NOTES

CANTOR v. DETROIT EDISON: GUIDELINES FOR APPLICATION TO STATE-REGULATED INDUSTRIES

I. INTRODUCTION

In his dissenting opinion to *Cantor v. Detroit Edison Co.*[1] Justice Stewart[2] wrote: "I respectfully dissent from this unprecedented application of the federal antitrust laws, which will surely result in disruption of the operation of every state-regulated public utility company in the Nation and in the creation of 'the prospect of massive treble damage liabilities' payable ultimately by the companies' customers."[3] To understand and evaluate Justice Stewart's concerns it will be necessary to examine both pre-*Cantor* and post-*Cantor* decisions in light of the *Cantor* ruling. Specifically, these decisions will be used to develop guidelines which both implement the *Cantor* decision and its underlying rationale, and at the same time avoid the dire consequences predicted by Justice Stewart. Moreover, these guidelines will be developed with an eye toward providing some practical suggestions which may be utilized by both the regulated industries affected by *Cantor* and the judiciary applying it.

II. PRE-CANTOR DEVELOPMENTS

In 1943 the Supreme Court was faced with the question of whether the antitrust laws were applicable to actions taken by a state. In *Parker v. Brown*,[4] a California Prorate Act had authorized "the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of commodities to packers."[5] Brown, a raisin producer and packer, brought suit against the California Director of Agriculture and other public officials charged with the administration and enforcement of the program. The Court held that, even assuming the Prorate Act would violate the Sherman Act "if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate," there was "nothing in the language of the Sherman Act or in its history which suggest[ed] that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . . [T]he Sherman Act . . . must be taken to be a prohibition of individual and not state action."[6]

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1. 428 U.S. 579 (1976).
2. Justice Stewart was joined in his dissent by Justices Powell and Rehnquist.
3. 428 U.S. at 615.
4. 317 U.S. 341 (1943).
5. 317 U.S. at 346.
6. *Id.*

The *Parker* decision was a narrow one, providing only for governmental immunity from Sherman Act liability. The defendants in *Parker* were state officials and the Court stated specifically that a state could not authorize private parties to conduct themselves in a manner contrary to the mandates of the Sherman Act.[7] In spite of the narrowness of the opinion, subsequent lower court decisions broadened *Parker* to include private parties acting under the direction or supervision of the state.[8]

Under this broadened application, the *Parker* "state action" exemption has been utilized by public utilities when sued for antitrust violations.[9] Perhaps the most expansive reading of *Parker* occurred in *Washington Gas Light Co. v. Virginia Electric and Power Co.*,[10] a Fourth Circuit decision. In *Washington Gas Light* the plaintiff alleged that the defendant's practice of installing underground utility connections at reduced rates to those homes which were "all electric" constituted a "tie-in" violation of the Sherman Act. The court of appeals held that this challenged practice was subject to the state action immunity as the utility was regulated by the Virginia State Corporation Commission. Although the Commission had given no affirmative approval to the challenged conduct, the court found that a proper inference was that "silence means consent, i.e., approval," and that the defendant utility's practices were "at all times within the ambit of regulation and under the control of the SCC."[11]

In its first major post-*Parker* explication of the "state action" doctrines the Supeme Court restricted the lower courts' broad applications of *Parker*. For example, in *Goldfarb v. Virginia State Bar*[12] the Court was presented with a challenge to minimum fee schedules published by a county bar association and enforced by the Virginia State Bar, a state agency. The Court rejected the lower courts' conclusions that the state bar qualified for the "state action" exemption. Although the state legislature had authorized the Supreme Court of Virginia to regulate the practice of law, that court had taken no action to fix fees, nor was there a statute directing members of the bar to establish minimum fee schedules. As such, the Court concluded that the state bar's participation in price fixing failed to satisfy the threshold inquiry under *Parker* of "whether the activity is required by the state acting as sovereign."[13] The Court held, contrary to the argument of the county bar, that it was not enough that the activity had been "prompted" by the state. Consequently,

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7. *Id.* at 351.

8. *See, e.g.*, Asherville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959).

9. *See* Justice Douglas' dissent in Jackson v. Metropolitan Edison Co., 419 U.S. 345, 363 (1974) wherein he stated that "[I]t should be noted that successful attempts by public utilities to exclude themselves from the antitrust laws have been based on the assertion that their monopoly activity consitutes 'state action,'" *citing* Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248 (4th Cir. 1971); Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971).

10. 438 F.2d 248 (4th Cir. 1971).

11. *Id.* at 252.

12. 421 U.S. 773 (1975).

13. *Id.* at 790.

in implementing a program that exceeded its bounds of authority, the state agency lost its protected status, and therefore its members were, in effect, considered private parties for antitrust purposes.[14]

While *Goldfarb* clarified the governmental immunity component of the state action doctrine, the question of whether a private party would be entitled to immunity when the challenged activity was required by the state was still left open. *Cantor v. Detroit Edison Co.*[15] purports to resolve that question.

III. Cantor v. Detroit Edison Co.

Cantor, a retail druggist selling light bulbs, sought injunctive and treble damage relief from the Detroit Edison Company, alleging that its practice of supplying light bulbs to its electrical customers violated section 2 of the Sherman Act and section 3 of the Clayton Act.[16] As a distributor of electricity, Detroit Edison was "pervasively regulated"[17] by the Michigan Public Service Commission. Since 1916 the Michigan Public Service Commission had approved tariffs filed by Detroit Edison which included provisions for the light bulb exchange program.[18] Moreover, while the current tariff was in effect, Detroit Edison could not abandon its program without violating state law.[19] Since the activity was thus required by the state, Detroit Edison argued that its actions, if prohibited by the antitrust laws, were entitled to a *Parker* "state action" exemption. The district court and the court of appeals agreed with Detroit Edison.[20] However, the Supreme Court reversed.

In holding that Detroit Edison was not entitled to immunity under *Parker,* the Court first examined the scope of the *Parker* decision. In Section II of the opinion, Justice Stevens, writing for only a plurality of the Court,[21]

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14. *Id.* at 791-92: "The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members."

15. 428 U.S. 579 (1976).

16. *Id.* at 581 n.3. In his brief to the Supreme Court, the plaintiff also argued that the practice constituted an illegal tie-in which was violative of § 1 of the Sherman Act, 15 U.S.C. § 1 (1970). *Id.* The practice challenged involved supplying new residential customers with light bulbs in "such quantities as may be needed" for all their permanent fixtures, and thereafter replacing the burned-out bulbs in proportion to the estimated use of electricity for lighting. *Id.* at 583 n.5. Detroit Edison held 50% of the standard-size light bulb market in the relevant geographic area. *Id.* at 582.

17. *Id.* at 584. Mich. Comp. L. Ann. § 460.6 vests the Michigan Public Service Commission with "complete power and jurisdiction to regulate all utilities in the state." Furthermore, the commission has the express power "to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities." *Id.* at § 460.501.

18. 428 U.S. 579, 583 (1976).

19. *Id.* at 585.

20. *Id.* at 581.

21. Chief Justice Burger concurred in parts I and III of Stevens' opinion, Justices Brennan, Marshall and White concurred in the entire opinion, Justice Blackmun concurred in the judgment and three justices dissented. *See* note 2, *supra.*

concluded that the *Parker* decision only provided governmental immunity for "official action taken by state officials."[22] Since the plaintiff in *Cantor* had not challenged the legality of any act of the State of Michigan or its officials (none having been named as defendants), the Court concluded that the *Parker* decision did not control.

Justice Stevens, in Section III of the opinion,[23] recognized that private immunity from Sherman Act liability for conduct required by a state was a novel question and thus attempted to establish various analytical criteria which could be utilized to resolve the issue. Stevens postulated two reasons why such conduct might be exempt:

> First, if a private citizen has done nothing more than obey the command of his state sovereign, it would be unjust to conclude that he has thereby offended federal law. Second, if the state is already regulating an area of the economy, it is arguable that Congress did not intend to superimpose the antitrust laws as an additional, and perhaps conflicting, regulatory mechanism.[24]

These two rationale supporting a private exemption have been termed the "unfairness standard" and the "implied immunity" standard, respectively.[25]

A. *The Unfairness Standard*

The Court in *Cantor* noted that the question of private immunity is not readily resolvable, because the activities of regulated industries often involve "a mixture of private and public decisionmaking."[26] The Court, however, did not find it necessary to delineate the point where private immunity stopped and liability started. The facts in *Cantor* were such that it could be concluded that Detroit Edison was the instigator of the practice at issue, thereby making the imposition of liability not "unfair." That is, Detroit Edison had instituted the light bulb program long before the State of Michigan began regulating public utilities,[27] and even though the program could not be discontinued without Commission approval, the option to have such a program was primarily vested with the utility.[28] Hence the utility's participation was

22. 428 U.S. at 591. Chief Justice Burger disagreed with this formulation of the *Parker* state action doctrine. Burger indicated that the focus in interpreting *Parker* has been and should continue to be not on the parties involved, but on the activity challenged. That is, immunity should be based upon a finding that the challenged activity reflects an affirmative state regulatory policy, regardless of who the actors are. *Id.* at 604-05..

23. This portion of the opinion was joined by Justices Burger, Brennan, Marshall and White.

24. *Id.* at 592.

25. *Id.* at 627, 629 (Stewart, J., dissenting).

26. *Id.* at 593.

27. The light bulb exchange program was instituted in 1886, while state regulation began in 1909. *Id.* at 583.

28. Justice Stevens cited Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Continental Ore v. Union Carbide, 370 U.S. 690 (1962); Schwegman Bros. v. Calvert Corp., 341 U.S. 384 (1951); and Northern Sec. Co. v. United States, 193 U.S. 197 (1904) for the proposition that although the state was involved with the conduct complained of, "in each case the private party

"sufficiently significant to require that its conduct in implementing the decision, like the comparable conduct by unregulated businesses, conform to applicable federal law."[29]

Thus, it would appear that under the "unfairness" standard imposed by *Cantor,* a public utility must not only demonstrate that its conduct was required by the state, but also that the decision to implement the conduct came primarily from the state.[30] Mere approval of provisions of a tariff by a state agency, as in *Washington Gas,* is no longer enough to exempt a regulated utility.

B. *"Implied Immunity" Standard*

The second standard posited by Justice Stevens inquires whether Congress intended to superimpose the antitrust laws on conduct already being regulated by the state under a different standard. Justice Stevens was unwilling to imply an immunity for Detroit Edison's conduct under the broad theory that the antitrust laws should not be applied to areas of the economy regulated by the states.

Stevens articulated several reasons for his refusal to grant a per se immunity for regulated industries. First, there was no inconsistency between requiring the utility to meet regulatory standards in areas where it was exercising its natural monopoly powers, the distribution of electricity, and requiring it to comply with the antitrust standards where it was acting within competitive areas of the economy, as in the distribution of light bulbs.[31] Second, Justice Stevens noted that even if there is a basic repugnancy between the antitrust laws and the state regulation in question, the federal interest is not necessarily subordinated to the state's.[32] While not providing explicit standards to resolve a federal-state law inconsistency, Stevens did suggest that the standards should be at least as rigorous as those applied to conflicts between two federal acts; that standard requires a finding that repeal of the act is necessary in order to make the regulatory act work "and even then only to the minimum extent necessary."[33] Applying this part of the

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exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decisions." 428 U.S. at 593.

29. 428 U.S. at 594.

30. *See* part III, C, *supra,* for a more complete discussion of the scope of the unfairness standard.

31. 428 U.S. at 595.

32. *Id.*

33. *Id.* at 597. Justice Stewart, in his dissent, vigorously disputed the validity of using of the "implied repeal" doctrine in this situation: "That doctrine, a species of the basic rule that repeals by implication are disfavored, comes into play only when two arguably inconsistent federal statutes are involved. 'Implied repeal' of federal antitrust laws by inconsistent state regulatory statutes is not only 'not favored' . . ., it is impossible. See U.S. Const. Art. VI, cl. 2." *Id.* at 629.

See also The Supreme Court, 1975 Term, 90 HARV. L. REV. 234-35, n.37 (1976):

> The Court's suggestion that it may apply the analysis developed in order to reconcile the antitrust laws and federal regulatory statutes as a guide to the appropriate scope

test to the light bulb exchange program, Justice Stevens found that the program was unnecessary to the effective functioning of Michigan's regulation of the distribution of electricity.[34] Finally, even assuming the antitrust laws were not intended to apply to areas "primarily regulated" by the state, Justice Stevens concluded that the antitrust laws should be applicable to what are essentially unregulated areas, such as the market for electric light bulbs.[35]

While it is difficult to formulate a precise articulation of the second part of the *Cantor* test,[36] here labeled the "implied immunity" test, one commentator has suggested the following: (1) the state regulation is repugnant to the antitrust laws; (2) the granting of immunity is essential to the maintenance of the regulatory scheme; and (3) the state's interest in maintaining the regulatory scheme is sufficiently primary to justify thwarting the antitrust laws.[37]

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of state action exemptions was unfortunate. Federal implied repeal doctrine is an appropriate means of assuring that two inconsistent federal statutes are both given their maximum possible effect, a result Congress may be presumed to have intended. However, in the case of state-federal conflict, an effort to assure that a regulatory statute effects the smallest possible inroad on the antitrust laws may not accord with a presumed Congressional concern for state sovereignty . . . . Moreover, if a federal court applies implied repeal doctrine as a means of determining what aspects of state regulation are central to a state regulatory scheme, it would be applying federal law in an area more properly controlled by state law.

34. 428 U.S. at 598.

35. *Id.* at 595.

36. The unwillingness of the Court to articulate a precise standard has occasioned much confusion as to what standard to apply. *See, e.g.*, Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298, 306 (E.D. Va. 1977), *vacated and remanded on other grounds*, 571 F.2d 205 (4th Cir. 1978) ("Just what further analysis is required is admittedly not entirely clear"); United States v. Southern Motor Carriers Rate Conference, 439 F. Supp. 29, 40-41 (N.D. Ga. 1977) ("Even apart from the unfairness question, the plurality of the Court recognized tacitly that in some rare instances Congress might not have intended the antitrust laws to apply to areas of the economy primarily and pervasively regulated by the states. The precise scope of the state action exemption has been somewhat obfuscated by the numerous opinions in *Cantor*."). *See also* notes 33, 40, *infra*, describing the various tests post-*Cantor* courts and commentators are applying.

37. Dorman, *State Action Immunity: A Problem under Cantor v. Detroit Edison*, 27 CASE W. L. REV. 503, 513 (1977).

Another commentator has developed the following test for the second part of the *Cantor* standards:

> 1) The "state must have a substantial interest in regulating conduct that would otherwise be violative of the antitrust laws."
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> 2) "The state's interest in regulation must be balanced against the federal interest in promoting competition in a particular segment of the economy."
>
> 3) The actual regulation can displace the competitive process "only to the minimum extent necessary" to accomplish a desired goal.

Rogers, *The State Action Antitrust Immunity*, 49 U. Colo. L. Rev. 147, 161 (1978).

Yet another commentator has labeled the second part of the *Cantor* test as "the state preemption test," which examines whether "the conduct is necessary to make the state regulatory act effective." Shores, *The State Action Doctrine after Goldfarb and Cantor*, 63 IOWA L. REV. 367, 371 (1978). This articulation is arguably too broad: if the facts were different in *Cantor*, and

There is some disagreement as to whether *Cantor* should be read as requiring the defendant to meet *both* the unfairness standard and the implied immunity standard or whether meeting just one of these two standards will suffice to provide a private party with Sherman Act immunity. This Note proceeds on the assumption that a defendant must meet both standards in order to acquire total immunity. This assumption is premised on the policy reason that a state agency should not be able to confer total immunity on conduct which is violative of the spirit of the antitrust laws and not essential to a state's regulatory scheme.[38] While this "and" test is necessarily more difficult for the utilities to meet than the "or" test, application of the guidelines developed later in this Note should help to ameliorate some of the differences.

C. *Immunity from Treble Damage Liability*

In Section IV of the majority opinion,[39] Justice Stevens discussed the application of treble damage liability to regulated companies. He posited two circumstances that might justify not imposing such damage liability on defendant companies: "[i]f the hazard of violating the antitrust laws were enhanced by the fact of regulation" *or* "[i]f a regulated company had engaged in anticompetitive conduct in reliance on a justified understanding that such conduct was immune from the antitrust laws."[40]

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the Michigan legislature had decided to create and supervise a monopoly of the lightbulb industry, granting that monopoly to Detroit Edison, under Shores' definition such monopolization would be immune from antitrust attack. This analysis does not take into account Justice Stevens' statement that even assuming inconsistency between state regulation and federal antitrust laws, "we could not accept the view that the federal interest must inevitably be subordinated to the State's." 428 U.S. at 595.

See note 40, *infra*, for various judicial articulations of the second part of the *Cantor* test.

38. For a more complete argument that a defendant must meet both standards, *see* Dorman, *supra* note 33, at 513. This interpretation is consistent with the way the majority's test was viewed by the dissenting opinion, written by Justice Stewart: "The second arm of the Court's new immunity test . . . apparently comes into play only if the utility's own activity does not exceed a vaguely defined threshold of 'sufficient freedom of choice. . . .'" 428 U.S. at 627.

But see City of Fairfax v. Fairfax Hospital Ass'n, 562 F.2d 280, 284 (4th Cir. 1977), *vacated and remanded* in light of *City of Lafayette*, ___ U.S. ___, 98 S.Ct. 1123 (1978): "Five of the justices held that private conduct was not exempted unless, *at least*, it was shown that either the state *coercively* commanded the private conduct, or that the state in the strictest sense of the term *'regulated'* the private conduct."

Another commentator has assumed the test is an "or" test: "It seems clear, however, that the court viewed these as alternative reasons, either of which would support private immunity," citing in support of this statement Justice Stewart's view of the majority's test, quoted above. Shores, *supra*, note 37, at 370 n.26. However, Justice Stewart's comment is plainly not support for an "or" position; under an "or" application, the second part of the test would not come into play at all if the defendant's conduct did not involve "sufficient freedom of choice."

39. This portion of the opinion was joined in by only a plurality of the Court. Justice Stevens was joined by Justices Brennan, Marshall and White.

40. 428 U.S. at 599. There is a significant issue as to whether the Court has the power at all to eliminate treble damages in an antitrust suit, absent action by Congress making such application discretionary. For the argument that treble damage immunity can—and should—be

These circumstances set forth by Justice Stevens as justifying limiting treble damage liability are consistent with the underlying rationale for imposition of that liability.[41] That is, when a firm is led to believe that certain conduct is immune from antitrust prosecution or when the conduct is performed at the instance of a regulatory body, the firm lacks the culpability which is to be deterred by the exaction of a penalty.

Justice Stevens found neither reason applicable to the conduct of Detroit Edison. Since the regulation in question was promulgated by Detroit Edison and was merely approved by the Michigan agency, such approval did not increase "the company's risk of violating the law."[42] Additionally, there was no basis for the utility to believe that its conduct was exempt from the federal antitrust laws. Ignoring lower court decisions such as *Washington Gas,* Justice Stevens wrote: "[t]his Court has never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it was permitted or required by state law."[43] Therefore, in this particular case, neither the Court nor the state had given Detroit Edison reason to believe it was exempt or had increased its risk of exposure.

Although only a plurality of justices specifically concurred in Part IV of the opinion, the concept of treble damage immunity being available in specific circumstances appears to be a majority holding in light of Justice Blackmun's comments in a footnote to his concurring opinion.[44] Therefore, argua-

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provided by the Court, *see* Posner, *The Proper Relationship between State Regulation and the Federal Antitrust Laws,* 49 N.Y.U. L. REV. 693, 729-32 (1974). One of Professor Posner's arguments is that the privilege can be developed as an integral part of the state regulatory exception (the state action doctrine) which itself has no express recognition in the antitrust laws. *Id.* at 730. However, there are cases that have held that the language of § 15 of the Clayton Act, 15 U.S.C. § 15 (1970), stating that any person injured "shall recover threefold the damages. . . ." means that treble damages are required by law and thus *must* be awarded upon proof of actual damages. *See* Locklin v. Day-Glo Color Corp., 429 F.2d 873, 878 (7th Cir. 1970), *cert. denied,* 400 U.S. 1020 (1971), and Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975).

41. Treble damage recovery "inevitably presupposes a punitive purpose." Lyons v. Westinghouse Elec. Corp., 222 F.2d 184, 189 (2d Cir. 1955), *cert. denied,* 350 U.S. 225 (1955). Moreover, such damages act as deterrence to others and encourage an antitrust violator to rehabilitate himself. Locklin v. Day-Glo Corp., 429 F.2d 873 (7th Cir. 1970). None of these justifications for imposition of treble damages would apply to the defendant utility company acting at the specific direction of the state. The state being the decision-maker, punishment of the utility for the state's action would be entirely inappropriate and would serve no rehabilitative or deterrent purpose.

42. 428 U.S. at 599.

43. *Id.* at 600.

44. Justice Blackmun wrote:

> First, I take it that a defense based on fairness would be a defense to a damages recovery but not [a defense to] injunctive relief. The latter, of course, presents no danger of unfairness. Moreover, as Mr. Justice Stevens implies by his emphasis on not unfairly holding a private party "responsible," the defense rests on the theory, not that the challenged restraint is legal, but that since the defendant has committed no voluntary act in implementing it, he cannot be said to have violated any law. The same would not be true of acts following a judgment that the restraint is in fact illegal, and the state law to that extent invalid.

bly the *Cantor* opinion creates a dichotomy between injunctive and treble damage immunity. In order to acquire total immunity from the antitrust laws, a private defendant must satisfy both the fairness and state immunity tests. However, the defendant, although unable to prove facts which would provide immunity from injunctive relief, could acquire immunity from treble damage liability through a demonstration that regulation had increased the hazard of antitrust liability or that it had justifiable reason to believe that its conduct was immune.

IV. Guidelines for Utility Company Participation in State Regulation

In his dissent, Justice Stewart viewed the result of the *Cantor* test as a directive to utilities that in order to be safe, they must do nothing:

> Today's holding will not only penalize the right to petition but may very well strike a crippling blow at state utility regulation. As the Court seems to acknowledge, such regulation is heavily dependent on the active participation of the regulated parties, who typically propose tariffs which are either adopted, rejected or modified by utility commissions. But if a utility can escape the unpredictable consequences of the second arm of the Court's new test, . . . only by playing possum—by exercising no "options" in the Court's terminology. . .—then it will surely be tempting to do just that, posing a serious threat to efficient and effective regulation.[45]

Although Justice Stewart may have overstated the case, it seems apparent that the utility companies and other state-regulated industries will be forced to examine their practices in light of the *Cantor* opinion. Since the standards under the second part of the *Cantor* test have yet to be fully agreed on by the courts,[46] and at this stage are somewhat, in Justice Stewart's words,

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> Second, I would hope that consideration will be given on remand to allowing a defense against damages wherever the conduct on which such damages would be based was required by state law. Such a rule would comport with the theory that a defendant would not be held "responsible" in damages for conduct as to which he had no choice, by which I do not mean to rule out other possible grounds for such a rule.

428 U.S. at 614-15, n.6.

45. *Id.* at 627.

46. *See* note 36, *supra*.

The post-*Cantor* cases, while all making reference to *Cantor*, demonstrate the confusion as to what standard to apply. For example, Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977), *vacated and remanded on other grounds*, 571 F.2d 205 (4th Cir. 1978), interpreted the *Cantor* test as involving "a determination of whether the anticompetitive activity is necessary to accomplish the regulatory purpose of that agency." *Id.* at 306. The court then examined Justice Blackmun's concurring *Cantor* opinion where he proposed a rule of reason test: the "state sanctioned anti-competitive schemes must fall like any other if its potential harms outweigh its benefits," (citing Cantor v. Detroit Edison Co., 428 U.S. 579, 610 (1976), and the Ninth Circuit Court of Appeals' standard of "whether the anti-competitive activity contributes directly to improving service to the public or only to suppress competition," (citing Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626 (9th Cir. 1977)). 431 F. Supp. at 306. From these varying standards, the court developed its own standard of examining the relationship between the anti-competitive activity and the state interest it purports to advance: "If that relationship is tenuous, the activity must fall." *Id.* at 306. Applying this standard, and the

"unpredictable," the utilities' primary concern at this juncture will be the unfairness standard. Under this standard it is conceded that the line between private and public decisionmaking is often a difficult one to draw; however, some general guidelines can be culled from *Cantor* and its progeny. To do this, it is necessary to consider the four possible ways "regulated" conduct might be implemented:

1. The utility adopts the conduct on its own.
2. A regulatory agency requires the conduct by "approving" a private decision.
3. A regulatory agency actively considers the merits of a private decision and grants approval, thus effectively requiring the conduct.
4. The regulatory agency imposes a specific conduct requirement.

A. *The Utility Adopts Conduct on its Own*

Obviously, when a utility adopts conduct entirely on its own, under no

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harm-benefit approach, the court found that the Virginia State Bar's practice of issuing advisory opinions regarding the unauthorized practice of law was not exempted from application of the antitrust laws.

In United States v. Southern Motor Carriers Rate Conference, 439 F. Supp. 29 (N.D. Ga. 1977), a case charging rate fixing by the rate conference bureaus and the member motor carriers, the court chose to examine whether "the state's regulatory interest [was] evidenced by active supervision and a clear statement of intent to regulate." *Id.* at 41.

In Mobilfone of N.E. Penn., Inc. v. Commonwealth Tel. Co., 428 F. Supp. 131 (E.D. Pa. 1977), *aff'd*, 571 F.2d 141 (3d Cir. 1978), the court articulated the test as follows: "is the state regulatory policy so antagonistic that an exemption to antitrust law is necessary to make the state regulatory scheme effective?" *Id.* at 134. The Third Circuit Court of Appeals, in affirming the *Mobilfone* decision, looked to whether the state had "an independent regulatory interest in the subject matter of the antitrust controversy" and whether the state supervision was active. Mobilfone of N.E. Penn., Inc. v. Commonwealth Tel. Co., 571 F.2d 141, 144 (3d Cir. 1978).

The Ninth Circuit Court of Appeals has made it clear that it does not view the second part of the test as one which is to be analyzed solely in terms of the inconsistency of the state statute and the federal antitrust laws, as was done in the *Mobilfone* lower court opinion. *See* Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626, 631 n.7 (9th Cir. 1977): "[i]t [the *Cantor* Court] rejected the simplistic view that the fundamental inconsistency of the two standards prohibited the application of the antitrust laws." *See also* Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1218 (9th Cir. 1977):

> As Justice Stevens observed in *Cantor*, arguments based on potentially inconsistent standards or conflicts between the State regulatory scheme and the federal antitrust laws are unavailing . . . We believe Congress did not intend that important federal interests underlying the antitrust laws should be subordinated to those of state regulatory programs, even if the resulting standard may be in conflict or inconsistent.

The *Cantor* dissent views the second part of the majority's test as providing for a judicial determination, on an *ad hoc* basis, of the substantive validity of state regulatory goals. 428 U.S. at 638-40. Furthermore, the dissent indicated such a test will allow the "federal judiciary to substitute its judgment for that of state legislatures and administrative agencies with respect to whether particular anticompetitive regulatory provisions are 'sufficiently central' . . . to a judicial conception of the proper scope of state utility regulation." *Id.* at 630.

Given this range of standards employed by the courts, from granting imprimatur to the state's regulatory policy to an examination of the regulatory policy itself, it seems impossible at this point to develop general guidelines regarding the second part of the *Cantor* test. Therefore, this Note concentrates on the first part of the test in the belief that through application of the guidelines, a private party can prevent total exposure to antitrust damages under whatever standards the court may follow under application of the second part of the test.

regulatory authority, or in contravention of agency authority,[47] its conduct will not be protected under an implied immunity theory. However, there have been cases where the regulatory agency has had some connection with the challenged conduct and the defendant has attempted to plead a "state action" immunity. These cases look not so much to the unfairness standard—whether the agency played a dominant role in requiring the conduct—but instead to whether the conduct was in fact required by the agency pursuant to the authority granted to it by the state. In other words, these cases have examined the "threshold" inquiry of *Goldfarb* concerning whether the activity was required by the state.

In this examination, it will be necessary to determine the role played by the regulatory agency under the state public utility law.[48] In *New Haven v. New Haven Water Co.*,[49] the Connecticut Supreme Court found that the state public utility law, unlike the laws in many jurisdictions, did "not in general condition the establishment of a changed rate schedule by a utility company on prior approval by the commission. All a company desiring to put into effect a changed rate schedule . . . [had] to do in the first instance . . . [was] to file it with the commission."[50] Thus *New Haven* determined that Connecticut law merely gave the agency the *discretion* to inquire into a utility's tariff. Subsequently, in an action challenging a telephone company's refusal of service to a telephone subscriber who had declined to lease an interface device from the telephone company for a telephone answering mechanism obtained from a private company, the Connecticut Supreme Court held that the state action doctrine did not immunize the defendant's conduct since the role assigned to the Connecticut PUC amounted to no more than acquiescence in the telephone company's action.[51] The court reasoned that the tariffs outlining the company's procedure became effective immediately upon filing; thus there was no state-required conduct and the *Goldfarb* threshold requirement had not been met.[52]

With regard to whether the agency required the conduct being examined, the issue may arise as to whether the tariff filed by the company for agency approval was specific enough to comprehend the challenged activity. In

47. For a suit brought challenging activity that was in contravention of representations made to the ICC in seeking approval of a busline acquisition, *see* Mt. Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687 (9th Cir. 1977) (defendant acquired no immunity from antitrust violations even though ICC had approved acquisitions.).

48. *See* Virginia State Bar v. Surety Title Ins. Agency, Inc., 571 F.2d 205 (4th Cir. 1978). In *Surety Title*, subsequent to the filing of the antitrust action, a state action was commenced which involved a determination of the State Bar's authority to act as it did under state law. Thus the Fourth Circuit Court of Appeals vacated and remanded the case to the district court "until the Virginia courts have had an opportunity to decide the disputed questions of state law." *Id.* at 208.

49. 132 Conn. 496, 45 A.2d 831 (1946).

50. New Haven v. New Haven Water Co., 132 Conn. 496, 509-10, 45 A.2d 831, 837 (1946).

51. Mazzola v. Southern New England Tel. Co., 169 Conn. 344, ____, 363 A.2d 170, 181 (1975) (action brought under state antitrust laws).

52. *Id.*

Chastain v. American Telephone & Telegraph Co.,[53] the defendant telephone company had filed tariffs with state regulatory agencies containing a provision that customer-supplied equipment "shall be suitable for the proper operation of the [mobile telephone] service."[54] The telephone company asserted that such provisions in the tariffs immunized its conduct in denying letters of intent to purchasers of privately sold manual mobile telephones.[55] The district court, however, found that the terms of the tariff "were too general to permit characterization as specific state directives or requirements" that the Bell System implement the challenged action.[56] "In fact, it cannot be assumed that the state agencies understood that the wording of the tariffs, as interpreted by the Bell System, would exclude portable phones from service in IMTS [Improved Mobile Telephone Service] areas."[57] Therefore, as its activities were not specifically directed or approved by the state regulatory agency, the telephone company could demand no immunity.

The *Goldfarb* inquiry is further complicated where the utility is regulated at both the state and federal level. For example, in *City of Mishawaka, Indiana v. Indiana & Michigan Electric Co.*,[58] the pricing scheme of a vertically integrated electric power company which was regulated by both state and federal agencies was challenged. The plaintiff municipalities claimed that the utility intentionally monopolized and attempted to monopolize the distribution and sale of retail electric power by requiring the cities to pay a wholesale price substantially higher than the retail prices which the utility charged to its own customers. Among other defenses, the utility asserted a state action immunity in that its retail rates were established by the states of Michigan and Indiana. The court found, however, that although the states had set the retail rates and the Federal Power Commission had approved the wholesale rates, none of the regulatory bodies involved had *required* the price squeeze itself.[59] Hence the electric company had to take full responsibility for its discriminatory rate structure; in addition, the court noted that such rates could have been avoided by "tailoring its applications to allow for competitive 'wholesale' and 'retail' power rates."[60]

Yet another issue in this area creating difficulties arises when the regulatory agency encourages collective action by the utilities it supervises. The

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53. [1975-2 Trade Cases] TRADE REG. REP. (CCH) ¶ 60,519 (D.D.C. Oct. 1, 1975).

54. Chastain v. American Tel. & Tel. Co., [1975-2 Trade Cases] TRADE REG. REP. (CCH) ¶ 60,519 (D.D.C. Oct. 1, 1975).

55. FCC regulations require that persons wishing to use a mobile telephone in connection with mobile phone telephone service provided by telephone company base stations must first obtain a license from the FCC. Those providing their own equipment must present evidence that mobile phone telephone service will be furnished to them. This requirement can be met by a "letter of intent" from the telephone company stating its willingness to provide service once the mobile phone is obtained. *Id.* (citing 47 CFR § 21.0 *et. seq.* (1974)).

56. *Id.*

57. *Id.*

58. 560 F.2d 1314 (7th Cir. 1977).

59. 560 F.2d at 1320.

60. *Id.*

utilities' action may not be encompassed within the mandate of a tariff, but instead, it may amount to conduct leading to the enactment of a tariff. For example, an agency might ask intrastate motor carriers to jointly establish consistent through rates. One court confronted with this situation was willing, despite the lack of an explicit requirement by the agency, to examine whether the conduct was "implicitly compelled by the nature of the regulatory scheme as a whole and a necessary consequence of the obligations imposed on the individual carriers in order to make state regulation of intrastate motor carrier operations effective."[61] Of course, this problem could be avoided if the agency were to *require* the utilities to act collectively. Where the collective activity of the utilities was clearly *required* by the agency, there seems to be little doubt that a valid state action immunity defense would exist.

Finally, there is the problem presented by *Goldfarb* itself: agency requirement of certain activity which is beyond the scope of the agency's delegated power. *Goldfarb* and *Parker* make it clear that, in this circumstance, the agency participants are not protected from liability by the "state action" doctrine.[62] However, the private conduct that has been required by the agency should be considered to have met the *Goldfarb* threshold test, despite the agency's lack of authority. Once there is an agency requirement of the con-

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61. United States v. Southern Motor Carriers Rate Conference, 439 F. Supp. 29, 44 (N.D. Ga. 1977). The district court refused to grant the government's motion to strike the "state action" defense. In this case, many of the statutes and rules of the state regulatory commissions involved and implicitly recognized, mandated or contemplated collection action on the part of intrastate motor carriers to establish joint and consistent through rates. *Id.*

62. In the context of a state utility commission it is unclear whether the *Goldfarb* "required by the state" is the test to apply or whether the seemingly lesser standard of "authorized or directed" of *City of Lafayette* applies. City of Lafayette, Louisiana v. Louisiana Power & Light Co., ___ U.S. ___, ___, 98 S.Ct. 1123, 1138 (1978). *City of Lafayette* involved the question of whether municipalities are immune from the antitrust laws. The Court held that they are not *per se* exempt and that their immunity is determined by whether the activity was "authorized or directed" by the state. *Id.*

Arguably, the *City of Lafayette* standard ought to apply to regulatory agencies. The Virgnia State Bar Association in *Goldfarb* was not given the power to regulate competition in the legal field, and thus, it could be concluded that any activity involving the regulation of competition should come from an express state mandate. However, state utility commissions are specifically established to regulate competition; consequently, challenges under the antitrust laws to conduct which is the result of specific agency activity should focus on whether the action was "authorized" by the state, rather than compelled. In this connection, adequate state mandate for anticompetitive activities of cities and *other subordinate governmental units* exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." *Id.* (emphasis added) (citing the circuit court opinion in the case, City of Lafayette Louisiana v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976)).

See also the remarks of Donald Baker, Chief of the Antitrust Division, in TRADE REG. REP. (CCH) ¶ 50,293 (Oct. 28, 1976):

> A state utility commission is normally what I would call an *independent state regulator*. It is made up of salaried, full-time officials, normally appointed by the Governor. Such officials are barred from having any outside interests. To the extent that such an independent regulatory board is acting within its mandate in promulgating regulations necessary to make a regulatory statute work, it normally qualifies as 'the state as sovereign' and its officers are thus immune from antitrust suit.

duct in question, private immunity, as opposed to governmental immunity, should not be governed by a *Goldfarb* or *City of Lafayette* analysis, but rather by the two part *Cantor* test. Although the Supreme Court has not specifically dealt with this issue, it is instructive that in *Cantor* the Court did not base its holding on whether or not the Michigan Public Service Commission was acting within its scope of authority in approving a tariff limiting light bulb competition. Thus it can be concluded that private immunity is not derived from governmental immunity.

In light of the above examples, a utility would be in a much better position, regarding antitrust liability, if it "forced" the agency to specifically require what might be considered anti-competitive conduct through refusing to act absent specific agency directives. In so doing, the utility is likely to cross the *Goldfarb* "threshold" and reach the *Cantor* standards.

B. *Regulatory Agency Requires the Conduct by "Approving" a Private Decision*

Even though the utility's conduct is required, it is clear after *Cantor* that agency approval which amounts to a "mere rubber stamping" of a private decision will no longer be immunized for either injunctive or treble damages purposes. Obviously, the *Washington Gas* holding that agency silence or tacit approval constitutes "state action" is no longer good law.

This result has been followed in several post-*Cantor* decisions. In *Litton Systems, Inc. v. Southwestern Bell Telephone Co.*,[63] Litton had challenged Bell's practice of tying branch exchange equipment to telephone service, charging that Bell was predatorily pricing the tied services so as to prevent or hamper competition from Litton. The lower court had denied Bell's motion to dismiss based on "state action" immunity, but did grant a stay under the doctrine of primary jurisdiction.[64] The Fifth Circuit Court of Appeals, while not reaching the question of "state action" immunity, did hold, based on the *Cantor* analysis, that the doctrine of primary jurisdiction was not applicable.[65] In reaching its conclusion, the court found that the doctrine of primary

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63. 539 F.2d 418 (5th Cir. 1976).

64. The *Litton* court stated that the doctrine of primary jurisidction applies when a federal court is of the opinion that suit ought to have been brought exclusively or initially before an administrative body. The reason for the possible applicability of the doctrine in this case stemmed from trying to "accommodate two seemingly conflicting statutes—*e.g.*, one bolstering free competition and the other regulating certain aspects of a particular industry." 539 F.2d at 420. *Litton* indicated that in this situation the court "may want to defer in the first instance to the administrative agency's construction of the regulatory statute the enforcement of which is its responsibility." 539 F.2d at 420. *See also*, Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973); Carter v. American Tel. & Tel. Co., 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967).

65. The *Litton* court questioned whether the doctrine of primary jurisdiction was even relevant to resolve conflicts between federal and state law, but, recognizing that the question had not yet been decisively answered, assumed that it did apply. 539 F.2d at 421.

For views that the doctrine of primary jurisdiction is to be used to resolve conflicts between the same sovereign, *see* Jaffe, *Primary Jurisdiction Reconsidered. The Antitrust Laws*, 102 U.

jurisdiction was to accommodate conflicting regulatory and antitrust policies, and here there was no regulatory policy involved as the tariffs were "first, the result of the utility's initiative, and, second, routinely acquiesced in by each regulatory board."[66] The court further stated: "[s]uch accommodation is unnecessary in this context, however, because it is Bell's conduct that is being challenged, not the conduct or policy of any state agency or official."[67] Presumably, one could conclude that just as the doctrine of primary jurisdiction did not apply in *Litton* because it was Bell's conduct being challenged and not state policy, so, too, there would be no implied antitrust immunity because of the agency acquiescence of Bell's conduct.

Another case leading to the same result was *Almeda Mall, Inc. v. Houston Lighting & Power Co.*[68] The court in *Almeda Mall* found that the defendant's conduct in refusing to sell a shopping center single-metered power for resale to tenants was not immune from antitrust liability. Although the tariffs precluding resale of electricity except by special contract had been filed and approved by the city of Houston,[69] the court found no evidence of the city council's *active consideration* of the defendant's submetering practices. The court stated:

> Decisions as to the initiation and implementation of defendant's resale policies have been made primarily by the defendant, and defendant does not dispute such a fact. The role of the City of Houston has been passive and apparently "neutral" with respect to defendant's submetering practices. . . . The fact that the challenged practice has been approved by the City of Houston and considered in determining appropriate electric power rates for customers and resultant rates of return for defendant is insufficient evidence of "state action" as analyzed by *Cantor*.[70]

Thus, it appears that courts are not hesitant to apply *Cantor* strictly: there is certainly no state action immunity of any sort when the state's involvement amounts to acquiescence or approval without active consideration of the merits.

C. *Agency Actively Considers the Merits of a Private Decision and Grants Approval, Thus Requiring the Conduct*

A much more difficult question occurs when a utility proposes a program, the merits of which are actively debated by the agency before final approval

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PA. L. REV. 577, 581 (1954); Convisser, *Primary Jurisdiction: The Rule and its Rationalizations*, 65 YALE L. J. 315, 336-37 (1956).

66. 539 F.2d at 423. The court suggested that Bell was motivated to predatorily price its services by the FCC's ruling that Bell could not prohibit the attachment of another's equipment to its lines. *Id.* at 423 n. 11 (citing In the matter of Carterfone, 13 F.C.C.2d 420 (1968)).

67. *Id.* at 422.

68. [1977-1 Trade Cases] TRADE REG. REP. (CCH) ¶ 61,485 (S.D. TEX. April 29, 1977).

69. At the time of the filing of the suit, local municipalities in Texas had the authority to regulate public utilities. Almeda Mall, Inc. v. Houston Light & Power Co., [1977-1 Trade Cases] TRADE REG. REP. (CCH) ¶ 61,485 (S.D. Tex. *April 29*, 1977).

70. *Id.*

is reached. It is questionable whether it is "fair" to hold the utility liable when the state agency has had active input into the final decision to require the activity, although the utility initiated the proposal which resulted in the required activity. The resolution of this inquiry necessitates defining the limits of the "unfairness standard."

Some of the language in *Cantor* suggests that in such a situation the defendant utility would be liable. For example, in discussing prior cases[71] holding private defendants liable, the Court stated that "[i]n each case, notwithstanding the state participation in the decision, the private party exercised sufficient *freedom of choice* to enable the Court to conclude that he should be held responsible for the consequences of his decision."[72] The Court also stated that "the *option* to have, or not to have, such a program. . . [was] primarily respondent's, not the Commission's,"[73] and further, that "respondent's participation in the decision . . . [was] *sufficiently significant* to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law."[74]

Under a literal application of this language, a private utility would exercise "freedom of choice" and an "option" that would be "sufficiently significant" when proposing activity to a regulatory agency, even when the agency approves only after active consideration of the proposal in light of the antitrust laws. Under this reading of *Cantor*, liability would be predicated merely on the utility's role as the initiator, and conversely, a utility could escape antitrust liability for required conduct only when it acted such that it could be concluded that it was not the initiator of the proposal. Such a literal reading would indeed pose a "serious threat to efficient and effective regulation."[75]

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71. The Court cited Continental Ore v. Union Carbide, 370 U.S. 690 (1962) (defendants acting in manner permitted, but not compelled by Canadian law); Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951) (resale price maintenance program invalidated even though effective throughout state because a Louisiana statute imposed a direct restraint on retailers who had signed no fair trade agreements); and Northern Sec. Co. v. United States, 193 U.S. 197 (1904) (state chartered holding company formed to hold stock of two competing railroads). 428 U.S. at 592-93.

72. *Id.* at 593 (emphasis added). *Schwegmann* is most apposite here. In the other cases, there was no indication that the state (or foreign government) *required* specific conduct of a private party. The plurality seems to read *Schwegmann* for the proposition that although the state compelled certain conduct, once the private defendant chose to enforce such conduct, he was liable under the antitrust laws. 428 U.S. at 593 n.30.

Justice Blackmun viewed *Schwegman* as a pre-emption case, 428 U.S. at 606, while the dissent interpreted the case as an expression of congressional intent of the Miller-Tydings Act. 428 U.S. at 637-38 n.25.

Under the plurality's interpretation, it would seem that the price-setting scheme of *Parker* would have fallen had the farmers been sued: "In each case [*Parker* and *Schwegman*] the particular scheme was initiated by the private actors at the invitation of a general statute, with which they may or may not have had anything to do." *Id.* at 609-10 (Blackmun, J., concurring).

73. *Id.* at 594.

74. *Id.* (emphasis added).

75. *Id.* at 627 (Stewart, J., dissenting).

The strict application of *Cantor*'s language, although not specifically contrary to the holding of *Eastern Railroad Presidents Conference v. Noerr Motor Freight,*[76] would seriously undermine its reasoning. Under what has been termed the "Noerr Doctrine," no antitrust liability arises "upon mere attempts to influence the passage or enforcement of laws."[77] This doctrine was extended in *California Motor Transport v. Trucking Unlimited* to the petitioning of government agencies.[78]

One of the justifications for the *Noerr* decision was that antitrust liability based on attempts to influence government action would reduce the flow of information upon which governments depend, and thus impair their ability to take actions that operate to restrain competition, an ability recognized in *Parker.*[79] Surely the act of automatically imposing liability on a utility for conduct required by the state but proposed by the utility would have the same inhibitory effect on the flow of information as would making the utility liable for the act of initiation itself.[80]

The Court in *Noerr* stated that it had previously held that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out,"[81] citing *United States v. Rock Royal Co-op*[82] and *Parker.* The Court continued:

> These decisions rest upon the fact that under our form of government the question of whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution.[83]

The "validity" of the government action should go to the second part of the *Cantor* test, but the first part of the *Cantor* test should only involve

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76. 365 U.S. 127 (1961). Justice Stevens saw no conflict with his opinion in *Cantor* and the *Noerr* case: "The holding in *Noerr* was that the concerted activities of the railroad defendants in opposing legislation favorable to the plaintiff motor carriers was not prohibited by the Sherman Act. The case did not involve any question of either liability or exemption for private action taken in compliance with state law." 428 U.S. at 601.

77. 365 U.S. at 135.

78. 404 U.S. 508, 510-11 (1972):

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors.

79. 365 U.S. at 137.

80. The dissent viewed *Parker* as a logical extension of *Noerr* and would have immunized Detroit Edison's conduct under the theory that *Noerr* protects the utility's action in proposing the conduct to the commission, while *Parker* protects the utility in acting pursuant to the terms of the tariff. 428 U.S. at 624. Thus, the dissent would effectively immunize all utilities acting according to the terms of their tariffs.

81. 365 U.S. at 136.

82. 307 U.S. 533 (1939).

83. 365 U.S. at 136.

considerations of whether or not the government agency has accepted "responsibility" for its decision, through careful and intensive consideration of the proposed conduct. Thus, if the defendant can demonstrate that the agency did assume such responsibility, the defendant should be deemed as having met the first part of the *Cantor* test. To hold otherwise would mean, under Stevens' restricted reading of *Parker*, that any organization that acted pursuant to a piece of legislation that it had introduced and lobbied for would be potentially liable once the legislation had been implemented, even though state policy dictated a different result.

Moreover, there is some indication in the *Cantor* opinion itself that the language involving "freedom of choice" and "options" should be applied only to the situation at issue in *Cantor*— mere agency approval. Justice Stevens disputed the dissent's conclusion that *Parker* and *Rock Royal Co-op* should be read as holding that a restraint imposed by governmental action does not violate the Sherman Act: "That passing reference to *Parker* sheds no light on the significance of state action which amounts to little more than approval of a private proposal. . . . Yet the dissent would allow every state agency to grant precisely that immunity by merely including a direction to engage in the proposed conduct in an approval order."[84] As such, Justice Stevens seems to have stressed the agency reaction to the proposal—"mere" direction contained in an approval order—rather than the utility's role as the initiator. When the agency takes a much more active role before finally approving and requiring the conduct, other factors relevant to the application of the unfairness test should be considered.

One relevant factor to consider should be state policy. When an agency requires activity after a full discussion of the merits of the proposal, particularly in terms of its effect on competition, it could be argued that the agency has taken "responsibility" for its action which should thus be viewed as an expression of state policy on the question. The *Cantor* Court stressed the fact that Michigan had no policy governing the restriction of competition in the light bulb market:

> Neither the Michigan Legislature, nor the Commission, has ever made any specific investigation of the desirability of a lamp exchange program or of its possible effect on competition in the light-bulb market. Other utilities regulated by the Michigan Public Service Commission do not follow the practice of providing bulbs to their customers at no additional charge. The Commission's approval of respondent's decision to maintain such a program does not, therefore, implement any statewide policy relating to light bulbs. We infer that the State's policy is neutral on the question whether a utility should or should not, have such a program.[85]

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84. 428 U.S. at 602.

85. *Id.* at 584-85. It is notable that Chief Justice Burger predicates his concurring opinion on this finding. *Id.* at 604-05. The Court of Appeals for the Seventh Circuit used this aspect of *Cantor* in deciding that a park district was not exempt from the antitrust laws: "Because a private actor's state law defense is at least related to a governmental body's assertion of a 'state action' defense, we think the *Cantor* Court's emphasis on the lack in that case of a 'statewide

As such there is a narrower reading of *Cantor* which is more consistent with the *Noerr* doctrine: immunity under the "unfairness" standard is to be based *not* on mere initiation of a proposal which is eventually accepted by an agency, but upon a clear articulation of state policy such as when a regulatory agency makes a specific investigation of the desirability of a program.[86]

The Supreme Court seems to have accepted this interpretation in a later case. In *Bates v. State Bar of Arizona*,[87] the plaintiff challenged, on antitrust and First Amendment grounds, the Arizona State Bar Association's prohibition against advertising by attorneys. Since the rule at issue came from the Code of Professional Responsibility of the American Bar Association, the plaintiff used *Cantor* to argue "that no immunity should result from the bar's success in having the Code adopted by the State."[88] In other words, the plaintiff was predicating the bar's liability on its role as the initiator of the proposed conduct.

The Court in *Bates* distinguished *Cantor* on the grounds that the practice there was only acquiesced in by the state regulatory commission and that the implementation of such a practice was, initially, totally within the discretion of the defendant utility. The practice in *Bates*, on the other hand, was reflective of a clear articulation of state policy with regard to the actions of attorneys.[89]

At least one post-*Cantor* lower court decision supports *Bates'* narrower reading of *Cantor*. In *Mobilfone of Northeastern Pennsylvania, Inc. v. Commonwealth Telephone Co.*,[90] the plaintiff sought to restrain the defendant

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program' or a state policy sheds some light on the present case." Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580, 589 (7th Cir. 1977) (remanded for decision in light of City of Lafayette, Louisiana v. Louisiana Power Co., ___ U.S. ___, 98 S. Ct. 1642 (1978)).

86. Language from City of Shakopee v. Northern States Power Co., Civ. No. 4-75-591 (D. Minn. 1976), *cited in*, City of Mishawaka, Indiana v. Indiana & Michigan Electric Co., 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, ___ U.S. ___, 98 S. Ct. 2274 (1978) should not be viewed as supporting a literal interpretation of Stevens' language. The court stated:

> If an anticompetitive practice is the product, at least in part, of the company being regulated and could be avoided if the company chose to do so, then the anticompetitive condition is in reality the work of that company and is not "necessary" to the functioning of the regulatory scheme and will not be immunized from antitrust liability.

560 F.2d at 1320.

As this case involved a price squeeze in retail and wholesale rates *(see* note 50, *supra)* where no agency in fact approved of the conduct, the quoted language is applicable. However, the cited language should not be applied to a broader context.

87. 433 U.S. 350 (1977).

88. *Id.* at 360.

89. *Id.* at 362. Specifically, the Court stated:

> Finally the light-bulb program in *Cantor* was instigated by the utility with only the acquiescence of the state regulatory commission. The State's incorporation of the program into the tariff reflected its conclusion that the utility was authorized to employ the practice if it so desired [citation omitted]. The situation now before us is entirely different. The disciplinary rule reflect a clear articulation of the State's policy with regard to professional behavior.

Id.

90. 571 F.2d 141 (3d Cir. 1978).

from instituting a one-way radio telephone service in the greater Wilkes-Barre area. The plaintiff alleged violations of sections 1 and 2 of the Sherman Act and the Clayton Act, in that the defendant could predatorily price by using one-way signaling as a line to its telephone service, and thereby not having to earn a profit on the former activity.[91]

In the first part of the *Mobilfone* opinion, the court examined *Cantor, Goldfarb* and *Bates,* and concluded that in order for a private party to obtain antitrust immunity for conduct required by a regulatory agency, it must be shown that: a) the state has an independent regulatory interest in the subject matter at issue; b) there is a clear articulation of the state's policy with regard to the subject matter; and c) the state supervision is active.[92] Applying these standards to the telephone company's conduct, the court found that the defendant was entitled to state action immunity.

The court first found that both the Pennsylvania legislature and the Public Utility Commission had clearly and affirmatively expressed a state policy that radio paging is a public utility. Moreover, the court also noted that the Public Utility Commission had specifically addressed Mobilfone's contention and had determined that a reasonable measure of competition was desirable.[93] The court concluded that the radio-telephone paging service was "subject to a state policy of regulation, clearly and affirmatively expressed and the state's supervision [was] comprehensively active."[94] Since there was a specific articulation of state policy, the first part of the *Cantor* test had been met, in spite of the fact that the commonwealth had proposed the challenged conduct.[95]

Once the activity is found to be primarily the responsibility and the policy of the state agency even though initiated by the utility, the case would proceed to a consideration of the merits of the activity under the second part of the *Cantor* test.[96] If the activity does not meet those requirements, injunctive relief would certainly be appropriate. However, as previously discussed,[97] there may be a limited immunity from treble damage liability.

In *Cantor,* Justice Stevens posited two situations where immunity from treble damages would be applicable: (1)"[i]f the hazard of violating the antitrust laws were enhanced by the fact of regulation," or (2) "if a regulated

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91. *Id.* at 142.

92. *Id.* at 144.

93. *Id.* at 146. Specifically, the Commission stated that "the furnishing of one-way radio-telephone paging service by an established operating telephone utility is a logical extension of its general telephone service clearly in the public interest and should be encouraged rather than denied." Mobilfone of N.E. Pa., Inc. v. Commonwealth Tel. Co., 428 F. Supp. 131, 132 (E.D. Pa. 1977) (citing In Re Application of Commonwealth Tel. Co., Application Docket No. 97564 at 3).

94. 571 F.2d at 146.

95. *Id.* at 148 (dissenting opinion).

96. *Id.* at 141. However, requiring agency articulation of state policy should materially aid a court's examination of the implied exemption standard. Such articulation would help a court resolve such issues as the relationship between the challenged conduct and the regulatory scheme as a whole and the extent of the state's interest in the activity.

97. *See* text accompanying notes 39-44, *supra.*

company had engaged in anticompetitive conduct in reliance on a justified understanding that such conduct was immune from the antitrust laws . . . ."[98] Under the *Cantor* facts, the Court held that the utility could not justifiably state that regulation had increased the company's chances of violating the law. The proposed activity had been initiated by the utility, and, absent regulation, it could be assumed that such conduct would have been undertaken.[99] Thus, the first exemption proposed by the court was not applicable there.

In his discussion of the second possible exemption, Justice Stevens appeared to imply that because there had been no prior Supreme Court decision granting a "state action" immunity to a private defendant, no utility would be justified in an understanding that its conduct was immune.[100] However, Justice Stevens did not discuss the possibility of a state creating that justified belief because that situation was not presented by the *Cantor* facts. Where a regulatory agency has approved proposed conduct *in light of antitrust considerations,* a utility should be justified in understanding that such conduct is immune from application of the antitrust laws. Even though the "mutual repugnancy" resolution of conflict between the antitrust laws and other *federal* legislation should not carry over to conflicts between the antitrust laws and *state* legislation,[101] the basic policy behind that doctrine should at least carry over to considerations of treble damage immunity. When the effect on competition is an element of the public interest that the state regulation considers in its regulation of conduct, the state has, in effect, taken over responsibility for whatever anti-competitive effects might ensue. A utility, therefore, regulated under a scheme as described above, would be justified in understanding that its conduct was immune from the antitrust laws, and should thus be accorded treble damage immunity (even though part II of the *Cantor* test is not met and the conduct may be enjoined).

D. *State Decision to Require the Conduct*

This last situation, like the second, is easily resolved under the *Cantor* test. Here, the decisionmaking comes directly from the state, either through express legislation or through the regulatory agency when such a requirement is within the legislative intent. In the words of Justice Stevens, "the private citizen has done nothing more than obey the command of his state sover-

98. 428 U.S. at 599.

99. *Id.* at 599-600.

100. *Id.* at 600-02.

101. *See* note 29, *supra.*

For an example of the mutual repugnancy test applied to conflicting federal statutes, *see* Phonetele, Inc. v. American Tel. & Tel., 435 F. Supp. 207 (D.C. Cal. 1977), holding that the federal antitrust laws and the FCC regulations regarding the interconnection of customer-provided equipment with national telephone network were sufficiently mutually repugnant to compel implied repeal of the antitrust laws. "[I]mplied immunity is logical, when, in formulating its regulatory policy, the agency includes a consideration of the beneficial purposes of preserving competition." *Id.* at 213.

eign."[102] The plaintiff's claims are essentially against the state, as were the plaintiff's claims in *Bates v. State Bar of Arizona.*[103] In *Bates,* the Court granted a "state action" immunity, reasoning that "the Arizona Supreme Court [was] the real party in interest; it [had] adopted the rules, and [was] the ultimate trier of fact and law in the enforcement process."[104]

Whether or not the activity is immunized under an application of Part II of the *Cantor* test, the utility would be immunized from treble damage liability. Here, regulation has in fact enhanced the utility's risk of exposure to an antitrust claim. Therefore, it would be unfair to hold it to Sherman Act liability when its conduct is in no way voluntary.

In *Surety Title Insurance Agency, Inc. v. Virginia State Bar,*[105] the district court applied this reasoning. The plaintiff had challenged the state bar's practice of rendering advisory opinions regarding the unauthorized practice of law.[106] The court held that, although the conduct was required by the state, the defendant was subject to liability under the antitrust laws.[107] However, the court directed the parties to address further the issue of a defense to monetary liability, believing that such a defense was appropriate to this case.[108]

V. Conclusion—Advantages of the Proposed Guidelines

Under these proposed guidelines the policy expressed by Justice Stevens in *Cantor* will not be thwarted, and the fears expressed by Justice Stewart should not be realized.

Although Justice Stevens' opinion may in fact be inconsistent with prior decisions of the Court,[109] the policy behind it should not be questioned by those concerned with the increasing regulation of competitive areas of the economy. Justice Stevens wrote:

> Mr. Justice Stewart's separate opinion possesses a virtue which ours does not. It announces a simple rule that can easily be applied in any case in which a state regulatory agency approves a proposal and orders a regulated company to comply with it. No matter what the impact of the proposal on interstate commerce, and no matter how peripheral or casual the State's interests may be in permitting it to go into effect, the state act would confer immunity from treble damage liability. Such a rule is supported by the wholesome interest in simplicity in the regulation of a com-

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102. 428 U.S. at 592.

103. 433 U.S. 350 (1977).

104. *Id.* at 361.

105. 431 F. Supp. 298 (E.D. Va. 1977), *vacated and remanded on other grounds,* 571 F.2d 205 (4th Cir. 1978).

106. The plaintiff was particularly concerned with an opinion which did not construe the definition of the practice of law so as to allow title insurance companies to certify titles. 431 F. Supp. at 301.

107. *Id.* at 307.

108. *Id.* at 309.

109. *See* Justice Stewart's dissent, 428 U.S. at 614, and the concurring opinion of Chief Justice Burger. 428 U.S. at 603.

> plex economy. In our judgment, however, that interest is heavily outweighed by the fact that such a rule may give a host of state regulatory agencies broad power to grant exemptions from an important federal law for reasons wholly unrelated either to federal policy or even to any necessary state interest.[110]

Thus, Justice Stevens is articulating a policy which permits court review of the conduct of regulated industries for antitrust violations. The policy also encompasses making regulated industries accountable for their actions that violate the policies of the Sherman and Clayton Acts when no overriding state policy is present. Finally, in separating injunctive from treble damage liability, the courts now have available a doctrine which permits application of the antitrust policies to regulated industries in a manner which is consistent with notions of fairness.

Under the guidelines proposed, however, it is not necessary for the utility to "play possum" in order to assure immunity from treble damage liability. Under these guidelines, the utility will incur such liability only when the regulatory agency "routinely acquiesces" or does not even pass on the utility proposal. The utility will be immune from such damages when the agency actively considers the merits of the utility-initiated proposal. Thus, if the regulatory agency is not confronted by objections from a competitor or a member of the public or does not, on its own initiative, conduct an examination of the effects and desirability of the utility's proposed conduct, it is incumbent that the utility itself force such examination by the regulatory agency. This would, of course, put the utility in the anomalous position of advocating certain conduct and at the same time raising the legal objections to it. But this is nothing more than an extension of the internal inquiry that a nonregulated industry should go through before initiating conduct that may have an adverse effect on competition.[111]

The utilities' pressure on the regulatory agencies should have several beneficial effects. First, a potential plaintiff could not be awarded treble damages simply because it chose to remain out of the regulatory process and went directly to federal court.[112] Second, in being forced to present both the merits and objections to a proposal, the industry would be more likely to give serious thought to eliminating a proposal that had serious anti-competitive consequences. Third, the regulatory agency would become more accountable

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110. 428 U.S. at 603.

111. It could be argued that regulated industries would be forced to "play possum" as it would require admissions which could be used by competitors in subsequent antitrust suits. However, if California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), is still good law, this use of admissions is precluded. *See* text accompanying note 76, *supra*.

112. *See* Litton Sys., Inc. v. Southwestern Bell Tel. Co., 539 F.2d 418 (5th Cir. 1976), regarding the inapplicability of the doctrine of primary jurisdiction. The *Litton* court considered it significant that the doctrine had not been applied in *Cantor*: *"Cantor* suggests that prior reference to state agencies will not materially aid in answering the 'immunity' question." *Id.* at 424. *But cf.* United States v. Southern Motor Carriers Rate Conf., 439 F. Supp. 29 (N.D. Ga. 1977) (declining to hold that defendants' "defense of primary jurisdiction is wholly frivolous or legally insufficient at this early stage of the proceeding.").

to the public for its actions. If it is true, as Justice Douglas has stated, that "state regulation of utilities has largely made state commissions prisoners of utilities,"[113] under the guidelines to *Cantor* presented above, a utility, in order to escape liability from treble damages, would force an agency to take a less one-sided view.

The application of *Cantor* along the lines discussed above may result in opening up some areas of the economy to competition without long and costly court suits. As one commentator has noted, this restoration of competition is crucial since the policy reasons for immunizing private utilities from the antitrust laws become meaningless once the monopoly is no longer inevitable or the monopoly begins to operate in areas of the economy where competition is possible.[114] However, industry attention to the proposed guidelines for the application of *Cantor* could accomplish this effect at the agency level without "the disruption of the operation of every state-regulated public utility in the Nation and in creation of the prospect of massive treble damage liabilities . . . ."[115]

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113. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 363 (1974) (dissenting opinion).
114. 76 B.Y.U. L. Rev. 912, 937 (1976).
115. 428 U.S. at 615.