SHERMAN ACT "JURISDICTION" IN HOSPITAL STAFF EXCLUSION CASES*

INTRODUCTION

In the past several decades, access to hospitals has become an increasingly essential factor in the success of a physician's practice. High technology equipment has become a common requirement for sophisticated medical practice. Typically, only large institutions can bear the high cost of such equipment. At the same time, the potentially tremendous liability hospitals face for malpractice has unquestionably made them more circumspect not only in their hiring practices, but also in their policies regarding the grant of staff privileges. In this controversial setting, a recent doctrinal shift by Congress and the courts toward

* After this Comment went to press, the Third Circuit reversed the principal case along lines similar to those suggested in this Comment. Cardio-Medical Assocs. v. Crozer-Chester Medical Center, No. 82-1817 (3d Cir. Nov. 18, 1983), rev'd 552 F. Supp. 1170 (E.D. Pa. 1982).

1 For a historical overview of the "forces [which] have contributed to the development of a symbiotic relationship between the hospital and the physician, and to the rise of the hospital as the monolithic structure with which all health care providers must be affiliated in order to achieve legitimacy," see Note, Health Professionals' Access to Hospitals: A Retrospective and Prospective Analysis, 34 VAND. L. REV. 1161, 1161-66 (1981). See also Cray, Due Process Considerations in Hospital Staff Privilege Cases, 7 HASTINGS CONST. L.Q. 217, 261 (1979); Drexel, The Antitrust Implications of the Denial of Hospital Staff Privileges, 36 U. MIAMI L. REV. 207, 207 (1982).

2 Hospitals traditionally enjoyed a "charitable immunity" from tort liability. The immunity was seen as necessary to shelter charitable institutions performing vital social and economic services which otherwise would be the responsibility of the federal or state government. More than half of the states have abolished charitable immunity since 1942. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS 996 (4th ed. 1971).

3 Forces that have contributed to limiting physicians' access to hospital privileges include intraprofessional restraints imposed by state and local medical societies, state licensing procedures, and internal hospital procedures for granting or denying hospital privileges. See Note, supra note 1, at 1170-78; see also Palmer, Restrictions on Competition by Government and Association Regulation in ANTITRUST IN THE HEALTH CARE FIELD 63-64 (1979) (physician's malpractice history is a legitimate basis on which hospital may exclude her).

4 In the 1979 amendments to the Health Planning and Resources Development Act, Congress specifically added that in appropriate areas of health plans, agencies should "give priority . . . to actions which would strengthen the effect of competition." 42 U.S.C. § 300(k-2)(b)(3) (Supp. III 1979). In addition, a new goal was added to the Act, that of "preserving and improving . . . competition in the health service area." Id. § 300(l-2)(a)(5). Finally, the Senate Labor and Human Resources Committee noted that "special consideration [is to] be given throughout the planning process to the importance of maintaining and improving competition in the health industry." S. REP. NO. 96, 96th Cong., 1st Sess. 3, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 1307, 1308.

5 For a description of the various health industry practices recently made vulnera-
competition in all phases of the health care industry has helped spawn a "burgeoning number of cases" brought by private physicians under the antitrust laws challenging their exclusion from hospital staff privileges. Those suits are generally brought under section one of the Sherman Antitrust Act and allege that hospitals, or doctors comprising the hospital medical staff or board of directors, have combined and conspired to boycott competing medical practitioners, monopolize local markets or foreclose competition in specialized medical services, and control access to facilities essential to a medical practice. The hospitals, in turn, defend the denial of staff privileges as a legitimate form of self-regulation.

Interesting ideological conflicts have arisen in the hospital staff exclusion cases. In particular, when an excluded physician is affiliated with a competing institution such as a low-cost abortion clinic, or is a representative of an innovative or different professional group such as osteopaths, podiatrists, chiropractors, or the new health professions, see antitrust scrutiny, see Heitler, Antitrust, Restraint of Trade, and Unfair Business Practices: Impact on Physicians, 3 J. LEGAL MED. 443 (1982).

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Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.


See, e.g., Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530 (5th Cir. 1978) (abortion center brought suit charging area physicians with conspiracy to monopolize and restrain trade in provision of abortions and related services), cert. denied, 444 U.S. 924 (1979).

See, e.g., Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 170 A.2d 791 (1961); cf. Don v. Okmulgee Memorial Hosp., 443 F.2d 234 (10th Cir. 1971) (osteopathic physician brought due process/equal protection suit against a public hospital for denying his staff membership application).

See generally Hollowell, The Growing Legal Contest—Hospital Privileges for Podiatrists, 23 ST. LOUIS U.L.J. 491 (1979) (an overview of regulations on the practice of podiatry, followed by analysis of cases in which podiatrists have challenged hospitals' exclusionary policies).

Several suits by chiropractors have alleged that radiologists have conspired to boycott them by refusing consultations. See, e.g., In re Consumers Union of United States, Inc. v. American Optometric Ass'n, 359 U.S. 1 (1959).


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HOSPITAL STAFF EXCLUSION

... tionals, exclusion may represent an attempt by entrenched medical interests to ward off competitive pressures from lower cost alternatives. Conflicts over the application of substantive antitrust doctrines have arisen in these cases and the prospects of success for plaintiffs has been markedly improved by the erosion of a number of defenses for hospitals. Ironically, at the same time that the judicial and legislative climate has begun to favor application of the federal antitrust laws in these cases, a number of federal courts have begun to apply overly rigorous interstate commerce standards to dismiss these suits summarily on what they call "jurisdictional" grounds.

Each hospital staff exclusion case presents a threshold question whether the challenged activities fall within the scope of the Sherman Act. A plaintiff must show that interstate commerce is implicated in some way. The requirement stems from the language of section one of the Sherman Act which prohibits only "restraints of trade or commerce among the several states," and reflects Congress's recognition of the limits of its power. In light of the interstate commerce requirement, courts have understandably been skeptical of antitrust claims involving a single physician who has been denied staff privileges at a local hospi-


The new health professionals are an example of lower cost alternative medical practitioners. They are generally trained as nurses with some further education and become nurse practitioners or physician's assistants. Nurse-midwives, nurses who can deliver babies at birthing centers or at home at a substantially lower cost than that of hospital delivery, are an example of the new health professionals. See Note, supra note 1, at 1195-98.

See generally Note, supra note 1, at 1185-98. The Supreme Court of the United States has recently agreed to hear a case involving a physician excluded from staff privileges at a hospital due to the hospital's exclusive dealing arrangements with another professional medical corporation. The question is whether the exclusive dealing arrangement constitutes a per se illegal tying arrangement or whether it should be analyzed under the rule of reason. See infra note 92 and accompanying text. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 686 F.2d 286 (5th Cir. 1982), cert. granted, 103 S. Ct. 1271 (1983) (No. 82-1031).


See infra note 28.

See infra notes 29-47 and accompanying text.

See infra notes 48-49 and accompanying text.


See infra notes 50-56 and accompanying text.
tal. At first glance it might seem incredible—and to some courts it remains so—that such claims could constitute restraints of "trade among the several states." But examined in light of the Supreme Court’s expansive and expanding interpretations of what is "in" or "affects" interstate commerce, the issues do not seem subject to summary resolution.

This Comment focuses on the application of the interstate commerce requirement to the recent influx of cases challenging hospital staff exclusions. The Comment argues that in light of Supreme Court precedent and congressional policy, lower courts have frequently applied overly restrictive standards in those cases. The Comment begins with a brief summary of the scope and purpose of section one of the Sherman Act, under which hospital staff exclusion cases are most frequently brought. It then demonstrates the confusion, both linguistic and substantive, in many of the court decisions in this area. The general development of the interstate commerce requirement under the Sherman Act will then be analyzed with an emphasis on the expansive trend illustrated by a recent Supreme Court decision. Once the liberal interpretations of the interstate commerce requirement have been established, the Comment focuses on the intransigence of some lower courts which refuse to give effect to those trends and continue to dismiss hospital staff exclusion cases on what they call "jurisdictional" grounds. The Comment then focuses on a recent district court decision, Cardio-Medical Associates, Inc. v. Crozer-Chester Medical Center; one of the very few examples of summary dismissal in which the court sets out its analysis in detail. Finally, the Comment suggests an alternative standard which more fully effectuates the policies and purposes of the antitrust laws in the health care field.

The Comment does not address the underlying merits of the antitrust claims in hospital staff exclusion cases; each case turns on its own facts. The Comment shows, however, that those claims must not be dismissed in a summary manner according to anachronistic views as to the antitrust status of a hospital or the scope of the Sherman Act.

21 Even one of the most vocal advocates of competition in the health care field, in a statement before a Senate subcommittee, expressed doubt that in an isolated case of one doctor suing a single local hospital, Sherman Act jurisdiction would be established. Competition in the Health Services Market: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., 1046-47 (1974) (statement of Clark C. Havighurst, Professor of Law, Duke University).

22 See infra notes 57-73 and accompanying text.

I. ANTITRUST ANALYSIS: THRESHOLD CONFUSION

Section one of the Sherman Act is the antitrust prohibition most frequently invoked in the hospital exclusion cases. The scope of the federal antitrust laws, including section one, is limited by Congress's general legislative power. Section one's language limiting its prohibition on restraints of trade to those occurring "among the several States, or with foreign nations" reflects the limitation on federal legislative power and at the same time prescribes the scope of the Sherman Act. The interpretations of the jurisdictional phrase "trade and-commerce among the several States" is analyzed below.

The erosion of certain historic exemptions from the Sherman Act for defendants in the health care industry has caused such defendants

24 "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." 15 U.S.C. § 1 (1982).
25 See Heitler, supra note 5, at 444.
26 See infra notes 50-56 and accompanying text.
27 See infra notes 57-73 and accompanying text.
28 Traditionally, hospitals and doctors have asserted an array of well-established defenses to claim immunity from liability under the federal antitrust laws. For example, until recently hospital or medical institution defendants argued that because the Sherman Act speaks of trade or commerce, which might not include professional services, Congress never intended them to be subject to the antitrust laws. The Supreme Court has largely rejected that argument. It has not deferred to contentions that unbridled price competition might undermine the quality of professional services or lead to deceptive advertising and pricing practices, and has accorded little weight to industry "self-regulation"—which itself has frequently triggered scrutiny under the antitrust laws. See, e.g., McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232 (1980); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Bodlicker v. Arizona State Dental Ass'n, 549 F.2d 626 (9th Cir. 1977), cert. denied, 434 U.S. 825 (1977); Elizabeth Hosp., Inc. v. Richardson, 269 F.2d 167 (8th Cir. 1959); Rigall v. Washington County Medical Soc'y, 249 F.2d 266 (8th Cir. 1957); see also Grad, The Antitrust Laws and Professional Discipline in Medicine, 1978 DUKE L.J. 443, 486 (relationship between regulators and regulated provides ample opportunities for abusive, anticompetitive practices).

Another antitrust exemption frequently argued by health care industry antitrust defendants is that established in Parker v. Brown, 317 U.S. 341, 350 (1943), in which the Supreme Court concluded that the Sherman Act is inapplicable to conduct that "derive[s] its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command."

The state action exemption has often been an effective defense for health care providers in antitrust actions since many hospital programs and practices are regulated, authorized, or overseen by the state. In addition, large capital expenditures by hospitals must be approved by state certificate-of-need programs. See 42 U.S.C. § 1320a-1 (1976 & Supp. III 1979) (denying Medicare and Medicaid reimbursements when capital expenditures not approved).

Since Parker, however, the Court has drastically limited the circumstances in which the state action immunity may be invoked. First, "[s]tate authorization, approval, encouragement, or participation in restrictive private conduct" gives rise to no immunity, Cantor v. Detroit Edison Co., 428 U.S. 579, 592-93 (1976) (footnote omitted); the activity must in some way have been "compelled by direction of the State acting as a
to seek refuge in strict interpretations of the interstate commerce requirement. In view of the liberal development of the interstate commerce requirements in other contexts, however, continued reliance by defendants and lower federal courts on subject matter jurisdiction as a basis for summary dismissal of hospital staff exclusion cases is misplaced.

A. "Jurisdiction"

There has been a great deal of confusion in Sherman Act cases in the courts' use of the term "jurisdiction." That linguistic difficulty has led to confusion in analysis. Often when the courts have discussed "jurisdiction" they have actually been discussing the "scope" of the Sherman Act.

When a court is presented with a dispute allegedly arising under the Sherman Act, it must initially decide if it has power to hear the dispute. Federal court jurisdiction is limited by the provisions of article III of the Constitution. The federal court can hear the dispute

sovereign," Goldfarb, 421 U.S. at 791. The Court has further limited the scope of the immunity recently by holding that a mere legislative delegation of power to local political subdivisions does not constitute an adequate state mandate for anticompetitive activities, in the absence of a "clearly articulated and affirmatively expressed state policy." Community Communications Co. v. City of Boulder, 455 U.S. 40, 52 (1982). Under those standards a defendant's invocation of the state action immunity is unlikely to meet with success in any suit in which the defendant is a nonpublic entity, like a private hospital or medical center. See, e.g., City of Fairfax v. Fairfax Hosp. Ass'n, 562 F.2d 280, 284 (4th Cir. 1977) (defendants must show "either that the state coercively commanded the private conduct, or that the state in the strictest sense of the term 'regulated' the private conduct"), vacated and remanded for reconsideration on other grounds, 435 U.S. 992 (1978).

Finally, another antitrust exemption was thought to stem from the federal government's extensive regulation of the health care industry. For example, in the National Health Planning and Resources Development Act of 1974, 42 U.S.C. § 300k-300l (1976 & Supp. III 1979), Congress established a broad statutory scheme to prevent maldistribution of health facilities and set up federal, state, and local bodies to coordinate activities in the area of health planning and policy. The comprehensive scope of the Act understandably provoked claims of "implied exemption" from the antitrust laws of activities undertaken by regional planning bodies pursuant to the Act. In a unanimous decision, however, the Supreme Court decisively rejected the claimed exemption explaining that "[e]ven when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry," National Gerimedical Hosp. & Gerontology Center v. Blue Cross of Kansas City, 452 U.S. 378, 389 (1981). A defendant in a health care case will have a difficult time, under such precedent, persuading a court that it fits into an implied exemption.

28 See D. Currie, FEDERAL COURTS 8-19 (3d ed. 1982).
30 The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of
only if it is a case or controversy and there is diversity of citizenship or the case is one "arising under" the Constitution or laws of the United States.\textsuperscript{31}

Undoubtedly, hospital staff exclusion antitrust cases are "cases or controversies" and "arise" under a law of the United States and so fall within the constitutional power of the federal judiciary. Consistent with this analysis, Congress has passed a statute that explicitly grants federal district courts original jurisdiction of "any civil action or proceeding arising under" the antitrust laws.\textsuperscript{32} The hospital staff exclusion cases clearly arise under the antitrust laws—the plaintiffs allege they were injured by violations of those laws and base their suits on the express right of action Congress gave them.\textsuperscript{33} Thus there is no question that a federal court has power to hear those cases: the court has jurisdiction.

The courts' preoccupation with "jurisdiction"\textsuperscript{34} involves other issues centering on the resolution of four independent questions: (1) Does Congress have the constitutional power to bring the commercial activity involved in the dispute within the scope of the Sherman Act? (2) Did Congress in fact do so? (3) Does the allegedly illegal conduct in fact violate the Sherman Act? and (4) Can the last question be answered before trial?

None of those questions is jurisdictional, at least not in the sense of whether the court has power to hear the case. For example, a court could decide that, in answer to the first question, Congress had no power to regulate commercial activity under the Sherman Act—that the Act is unconstitutional. As discussed above,\textsuperscript{35} the court clearly has jurisdiction to make that determination.

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\item \textit{U.S. Const. art. III, \S 2.}\n\item \textit{Id.} The jurisdiction of the federal courts is further limited by 28 U.S.C. \S\S 1330-1364 (1976). Those further limitations are not relevant here, and for ease of exposition this comment will discuss only the constitutional limitations.
\item "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies . . . ." 28 U.S.C. \S 1337(a) (1976).
\item "Any person who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained . . . ." 15 U.S.C. \S 15 (1982).
\end{enumerate}
\end{quote}
The courts use the term "jurisdiction" in another sense—one which should not necessarily be termed wrong (since a great many courts seem to do it) but which may fairly be characterized as misleading. Typical is the Supreme Court's use of the term in *McLain v. Real Estate Board of New Orleans, Inc.*,\(^{36}\) in which the court repeatedly referred to notions of "Sherman Act jurisdiction,"\(^{37}\) "the jurisdictional requirement of the Sherman Act,"\(^{38}\) and "the jurisdictional element of a Sherman Act violation."\(^{39}\) The term "jurisdiction" seems to be used in relation to the issue whether the Sherman Act "covers" the commercial activity involved. Another way of phrasing that issue is to ask whether the parties' activity lies within "the scope" of the Sherman Act. An activity lies within the scope of the Act if Congress intended the proscriptions of the Act to apply to that activity. If an activity is within the scope of the Act, a court should apply antitrust analysis to determine if the defendant's specific conduct violates the Sherman Act.

When the courts have discussed "jurisdiction," they have, in fact, been talking about the scope of the Sherman Act.

That is not a trivial distinction. Some courts, incorrectly believing they have no jurisdiction, have dismissed antitrust cases under Federal Rule of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction. For example, the Fifth Circuit in *McLain* affirmed the district court's dismissal of the suit, but said that dismissal should be under Rule 12(b)(1), not 12(b)(6) as the lower court had held.\(^{40}\) After noting that the defendants "assert[ed] that the challenged brokerage activities were wholly intrastate in nature and thus fell beyond the reach of federal antitrust prohibitions,"\(^{41}\) the Fifth Circuit went on to say, "[o]ur starting point is the recognition that jurisdiction under the Sherman Act extends to the furthest reaches of congressional power to regulate commerce."\(^{42}\) That, of course, is wrong. The court's power has nothing to do with Congress's.\(^{43}\) Acting on that misperception, the Fifth Circuit said, "we hold that the proper disposition of this action requires a dismissal for lack of jurisdiction" under 12(b)(1).\(^{44}\)

The court cited *Mortensen v. First Federal Savings & Loan Asso-

\(^{37}\) Id. at 234, 245.
\(^{38}\) Id. at 242.
\(^{39}\) Id.
\(^{40}\) 583 F.2d 1315, 1324 (5th Cir. 1978), rev'd, 444 U.S. 232 (1980).
\(^{41}\) Id. at 1318.
\(^{42}\) Id.
\(^{43}\) See supra note and accompanying text.
\(^{44}\) 583 F.2d at 1324.
for the differences between dismissing an antitrust claim under 12(b)(1) and 12(b)(6):

The differences... are vital... especially when the claim subject to dismissal arises under the Sherman Act... Because at issue in a factual 12(b)(1) motion is the trial court’s jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case... [N]o presumptive truthfulness attaches to plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Thus the misuse of the term “jurisdiction” may be quite significant. The use of the wrong word results in imposing an extra burden of proof upon antitrust plaintiffs and defeats the purposefully liberal rules of pleading complaints in federal court.

B. Scope of the Act v. Violation of the Act

Confusion exists even aside from the issue of “jurisdiction.” Courts have, in many instances, mixed together two different analyses designed for two different purposes.

Courts must recognize the distinction between that which is within the scope of the Act and that which violates the Act. An activity may be within the scope of the Act and yet not violate the Act. Similarly it may be said that an activity would violate the Act if it were within the Act’s scope. For instance, it is well known that the Sherman Act does not apply to unions. It is equally clear that if unions were within its scope, at least some of their activities would violate the Act. Similarly, it is conceivable that an egregious restraint of trade only affects intrastate commerce, and so is not within the scope of the Act. Alternatively, fixing the hours when trading on an exchange may take place is within

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45 549 F.2d 884 (3d Cir. 1977).
46 Id. at 890-91.
47 It is significant for another reason, too. A court with no subject matter jurisdiction may not issue a judgment with res judicata effect, whereas a 12(b)(6) dismissal has such effect. See R. FIELD, B. KAPLAN & K. CLERMONT, CIVIL PROCEDURE 656-59 (4th ed. 1978).
the scope of the Act, but is not a violation.\footnote{\textit{Board of Trade v. United States}, 246 U.S. 231 (1918).}

At this point we should again be clear that whether an activity is within the scope of the Act, and whether it violates the Act, has nothing to do with the jurisdiction of courts. The scope of a statute is irrelevant to the power of a court. It is a court, after all, that must decide those questions. The issue is not the power of a court; it is, successively: (1) the power of Congress to make the Act apply to various activities; (2) what in fact Congress made the Act apply to; (3) whether the defendant's conduct violates the Act, assuming it is within the scope of the Act; and (4) can (3) be answered without a trial? This comment will now address those questions.

II. **The Sherman Act**

A. **Congressional Power**

The power of Congress to enact the antitrust laws comes from article 1, section 8 of the Constitution. There Congress is given power to "regulate Commerce . . . among the several States."\footnote{\textit{U.S. Const.}, art. I, § 8.} Congress's power under the commerce clause is very broad.

Under the general commerce clause standard set forth in cases such as \textit{Wickard v. Filburn},\footnote{\textit{317 U.S.} 111 (1942).} \textit{Perez v. United States}\footnote{\textit{402 U.S.} 146 (1971) (loan-sharking as a class of activity was found to affect interstate commerce so substantially as to put it within Congress's power to make individual, purely intrastate loan transactions illegal).} and \textit{Katzenbach v. McLung},\footnote{\textit{379 U.S.} 294 (1964) (relying on the cumulative effect of all restaurant sales on interstate commerce).} the power of the federal government to regulate conduct under its commerce power extends to very remote and local activities, which, in the aggregate, have some effect on interstate commerce. The courts have repeatedly relied on the so-called "cumulative effect" principle of those decisions to sustain the constitutionality of regulatory legislation.\footnote{See \textit{L. Tribe, American Constitutional Law} § 5-5, at 236-37 (1978).}

In \textit{Wickard}, for example, the Supreme Court held that Congress could regulate a farmer's production of wheat for personal consumption because the aggregate effect of many farmers producing for their own consumption was felt in the interstate market for wheat.\footnote{\textit{317 U.S.} at 128.} "That appellant's own contribution . . . may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his
contribution, taken together with that of many others similarly situated, is far from trivial.\footnote{56}

B. Scope of the Act

The development and expansion of the concept of interstate commerce as interpreted in the context of the Sherman Act has been frequently traced and is well-documented.\footnote{57} The Supreme Court's initial look at the interstate commerce requirement of the Sherman Act came in 1895 in United States v. E.C. Knight Co.\footnote{58} In that case the Court rejected a claim under the Sherman Act against the sugar monopoly, finding the refining of sugar to be a wholly local activity despite the undenied allegations that the monopoly received all its raw materials from outside the state and that the final sugar product was shipped to every state in the union.

The restrictive E.C. Knight holding, which crippled antitrust enforcement during an extremely active decade of trust formation,\footnote{59} was eventually confined to its facts and repudiated. The Supreme Court later sustained claims when the alleged conspiracy directly affected distribution as well as manufacture\footnote{60} or when the alleged price fixing agreement, though limited to operations within one state, was directed at the interstate flow of the product.\footnote{61} The Court formulated the "flow of commerce" test,\footnote{62} under which the Sherman Act applied if the illegal activity was directly connected to either side of a transaction in interstate commerce. In 1948 the Supreme Court substantially expanded the scope of Sherman Act jurisdiction when it declared that a challenged activity need not occur "in" commerce. Under the so-called "effect on

\footnotesize{\begin{itemize}
\item \footnote{56} Id.
\item \footnote{58} 156 U.S. 1 (1895).
\item \footnote{60} Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 240-41 (1899).
\item \footnote{61} Swift & Co. v. United States, 196 U.S. 375, 398-400 (1905).
\item \footnote{62} Id. at 399.
\end{itemize}}
commerce test" laid down in *Mandeville Island Farms v. American Crystal Sugar Co.*, the "exact location of [the line between interstate and intrastate commerce makes] no difference, if the forbidden effects flow[] across it to the injury of interstate commerce or to the hindrance or defeat of Congressional policy regarding it." Thus, the interstate commerce requirement may now be fulfilled either by alleging (1) that the violations occurred "in" interstate commerce, or (2) that they occurred in intrastate commerce, but "affect" interstate commerce in some way.

In the past decade the Supreme Court has continued to refine the interstate commerce requirement of the Sherman Act to expand the Act's coverage. The most recent expansion occurred in *McLain v. Real Estate Board of New Orleans, Inc.* McLain involved a claim by real estate purchasers and sellers that real estate brokers had unlawfully conspired to fix brokerage commission rates. Until *McLain*, the Court's Sherman Act "affecting commerce" decisions had only considered whether defendant's alleged antitrust violations substantially affected interstate commerce. Persuasive language in *McLain*, however, points toward a standard requiring only that the defendant's general business activities, not the unlawful components of that local activity, substantially affect interstate commerce:

*To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by re-*

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64 Id. at 232.
spondents’ brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents’ activity that are alleged to be unlawful.\textsuperscript{68}

A number of courts have refused to interpret the \textit{McLain} holding in such an expansive way, relying on other, more conventional, language in the opinion,\textsuperscript{69} and explaining that passage in a variety of ways.\textsuperscript{70} The Tenth Circuit in \textit{Crane v. Intermountain Health Care, Inc.},\textsuperscript{71} for example, interpreted the \textit{McLain} passage to mean that a plaintiff need not make the particularized showing of an actual economic effect on interstate commerce, “but must make ‘an allegation showing a logical connection between the unlawful conduct and interstate commerce.’”\textsuperscript{72}

Other courts, not willing to accept the change \textit{McLain} appears to adopt, have followed the Tenth Circuit’s example. One court rationalized the narrow approach by reasoning that under the broader approach a local conspiracy would be subject to federal antitrust laws on the “fortuitous” circumstance of whether an “interstate conglomerate” owns the defendant firm.\textsuperscript{73}

The expansive interpretation of \textit{McLain} is more consistent with a

\textsuperscript{68} 444 U.S. at 242-43.

\textsuperscript{69} For example, in Cardio-Medical Assocs. v. Crozer-Chester Medical Center, 536 F. Supp. 1065, \textit{after amended complaint}, 552 F. Supp. 1170 (E.D. Pa. 1982), the court cited the following passage from \textit{McLain}: “To establish federal jurisdiction in this case, there remains only the requirement that respondents’ activities which allegedly have been infected by a price fixing conspiracy be shown ‘as a matter of practical economics’ to have a not insubstantial effect on the interstate commerce involved.” \textit{McLain}, 444 U.S. at 246, quoted in Cardio-Medical, 536 F. Supp. at 1075 (emphasis supplied by district court).


\textsuperscript{71} 637 F.2d 715 (10th Cir. 1981) (en banc).

\textsuperscript{72} \textit{Id. at} 723 (citation omitted). \textit{Accord} Malini v. Singleton & Assocs., 516 F. Supp. 440, 442 (S.D. Tex. 1981).

general interpretation of the power accorded Congress by the commerce clause of the Constitution, upon which the Sherman Act rests. The Supreme Court has repeatedly emphasized that the reach of the Sherman Act is coextensive with the commerce power. Since "[t]he reach of the Sherman Act is 'as inclusive as the constitutional limits of Congress' power to regulate commerce,' "76 if Congress has power pursuant to the commerce clause to regulate or prohibit the challenged conduct, then the Sherman Act covers such conduct. In the context of the hospital staff privileges cases, that principle means that the Sherman Act should apply if the aggregation of all hospital staff activities substantially affects interstate commerce.

Although the Supreme Court has frequently stated the principle that the Sherman Act and commerce clause power are co-extensive, it oddly has never relied on the "cumulative effect" of Sherman Act violations to sustain interstate commerce jurisdiction. Thus, although a broad reading of McLain expands the scope of the Sherman Act further than any previous case in the antitrust field, the Court has not yet been presented with issues involving the Sherman Act at the outer reaches of the commerce power.

Regardless of the way courts interpret McLain, it is clear that the scope of the Sherman Act has expanded consistently since the Act's inception. The trend toward a more expansive reading of the Sherman Act suggests that only rarely should a health care institution's contacts with interstate commerce prove insignificant enough to place the challenged activities beyond the scope of the Act.


77 Commentators have noted Congress's use of broad commerce clause power in many areas of perceived national need, such as civil rights, that are not commercial. See Note, Portrait, supra note 57, at 323-24; Note, Recent Development, supra note 57, at 1216-17. Those noncommercial statutes have pushed the limits of constitutionally permissible legislation to include very tenuous interstate impacts. Such expansion, however, has not been limited to social welfare legislation. Federal commercial laws such as the Securities and Exchange Act of 1934 have been upheld through interpreting federal power broadly and inclusively. See Note, Portrait, supra note 57, at 325; Note, Recent Development, supra note 57, at 1216.
III. LOWER COURTS' CONTINUED APPLICATION OF STRICT INTERSTATE COMMERCE REQUIREMENTS

Despite the clear trends described above, many plaintiffs in hospital staff exclusion cases still are not given the opportunity to proceed to the merits of their cases because of summary dismissals on "jurisdictional" grounds.\(^7\) Those "jurisdictional" hurdles frustrate the expressed liberal policy of the Supreme Court in applying the interstate commerce requirement,\(^7\) defeat the remedial purpose of the antitrust laws in the health care field, and retard the policy of opening that field to the free play of market forces and the beneficial effects of free and open competition.\(^8\)

Many of the recent district court decisions finding no "jurisdictional" represent a grudging accommodation of the Supreme Court's recent Sherman Act precedents, discussed above.\(^8\) An excellent example is *Cardio-Medical Associates v. Crozer-Chester Medical Center*,\(^8\) in which several individual physicians, practicing cardiology under the name of Cardiology Associates of Delaware County, were not allowed to perform certain specialized cardiology procedures at a nearby hospital. After having found in "an analysis of the case law . . . no comprehensive discussion of the theories underlying any of the standards to be applied in deciding claims of this type,"\(^8\) the court discussed the "jurisdictional" issue at considerable length in two separate opinions. In the first opinion issued in the case, the court noted the "large financial and administrative burdens imposed on hospital defendants and the courts" stemming from these cases.\(^8\) The court intimated its "doubts that the

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\(^8\) See supra notes 75-77 and accompanying text.

\(^9\) See supra note 4 and accompanying text.

\(^10\) See supra notes 65-68 and accompanying text.


\(^12\) 552 F. Supp. at 1175.

\(^13\) 536 F. Supp. at 1069.
ordinary denial of staff privileges claim states a federal cause of action in any case."

Plaintiffs' interstate commerce allegations in *Cardio-Medical* included treatment of out-of-state patients, interstate flow of revenues to plaintiffs, use of multistate medical equipment and supplies by plaintiffs, use of out-of-state automobiles, gasoline, and other equipment by plaintiffs, prescription by plaintiffs of drugs and medicine manufactured in other states, dissuasion of out-of-state physicians from joining plaintiffs' staff, inflation of fees for cardiology services, diminished interstate investments in plaintiffs' pension portfolio, curtailment of plaintiffs' practice in connection with a clinic in another state, and a decrease in out-of-state continuing education. Although the reasoning and analysis of *Cardio-Medical* is the most thorough of the group of restrictive lower court decisions, its interpretation of the "jurisdictional" requirement seems at odds with Supreme Court precedent. Since *Cardio-Medical* best illustrates the approach adopted by many district courts, this Comment will examine its analysis of the scope of the Sherman Act.

A. Cardio-Medical Associates v. Crozer-Chester Medical Center

*Cardio-Medical* lists the threshold requirements for a suit based on violations of the Sherman Act:

- plaintiffs' amended complaint must contain factual allegations that, if proved, would sustain each of three independent underlying findings: (i) the presence of interstate commerce; (ii) the existence of a substantial and adverse effect on inter-

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85 Id. An interesting issue is presented by the Supreme Court's recent grant of certiorari in a denial of hospital staff privileges case. See *Hyde v. Jefferson Parish Hosp. Dist. No. 2*, 686 F.2d 286 (5th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3649 (U.S. Mar. 8, 1983) (No. 82-1031). In that case the district court did not dismiss the claims, stating:

> [T]he evidence shows that in the operation of its anesthesia department the defendants are involved in activities which have a not insubstantial effect on interstate commerce. These include buying anesthesia medicines and other supplies from out of state, the receipt by patients of federal medicare and medicaid benefits to pay for anesthesia services and the treatment of out of state patients who require anesthesia services.

513 F. Supp. 532, 540 (E.D. La. 1981). The Fifth Circuit apparently agreed, for it dealt only with the merits of the case, 686 F.2d at 270-72, and the issue certified by the Supreme Court is one of substantive antitrust law. Therefore it appears that the Supreme Court, if it decides the *Hyde* case on the merits, will tacitly disagree with the suggestion in *Cardio-Medical* that no individual denial of staff privilege states a federal cause of action.

state commerce; and (iii) the requisite nexus between the challenged activities of defendants and the effect on the relevant channel of interstate commerce.\textsuperscript{87}

Moreover, the \textit{Cardio-Medical} court held, "the identified aspect of interstate commerce must relate to the activities of plaintiffs, and not defendants."\textsuperscript{88} Those requirements reflect much of the general confusion in the lower courts surrounding the "effects" test.\textsuperscript{89}

\section{1. Substantial and Adverse Effect}

\textit{Cardio-Medical} requires that plaintiffs show a "substantial and adverse" effect on their interstate commerce activities. That requirement confuses the question whether the Sherman Act is applicable (whether the challenged activities are within the scope of the Act) with the question whether the defendants violated the Act.

The requirement originated in the context of the merits of a Sherman Act claim. The Supreme Court said "the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. \textit{If so, the restraint must fall.}"\textsuperscript{90} Clearly, the court was talking about the merits of the claim, not whether the Act applied.\textsuperscript{91} That makes sense, since the \textit{scope} of the Sherman Act extends to all activities in interstate commerce, not just those with a substantial and adverse effect on interstate commerce. It is only those activities that violate the Act that must have a substantial and adverse effect on interstate commerce. "Adverseness" is no more than a gloss on the statutory requirement that the challenged conduct produce a "restraint" of trade or commerce. The "substantiality" requirement only reflects the concept that de minimis restraints of trade, under the Rule of Reason,\textsuperscript{92} do not violate the Act. A strict adherence to the principle that the Sherman Act is coextensive with congressional power under the commerce

\textsuperscript{87} \textit{Id.} at 1177 (emphasis in original).
\textsuperscript{88} \textit{Id.}
\textsuperscript{89} \textit{Cardio-Medical}'s discussion of the sufficiency of each interstate commerce allegation highlighted the unsettled nature of the law when, after rejecting many allegations, it listed at least equal numbers of cases which had held to the contrary. \textit{See} 552 F. Supp. at 1188, 1191, 1193.
\textsuperscript{90} \textit{Mandeville Island Farms, Inc. v. American Crystal Sugar Co.}, 334 U.S. 219, 234 (1948) (emphasis added).
\textsuperscript{91} The Court also seems to confuse the scope of the Act with standing requirements that plaintiffs show injury in fact. \textit{See} Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970); \textit{infra} notes 100-02 and accompanying text.
\textsuperscript{92} \textit{See} L. SCHWARTZ \\& J. FLYNN, \textit{supra} note 48, at 13-14.
clause requires the elimination of any requirement of adverseness or substantiality before application of antitrust analysis under the Act.

By confusing the scope of the Act with the substantive terms of the Act, the Cardio-Medical court denied plaintiffs the opportunity to develop their claims at trial.

2. Effect on Plaintiff's Interstate Commerce Activities

The district court in Cardio-Medical concluded that plaintiffs must demonstrate an effect on their own interstate commerce activities.

The Cardio-Medical court is not alone in imposing that requirement, but more often "the case law discloses a virtual lack of discussion of this issue." That requirement cannot be squared with Supreme Court precedent or with the broader purposes of the Sherman Act. The Supreme Court has never held that an effect on plaintiff's interstate commerce must be shown to establish "jurisdiction." The common expression is that a "not insubstantial effect on interstate commerce" must be alleged, without identifying what particular aspect of interstate commerce must be affected.

No interpretation of the Sherman Act that requires that a particular part of interstate commerce must be affected can be consistent with the general purpose of the antitrust laws or with the assertion that Congress intended to use all of its power under the commerce clause in enacting them. The antitrust laws are essentially intended to preserve vigorous competition and are based on the conviction that the free operation of competitive markets will result in the optimal allocation of re-

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93 See supra note 75 and accompanying text.


95 552 F. Supp. at 1177.


97 Cardio-Medical, 536 F. Supp. at 1076.

sources and the highest quality products and services at the lowest prices. Section one’s prohibition against concerted restraints on trade or commerce represents a prohibition of any attempt to impair competition. The “among the several states” language merely sets the limits of Congress’s power to uphold the competitive model that lies at the core of national economic policy. Thus, any activity that impairs the competitive economic system endorsed by Congress falls within the Sherman Act so long as an effect on any channel of interstate commerce can be identified. Whether the defendant’s or plaintiff’s relationship to interstate commerce feels the effect of the challenged activity should be irrelevant, as Congress intended to protect all interstate commerce from harmful effects.

A “jurisdictional” standard which requires an effect on the interstate commerce activities of the plaintiff seems more like the standing or injury requirement which any private antitrust plaintiff must establish under section 4 of the Clayton Act. A plaintiff who cannot show that he or she has been “injured in his [or her] business or property” by an antitrust violation may not maintain an action. It seems inappropriate, however, to transplant notions of standing into an analysis of the scope of the Act when presumably a plaintiff must prove antitrust injury, or threat of injury, and causation at the time of trial. Moreover, even at trial it is not required that the injury be in the “interstate commerce aspect” of the plaintiff’s business.

All that the Supreme Court has required is an effect on “interstate commerce.” To require a showing relating to plaintiff’s interstate commerce is to create extra obstacles for potential antitrust plaintiffs that find no support in Supreme Court precedent and defeat the remedial purpose of the antitrust laws in private civil cases. Furthermore, if determinations as to the scope of the Sherman Act depend on proof of effect on plaintiff’s interstate commerce, what could that requirement possibly mean when the plaintiff is the government in a civil case? Obviously, any standard for determining whether the Sherman Act is applicable must make sense in relation to all potential plaintiffs.

3. Illegal Activity Must Effect Interstate Commerce

The court in *Cardio-Medical* also adopted the more restrictive of the two interpretations of *McLain v. Real Estate Board of New Or-

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99 See Gough v. Rossmoor Corp., 487 F.2d 373, 376 (9th Cir. 1973).
101 Id.
leans, Inc.\textsuperscript{103}; the plaintiff must allege that the required effect on interstate commerce flows not simply from defendant's general business activities, but from that portion of the defendant's conduct that plaintiff asserts is illegal under the antitrust laws. That interpretation, although it has been applied in cases outside the hospital area,\textsuperscript{104} has been frequently utilized in hospital staff exclusion cases.\textsuperscript{105} The development of the restrictive approach to \textit{McLain} in those cases, added to the other narrow views taken in them, reflects the consistent multiplication of hurdles which such antitrust plaintiffs must overcome before being entitled to try the merits of their claims. That naturally gives rise to the suspicion that the court in \textit{Cardio-Medical}, and other lower courts that have adopted similar approaches, are influenced by their views as to the merits of the cases rather than by strictly "jurisdictional" considerations.\textsuperscript{106}

\section*{B. Lower Standard in Cases Outside the Health Care Area}

Lower courts have frequently dismissed hospital staff exclusion cases for lacking the requisite impact on interstate commerce.\textsuperscript{107} In \textit{Cardio-Medical}, the plaintiff's allegations were spelled out in great detail,\textsuperscript{108} and the fact patterns in many of the cases parallel the material facts of \textit{Cardio-Medical}. By contrast, a review of decisions dealing with the interstate commerce connection in other cases arising under the Sherman Act illustrates less rigorous standards. Few courts dismiss for


\textsuperscript{106} See Note, \textit{The Applicability of the Sherman Act to Legal Practice and Other "Non-commercial" Activities}, 82 \textit{Yale L.J.} 313 (1972) (arguing that courts should take "jurisdiction" whenever "economic evils" which Sherman Act was designed to eliminate are present); see also P. AREEDA & D. TURNER, \textit{supra} note 57, at 230.


\textsuperscript{108} See \textit{supra} note 86 and accompanying text.
want of "jurisdiction" unless truly minimal interstate commerce allegations or possibilities exist. Seldom are the unsuccessful plaintiffs in those cases able to allege an effect on more than one channel of interstate commerce. A telling comparison is provided by the decisions in private antitrust actions against refuse collectors. Typically those are suits by one refuse hauler against competing refuse haulers, alleging conspiracies to monopolize, price-fixing or concerted boycotts. As in the hospital staff exclusion cases, the defendants raise the threshold question of "subject matter jurisdiction," claiming that trash hauling is a wholly local activity. Unlike the health care providers, however, the trash haulers can claim few ties to interstate commerce. Nor can they demonstrate that the federal government has already extensively exercised its powers of regulation. Plaintiffs in the trash collection cases rely principally on the out-of-state purchase of expensive equipment and on sporadic hauling across state lines. Typically, however, both the plaintiffs' and defendants' businesses primarily consist of local trash collection. Interestingly, courts have actually rejected plaintiffs' "jurisdictional" allegations in only two cases. In the remainder of cases, the courts have found sufficient connection to interstate commerce to apply the antitrust laws.

See, e.g., Marston v. Ann Arbor Property Managers Ass'n., 422 F.2d 836 (6th Cir. 1970) (claim of conspiracy to monopolize rental apartments in one city available to students); Hotel Phillips, Inc. v. Journeyman Barbers, 301 F.2d 443 (8th Cir. 1962) (claim that hotel conspired to fix minimum prices and enforce a five-day week for hotel-based barber shop; shop alleged a large number of interstate travellers used the barber shop); see also Cordova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank, N.A., 649 F.2d 36 (1st Cir. 1981) (claim of conspiracy by insurer to reinstitute cancelled policies without making use of plaintiff's brokerage services; reinsurance of "single interest" policies acquired outside Puerto Rico); Alabama Homeowners, Inc. v. Findahome Corp., 640 F.2d 670 (5th Cir. 1981) (appellant had sold one home to an out-of-state resident and alleged that local real estate association of which it was not a member got government financing); Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2d Cir. 1964) (claim of conspiracy by bowling alley owners to prevent plaintiff from competing; original equipment was purchased out-of-state); John Kalin Funeral Home, Inc. v. Fultz, 313 F. Supp. 435 (W.D. Wash. 1970) (conspiracy to deny funeral home rotation spot for unclaimed cadavers; allegation that embalming equipment came from out-of-state).

Heille v. City of St. Paul, 1982-1 Trade Cas. (CCH) ¶ 64,565 (8th Cir. 1982); Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969).

IV. CONCLUSION

There has been a tremendous amount of confusion in hospital staff exclusion antitrust cases. First, courts have consistently and pervasively misused the term “jurisdiction” in analyzing antitrust cases. While it may not be wrong to use the term as a description of the scope of the Sherman Act, courts must not confuse that use with the meaning of the word in Federal Rule of Civil Procedure 12(b)(1). The concepts behind the two usages are entirely different, and the allocation of evidentiary burden may be significantly altered by incorrect usage. No well-pleaded complaint alleging injury because of antitrust violations should be dismissed for lack of subject matter jurisdiction.

Second, despite disclaimers by lower courts that hospital defendants enjoy no special treatment, judicial hostility to hospital staff exclusion plaintiffs continues. Some lower courts have invoked archaic precedent or applied current precedent in an odd manner to summarily dispose of such cases. As a result, those lower courts have foiled the congressional policy of judicially enforced competition in the health care industry.

Since the Sherman Act reaches any conduct Congress can prohibit or regulate as part of its constitutional power to regulate interstate commerce, cases implicating almost any facet of health services would seem to present no interstate commerce obstacles given the well-established, expansive scope of that power. In view of the federal government’s obvious interest in controlling escalating health care costs and providing health care to the needy, and its already overwhelming involvement in the area, the federal government unquestionably possesses ample power to regulate hospital administrative policies to insure that they comply with national economic goals. The antitrust laws are nothing more than another form of regulation. Furthermore, Congress has begun to endorse competition as the favored method of controlling health care costs.

Because of those trends, if a challenged practice does not constitute a restraint of or unreasonable burden on trade, that determination should be made and defended on the merits—not disguised in hypertechnical summary rulings.

112 See supra notes 29-47 and accompanying text.
114 See supra notes 75-77 and accompanying text.
116 See supra note 4 and accompanying text.
116 See supra note 4.
117 Cases that follow a more suitable approach include Konik v. Champlain Val-
The ambiguous language of the Supreme Court in *McLain v. Real Estate Board of New Orleans, Inc.*\(^{118}\), as well as the differing definitions of a “substantial” effect on interstate commerce, have not ameliorated the confusion in the area. Those two ambiguities have permitted courts hostile to plaintiffs in hospital cases to increase threshold interstate commerce requirements. A clarification of *McLain* by the Supreme Court endorsing the broader view of the scope of the Sherman Act, and an approach to the substantiability requirement consistent with other antitrust cases, would prevent courts from using unfounded “jurisdictional” concerns to dismiss cases that should be decided on their merits.

\(^{118}\) 444 U.S. 232 (1980).