United States v. Morgan Drive Away: Perfunctory Criminal Antitrust Prosecution and Novel Civil Relief

> There are some who think that the existence of regulation *ipso facto* eliminates antitrust as a practical concern for regulated firms in the surface transportation industries. This view, however, is a dangerous distortion of reality.[1]

Despite governmental industry regulation, the United States Department of Justice, Antitrust Division prosecutes antitrust violations with vigor, ease, and ingenuity. This note focuses on the recent *Morgan Drive Away* antitrust litigation, which involved both criminal proceedings[2] and a civil action.[3] Of significance is the ease with which the Antitrust Division disposed of the defenses raised by joint motion of the defendants in the criminal case, and also the unique relief which resolved the civil litigation.

The *Morgan Drive Away* criminal case was initiated first, August 2, 1973.[4] Defendants filed a joint motion to dismiss the indictment, or in the alternative to strike specific charges therein, or to stay the proceedings pending referral of specific issues to state or federal agencies.[5] The court denied summarily each issue raised, whereupon the defendants entered pleas of nolo contendere which were accepted.[6] An aggregate fine of one hundred seventy-five thousand dollars was imposed, five thousand of which was suspended.[7] In this note, a brief background of the legal principles raised by the joint motion and an analysis of the court's opinion is presented. Of particular note is the similarity of the opinion to the arguments presented by the Antitrust Division, and, consequently, the apparent amenability of the Court to those arguments.

The civil action was initiated December 5, 1974.[8] Before trial the

1. Address by Jonathan C. Rose, Deputy Assistant Attorney General, Antitrust Division, Association of Interstate Commerce Commission Practitioners, June 22, 1976.

2. United States v. Morgan Drive Away, 1974 Trade Cas. 95,997 (D.D.C. 1974).

3. United States v. Morgan Drive Away, Civil No. 74-1781 (D.D.C., June 30, 1976).

4. Indictment, United States v. Morgan Drive Away, 1974 Trade Cas. 95,997 (D.D.C., August 2, 1973) [hereinafter cited as Indictment].

5. United States v. Morgan Drive Away, 1974 Trade Cas. 95,997 (D.D.C. 1974).

6. 1975-5 TRADE REG. REP. (New U.S. Antitrust Cases) ¶ 45,073, at 53,536 (D.D.C., Feb. 24, 1975).

7. *Id.*

8. Complaint, United States v. Morgan Drive Away, Civil No. 74-1781 (D.D.C., Dec. 5, 1974) [hereinafter cited as Complaint].

parties negotiated a consent judgment or decree[9] which was approved by the court on June 30, 1976.[10] The consent judgment imposed an aggregate fine of $209,388 and afforded unique affirmative and negative injunctive relief.[11] The duration of the judgment was made perpetual except for punitive injunctions which prohibited what normally would be legal activities, and for affirmative obligations which placed the defendants in a less competitive position than others in the industry.[12] The significant facet of the consent judgment was the imposition of a moratorium on protests before the Interstate Commerce Commission. The protest moratorium replaced the normal method of restoring competition to a monopolized industry which had been the revocation of an antitrust violator's certificates of public convenience and necessity.

The transportation industry should be aware of the current trend of antitrust decisions. Although convictions in the past are not unknown,[13] regulated firms frequently display a complacent attitude toward conduct which could be construed as violative of the antitrust laws. The status "regulated" does not affect the interval decision to prosecute or to seek severe criminal sanctions according to a Department of Justice official in 1974.[14] "[E]ven the presence of some limited antitrust immunity embodied in the regulatory statute will not foreclose criminal prosecution and liability. . . ."[15] The ease and ingenuity with which these guidelines can be pursued should be recognized.

The note is organized and proceeds as follows:

II. Violations Alleged and the Factual Context
III. Resolution and Civil Relief
  A. A Moratorium on Protests
  B. Enumerated Illegalities, Litigation Conduct, and Public Comments

9. Final Judgment, United States v. Morgan Drive Away, Civil No. 74-1781 (D.D.C., June 30, 1976); *reprinted in* 41 Fed. Reg. 3758 (1956) [hereinafter cited as Final Judgment, pagination to Fed. Reg.].

10. Memorandum and Order, United States v. Morgan Drive Away, Civil No. 74-1781 (D.D.C., June 30, 1976).

11. *Id.*

12. Competitive Impact Statement, United States v. Morgan Drive Away, Civil No. 74-1781 (D.D.C., Jan. 15, 1976); *reprinted in* 41 Fed. Reg. 3764 (1976) [hereinafter cited as Competitive Impact Statement, pagination to Fed. Reg.].

13. United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963); California v. Federal Power Comm'n, 369 U.S. 482 (1962); United States v. Radio Corp. of America, 358 U.S. 334 (1959); Federal Maritime Board v. Isbrandtsen Company, Inc., 356 U.S. 481 (1958); Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945), *rehearing denied*, 324 U.S. 890 (1945); United States v. Borden Co., 308 U.S. 188 (1939).

14. Speech by Keith I. Clearwater, *Antitrust Policy versus Carrier Policy*, 1974 TRANSPORTATION L. SEMINAR 117, 120 (1974).

15. *Id.*

II. VIOLATIONS ALLEGED AND THE FACTUAL CONTEXT

On August 2, 1973 a federal grand jury indicted the three largest motor carriers engaged in for-hire transportation of mobile homes within the United States: Morgan Drive Away, Inc., National Trailer Convoy, Inc., and Transit Homes, Inc. Six agents of these companies also were charged on three separate counts of violating sections 1 and 2 of the Sherman Act.[16] On December 5, 1974 the United States Department of Justice, Antitrust Division filed a complaint against the three corporations alone which alleged violations of the Sherman Act since the early 1950's on the same three counts: a combination and conspiracy in an unreasonable restraint of trade in violation of section 1 of the Sherman Act; conspiracy to monopolize trade in violation of section 2; and monopolization of trade in violation of section 2.[17]

For-hire transporters of mobile homes had gross 1971 revenues in excess of seventy-one million dollars. Service involves "initial moves" from the factory to the retailer, and "secondary moves" from the retailer to the individual purchaser. Secondary moves also include subsequent transportation requested by the private owner. Motor carriers engaged in for-hire transportation of mobile homes generally rely on operator-owners who lease the specially designed trucks.

Mobile home transporters such as the defendants operate both across state lines and wholly within individual states. A certificate of public convenience and necessity must be obtained from the Interstate Commerce Commission for all interstate operations according to 49 U.S.C. § 306. Most states require similar operating licenses or specified authority for intrastate service. The holder of mobile home authority may file protests with the Commission, and with most state agencies, against any applications for a certificate which conflicts with its existing operating authority. In addition, rates charged for interstate operations are subject to Commission regulation under 49 U.S.C. § 316(e). Motor carriers of the same class may obtain Commission approval of rate agreements and rate-making conferences under 49 U.S.C. § 5(b)(2).

Since 1965 Morgan Drive Away, National and Transit have earned more than eighty-five per cent of the total gross revenue received in the industry. The defendants have sufficient mobile home authority for one or

16. 15 U.S.C. §§ 1, 2 (1970). Indictment at 2-4, 9-14.
17. Complaint at 3-4, 10-15.

more of them to protest virtually any application certificates. Since 1962, the defendants, among others, have participated as members of the Mobile Housing Carriers Conference, Inc. (MHCC).

The alleged illegal activity of the *Morgan Drive Away* defendants is essentially the same for all three counts and identical for both suits.[18] The indictment and the complaint state that the substantial terms of the conspiracy have been a continuing agreement, understanding, and concert of action to exclude other persons from the industry; to limit and restrict the growth of competitors; to coerce competitors to both raise rates and join the MHCC; and to coerce other members of the MHCC to relinquish their right of independent action on rate charges. The suits also charged that defendants conspired to coerce competitors to charge rates identical to their own and to fix rates within individual states without authorization of state law. The companies were charged with conspiring to eliminate competition among themselves for the services of drivers and field organization personnel. The indictment and complaint further charged that the defendants deprived persons applying for mobile home operating authority of meaningful access to, and fair hearings before, federal and state agencies and courts. Finally, the defendants allegedly interfered with the lawful business pursuits of competitors by threats of substantial rate reductions.

III. Resolution and Civil Relief

Current attitudes and the Department of Justice's ability to prosecute make the benefits of early resolution desirable for defendants in antitrust litigation. Neither a consent judgment nor a plea of nolo contendere imply an admission of guilt by the defendant. If no testimony has been taken, both forms of resolution avoid the effect of § 5(a) of the Clayton Act.[19] This provision directs that an adverse decision in a government antitrust action shall constitute *prima facie* evidence of liability in any subsequent suit brought by a private individual.[20]

The Department's objectives in the negotiations for a consent judgment in the *Morgan Drive Away* civil case were threefold. First, they sought to prevent a continuation of the defendant's unlawful conduct and conspiracy, and to insure independent conduct. Second, the Department wanted to insure that the defendants would refrain from abuses of the regulatory process. Third, a restoration of competition to the industry was intended.[21] Although "negotiations" did ensue, the Department was not,

18. Indictment at 9-14; Complaint at 10-15.

19. 15 U.S.C. 16(a) (1970) (consent judgment); City of Burbank v. General Elec. Co., 329 F.2d 825 (9th Cir. 1964) (nolo contendere).

20. 15 U.S.C. 16(a) (1970).

21. Competitive Impact Statement at 3764.

and typically has not been, inhibited from effecting its goals in a consent judgment. In 1968, the Assistant Attorney General in charge of the Antitrust Division stated that "the Government should depart from a standard of reasonably complete relief only in a few carefully defined situations."[22] In addition, final judicial approval of a consent decree is subject to a determination by the court that such judgment is in the public interest.[23]

A. A MORATORIUM ON PROTESTS

The most remarkable component of the consent judgment was the protest moratorium,[24] "the first such relief ever obtained by the Antitrust Division in a case involving defendants in a heavily regulated industry."[25] The purpose of the protest moratorium was "to redress the injury to competition . . . caused by defendant's monopolization of that industry."[26]

The protest moratorium replaced the "revocation of authority certificates" remedy which traditionally has been used to restore competition to an industry.[27] The moratorium was to enable a protection of "the interests of the ICC in a continuation and expansion of adequate transportation service."[28] The method was to diminish defendant's market power, to restructure the industry and to allow opportunity for new entry by existing and potential competitors.[29] "Section X provides, in effect, that each defendant is permanently enjoined from protesting any application for mobile home authority which meets the criteria set forth in paragraphs (a) or (b), even if the application is still pending after the expiration of the time period provided therein for filing."[30] Paragraphs (a) and (b) impose separate time and geographic limits for initial and secondary mobile home authority.[31]

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22. Turner, *Antitrust Consent Decrees: Some Basic Policy Questions*, 23 RECORD OF N.Y.C.B.A. 118, 119 (1968).

23. 15 U.S.C. 16(e) (Supp. IV, 1974); U.S. v. The Gillette Co., 1975-2 Trade Cas. 67,838 (D. Mass. 1975).

24. Final Judgment at 3760.

25. Response of the United States To The Joint Comments of Barrett Mobile Home Transport, Inc. and Chandler Trailer Convoy, Inc., and To The Comments of Griffin Transportation, Inc., United States v. Morgan Drive Away, Civ. No. 74-1781 (D.D.C., May 4, 1976); *reprinted in* 41 Fed. Reg. 18,442 (1976).

26. Competitive Impact Statement at 3763.

27. The Department of Justice's original complaint requested certificate revocation, not a protest moratorium. Complaint at 16.

28. Competitive Impact Statement at 3765.

29. *Id.* at 3764.

30. *Id.* at 3763.

31. Twelve months in twelve states for secondary authority; thirty months in twenty-eight states for initial authority. Final Judgment at 3759.

The advantages of a protest moratorium compared to certificate revocation are enumerated in the *Morgan Drive Away* competitive impact statement.[32] Certificate revocation was deemed too cumbersome and its impact too uncertain.[33] The protest moratorium was self-executing and thus avoided expense and delay. The market of for-hire mobile home transport was subject to rapid geographical shifts so flexibility was important. The small number and weakness of existing carriers available to handle the relinquished authority was also determinative.[34] Future use of the protest moratorium will depend upon long run effectiveness, ease of administration, and the existence of industries in like circumstances.

B. Enumerated Illegalities, Litigation Conduct, and Public Comments

The remainder of the consent judgment includes more typical negative and affirmative injunctive relief. Part of the permanent injunction delineated the alleged activity and conspiracy which violated sections 1 and 2 of the Sherman Act.V.[35] Threats and agreements or communications about threats were enjoined.VIII. The defendant's discussion of rates and employment was limited by the judgment to during an approved conference or when in compliance with state action requirements.IX. No across-the-board or secret non-protest agreements were allowed, nor was action to fix the compensation or inhibit the mobility of personnel within the industry.VII.

Many obligations were placed upon litigation conduct to enjoin the coordination or inducement of opposition.VI. The decision to protest an application for mobile home authority was required to be independent. Not even notification of another competitor about a third party's pending application was allowed. Five year injunctions were ordered on sharing the major costs of initial adjudications. Meritless protests were disallowed and, for five years from the date of the final judgment, the defendants were required to make, and reduce to writing, an investigation of the merit of any rate or authority application to be protested.

Comments suggesting modifications or alternatives were received[36] pursuant to 75 U.S.C. § 16(d) and were rejected. An "asphalt clause" was suggested which estops defendants from denying any of the allegations of the complaint in any subsequent private action involving the same issues. The Antitrust Division decided that this proposal would delay

32. Competitive Impact Statement, *supra* note 12.

33. Competitive Impact Statement at 3764.

34. *Id.*

35. Roman numerals in this and the subsequent paragraph refer to sections of the Final Judgment, *supra* note 9.

36. Comments of Barrett Mobile Home Transport, Inc., and Chandler Trailer Convoy, Inc., on Proposed Consent Judgment, United States v. Morgan Drive Away, Civil No. 74-1781 (D.D.C., June 30, 1976); *reprinted in* 41 Fed. Reg. 18,437 (1976).

restoration of competition in the industry and therefore was contrary to the public interest.[37] Also rejected was a limited admission provision for subsequent use in agency adjudication of certificate applications and protests.[38] The requirements for a reduction to writing of investigations on the merit of any protest and the protest moratorium were deemed adequate. [39] Cost sharing at the appellate stage was not enjoined, nor were mergers or acquisitions.[40]

The long term effectiveness of the *Morgan Drive Away* consent judgment, and especially the protest moratorium facet, can not now be readily evaluated. Attempts to obtain similar relief will depend on like circumstances in future cases. Noteworthy is the Antitrust Division's initiative for obtaining, in any particular situation, relief which is effective.

IV. Regulation Based Immunity

The court's decision in the *Morgan Drive Away* criminal case exemplifies the strong body of precedent which is contrary to the general belief that regulated industry is immune from the antitrust laws. The Supreme Court has never held "that a federal regulatory act by implication completely displaced the antitrust laws."[41] The express exemptions from operation of the antitrust laws are to be construed "strictly."[42] In addition, the use of exempted procedures for predatory practices can destroy immunity.[43]

Antitrust prosecution of regulated industries has become so well established that the *Morgan Drive Away* court was able to dismiss each immunity issue summarily, with little reference to judicial precedent. The defendants contended that their activities to coerce members and nonmembers of the MHCC were immune under the Interstate Commerce Act's antitrust exemption for approved agreements.[44] It was obvious to the court that parties to an agreement approved by the ICC are relieved from operation of the antitrust laws by section 5 a(9) "only with respect to the

37. Competitive Impact Statement at 3764; *see also* Written Comments Upon Consent Judgment and Department of Justice Response Thereto, United States v. Morgan Drive Away, Civil No. 74-1781 (D.D.C., May 4, 1976); *reprinted in* 41 Fed. Reg. 18,437 (1976).

38. *Id.*

39. Response of the United States to the Joint Comments of Barrett Mobile Home Transport, Inc. and Chandler Trailer Convoy, Inc., and To The Comments of Griffin Transporation, Inc., United States v. Morgan Drive Away, Civil No. 74-1781 (D.D.C., May 4, 1976); *reprinted in* 41 Fed. Reg. 18,444 (1976).

40. *Id.*

41. Marnell v. United Parcel Serv. of America, 260 F. Supp. 391, 400 (N.D. Cal. 1971).

42. United States v. McKesson and Robbins, Inc., 351 U.S. 305, 316 (1956).

43. Georgia v. Pennsylvania R.R., 324 U.S. 439, 458 (1945), *rehearing denied*, 324 U.S. 890 (1945).

44. 49 U.S.C. 5b(9) (1970).

making and carrying out of the agreement in conformity with its provisions and the terms prescribed by the ICC."[45] Contacts with non-members of a conference are not exempted. Coercion of members destroys any available immunity because "the free and unrestrained right to take independent action" must be preserved to each party.[46] The defendants also contended that their threats of rate-reductions could not be coercive since all rates must ultimately be approved by the Commission.[47] To this contention the court held:

> Aside from the factual inaccuracy of this assertion, the Court is not persuaded that the power of the ICC to approve rates precludes as a matter of law the possibility that coercive rate reduction proposals can violate the anti-trust laws.[48]

In the alternative, defendants argued that charges based on the alleged activities should have been stricken on due process grounds because they lacked fair warning that such conduct could constitute antitrust violations where an industry is pervasively regulated. Defendant's alternative argument is contrary to established precedent, and representative of the misunderstanding of the antitrust laws evidenced by many regulated industries. A pervasive regulatory scheme has implied repeal of the antitrust laws only where a clear and positive repugnancy exists between the acts.[49] The *Morgan Drive Away* court dismisses the contention with the simple statement, "criminal prosecutions under the Sherman Act against defendants in regulated industries are not unknown."[50]

Immunity of regulated industries from antitrust prosecution has been construed narrowly and implied rarely.[51] Coercion was never intended to be immunized by ICC regulation: rules incorporated with *Certificate No. 44*,[52] the original exemption for carrier rate conferences, and the author of section 5a(9)[53] of the Interstate Commerce Act, both expressed strong

45. United States v. Morgan Drive Away, 1974 Trade Cas. 95,997, 95,998 (D.D.C. 1974).

46. 49 U.S.C. 5b(6) (1970).

47. United States v. Morgan Drive Away, 1974 Trade Cas. 95,997, 95,998 (D.D.C. 1974).

48. *Id.*

49. Federal Maritime Comm'n v. Seatrain Lines, 411 U.S. 726 (1973); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350, 351 (1963); United States v. Borden Co. 308 U.S. 188, 199 (1939); Keogh v. Chicago and N.W.Ry., 260 U.S. 156 (1922). *But see* Pan American World Airways v. United States, 371 U.S. 296 (1963).

50. United States v. Morgan Drive Away, 1974 Trade Cas. 95,997, 95,999 (D.D.C. 1974); *See e.g.*, United States v. Borden Co. [1932-1939 Trade Cases ¶ 55,250], 308 U.S. 188 (1939); United States v. North American Van Lines, Inc., CR. 527-61 (S.D. Ind. 1963); United States v. Airfreight Transportation Corp., 71 CR. 485 (E.D.N.Y.). (citation form of opinion).

51. California v. Federal Power Comm'n, 369 U.S. 482 (1962); United States v. Borden Co., 308 U.S. 188 (1939).

52. 8 Fed. Reg. 3804, 3805 (1943).

53. 94 CONG. REC. A4222 (1948) (remarks by Congressman Bulwinkle).

views against the immunization of coercive activity. The *Morgan Drive Away* opinion illustrates that successful antitrust prosecution is imminent. The Justice Department's brief reveals the Government's attitude toward bringing suit: "absent express antitrust immunity for the totality of conduct alleged to violate the statute, there is no business which operates in a zone safe from criminal prosecution."[54] That type of activity which violates the antitrust laws is discernable and regulated industry should begin monitoring the new and dynamic trends.

V. MEANINGFUL ACCESS TO COURTS AND AGENCIES

Concerted actions to deter applications for certificates of public convenience and necessity—as opposed to attempts to defeat applications on the merits—are not immune from operation of the Sherman Act. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). The *Morgan Drive Away* defendants objected that prior to *Trucking Unlimited* they lacked fair warning of the criminality of their actions which were alleged to have obstructed access to application hearings. Consequently, the defendants contended, due process was not being accorded because, at the time the activity occurred, there was lacking a reasonable degree of certainty that the activity violated a criminal statute. The *Morgan Drive Away* court overruled the objection, relying on *United States v. Trenton Potteries Co.* and *Nash v. United States*[55] for the proposition that the criminal provisions of the Sherman Act "have been consistently held not to violate a defendant's due process rights . . . ."[56]

More importantly the court found that the result in *Trucking Unlimited* had been signaled previously by *Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc.*[57] *Noerr* established the principle that attempts to influence representative government personnel were not violative of the antitrust laws regardless of motive or result.[58] The "signal" in *Noerr*, however, was the "sham" exception to the above principle which would arise where a publicity campaign was a mere sham to cover a primary purpose "to interfere directly with the business relations of a competitor."[59]

The activity of the *Morgan Drive Away* defendants alleged to have

54. Brief for Plaintiffs at 38, United States v. Morgan Drive Away, 1974 Trade Cas. 95,997 (D.D.C. 1974) [hereinafter cited as Brief for Plaintiffs].

55. *See* United States v. Trenton Potteries Co., 273 U.S. 392 (1927); Nash v. United States, 229 U.S. 373 (1913) (there is sufficient certainty regarding the economic harm which the statute proscribes).

56. United States v. Morgan Drive Away, 1974 Trade Cas. 95,997, 95,999 (D.D.C. 1974).

57. 365 U.S. 127 (1961) [hereinafter cited as Noerr].

58. *Id.* at 139-140.

59. *Id.* at 144; *see also* Hecht v. Pro Football, Inc., 444 F.2d 931 (D.C.C. 1971), *cert. denied*, 404 U.S. 1047 (1972).

deprived other persons applying for mobile home authority of meaningful access to, and of fair hearings before, federal and state agencies and courts was:

> (1) protesting virtually all such applications, without regard to the merits; (2) inducing others to protest such applications, without regard to the merits; (3) jointly financing such protests, and jointly providing personnel including employees to aid in the conduct of such protests; (4) using tactics whose purpose and effect were to deter, delay and increase the costs of applications of other persons for mobile home authority; (5) refraining from protesting one another's applications for mobile home authority, for the purpose of qualifying each to protest applications of other persons for mobile home authority; (6) providing, procuring, and relying upon testimony which they knew to be false and misleading in agency proceedings concerning such applications.[60]

The activity in *Noerr* alleged to be an antitrust violation involved a publicity campaign to stimulate the enactment of laws helpful to the defendant railroad's competitive position. Desired was a restriction on permissible load limits for trucks and an increase in motor carrier taxes. *Noerr's* primary holding was to exempt from antitrust prosecution attempts to influence the representative branches of government.[61] A similar case, *United Mine Workers v. Pennington*,[62] reinforced the principal that this activity was immune whether "standing alone or as part of a broader scheme itself violative of the Sherman Act."[63] The premise for this doctrine was the belief that neither the functioning of representative government[64] nor the first amendment right to petition[65] should be impaired.

The result in *Trucking Unlimited* served to define "interference with the business relations of a competitor," as well as to expand both the immunity rule and the exception.[66] The defendants of *Trucking Unlimited* were accused and convicted of activity identical to that of the *Morgan Drive Away* defendants: an agreement to oppose license applications regardless of the merits of any applications, pooling resources to do so, and publicizing this intent. The result in *Trucking Unlimited* answered affirmatively the question raised in *Pennington* of whether immunity would attach for attempts to influence adjudications.[67] The "sham" exception

60. Indictment, *supra* note 4 at 10-11.
61. Noerr, 365 U.S. 127, 135-37 (1961).
62. 381 U.S. 657 (1965).
63. *Id.* at 670.
64. Noerr, 365 U.S. 127, 137 (1961).
65. *Id.* at138.
66. *See* Oppenheim, *Antitrust Immunity for Joint Efforts to Influence Adjudication before Administrative Agencies and Courts—from Noerr-Pennington to Trucking Unlimited*, 29 WASH. & LEE L. REV. 209 (1972); Note, *Antitrust—Supreme Court Extends Noerr Immunity from Sherman Act to Attempts to Influence Adjudication*, 76 DICK. L. REV. 593 (1972).
67. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

was expanded to include "[m]isrepresentations . . . used in the adjudicatory process."[68] *Trucking Unlimited's* expansion of *Noerr's* "sham" exception to cover falsified facts does not conflict with the statement in *Morgan Drive Away* that "*Trucking Unlimited* neither established nor brought previously exempt conduct within the prescription of the Sherman Act."[69] The *Morgan Drive Away* court cites other cases[70] for the proposition that "perjury and subordination of perjury . . . has never been contenanced or protected in agency proceedings."[71]

According to the *Morgan Drive Away* opinion, then, a reasonable degree of certainty did exist prior to *Trucking Unlimited* that some activity, ostensibly attempting to influence governmental bodies, could violate the antitrust laws. With respect to the *Morgan Drive Away* case *Trucking Unlimited* only expanded *Noerr* by specifying certain activity to be within the exemption. It was *Noerr* which established the potential for criminal prosecution. Therefore the defendants' due process rights could not be violated.

Applications for certificates of public convenience and necessity and protests against such applications are integral to ICC regulation. The merit of such protests should be considered with an eye toward *Trucking Unlimited*, especially if protests are made in concert with other established holders of carrier authority. Repeated protests of baseless merit which directly injure other parties to the adjudication, and thereby attempt to influence government action only incidentally, are subject to antitrust prosecution. It is highly possible that some courts will presume that frequent, baseless protests do directly injure other parties. The question of what constitutes "baseless merit" can be resolved by reference to the regulations and viable precedent of a particular agency. The adjudications of an application for carrier operating authority centers on the adequacy of existing service. *Morgan Drive Away* illustrates the importance of a thorough knowledge of existing law. A due process argument based on ignorance is decidedly weak.

VI. Primary Jurisdiction

The doctrine of primary jurisdiction is dependent predominately on a court's assessment of the danger of unnecessary conflict with agency regulation, plus the usefulness to the antitrust proceeding of prior resort to an agency.[72] A court's decision on these two overworked principles,

68. *Id.* at 513.

69. United States v. Morgan Drive Away, 1974 Trade Cas. 95,997, 95,999 (D.D.C. 1974).

70. *See, e.g.*, Walker Process Equipment Co. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965); Woods Exploration & Producing Co. v. Aluminum Co., 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *cf.* 18 U.S.C. §§ 1001, 1621, 1622 (1970).

71. United States v. Morgan Drive Away, 1974 Trade Cas. 95,997, 95,999 (D.D.C. 1974).

72. *See* Comment, *The Shifting Jurisdiction of the Antitrust Laws*, 33 Wash. & Lee L. Rev. 181

desire for uniform regulation[73] and need of expertise,[74] necessarily reflects a court's predispositions in any given case. The defendants in *Morgan Drive Away* moved for dismissal on the grounds that the antitrust case interfered with ICC regulation. The defendants requested, at minimum, a stay for an ICC determination of the facts.[75] The court found no conflict because the alleged conduct of defendants in violation of antitrust law was not "within the jurisdiction of the ICC to approve or immunize."[76] The court concluded that prior ICC adjudication would not have been of "material aid . . . in deciding whether and to what extent the Interstate Commerce Act forecloses this action or in resolving any corflicts between regulatory and anti-trust statutory policies."[77]

The Department of Justice disagrees with the general principle that primary jurisdiction automatically rests with an administrative agency when the regulatory statute covers the dominant facts at issue in the antitrust case. The Department construed from *Ricci v. Chicago Mercantile Exchange*,[78] a civil case, that referral "need not be made unless the sole or dominant issue presented by the antitrust case is within agency jurisdiction and a determination of the antitrust case depends upon or would be materially assisted by prior agency action."[79] More specifically, *Ricci* is interpreted as stating that when the only subject of the antitrust complaint is a violation of agency rules, referral is necessary where the violation determines "both the scope of immunity and the fact of antitrust liability."[80]

Apparently, the court approved of the Department's interpretation of *Ricci* since the case was cited heavily in the *Morgan Drive Away* opinion. The ability of the Department to convince the court may suggest a judicial attitude toward antitrust prosecution of this nature. At minimum, regulated industry should beware that for unapproved or unapprovable past conduct in a criminal case, there is little chance of successfully alleging interference with agency jurisdiction.[81]

(1976). *See also* L. JAFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 141 *et seq.* (abr. ed. 1965). von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 HARVARD L. REV. 929, 932 (1954).

73. *See* Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966).

74. *See* Far East Conference v. United States, 342 U.S. 570 (1952).

75. United States v. Morgan Drive Away, 1974 Trade Cas. 95,997, 95,999 (D.D.C. 1974).

76. *Id.*

77. *Id.*

78. 409 U.S. 289 (1973).

79. Brief for Plaintiffs at 9.

80. *Id.* at 79.

81. Carnation v. Pacific Westbound Conference, 383 U.S. 213 (1966); Marnell v. United Parcel Serv. of America, 260 F. Supp. 391 (N.D. Cal. 1966).

VII. Immunity under Parker v. Brown

In the interests of expeditious antitrust prosecution, the court denied defendant's request of referral to state agencies to determine whether their alleged intrastate rate agreement was protected under the doctrine of *Parker v. Brown*.[82] To avoid delay by making referral unnecessary, the court decided that evidence of conduct immunized by *Parker* could be excluded at trial.

Although the *Morgan Drive Away* court decided to avoid the issue, antitrust immunity under *Parker* is not always readily available. In the words of the *Morgan Drive Away* opinion, *Parker* conferred immunity upon "conduct which is directed, commanded or imposed by the state legislature acting as sovereign."[83] Under *Parker* "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."[84] A fine distinction was drawn by *Parker* between official state action taken by state officials and private action taken pursuant to a state statute. This distinction has been restressed in recent months by *Cantor v. Detroit Edison Co.*[85] On the facts, *Cantor* held that *Parker* does not immunize conduct which has been approved by a state and which must be continued while the state approval remains effective.

Delay tactics, however much potential for legitimacy exists, are not being tolerated in antitrust proceedings in Federal District Court of the District of Columbia. Tangential violations will be ignored in order to effectuate the policies against antitrust. Exclusion of evidence "is preferable to the delay that would accompany deferral to state agencies."[86]

VIII. The Nexus with Interstate Commerce

The Sherman Act proscribed "restraint of trade or commerce among the several States"[87] and monopolization or attempts to monopolize "any part of the trade or commerce among the several States."[88] Defendants contended that their alleged intrastate activity was not shown to have sufficient nexus with interstate commerce to satisfy the requirements of the Sherman Act.[89] The Department of Justice charged that the defendants' local conduct was "a method of furthering a conspiracy to control a national market which itself is comprised of businesses depending on

82. 317 U.S. 341 (1943).
83. United States v. Morgan Drive Away, 1974 Trade Cas. 95,997, 96,000 (D.D.C. 1974).
84. Parker v. Brown, 317 U.S. 341, 351 (1943).
85. 44 U.S.L.W. 5357 (U.S. July 6, 1976).
86. United States v. Morgan Drive Away, 1974 Trade Cas. 95,997, 96,000 (D.D.C. 1974).
87. 15 U.S.C. § 1 (1970).
88. 15 U.S.C. § 2 (1970).
89. United States v. Morgan Drive Away, 1974 Trade Cas. 95,997, 96,000 (D.D.C. 1974).

both interstate and intrastate operations."[90] The court dismissed this issue with no more than the conclusory statement that "when read as a whole the indictment sufficiently alleges an effect on interstate commerce."[91]

As precedent for the above statement dismissing the defendants' argument, the court relied on *Moore v. Meads Fine Bread Co.*,[92] which involved an interstate bakery's effectuation of local price cuts to destroy the business of a purely intrastate bakery. The Supreme Court held that "Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business, outlawing the price cutting employed by respondent."[93] The *Morgan Drive Away* court also mentioned *United States v. Employing Plasterers Ass'n*[94] which was concerned with the issue of whether an antitrust complaint stated a cause of action: when "a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified."[95] The final case cited, *Las Vegas Merchant Plumbers Ass'n v. United States*,[96] stands for the proposition, at least in the Department's brief, that the merit of the alleged effect on interstate commerce is for jury determination, not pretrial motion.

The failure of the court's opinion to recognize and thoroughly consider the defendant's contentions illustrates the inadequacy of canned defenses. Also suggested might be the fact that defendants' delay tactics again were dismissed summarily. At minimum, we know the nexus of anticompetitive activity with interstate commerce is not difficult to prove. *Employing Plasterers* interprets *Mandeville Island Farms Inc. v. American Crystal Sugar Co.*[97] as standing for the proposition that "[w]here interstate commerce ends and local commerce begins is not always easy to decide and is not decisive in Sherman Act cases."[98]

CONCLUSION

Scrutiny of anticompetitive conduct is becoming more acute and prosecution more prevalent. The *Morgan Drive Away* litigation evidences the ability of the Department of Justice to fulfill its constant mandate: "vigorous enforcement of the antitrust laws."[99]

90. Brief for Plaintiffs at 119.
91. United States v. Morgan Drive Away, 1974 Trade Cas. 95,997, 96,000 (D.D.C. 1974).
92. 348 U.S. 115 (1954), *rehearing denied*, 348 U.S. 932 (1955).
93. *Id.* at 120.
94. 347 U.S. 186 (1954).
95. United States v. Employing Plasterers Ass'n, 347 U.S. 186, 189 (1954).
96. 210 F.2d 732, 748 (9th Cir. 1954), *cert. denied*, 348 U.S. 817 (1954), *rehearing denied*, 348 U.S. 889 (1954).
97. 334 U.S. 219 (1948).
98. United States v. Employing Plasterers Ass'n, 347 U.S. 186, 189 (1954).
99. Address by Jonathan C. Rose, Deputy Assistant Attorney General, Antitrust Division, Association of Interstate Commerce Commission Practitioners, June 22, 1976.

Under both the current state of the law and foreseeable trends, the Department has an advantage in the prosecution of antitrust cases. The Federal District Court of the District of Columbia appears sympathetic to and receptive of the Antitrust Division's analysis of applicable legal concepts. The implied immunity of regulated business is virtually a baseless argument. Express immunity will be narrowly construed. Despite the *Noerr-Pennington* immunity case series a strong doctrine has developed against predatory activities which are directed at parties to an adjudication before courts and agencies. In fact, the use of coercion destroys express statutory immunity. As antitrust immunity afforded by regulatory agencies diminishes, carriers may become more susceptible to antitrust prosecution in criminal courts. The principle of *Parker v. Brown* also is being narrowly construed. The definition of interstate commerce continually is proved to be malleable to the court's sense of values.

The Department's propensity for success in the antitrust arena is illustrated further by its novel efforts for civil relief in *Morgan Drive Away*. The future use of the protest moratorium is dependent, of course, on the long run effectiveness and ease of administration it may prove to provide. What the relief in *Morgan Drive Away* truly shows is the attitude of the Department of Justice toward unprecedented circumstances and toward actuating more effective sanctions.

Regulated industry can remain complacent toward its anticompetitive conduct, or it can become aware of cases such as *Morgan Drive Away* and make conscious efforts toward compliance with the antitrust laws. Compliance may be elusive, however, due to the attitudinal fluctuation of both carriers and the government. Whether the regulatory agencies recognize their role in antitrust enforcement, it seems that the Department of Justice, Antitrust Division will be scrutinizing potential anticompetitive conduct.[100] And it is the Department of Justice which will be setting standards of conduct and applying the severe sanctions suggested in the *Morgan Drive Away* litigation. The only possible escape from criminal liability may be more effective use of agency antitrust review.[101]

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100. *See, e.g.*, Antitrust Premerger Notification Act, H.R. 8532, 94th Cong., 2nd Sess., at 69 *et seq.*, (Sept. 8, 1976) (submitted for Executive signature, Sept. 18, 1976) (premerger antitrust review).

101. *See* 42 U.S.C. 2135 (1970) (established a prelicensing antitrust review).