active state supervision of the private agreements. Consequently, the court remanded the case for consideration of whether the private agreements qualified for state action immunity under the active supervision prong. \textit{Id.} at 9. The court's decision, therefore, further demonstrated the stringent requirement of active state control of a challenged restraint under the second part of the \textit{Midcal} test.
tant values underlying the antitrust laws (i.e., promoting competition and consumer welfare) and places a heavy burden on the Florida Legislature to provide sufficiently clear legislation and active supervision to warrant antitrust immunity.

C. Antitrust State Action Cases Analyzing Other States' Certificate of Need Programs

In the certificate of need context, courts that have considered the extent of supervision necessary to meet the second part of the *Midcal* test have reached somewhat dissimilar conclusions. For instance, in *North Carolina ex rel. Edmisten v. P.I.A. Asheville,*125 the state attorney general challenged the acquisition of fifty percent of the stock in a psychiatric facility by the largest national private operator of acute psychiatric hospitals.126 The court concluded that once a hospital acquisition passes certificate of need review, however, the "state makes no attempt to monitor the use of the acquisition."127 The certificate of need statute "in no way attempts to monitor the conduct of health care providers to be sure it is in harmony with the expressed goals" of federal and state legislation.128 The appellate court therefore found no state action immunity because active state supervision of the acquisition was lacking. The court’s rationale was simply that if a state fails to provide continuous, ongoing scrutiny of hospital acquisitions, state action immunity is unavailable.129

In *General Hospitals of Humana, Inc. v. Baptist Medical System, Inc.,*130 however, the court disagreed with the analysis in *P.I.A. Asheville.* The challenged conduct in *Baptist Medical* was the defendant’s past expansions and overbedding designed to eliminate competition. The court determined that both parts of the *Midcal* test are met for this type of conduct.131 Regarding the active state supervision prong, the court reviewed the certificate of need statute and determined that:

there is some continuing supervision by the state in that any cost overruns must be approved by the regulatory process, and any

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126. *Id.* at 276.
127. *Id.* at 278.
128. *Id.*
129. *Id.*
130. 1986-1 Trade Cas. (CCH) ¶ 66,996 (E.D. Ark. 1986).
131. Under the first part of the test, the court found that "the state subjected defendant's proposals to exacting scrutiny to determine whether, in the state's view, the expansions were necessary and appropriate." *Id.* at 62,116. Although the certificate of need act "was not intended to supplant competition in every area of health care, . . . it was intended to supplant competition with respect to expansion of bed capacity." *Id.* Thus, a clearly articulated state policy existed. *Id.*
significant future expansions require an additional CON. Even more importantly, continuing supervision exists in the sense that the state always considers the present situation of an entire area in determining whether to grant a CON. Thus, because it has absolute control over whether new entry is permitted, and because the decision concerning new entry is based on an evaluation of the existing conditions, the state has a powerful lever, albeit an indirect one, with which to control the entire system.\textsuperscript{132}

The court held that total regulatory control of the challenged conduct was unnecessary and that the challenged conduct need not be compelled by the state in order to establish active state supervision.\textsuperscript{133} The court also recognized that the state’s control would be more active and effective if it had the authority to require a hospital to reduce beds.\textsuperscript{134} Nonetheless, the court found sufficient state oversight to meet the active supervision test.\textsuperscript{135}

The different results in the \textit{P.I.A. Asheville} and \textit{Baptist Medical} cases are attributable to a number of factors. First, the challenged conduct in each action was different (acquisition of hospital versus acquisition of bedding capacity). Many state certificate of need programs do not monitor or control the former, while most monitor and control the latter. Also, the courts’ interpretations of the extent of state supervision differed. Both decisions predated the United States Supreme Court’s decision in \textit{Patrick v. Burget}\textsuperscript{136} and, therefore, both may have been willing to give too much deference to the extent of state monitoring and oversight. This is true particularly in the \textit{Baptist Medical} case.

\section*{III. The \textit{Noerr-Pennington} Doctrine}

In a line of cases beginning in 1961, the United States Supreme Court established that the first amendment petition clause protects businesses and business associations from antitrust liability for the legitimate exercise of their rights to petition the government, whether it be the legislative branch, the executive branch, an administrative agency, or the courts. This doctrine, termed the \textit{Noerr-Pennington} doctrine, shields such “petitioning” activities from the antitrust laws

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} \textit{Id.} at 62,116-17 (citing Southern Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48 (1988)).

\textsuperscript{134} \textit{Id.} at 62,116.

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} 486 U.S. 94 (1988).
even if the activities are undertaken for anticompetitive purposes.\textsuperscript{137} The doctrine is based on the principle that the right to petition the government under the first amendment supersedes the federal antitrust interest in competition. The doctrine, however, does not shield abusive "sham" activities designed to directly interfere with a competitor's business relations.

The doctrine is anomalous because while courts have recently strengthened the state action doctrine and made antitrust immunity for private parties difficult to establish, courts have simultaneously and uniformly extended antitrust immunity to almost any type of anticompetitive petitioning activity by private parties under the guise of \textit{Noerr-Pennington} immunity. The doctrine has evolved such that "all activities within the normal scope of petitioning which represent attempts to secure anticompetitive governmental responses are exempt from antitrust liability."\textsuperscript{138} As a consequence, the doctrine is the subject of sharp criticism because it fosters and permits more anticompetitive effects than are necessary to protect the basic right to petition government.\textsuperscript{139} "The absolute rule embodied in existing \textit{Noerr-Pennington} doctrine that ignores direct injury when a genuine petitioning motive is present and makes no inquiry into less-injurious alternatives is neither desirable nor constitutionally mandated."\textsuperscript{140} The United States Supreme Court, however, has not yet applied the first amendment balancing test it has set forth in other contexts.\textsuperscript{141} Instead, as the

\textsuperscript{137} This type of activity is also referred to as "predation through governmental process." \textit{Bork, The Antitrust Paradox} 347-364 (1978). Sham litigation as a means of predation is generally successful because "the party seeking to enter the market bears the burden of going forward with evidence" such that "litigation expense may be much heavier for him." \textit{Id.} at 348. Although the party opposing entry also incurs expenses, the potential entry generally does not have the resources to outlast the incumbent. Also, the incumbent may simply wish to delay entry for a few years through predatory litigation. \textit{Id.} In addition, this type of predation is "particularly insidious because of its relatively low antitrust visibility" and imposes a significant aggregate annual loss on consumers who would otherwise benefit from unfettered competition. \textit{Id.} at 348-49.

\textsuperscript{138} Note, \textit{A Standard for Tailoring Noerr-Pennington Immunity More Closely to the First Amendment Mandate}, 95 \textit{Yale L.J.} 832, 834 (1986). The author argues that the \textit{Noerr-Pennington} doctrine's blanket protection for anticompetitive conduct is not justified when less-injurious alternatives to the petitioning activity are available.

\textsuperscript{139} \textit{Bork, supra} note 137, at 347-64 ("[p]redation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition"); Note, \textit{supra} note 138, at 838 (\textit{Noerr-Pennington} doctrine is too broad because, among other things, it "causes more direct injury than is necessary to protect the interests articulated in \textit{Noerr} . . . and does not inquire into the existence of alternative means of petitioning that would cause less injury").

\textsuperscript{140} Note, \textit{supra} note 138, at 839.

\textsuperscript{141} The Court in \textit{United States v. O'Brien}, 391 U.S. 367 (1968), held that:

[governmental regulation incidentally affecting First Amendment freedoms is permit-
next sections explain, the Court has extended immunity to almost all forms of anticompetitively-motivated petitioning activity.

A. The Noerr-Pennington-California Motor Transport Trilogy

In the seminal case of Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., the United States Supreme Court held that a group of railroads which allegedly conspired to influence the passage of laws unfavorable to the trucking industry were not subject to antitrust liability for such activities. Although the railroads' intent was to promote anticompetitive legislation through an intensive and allegedly misleading publicity campaign, the Court ruled that such efforts are protected political activities. The Noerr decision therefore stands for two broad propositions: (1) an antitrust violation cannot be based on mere attempts to influence the passage or enforcement of laws, and (2) competitors may engage in otherwise prohibited concerted efforts to obtain favorable legislative or executive action.

The Court in Noerr distinguished acts forbidden under the antitrust laws, such as price-fixing, from agreements to jointly seek legislation or law enforcement. The Court emphasized that:

A construction of [the antitrust laws] that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them. The Court, however, created an exception to the immunity doctrine where the action "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."

Professor Philip Areeda has explained this "sham" exception as follows:

[T]he basic concept, as employed by the Supreme Court, is that the defendant's activity was intended to injure the plaintiff directly

143. Id. at 136-37.
144. Id. at 139.
145. Id. at 144.
rather than through a governmental decision. When the antitrust defendant had not truly sought to influence a governmental decision, his invocation of governmental machinery is a sham. To be sure, he would always be pleased to obtain a governmental decision against his rival. But where he had no reasonable expectation of obtaining the favorable ruling, his effort to do so was a sham.\(^{146}\)

In general, courts have narrowly construed this exception and found "shams" to exist in only the more egregious cases, such as where "a pattern of baseless, repetitive claims" demonstrates an abuse of the judicial or administrative process.\(^{147}\) Nonetheless, some courts have held that a single, baseless suit or protest is sufficient to state an antitrust cause of action.\(^{148}\)

Four years later, the Court held in *United Mine Workers of America v. Pennington*\(^ {149}\) that efforts by a combination of a labor union and large mine operators to influence the Secretary of Labor to set high minimum wages were immune from the antitrust laws. Smaller mining companies claimed these joint efforts were designed to make it more difficult for them to compete. The Court held in favor of the union and large mine operators and reaffirmed *Noerr* by stating "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."\(^ {150}\) The Court emphasized that such petitioning conduct "is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."\(^ {151}\)

In its 1972 decision in *California Motor Transport Co. v. Trucking Unlimited*,\(^ {152}\) the Court extended the *Noerr-Pennington* doctrine to petitioning activities in administrative and judicial proceedings. The Court, however, devoted most of its opinion to explaining why the "sham" exception more readily applies in the administrative and judi-


\(^{148}\) See, e.g., Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1254-57 (9th Cir. 1982), cert. denied, 459 U.S. 1227 (1983). A majority of Justices of the Supreme Court in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977), indicated that the filing of a single lawsuit might support an antitrust action. See *id.* at 635-36 n.6 (Rehnquist, J., plurality opinion), 660-663 (Stevens, J. dissenting).

\(^{149}\) 381 U.S. 657 (1965).

\(^{150}\) *Id.* at 670.

\(^{151}\) *Id.*

\(^{152}\) 404 U.S. 508 (1972).
cial context. A group of trucking companies engaged in a jointly-financed, widely-publicized program in opposition to all applicants before the California Public Utilities Commission, the Interstate Commerce Commission, and the courts for the issuance, transfer, or registration of operating rights. The applicants filed an antitrust action claiming these efforts were designed to bar them from meaningful access to the agencies and courts.

Although establishing that the "right to petition extends to all departments of the Government" including courts, the Court indicated that the "sham" exception applied. In particular, the Court noted that the complaint contained lengthy allegations that elaborated on the "sham" theory and that Noerr did not provide immunity under the alleged facts.

In the present case . . . the allegations are not that the conspirators sought "to influence public officials," but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process.

The Court also modified the application of the "sham" exception in the administrative and judicial context by stating that misrepresentations, otherwise permitted in the political arena, are not immunized. In addition, wrongful conduct and practices that may corrupt the administrative or judicial processes may result in a finding of "sham" activity. In short, the Court explained that subversion of the administrative or judicial process is not immune because petition clause rights cannot be used as a pretext to achieve substantive evils.

B. Omni Outdoor Advertising

This trilogy of cases provided the foundation upon which lower courts built a substantial base of precedent over the last twenty years. These precedents did not consistently define the parameters of the "sham" exception or state whether a "conspiracy" exception to the

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153. Id. at 510.
154. Id. at 511-12.
155. For example, in the certificate of need context a hospital has more leeway in petitioning the Legislature for revisions of the certificate of need statute than it has in administratively challenging a certificate of need applicant.
156. California Motor Transport, 404 U.S. at 511-12.
doctrine existed. The Supreme Court’s recent decision in City of Columbia v. Omni Outdoor Advertising, Inc., however, makes plain that the “sham” exception is a narrow one and that a conspiracy exception is not available. As discussed above, in Omni Outdoor Advertising the corporate officials of a dominant billboard advertising company had very close relations with city officials and lobbied these officials to enact restrictive zoning ordinances that hindered a competing billboard company’s ability to compete. The rival company sued both the city and the dominant billboard company alleging federal and state antitrust violations. The two primary claims against the dominant billboard company were that it engaged in “sham” lobbying activities and that it engaged in an anticompetitive conspiracy with the city. The dominant billboard company claimed Noerr-Pennington immunity, but a jury returned a verdict for the rival company. The trial judge granted judgment notwithstanding the verdict to the defendants, but the Fourth Circuit reinstated the jury’s verdict.

In reversing the court of appeals, the Supreme Court emphasized that the Noerr-Pennington doctrine is a necessary adjunct to the state action doctrine. The Parker and Noerr decisions “are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States’ acts of governing, and the latter the citizens’ participation in government.” Based on this business-politics dichotomy, the Court rejected the relevance of whether “a private party’s political motives are selfish” because “Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.”

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157. Some lower federal courts, including the majority in the Fourth Circuit’s panel opinion in Omni Outdoor Advertising, had recognized a “conspiracy” exception where a government official conspires with a private party to engage in anticompetitive conduct. See Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555 (5th Cir. 1984) (en banc), cert. denied sub nom., Gulf Coast Cable Television Co. v. Affiliated Capital Corp., 474 U.S. 1053 (1986); Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982), cert. denied sub nom., Drury v. Westborough Mall, Inc., 461 U.S. 945 (1983). Some commentators urged the recognition of the public official conspiracy exception in situations where regulators manipulate the process to serve private anticompetitive ends. See, e.g., Miller, Antitrust and Certificate of Need: Health Systems Agencies, the Planning Act, and Regulatory Capture, 68 Geo. L.J. 873 (1980) (discussing state action and Noerr-Pennington doctrines as well).


159. Omni Outdoor Adv., 891 F.2d 1127.

160. Omni Outdoor Adv., 111 S. Ct. at 1355. The Court noted it would be “peculiar in a democracy, and perhaps in derogation of the constitutional right ‘to petition the Government for a redress of grievances,’ to establish a category of lawful state action that citizens are not permitted to urge.” Id. at 1353 (citation omitted).

161. Id. at 1354 (emphasis added) (quoting United Mine Workers of America v. Pennington, 381 U.S. 657, 670 (1965)). The Court’s reference to “political motivations” would seemingly permit consideration of economic or business motivations (except to the extent such economic or business motivations are considered political).
set, the Court established that anticompetitive intent is not a relevant factor.

The Court rejected the lower court's application of the "sham" exception to the dominant billboard company's lobbying activities. Nonetheless, the Court reiterated its holding in California Motor Transport that a "'sham' situation involves a defendant whose activities are 'not genuinely aimed at procuring favorable government action' at all, . . . not one 'who genuinely seeks to achieve his governmental result, but does so through improper means.'" The Court limited the "sham" to "situations in which persons use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon."

In particular, the challenged petitioning activity must directly interfere with the rival's business relationships. On this point, the Court rejected the theory that the dominant billboard company's lobbying activities were designed to directly interfere with its rival's business. The Court stated that although the dominant billboard company "indisputably set out to disrupt [its rival's] business relationships, it sought to do so not through the very process of lobbying, or of causing the city council to consider zoning measures, but rather through the ultimate product of that lobbying and consideration, viz., the zoning ordinances." Because the defendant's lobbying efforts were a step removed from the government's actual imposition of the restrictive zoning regulation and were, in the Court's view, a genuine attempt to influence governmental action, no "sham" conduct occurred.

The Court also rejected the theory that the dominant billboard company's lobbying efforts were not immune because they were designed to delay its rival's entry into the market or deny it meaningful access to the city's administrative and legislative forums. First, the Court held that lobbying activities where the purpose is to delay a competitor's entry into a market are not a "sham" unless "the delay is sought to be achieved only by the lobbying process itself, and not

162.  Id. (quoting Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 n.4 & 508 n.10 (1988)).

163.  Id.

164.  The Court relied on its statement in Noerr that immunity does not extend to an action which "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961).


166.  Id.

167.  Id.
by the governmental action that the lobbying seeks." In this case, any delay that resulted was only a byproduct of the genuine lobbying efforts of the dominant billboard company. Second, the Court found that if any denial of meaningful access was achieved it was through an attempt to influence city officials "that, far from being a 'sham,' was if anything more in earnest than it should have been."

Any lobbyist or applicant, in addition to getting himself heard, seeks by procedural and other means to get his opponent ignored. Policing the legitimate boundaries of such defensive strategies, when they are conducted in the context of a genuine attempt to influence governmental action, is not the role of the Sherman Act.

Based on its enunciated principle that the antitrust laws regulate business and not politics, the Court was unwilling to extend antitrust liability "to a context in which the regulatory process is being invoked genuinely, and not in a 'sham' fashion."

In considering the issue for the first time, the Court also rejected a "conspiracy" exception to the Noerr-Pennington doctrine for the same reasons it rejected such an exception to the state action doctrine. The Court's rationale for rejecting the exception is the impracticability of defining and identifying what constitutes an illegal "conspiracy" in the context of lobbying and petitioning activities.

If ... "conspiracy" means nothing more than an agreement to impose the regulation in question[,] ... since it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them, such an exception would virtually swallow up the Parker rule: All anticompetitive regulation would be vulnerable to a "conspiracy" charge.

As the Court stated, "'[i]t would be unlikely that any effort to influence legislative action could succeed unless one or more members of the legislative body became ... 'co-conspirators' in some sense with the private party urging such action.' The Court also found it impracticable to identify whether lawmaking "has been infected by self-

168. Id.
169. Id. at 1355. "If the denial was wrongful there may be other remedies, but as for the Sherman Act, the Noerr exemption applies." Id.
170. Id.
172. Id.
173. Id. at 1351.
174. Id. at 1355 (citations omitted).
ishly motivated agreement with private interests” or whether “lobbying . . . has produced selfishly motivated agreement with public officials.” In either instance, the Court was unwilling to sanction such inquiries.

In addition, the Court held that the policies of the antitrust laws do not impose a code of ethics on public officials or private parties. Thus, the Court also rejected a “conspiracy” exemption that would be limited to instances of governmental “corruption.” The Court’s holding is based on the inherent difficulties in determining what would constitute “corruption” for purposes of the exception. For instance, if “corruption” were defined as not acting in the public interest, it would be impractical to determine whether an official acted in the “public interest” or his or her own “private interest.” Similarly, if “corruption” were defined as some unlawful activity under federal or state law, such as bribery, the purposes of the antitrust laws are not furthered by prohibitions on such activities. If “the invalidating ‘conspiracy’ is limited to one that involves some element of unlawfulness (beyond mere anticompetitive motivation), the invalidation would have nothing to do with the policies of the antitrust laws.”

C. Limitations on Noerr-Pennington Immunity

Although Noerr-Pennington protects certain “petitioning” activities that would otherwise be unlawful under the antitrust laws, it does not protect certain “nonpetitioning” restraints or agreements. For example, in FTC v. Superior Court Trial Lawyers Association, the Supreme Court held that a boycott by criminal defense attorneys who represented indigent defendants to increase statutorily set attorneys’ fees violated the antitrust laws and was not immune under the first amendment. The Court rejected the attorneys’ Noerr-Pennington argument because the attorneys’ boycott was the means by which the attorneys sought favorable legislation rather than the governmentally-sought consequence of permissible lobbying activities. In essence, the attorneys engaged in an impermissible restraint on competition, the consequences of which had the same effect as favorable legislation (i.e., higher attorneys’ fees). Under the antitrust laws, however, the attorneys could not lawfully achieve the anticompetitive result them-

175. Id.
176. Id. at 1352.
178. Id. at 1356.
180. Id. at 867.
selves through a direct and private restraint on trade. Instead, they would have to seek the result through permissible joint lobbying activities in order to acquire Noerr-Pennington immunity. Further, the Court found that the social justification underlying the attorneys' restraint made it no less unlawful. The Court therefore rejected the argument that Noerr-Pennington immunity extends to "every concerted effort that is genuinely intended to influence governmental action."  

A final limiting principle is that competitors who engage in anticompetitive acts under the guise of a private association do not necessarily attain Noerr-Pennington immunity. In Allied Tube & Conduit Corp. v. Indian Head, Inc., the Supreme Court held that a private association that set and published product standards and codes was not a "quasi-legislative" body for Noerr-Pennington antitrust immunity purposes even though Legislatures routinely adopted such standards and codes. The Court held that an economically interested party that exercises decision-making authority in formulating product standards for an association that is made up of market participants has no antitrust immunity from the anticompetitive effects the standard causes in the marketplace.

The importance of Superior Court Trial Lawyers and Allied Tube in the certificate of need context is twofold. First, private concerted conduct that merely imposes a restraint on competition does not have Noerr-Pennington immunity. Private petitioning activities are shielded, provided they do not constitute a "sham." In the certificate of need context, concerted agreements of incumbent certificate holders that are designed to impose a direct restraint on competition, rather than influence a health care agency's decision, are unprotected activities. Second, the private concerted conduct of economically-interested participants does not have Noerr-Pennington immunity even though governmental agencies routinely rely upon and adopt the information the association provides. In the certificate of need context, "quasi-governmental" health care agencies and associations and incumbent certificate holders may engage in concerted conduct designed to eliminate competition. Such conduct, however, may not have antitrust immunity.

D. Noerr-Pennington and the Certificate of Need Process

Courts tend to have an expansive conception of Noerr-Pennington immunity and appear unwilling to find "shams" unless particularly

183. Id. at 499.
egregious conduct is evident. Cases alleging "sham" petitioning activities in the certificate of need context illustrate this tendency because such cases have generally been met with judicial skepticism.\footnote{184} For example, courts have established broad antitrust immunity for a hospital's opposition to a certificate of need applicant,\footnote{185} agreements among hospitals to oppose a certificate of need application,\footnote{186} and agreements among hospitals not to oppose each other's certificate of need applications.\footnote{187} Although courts have a reluctance to interfere with most "petitioning" activities in the certificate of need context, not all "petitioning" activities are immune from antitrust scrutiny.

For instance, in \textit{St. Joseph's Hospital v. Hospital Corp. of America},\footnote{188} an existing certificate holder had intervened in the administrative proceedings and delayed the issuance of a certificate of need for new cardiac surgical services to an applicant.\footnote{189} The applicant alleged that the incumbent medical center deliberately submitted misrepresentations to the Georgia state health planning agency that administered the certificate of need program in an effort to obstruct the issuance of a certificate of need. Although the district court found such misrepresentations provided no support for the application of the "sham" ex-

\begin{itemize}
  \item \footnote{184} See Lake Otis Clinic, Inc. v. Sisters of Providence No. 90-35064, 921 F.2d 280 (9th Cir. 1990) (unpublished disposition) (WESTLAW, ALLFEDS database) (summary judgment proper for defendant on complaining hospital's "capture" theory that state health care agencies conspired to oppose hospital to revoke hospital's certificate of need); Potters Medical Center v. City Hosp. Ass'n, 800 F.2d 568 (6th Cir. 1986) (hospital's opposition to certificate of need not a "sham" and was immune from antitrust liability); St. Joseph's Hosp. v. Hospital Corp. of Am., 795 F.2d 948 (11th Cir. 1986) (delaying tactics, motions to dismiss, and appeals are "clearly immune"); Huron Valley Hosp., Inc. v. City of Pontiac, 650 F. Supp. 1325 (E.D. Mich.) (agreement among hospitals to oppose certificate of need application "clearly protected" under \textit{Noerr-Pennington}), aff'd, 849 F.2d 262 (6th Cir. 1986), cert. denied, 488 U.S. 942 (1988); General Hosp. of Humana, Inc. v. Baptist Medical Sys., Inc., 1986-1 Trade Cas. (CCH) ¶ 66,996 (E.D. Ark. 1986) (hospitals' opposition to certificate of need immune; hospitals' agreement not to oppose each other's certificate of need applications also immune); cf. Hospital Bldg. Co. v. Trustees of Rex Hosp., 691 F.2d 678 (4th Cir. 1982) (baseless appeal, misrepresentations, and conspiracy with government officials fall within sham exception), cert. denied, 464 U.S. 890 & 904 (1983); see generally Annotation, Opposition to Construction of New Hospital or Expansion of Existing Hospital's Facilities as Violation of Sherman Act, 88 A.L.R. Fed. 478 (1988).
  \item \footnote{185} Potters Medical Center v. City Hosp. Ass'n, 800 F.2d 568 (6th Cir. 1986); General Hosps. of Humana, Inc. v. Baptist Medical Sys., Inc., 1986-1 Trade Cas. (CCH) ¶ 66,996 (E.D. Ark. 1986).
  \item \footnote{187} General Hosps. of Humana, Inc. v. Baptist Medical Sys., Inc., 1986-1 Trade Cas. (CCH) ¶ 66,996 (E.D. Ark. 1986).
  \item \footnote{188} 795 F.2d 948 (11th Cir. 1986).
  \item \footnote{189} Notably, this case involves only one independent competitor opposing the issuance of a certificate of need—not a joint, concerted effort by a number of competitors.
\end{itemize}
ception, the Eleventh Circuit permitted the plaintiff's antitrust actions to proceed based on this alleged provision of misinformation.

The appellate court, however, held that a competitor's delaying tactics, motions to dismiss, and appeals in the certificate of need administrative context are "clearly immune" from antitrust liability. Relying upon Noerr, the court held the plaintiffs did not allege the defendants did "anything more than use the adjudicatory process to obtain a favorable outcome. In spite of the damaging effect [on the applicant], the defendants were within their rights to use every available legal means to delay or forestall the CON being issued and the anti-competitive purpose did not make them illegal."

The court's unwillingness in St. Joseph's Hospital to recognize a "sham" exception for activities designed to delay the issuance of a certificate of need is questionable in light of the Supreme Court's decision in Omni Outdoor Advertising. The Court retained the viability of a "sham" exception based on delay tactics provided it is shown that "the delay is sought to be achieved only by the lobbying process itself, and not by the governmental action that the lobbying seeks." In other words, the use of petitioning activities simply to delay the issuance of a certificate of need does not have antitrust immunity. Delays resulting from the governmental action sought or delays resulting as a necessary by-product of genuine litigation efforts in opposition to applicants do have antitrust immunity. Thus, the court's expansive language in St. Joseph's Hospital should not be read so broadly as to condone all "delaying tactics."

In another certificate of need action, the Fourth Circuit in Hospital Building Co. v. Trustees of Rex Hospital reviewed an antitrust ver-

191. 795 F.2d at 955.
192. Id. Georgia requires all health care facilities to obtain a certificate of need from the State Health Planning Agency (SHPA) prior to implementation or expansion of any health services. Id. at 950. Cf. Hospital Bldg. Co. v. Trustees of Rex Hosp., 691 F.2d 678, 687 (4th Cir. 1982) (no antitrust immunity for "baseless appeal[s] . . . with intent to delay approval" of application for certificate of need), cert. denied, 464 U.S. 890 & 904 (1983).
195. For instance, a situation might arise where an incumbent certificate holder succeeds in its request for the imposition of a moratorium on the issuance of approved, but currently unissued, certificates. The incumbent certificate holder's actions would be immune because the delay is the product of the governmental action sought to be achieved.
196. 691 F.2d 678 (4th Cir. 1982).
dict in favor of a Raleigh, North Carolina hospital whose certificate of need application had been actively opposed in administrative and judicial proceedings by a competing hospital. The court rejected the defendant hospital's claim of Noerr-Pennington immunity stating that "[a]ctions taken to discourage and ultimately prevent competitors from meaningful access to the processes of administrative agencies fall within the sham exception." In support of its conclusion that the sham exception applied, the court referred to three factors. First, the court stated that proof that the defendants conspired with government officials with the intent to foreclose access to the certificate of need process is within the sham exception. Second, the court held that the defendants were not immune if they engaged in a baseless appeal with the intent to delay approval of the plaintiff's certificate of need and thereby delay plaintiff's entry into the market. Third, the defendants allegedly engaged in misrepresentations made with the intent to deny meaningful access to the certificate of need process.

Although the case was remanded on other grounds and the jury ultimately returned a verdict for the defendants, the court's conclusions in Hospital Building Co. regarding Noerr-Pennington immunity are noteworthy. In particular, its holding that a baseless appeal for the purpose of delaying approval of a certificate of need is not immune appears to be contrary to the Eleventh Circuit's holding in St. Joseph's Hospital. The different outcomes may be attributable to the plaintiff's failure in St. Joseph's Hospital to allege that the defendants knew or should have known that their advocacy was baseless and therefore a "sham." In contrast, the jury instruction in Hospital Building Co. made clear that actions without a "genuine intent" to influence an agency or court are a sham. Nonetheless, in light of the Supreme Court's decision in Omni Outdoor Advertising, it appears that the "sham" exception remains viable for actions in which delay is sought to be achieved only through the litigation process itself. In addition, the deliberate submission of misrepresentations to state health agencies that administer certificate of need programs in order to ob-

197. Id. at 687.
198. Id. This factor may be irrelevant in light of Omni Outdoor Advertising.
199. Id.
200. The trial court, however, failed to give the proper instruction on this matter. Id. at 688.
201. Hospital Bldg. Co. v. Trustees of Rex Hosp., 791 F.2d 288 (4th Cir. 1986). The jury specifically found that the hospital's opposition to the certificate of need application was not a sham. Id. at 290.
203. 791 F.2d at 293.
struct the issuance of a certificate of need may qualify for the "sham" exception.

IV. APPLICATION OF THE STATE ACTION TEST AND NOERR-PENNINGTON DOCTRINE TO FLORIDA'S CERTIFICATE OF NEED PROGRAM

No reported cases have addressed the extent to which Florida's certificate of need program immunizes the otherwise anticompetitive actions of certificate holders. Nor have any reported cases addressed the application of the Noerr-Pennington doctrine to petitioning activities in Florida's certificate of need application process. Given this lack of definitive guidance, the next two sections explore the limits of antitrust immunity of both doctrines under Florida's certificate of need program, with particular emphasis on those types of agreements described earlier in this Article.204

A. State Action Immunity

In order to establish state action immunity under Florida's certificate of need program for a particular challenged activity, an institutional health care provider must demonstrate that (1) Florida has clearly articulated and affirmatively expressed a policy of displacing competition for the provision of health care facilities and services with regulation, and (2) Florida actively supervises and controls the private parties' otherwise anticompetitive conduct. Florida's certificate of need program clearly meets this test for conduct such as monopolization of health care markets through the legitimate acquisition of certificates of need. The program, however, does not appear to satisfy this two-part state action immunity test for certain types of anticompetitive activities described below.

Under the first part of the test, the certificate of need program reflects a general state policy to displace open-market competition with a regulatory regime that HRS administers. The preceding review of Florida's certificate of need program indicates that the Florida Legislature intended that the program be a combination of health care planning activities and a quasi-competitive comparative review process for the issuance of certificates. For instance, HRS sets the level of bed capacity statewide, scrutinizing certificate of need applications to determine whether expansions are necessary and appropriate. Thus, a health care company's acquisition of certificates of need such that it monopolizes bed capacity in a particular geographic or service mar-

204. See supra text accompanying notes 71-203.
ket, for example, would be immunized from antitrust scrutiny because the certificate of need program is "intended to supplant competition with respect to expansion of bed capacity." Any "monopoly" that results through the acquisition of bed capacity would therefore be state-authorized.

The state's general regulation of health care markets, however, does not necessarily immunize all otherwise anticompetitive conduct. As two health care commentators have suggested, "courts will scrutinize closely the claimed state authorization to determine whether it was actually intended to encompass the particular anticompetitive activity." Notably, Florida's certificate of need statutes do not explicitly authorize health care competitors to engage in private anticompetitive conduct such as (1) market allocation or protection agreements including agreements to oppose (or not to oppose) particular applications or not to apply in particular districts, (2) agreements to stagger competition for certificate of need applications in particular batches, or (3) otherwise impermissible information-sharing agreements.

The question arises whether such conduct is a foreseeable result of Florida certificate of need programs. The answer appears to be no. First, no statute directly or impliedly supports the notion that the Legislature intended to authorize sub rosa agreements to restrain or eliminate the quasi-competitive comparative review process for the issuance of certificates. Second, the Legislature explicitly retained the goal of economic efficiency and competition, which reinforces the position that the certificate of need program only displaces competition to the degree necessary to administer the program. Thus, under the rationale of Bolt v. Halifax Hospital Medical Center, these types of anticompetitive agreements may not be immunized.

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205. See, e.g., General Hosps. of Humana v. Baptist Medical Sys., 1986-1, Trade Cas. ¶ 66,996, at 62,116 (E.D. Ark. 1986). As discussed elsewhere in this Article, the acquisition of certificates through illegitimate and unauthorized administrative procedures or petitioning practices may negate Noerr-Pennington immunity.

206. See Note, Antitrust and Certificate of Need: A Doubtful Prognosis, 69 IOWA L. REV. 1451 (1984). The author concludes that although state action immunity may be available for certain planning activities subject to certificate of need requirements, such as "consolidations, joint ventures and acquisitions," other types of activities, particularly in conjunction with local health agencies, "run substantial antitrust risks." Id. at 1474.


208. Because HRS acquires data from health care providers, a greater degree of competitive and strategic information is available to health care competitors than in other industries. Nevertheless, agreements to share strategic information beyond that disclosed through the regulatory process may support an antitrust claim.

209. 891 F.2d 810 (11th Cir. 1990), on remand from, 874 F.2d 755 (11th Cir. 1989), reinstating opinion in part on reh'g from, 861 F.2d 1233 (11th Cir.), granting reh'g and vacating opinion from, 851 F.2d 1273 (1988), cert. denied, 110 S. Ct. 1960 (1990).
petitive practices are not a foreseeable consequence of certificate of need regulation, nor are they necessary to achieve the certificate of need statute’s purpose of providing high quality, cost-effective health care. In fact, these practices are inconsistent with the quasi-competitive model the statute envisions for the acquisition and retention of certificates of need.

Under Southern Motor Carriers Rate Conference, Inc. v. United States, however, a health care provider could argue that because Florida clearly intended to displace competition in the health care field with a regulatory structure, the first part of the Midcal test is satisfied. A provider who acts pursuant to such an anticompetitive regulatory program need not "point to a specific detailed legislative authorization" for its challenged conduct. Unlike the Public Service Commission in Southern Motor Carriers, however, HRS has not authorized these types of anticompetitive agreements. Furthermore, it is doubtful under Florida law whether HRS has the necessary authority and discretion to authorize such agreements. Thus, it appears likely that Florida’s certificate of need statute does not meet the first part of the Midcal test for these types of agreements.

Second, even assuming the first part is met, the state does not actively supervise these particular types of anticompetitive practices. Neither the certificate of need statute nor HRS administrative rules authorize or provide a policing mechanism for agreements between health care providers to oppose (or not oppose) particular certificate of need applications, to stagger competition, or to share strategic information. The state collects and analyzes marketplace data and economic conditions and essentially sets the output levels in the industry (i.e., number of beds). The state also monitors provider compliance with conditions contained in certificates of need. Nonetheless, because no state supervision of market allocation or protection agreements, staggered competition agreements, or information sharing agreements

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210. As discussed above, the certificate of need statutes explicitly require that market economics be used in establishing methodologies for determining needs and that the competitive impact of proposed facilities and services be considered. Fl. Stat. §§ 381.704(3), .705(1)(l) (1989).

211. Although HRS controls the total level of output in Florida health care markets, it does not control individual health care providers’ decisions regarding what portion of the markets they wish to serve.


213. HRS has no express authority to develop rules or standards for creating or reviewing such agreements on a periodic basis. See generally Consolidated Gas Co. v. City Gas Co., 880 F.2d 297 (11th Cir.), reh’g granted and opinion vacated, 889 F.2d 264 (1989), on reh’g, 912 F.2d 1262 (11th Cir. 1990) (en banc) (reinstating panel opinion), cert. granted and judgment vacated as moot, 111 S. Ct. 1300 (1991).
exists, the second part of Midcal does not appear to be satisfied.\textsuperscript{214} As the court in Patrick stated, the "mere presence of some state involvement or monitoring does not suffice."\textsuperscript{215}

A particularly interesting situation arises when a certificate of need holder stipulates with other certificate holders or an applicant to withdraw from a certificate of need administrative proceeding on the condition that the certificate holders or applicant not oppose each other's existing or future certificate applications. Under the analysis above, such an anticompetitive agreement, if entered outside of the administrative proceeding context, would not be entitled to state action immunity. The fact that the stipulation is entered as a part of the administrative process muddles the analysis. If the stipulation is not subject to the scrutiny or approval of a hearing officer or HRS, the requisite active supervision and control is lacking. In instances where a hearing officer formally approves the stipulation, the question is whether this quasi-judicial approval of the stipulation meets the active supervision prong. Under the rationale of Consolidated Gas Co. of Florida v. City Gas Co.,\textsuperscript{216} the hearing officer's approval would not provide the requisite oversight.\textsuperscript{217} In either case, state action immunity may be unavailable because the certificate of need statutes do not explicitly provide for such stipulations, nor do they appear to be a foreseeable result of the certificate of need program.

\subsection*{B. Noerr-Pennington Immunity}

The extent of Noerr-Pennington immunity in the certificate of need context is a difficult and divisive issue. It is clear that certain types of petitioning activities are protected. For example, an existing certificate holder is immune from antitrust attack for unilaterally challenging certificate of need applications in administrative and judicial proceedings even if the certificate holder's purpose is to inhibit the entry of new health care providers. This type of effort has immunity because Florida's certificate of need regulations explicitly permit existing health care facilities that hold certificates to initiate or intervene in administrative hearings to contest the issuance of certificates of need.

\begin{itemize}
\item \textsuperscript{214} See, e.g., North Carolina ex rel. Edmisten v. P.I.A. Asheville, Inc., 740 F.2d 274, 278 (4th Cir. 1984) (no continuous, ongoing state scrutiny because certificate of need statute "in no way attempts to monitor the conduct of health care providers to be sure it is in harmony with the expressed goals of" federal and state legislation), cert. denied, 471 U.S. 1003 (1985).
\item \textsuperscript{216} 880 F.2d 297 (11th Cir. 1989), \textit{reh'g granted and opinion vacated}, 889 F.2d 264 (1989), \textit{on reh'g}, 912 F.2d 297 (11th Cir. 1990) (en banc) (per curiam opinion reinstating panel opinion), \textit{cert. granted and judgment vacated as moot}, 111 S. Ct. 1300 (1991).
\item \textsuperscript{217} It is uncertain whether HRS has or would approve such a stipulation in a final order.
\end{itemize}
that affect their health care programs. Further, such unilateral administrative and judicial activities are communicative petitioning activities to which courts have unhesitatingly applied Noerr-Pennington immunity. Similarly, a hospital may encourage and influence its former patients to file good faith complaints with a state medical board against a competitor who is applying for a certificate of need without incurring antitrust liability. Of course, encouraging or filing false complaints has no Noerr-Pennington immunity.219

The potential exists for the application of the sham exception to bad faith, abusive, access-barring activities, particularly those designed to delay proceedings or to mislead HRS, a hearing officer, or a court. Although delays attributable to permissible intervention before administrative agencies that necessarily forestall the issuance of a certificate of need are generally permissible under Noerr-Pennington, tactics intended solely to delay issuance of a certificate of need may constitute “sham” activities.220 In general, the sham exception does not apply so long as the activities before the agency or court are procedurally permissible, not misleading, and undertaken for the genuine purpose of achieving lawful governmental action (and not undertaken solely for delay).

Noerr-Pennington immunity is available for certain types of joint petitioning activities as well. In general, the extent of Noerr-Pennington immunity available to competitors for concerted efforts to petition government is no greater than is available to trade associations. Although trade associations have protected first amendment rights to petition government, these rights do not extend to “every concerted effort that is genuinely intended to influence governmental action.”221 The first amendment rights of hospitals to engage in concerted efforts to oppose, or not oppose, certificate of need applications are similarly limited.

For example, existing certificate holders could collectively agree to lobby on behalf of legislation that altered the certificate of need program. Such petitioning activity, which is similar to trade association

218. FLA. STAT. § 381.709(5)(b) (1989).
220. Id.
lobbying activities, is entitled to first amendment protection. Certifi-
cate holders could also administratively and judicially oppose a certifi-
cate of need application in their geographic area unless such concerted
efforts were a "sham." However, an agreement among certificate
holders to oppose all applications in their respective geographic areas,
regardless of each application's merit, would not be entitled to immu-
nity. First, the agreement is a direct restraint on competition much
like the attorneys' boycott in FTC v. Superior Court Trial Lawyers
Association. Second, such an agreement would constitute a "sham"
because it has no purpose other than to injure the applicants directly,
particularly if there is no reasonable expectation that an application is
necessarily deficient. In addition, courts have repeatedly stated that
Noerr-Pennington immunity does not extend to activities that abuse
the administrative process. Thus, a blanket agreement to oppose all
applications would abuse the quasi-competitive process upon which
the certificate of need application procedure is based and would there-
fore not be immune from antitrust liability.

An agreement among certificate holders not to oppose particular
certificate of need applications (or one another's applications) may
also be unprotected. It is clear that a hospital's unilateral decision to
not oppose a certificate of need application is immune. A concerted
agreement not to oppose applications, however, is a different type of
restraint and does not fall within the types of petitioning activities for
which the Noerr-Pennington doctrine provides protection. Such an
agreement is not a traditional "petitioning" activity and is more akin
to a direct restraint on competition like that condemned in Superior
Court Trial Lawyers. Because the restraint has little or no communi-
cative or informative value, antitrust liability for this type of restraint
on competition is possible.

Valley Hosp., Inc. v. City of Pontiac, 650 F. Supp. 1325 (E.D. Mich.) (agreement among hospi-
tals to oppose certificate of need application "clearly protected" under Noerr-Pennington),
aff'd, 849 F.2d. 262 (6th Cir. 1986), cert. denied, 488 U.S. 942 (1988); General Hosps. of Hu-
mana, Inc. v. Baptist Medical Sys., Inc, 1986-1 Trade Cas. (CCH) ¶ 66,996 (E.D. Ark. 1986)
(hospitals' opposition to certificate of need immune).


225. Even in Omni Outdoor Advertising, the Court reaffirmed its holding in California Mo-
tor Transport "that a conspiracy among private parties to monopolize trade by excluding a com-
petitor from participation in the regulatory process [does] not enjoy Noerr protection." City of

226. See, e.g., General Hosps. of Humana, Inc. v. Baptist Medical Sys., Inc, 1986-1 Trade
Cas. (CCH) ¶ 66,996 at 62,118 (E.D. Ark. 1986) ("just as a party may oppose a competitor's
proposal before [the agency] without fear of antitrust liability, a party may choose not to oppose
a competitor's proposal without fear of liability").
In summary, the scope of Noerr-Pennington immunity is a protean concept that depends upon a number of conflicting factors. Opponents to certificate of need applications will attempt to wrap the first amendment around their otherwise anticompetitive actions while applicants will claim such actions are baseless and a sham. Despite the fact that courts have generally upheld immunity for certain petitioning activities in the certificate of need context, Noerr-Pennington immunity does not necessarily extend to every unilateral or concerted effort to affect a certificate of need application. Certain anticompetitive actions and agreements, particularly those with no informational or communicative value, may fall beyond Noerr-Pennington's reach.

V. CONCLUSION

Florida's certificate of need statutes immunize many otherwise anticompetitive activities of private parties. They may not, however, satisfy the two-part state action immunity test for private agreements to share strategic information, agreements not to oppose particular applications or apply in particular districts, and agreements to stagger competition for certificate of need applications in particular batches. Although the certificate of need program displaces free-market competition with a regulatory regime, it does not explicitly authorize or actively supervise these particular types of anticompetitive agreements. Noerr-Pennington immunity may be available, however, if the challenged conduct involves administrative or judicial challenges to the issuance of certificates of need, provided such conduct is a genuine attempt to invoke the governmental process and is not merely intended to delay or deny an applicant's access to the certificate of need process. Certain concerted efforts to oppose or not to oppose certificate of need applications may not be entitled to such immunity as either "sham" activities or because they are beyond the protections of the first amendment petition clause.