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## Antitrust Law - Sherman Act Subject Matter Jurisdiction - Application of the Substantial Effect on Interstate Commerce Test

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ANTITRUST LAW—SHERMAN ACT SUBJECT MATTER JURISDICTION—APPLICATION OF THE SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE TEST—The United States Court of Appeals for the Third Circuit, in establishing the standards for evaluating Sherman Act jurisdictional prerequisites in denial of staff privileges cases, has rejected the imposition of any specific requirement, holding instead that allegations of a shift of interstate commerce will suffice to obtain jurisdiction, and has indicated that the Third Circuit will examine the activities of both plaintiffs and defendants in ascertaining the presence of interstate commerce.

*Cardio-Medical Assocs., Ltd. v. Crozer-Chester Medical Center*, 721 F.2d 68 (3d Cir. 1983).

Four Pennsylvania cardiologists and their employer, Cardio-Medical Associates, Ltd. (a Pennsylvania corporation), filed a complaint in the United States District Court for the Eastern District of Pennsylvania in 1981 against Crozer-Chester Medical Center and a number of its employees, alleging violations of sections 1 and 2 of the Sherman Act,<sup>1</sup> and of the equal protection and due process clauses of the fourteenth amendment.<sup>2</sup> The plaintiffs claimed that by denying them the privilege of using cardiological equipment at the Medical Center, defendants were engaging in anticompetitive conduct which affected interstate commerce.<sup>3</sup> Defendants answered the complaint and moved for a judgment on the pleadings for failure to state a claim and for lack of subject matter jurisdic-

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1. Sherman Act, §§ 1, 2, 15 U.S.C. §§ 1, 2 (1976). Section 1 states in part: "Every contract, combination in the form of a 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 (1976). Section 2 states: "Every person who shall monopolize, or attempt to monopolize, to combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ." *Id.* § 2.

2. *Cardio-Medical Assocs., Ltd. v. Crozer-Chester Medical Center*, 721 F.2d 68 (3d Cir. 1983).

3. *Id.* at 71. Plaintiffs claimed that defendants had conspired to prevent them from using specialized cardiological equipment located in the Medical Center in order to monopolize the local market in cardiology. *Id.* The effect of the alleged conspiracy, plaintiffs asserted, was to prevent them from offering full cardiological services to existing patients and to hinder their attempts to attract new patients. *Id.* The area served by the medical center extended into New Jersey and Delaware. *Id.* at 76. Twelve to fifteen percent of plaintiffs' patients, accounting for over \$100,000 of plaintiffs' annual income, were from out-of-state. *Id.*

tion.<sup>4</sup> The motion was granted and the claim dismissed without prejudice.<sup>5</sup> Plaintiffs filed an amended complaint<sup>6</sup> which defendants, without answer, moved to have dismissed for lack of subject matter jurisdiction.<sup>7</sup> The district court granted the motion with prejudice,<sup>8</sup> and the plaintiffs appealed.<sup>9</sup> The Third Circuit Court of Appeals reversed.<sup>10</sup>

The district court held that the plaintiffs had not alleged conduct by the defendants sufficient to demonstrate the effect on interstate commerce necessary to meet the jurisdictional requisites of the Sherman Act.<sup>11</sup> To reach this conclusion, a three-element test, detailed in the decision dismissing the original complaint,<sup>12</sup> was employed.<sup>13</sup> In applying this test the district court held that the plaintiffs had to show: (1) either an increase or decrease in the amount of interstate commerce going in and out of the state; (2) that the effect on interstate commerce was related to the conduct of the defendants; and (3) that the effect directly affected interstate commerce related to the plaintiffs' activities.<sup>14</sup>

Chief Judge Seitz delivered the opinion for the court of appeals.<sup>15</sup> The court initiated its opinion by indicating that two ways existed by which jurisdiction could be demonstrated under the Sherman Act: (1) by a showing that the conduct complained of is "in interstate commerce;" or (2) by a demonstration that certain conduct, though intrastate, has a substantial and adverse effect on interstate commerce.<sup>16</sup> Noting that in their complaint the plaintiffs

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4. *Id.* at 71.

5. *Id.* See *Cardio-Medical Assocs., Ltd. v. Crozer-Chester Medical Center*, 536 F. Supp. 1065, 1084-85, 1099 (E.D. Pa. 1982). The constitutional claims were dismissed with prejudice.

6. 721 F.2d at 71. The plaintiffs' amended complaint dropped the equal protection and due process claims and added a demand for a jury trial. *Id.*

7. *Id.* Defendants also moved to strike the jury trial demand and to stay discovery until disposition of their motion to dismiss for lack of subject matter jurisdiction. *Id.*

8. *Cardio-Medical Assocs., Ltd. v. Crozer-Chester Medical Center*, 552 F. Supp. 1170 (E.D. Pa. 1982).

9. 721 F.2d at 71.

10. *Id.* at 77.

11. 552 F. Supp. at 1202.

12. 536 F. Supp. at 1074-75.

13. 721 F.2d at 72. The three elements of the test were: (1) the presence of interstate commerce; (2) the existence of a substantial and adverse effect on interstate commerce; (3) the requisite nexus between the challenged activities of the defendant and the effect on the relevant channel of interstate commerce. *Id.* See also 552 F. Supp. at 1177.

14. 721 F.2d at 72.

15. *Id.* at 70. Judges Sloviter and Van Dusen joined in the opinion.

16. *Id.* at 71 (citing, for the second proposition, *McLain v. Real Estate Bd.*, 444 U.S. 232, 246 (1980) ("not insubstantial effect") and *Hospital Bldg. Co. v. Trustees of Rex Hospi-*

had alleged the defendants' conduct had an effect on interstate commerce,<sup>17</sup> Judge Seitz proceeded to evaluate the lower court's application of the three-part test. The judge maintained that the first and third elements of the test—the determination of presence of interstate commerce and of a nexus between the activities complained of and the interstate channel effected—were in fact subsumed by the second element, and the court thus proceeded to declare that the plaintiffs needed only to show “a substantial and adverse effect on interstate commerce.”<sup>18</sup>

The court next considered the requirement that the facts alleged must indicate a net change in interstate commerce, rather than merely a shift in commercial activity, in order to show the required effect on interstate commerce.<sup>19</sup> Although the district court had cited *Moles v. Morton F. Plant Hospital, Inc.*<sup>20</sup> as authority for this position,<sup>21</sup> the circuit court declined to follow the case.<sup>22</sup> Judge Seitz cited a recent Third Circuit decision, *Harold Friedman Inc. v. Thorofare Markets, Inc.*,<sup>23</sup> in which the plaintiff's demonstration of a decrease in his trade and an increase in the defendant's trade was held sufficient to meet this burden and to thus satisfy jurisdic-

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tal, 425 U.S. 738, 743 (1976) (“substantially and adversely affects interstate commerce”).

17. 721 F.2d at 71-72.

18. *Id.* at 72. Judge Seitz relied on the opinions of the Supreme Court in *McLain*, 444 U.S. 232, and *Hospital Bldg. Co.*, 425 U.S. 738, for this conclusion. *Id.* The Court in *Hospital Bldg Co.* found that “[a]s long as the restraint in question ‘substantially and adversely affects interstate commerce,’ the interstate nexus required for Sherman Act coverage is established.” 425 U.S. at 743. To allege an effect on interstate commerce, it is obvious that the presence of interstate commerce must by necessity be shown. This is apparent from *McClain* where the Court explained that to demonstrate a substantial effect on interstate commerce a plaintiff must identify the aspect of interstate commerce and allege how the defendants' activities have affected it. *See* 444 U.S. at 242.

19. 721 F.2d at 72.

20. 1980-81 Trade Cas. (CCH) ¶ 63,600 (M.D. Fla. 1978), *cert. denied*, 449 U.S. 919 (1980). Plaintiffs, two physicians, claimed a per se violation of the Sherman Act—a group boycott—by the defendants. The defendants included the hospital corporation, its two top executives, and five physician members of the medical staff executive committee. The court dismissed the claim for failure to state a claim for which relief could be granted because there was no indication that the individual defendants were acting as other than officers of the hospital corporation. Therefore, the conspiracy necessary to establish a group boycott was missing. However, the *Moles* court went on to consider the defendants' charge that plaintiffs had not pleaded sufficient allegations to show a substantial effect on interstate commerce and so failed to establish jurisdiction in the district court. After finding that the allegations failed to show the amount of interstate commerce to be changed, but only that the commerce had been shifted from the plaintiffs to the defendants, the court indicated that this would not constitute a substantial effect on interstate commerce. *Id.* at 77188-89.

21. 552 F. Supp. at 1178.

22. 721 F.2d at 74 n.1.

23. 587 F.2d 127 (3d Cir. 1978).

tional requirements.<sup>24</sup> A Sixth Circuit decision, *James R. Snyder Co. v. Associated General Contractors of America*,<sup>25</sup> was cited by the court as holding that a shift in interstate commerce would satisfy the jurisdictional requirement.<sup>26</sup> Judge Seitz noted that, in reaching this determination, the *Snyder* court had relied on two Supreme Court decisions,<sup>27</sup> *McLain v. Real Estate Board*<sup>28</sup> and *Hospital Building Co. v. Rex Hospital Trustees*.<sup>29</sup> Judge Seitz stated that in those two cases the Supreme Court did not require the plaintiffs to quantify the impact of the defendants' activities on interstate commerce in order to satisfy the jurisdictional requirement.<sup>30</sup> He reasoned that if it was not necessary to quantify the effect, then requiring an allegation of net change would be equally unnecessary.<sup>31</sup>

The district court had relied in part on *Exxon Corp. v. Governor of Maryland*<sup>32</sup> to support the requirement of net change.<sup>33</sup> In *Ex-*

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24. 721 F.2d at 72.

25. 677 F.2d 1111 (6th Cir.), *cert. denied*, 103 S. Ct. 374 (1982). The plaintiffs in *Snyder* were independent masonry contractors who claimed lost business as a result of alleged anticompetitive activities by the defendants. 677 F.2d at 1112-13. The *Snyder* court found no change in the demand for masonry work in the area, and inferred that the interstate commerce (supplies purchased out-of-state) had only been shifted to contractors who had picked up the work the plaintiffs had lost. *Id.* at 1114. This was sufficient to establish jurisdiction. *Id.*

26. 721 F.2d at 72.

27. *Id.* at 73.

28. 444 U.S. 232 (1980). In *McLain*, plaintiffs contended that the presence of a brokerage fee set by the Real Estate Board prevented them from negotiating for a lower charge. They claimed that the brokers were essential to obtaining financing to buy a house and that funds for the financing came from out-of-state. *Id.* at 235. Since it was possible to infer that plaintiffs might be able to show a "not insubstantial effect on interstate commerce," jurisdiction was established. *Id.* at 246. Writing for the Court, Chief Justice Burger stated, "Nor is jurisdiction defeated in a case relying on anticompetitive effects by plaintiff's failure to quantify the adverse impact on defendant's conduct." *Id.* at 243.

29. 425 U.S. 738 (1976), *reh'g denied*, 104 S. Ct. 512 (1983). The plaintiffs in *Hospital Bldg. Co.* claimed that the defendants conspired to block expansion of their hospital. *Id.* at 740. This was alleged to affect interstate commerce by preventing the plaintiffs from purchasing more medicine and supplies from out-of-state, servicing more out-of-state patients, and paying a larger managerial service fee to its out-of-state parent company. *Id.* at 741. The Court found these allegations sufficient for jurisdictional purposes even though there was no present effect on interstate commerce. *Id.* at 739.

30. 721 F.2d at 73.

31. *Id.*

32. 437 U.S. 117 (1978), *reh'g denied*, 439 U.S. 884 (1978). In *Exxon*, a Maryland statute prohibiting refiners and producers of petroleum products from operating retail service stations in the state was challenged by Exxon as imposing an impermissible burden on interstate commerce in violation of the Commerce Clause. *Id.* at 120-21. The Court held that since there was no discrimination against interstate commerce in favor of local industry and no inherent need for consistent national policy, the Commerce Clause itself did not demand

*xon*, the Supreme Court rejected the notion that a state statute which had the effect merely of *shifting* retail sales of petroleum products "from one interstate supplier to another" necessarily imposed an impermissible burden on interstate commerce. *Exxon* was distinguished by Judge Seitz as holding only that a state regulation which shifts commerce from one enterprise to another within the state does not interfere with the implicit decision by Congress to keep interstate commerce free. According to Judge Seitz, the Court in *Exxon* did not hold that Congress could not act to prohibit state regulations which had that effect.<sup>34</sup>

In holding that a shift in interstate commerce is sufficient to establish jurisdiction, Judge Seitz noted the purpose of the Sherman Act and its relation to the Commerce Clause.<sup>35</sup> The court explained that prevention of anticompetitive conduct, both local and interstate, was the reason underlying the Act's promulgation, noting also that in prohibiting this conduct Congress must act within the bounds of the Commerce Clause.<sup>36</sup> Judge Seitz stated that to accomplish this, it is sufficient to show that the interstate commerce affected by the alleged anti-competitive activities is substantially different than it would have been had the activities not occurred; whether the change is reflected in an increase or a decrease is not relevant.<sup>37</sup>

The court then considered the district court's holding that the only activities of the defendants which were to be considered in determining jurisdiction were those which affected interstate commerce through their effect on the plaintiffs, rather than in conjunction with how the activities affected commerce directly.<sup>38</sup> Adopting the former approach, the district court had limited its holding to

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preemption of the area from state regulation. *Id.* at 128.

33. See 552 F. Supp. at 1179 n.7.

34. 721 F.2d at 73. Judge Seitz noted, however, that it was clear that Congress could, if it wished, "affirmatively act to regulate intrastate commerce that has no greater effect on interstate commerce than the Maryland statute has." *Id.*

35. *Id.* at 74.

36. *Id.*

37. *Id.* Judge Seitz stated: "Such transactions 'burden' interstate commerce because they are the result, directly or indirectly, of conduct that violates federal antitrust policy. They are a burden not on the volume of trade, but on the freedom of trade." *Id.*

The Third Circuit recently applied the holding in *Crozer-Chester* in *Englert v. City of McKeesport*, 736 F.2d 96 (3rd Cir. 1984), to support its decision to reverse a lower court decision dismissing this Sherman Act suit for lack of subject matter jurisdiction. *Id.* at 97. The court held as sufficient to establish subject matter jurisdiction the plaintiff's allegation that the city, by entering into an exclusive contract with one electric company to do electrical inspections, had shifted fees for this work away from the plaintiffs. *Id.* at 98.

38. 721 F.2d at 74-75.

denial of staff privileges cases.<sup>39</sup> Judge Seitz noted that it was unnecessary to consider this point since it was possible to determine that the plaintiffs had met the jurisdictional requirement without considering the overall effect of the defendant's activities on interstate commerce.<sup>40</sup> Nevertheless, the court addressed the issue because the lower court's position was inconsistent with the recent trend of cases in the Third Circuit,<sup>41</sup> and was in direct conflict with a Ninth Circuit decision.<sup>42</sup> Judge Seitz indicated that the Third Circuit would consider the overall effect of the defendant's activities on interstate commerce, as well as the effect of the defendant's activities on the plaintiff in determining the existence of jurisdiction under the Sherman Act.<sup>43</sup> He supported this view by explaining that it is the anticompetitive conduct which is sought to be regulated; it is, therefore, irrelevant where the interstate commerce effect is found.<sup>44</sup>

Chief Judge Seitz cited the Ninth Circuit opinion in *Hahn v. Oregon Physicians Service*<sup>45</sup> as being in direct conflict with the district court's position that only the effect on plaintiffs' interstate activities can be used to establish jurisdiction.<sup>46</sup> The *Hahn* court

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39. See 536 F. Supp. at 1076. Judge Lord, in the district court opinion, stated:

The crucial issue is whether the "relevant channel of interstate commerce" requirement in denial of hospital staff privileges cases relates to plaintiffs' or defendants' activities, or both. I hold that, in any denial of hospital staff privileges case, the only relevant jurisdictional inquiry involves a determination of whether the defendant hospitals' denial of staff privileges to the plaintiff physician substantially and directly affects the *plaintiff's* activities in interstate commerce.

*Id.* (emphasis in original). Judge Lord indicated that special treatment of staff denial cases was necessary, in part, because of the high cost of the litigation to the hospital defendants and the administrative burden to the courts were not justified considering how infrequently plaintiffs prevail. *Id.* at 1069.

40. 721 F.2d at 74. The allegations which the Third Circuit found to be sufficient were (1) interference with interstate travel of patients, (2) interstate payment of fees and (3) interstate purchase of medication. 721 F.2d at 76. See 552 F. Supp. at 1187-1202 (recitation of all the allegations made in *Crozer-Chester*).

41. 721 F.2d at 75 (citing *Harold Friedman Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127, 134 (3d Cir. 1978); *J.P. Mascaro & Sons v. Wm. J. O'Hara, Inc.*, 565 F.2d 264, 266 (3d Cir. 1977); *Mortenson v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 897 (3d Cir. 1977)).

42. 721 F.2d at 75. See *Hahn v. Oregon Physicians Serv.*, 689 F.2d 840, 844 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 3115 (1983). In *Hahn*, a number of doctors of podiatric medicine brought antitrust actions against providers of prepaid health insurance for allegedly conspiring to boycott podiatrists in favor of medical doctors by limiting reimbursement for podiatric services to their insureds only if done by medical doctors or done by a podiatrist after referral by a medical doctor. 689 F.2d at 841.

43. 721 F.2d at 75.

44. *Id.*

45. 689 F.2d 840 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 3115 (1983).

46. *Id.* at 75. See *supra* note 39.

had overruled a lower court dismissal of the plaintiff's Sherman Act claims for failure to meet the jurisdictional requirement of alleging an effect on interstate commerce.<sup>47</sup> The *Hahn* court held that the lower court, when determining whether interstate commerce was involved, was incorrect in examining only the plaintiff's interstate contacts and in concluding that because plaintiff's contacts were insubstantial, defendants' activities could not have the requisite effect on interstate commerce.<sup>48</sup> Noting that jurisdiction could be established by showing that defendant's activities affect interstate commerce through the plaintiff's interstate contacts, the *Hahn* court held that "jurisdiction may also be established directly by the defendants' activities."<sup>49</sup>

Having rejected the district court approach, Judge Seitz proceeded to make his own jurisdictional determination.<sup>50</sup> He noted the plaintiffs' allegations that (1) both plaintiffs and defendants offered services to patients in a tri-state area, and (2) that the 12 to 15% of the plaintiffs' patients who were from out-of-state accounted for over \$100,000 of plaintiffs' annual income.<sup>51</sup> Judge Seitz found that these allegations satisfied the plaintiffs' burden of demonstrating a substantial effect on interstate commerce for jurisdictional purposes, and thus proceeded to reverse the decision of the district court.<sup>52</sup>

The Sherman Act was passed by Congress pursuant to its power to regulate interstate commerce. The purpose for which it was enacted and the extent to which it has been applied are critical in understanding the rationale for the decision of the Third Circuit in *Crozer-Chester*.

The congressional purpose behind the Sherman Act was addressed at an early point by the Supreme Court in *Apex Hosiery v.*

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47. 689 F.2d at 844.

48. *Id.*

49. *Id.* See also *Furlong v. Long Island College Hospital*, 710 F.2d 922 (2d. Cir. 1983) (interstate activities may be that of defendants as a matter of "substantive antitrust law" because anticompetitive effects could affect the amount of goods hospital purchases and amount of service it provides); *Konick v. Champlain Valley Physicians Medical Center*, 561 F. Supp. 700 (N.D.N.Y. 1983) (sufficient interstate commerce where complaint alleges denial of staff privileges after refusal to sign exclusive services and restrictive pricing agreement). *But see Nara v. American Dental Association*, 526 F. Supp. 452 (W.D. Mich. 1981) (relevant interstate commerce found to be plaintiff's purchase of supplies from out-of-state, but no allegations that the defendant's conduct would affect this).

50. 721 F.2d at 75-76.

51. *Id.* at 76. See *supra* note 3.

52. *Id.* at 76.

*Leader*.<sup>53</sup> In *Apex*, the Court examined the legislative history and those Supreme Court decisions which had interpreted the Act and determined that it was enacted to prevent restraints on business and commercial transactions.<sup>54</sup> In explaining the intent of Congress in using the words "or commerce among the several states," Justice Stone, citing *Atlantic Cleaners and Dryers v. United States*,<sup>55</sup> indicated that the phrase was used "to relate the prohibited restraint of trade to interstate commerce for constitutional purposes" and in doing this Congress intended to exercise "all the power it possessed."<sup>56</sup>

The extent of Congress' power to regulate interstate commerce was subsequently addressed in *Wickard v. Filburn*.<sup>57</sup> After an extensive review of Commerce Clause cases, the *Wickard* Court concluded that Congress could reach any activity, even if local and not considered commerce, if it exerts a "substantial economic effect on interstate commerce."<sup>58</sup> The Supreme Court again considered the source of the restraint in *United States v. Women's Sportswear Manufacturers*,<sup>59</sup> where it reversed the decision of the trial court to dismiss a Sherman Act complaint because the defendants were not engaged in interstate commerce.<sup>60</sup> The Court emphasized that even though the alleged restraint was intrastate, the conduct was actionable under the Sherman Act if interstate commerce was affected.<sup>61</sup>

53. 310 U.S. 469 (1940).

54. *Id.* at 490-93. Justice Stone in his opinion explained:

The legislative history of the Sherman Act, as well as the decisions of this Court interpreting it, show that it was not aimed at policing interstate transportation or movement of goods and property. . . . The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices of otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

*Id.*

55. 286 U.S. 427, 434 (1932).

56. 310 U.S. at 495 (quoting *Atlantic Cleaners*, 286 U.S. at 435).

57. 317 U.S. 111 (1942) (constitutional to prohibit farmer from growing wheat for his own use because cumulative effect of such individual practice could disrupt national price control plan).

58. *Id.* at 125.

59. 336 U.S. 460 (1949). In *Women's Sportswear Mfrs.*, a trade association had contracted with jobbers in Boston for their members to do all the sewing needed by the jobbers. The members were local residents who did the work locally. The jobbers sold 80% of the sportswear in interstate commerce. *Id.* at 461.

60. *Id.* at 464.

61. *Id.* Justice Jackson elaborated:

The source of the restraint may be intrastate, as the making of a contract or a combi-

In *McLain v. Real Estate Board*<sup>62</sup> Chief Justice Burger noted that the definition of commerce, and consequently the scope of the Sherman Act, had evolved and changed as technological advances have changed and influenced business.<sup>63</sup> The Supreme Court in *McLain* described the scope of an effect on interstate commerce as a "not insubstantial effect" to be determined "as a matter of practical economics."<sup>64</sup> The practice of medicine was considered a learned profession and exempt from the Act prior to the 1975 Supreme Court decision in *Goldfarb v. Virginia State Bar*,<sup>65</sup> and it was not until the decision in *Hospital Building Co. v. Trustees of Rex Hospital* that medical services were considered to have the requisite "not insubstantial effect" necessary to satisfy the jurisdictional requirements.<sup>66</sup>

In *McLain*, the Supreme Court found the relevant interstate commerce in activities which were engaged in by the defendants.<sup>67</sup> This was interpreted by the Ninth Circuit in *Western Waste Services Systems v. Universal Waste Control*<sup>68</sup> as indicating that the Supreme Court intended "the focus of the inquiry" was to be on the defendant's business in determining the requisite effect on interstate commerce.<sup>69</sup> However, in *Hospital Building Co.*, the Court found sufficient interstate commerce from conduct which the

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nation usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

*Id.*

62. 444 U.S. 232 (1980).

63. *Id.* at 241.

64. *Id.* at 246 (citing *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 745 (1976)).

65. 421 U.S. 773 (1975). In *Goldfarb*, the Supreme Court reversed an appellate court decision which held that, although a minimum fee schedule had a substantial restraint on competition among lawyers, the Sherman Act could not be used to prohibit the conduct "because the practice of law is not 'trade or commerce'." *Id.* at 775. In discussing the status of the learned professions under the Act, Chief Justice Burger commented that Congress did not intend any such broad exclusion, and when a learned profession takes on business aspects which affect interstate commerce, it becomes subject to the prohibitions of the Sherman Act. *Id.* at 786-88.

66. 425 U.S. at 742, 744.

67. 444 U.S. at 342. See *supra* note 29 and accompanying text.

68. 616 F.2d 1094 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980). Plaintiff claimed that the defendants had attempted to monopolize the waste disposal business in Phoenix and conspired to eliminate plaintiff from the business. *Id.* at 1095. The court found that defendants' interstate activities would "reasonably be expected to fluctuate in direct proportion to Universal's success in conducting its alleged antitrust violations." *Id.* at 1099.

69. *Id.* at 1097 n.2 (disagreeing with the position of the dissent that *McLain* requires a connection between plaintiffs' activities and interstate commerce).

plaintiff alleged it would have engaged in absent the defendant's alleged illegal conduct.<sup>70</sup>

The courts appear to experience difficulty both in ascertaining the presence of interstate commerce, and in determining what constitutes a substantial effect—or a not insubstantial effect—on interstate commerce. The unsettled nature of this area of law is indicated by the inconsistent decisions among the circuits.<sup>71</sup> Despite this disagreement, the Supreme Court has not addressed these issues directly. Scholarly criticism has been directed at this ambiguity of the "effect on interstate commerce" test for Sherman Act jurisdiction and the Supreme Court's failure to clarify how the test should be applied.<sup>72</sup>

In *Crozer-Chester* Chief Judge Seitz considered in depth two aspects of the district court's dismissal of the plaintiffs' claim for lack of subject matter jurisdiction. These were: (1) that the interstate commerce affected must be related to the plaintiffs' activities; and (2) that to establish the requisite effect on interstate commerce plaintiffs must show a net change in the flow of interstate commerce into and out of the state.<sup>73</sup>

It is submitted that restricting determination of the relevant interstate commerce to an examination of either the plaintiffs' or the defendants' activities, in antitrust law generally or in one specific area, thwarts the purpose of the Sherman Act by arbitrarily excluding challenges of potential anticompetitive activities. If inter-

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70. 425 U.S. at 342. See *supra* note 28 and accompanying text. The district court in *Crozer-Chester* relied on this case as support for its position that the only relevant interstate activities in denial of staff privileges cases were those of the plaintiff. 536 F. Supp. at 1076.

71. See, e.g., *Heille v. City of St. Paul*, 671 F.2d 1134 (8th Cir. 1982) (both plaintiffs' and defendants' activities examined in finding the interstate commerce connection); *Crane v. Intermountain Health Care*, 637 F.2d 715 (10th Cir. 1981) (plaintiffs must show a connection between the defendant's challenged conduct and interstate commerce for jurisdictional purposes); *Alabama Homeowners, Inc. v. Findahome Corp.*, 640 F.2d 670 (5th Cir. 1981) (connection between the defendant's general business conduct and the alleged interstate commerce found illusory); *Western Waste Services v. Universal Waste Control*, 616 F.2d 1094 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980) (only defendant's activities considered in finding the requisite interstate commerce and the effect on interstate commerce could be found in the general business activities of the defendant—an effect from the alleged illegal activities held not to be necessary).

72. See Comment, *Standing to Sue in Private Antitrust Litigation: Circuits in Conflict*, 10 IND. L. REV. 532 (1977); Comment, *The Confusing World of Interstate Commerce and Jurisdiction Under the Sherman Act—A Look at the Development and Future of the Currently Employed Jurisdictional Tests*, 21 VILL. L. REV. 722 (1976); Furgeson, *The Commerce Test for Jurisdiction Under the Sherman Act*, 12 HOUS. L. REV. 1052 (1975).

73. 721 F.2d at 72.

state commerce is present and a showing is made that this interstate commerce is not insubstantially affected by the defendant's challenged activity, the case should be heard.<sup>74</sup> It would also appear to be contrary to the Supreme Court decisions in *Hospital Building Co.* and *McLain* to base the determination of the relevant interstate commerce exclusively on either the plaintiffs' or the defendants' activities. To give effect to both decisions the most logical course of action would be to examine the activities of both.

The issue of what constitutes the requisite effect on the relevant interstate commerce channel which must be alleged to meet the "not insubstantial" part of the antitrust jurisdictional test has created as much difficulty as the determination of the relevant interstate commerce channel. The specific aspect of this issue considered in *Crozer-Chester* was whether a shift in interstate commerce, rather than an increase or decrease, will satisfy the jurisdictional requirement. The Third Circuit held that the former would be sufficient.<sup>75</sup>

Judge Seitz explained that to establish jurisdiction it is not required that the alleged illegal conduct affect the net volume of interstate trade, but "[w]hat is relevant is the presence in interstate commerce of transactions that, as a result of the anticompetitive conduct, are 'substantially' different from transactions that would otherwise have occurred."<sup>76</sup> In developing this concept in *Crozer-Chester*, Judge Seitz indicated that in addition to differences in net volume of business, differences in the parties and the terms of the business transactions would suffice.<sup>77</sup> Judge Seitz emphasized

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74. See *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.*, 710 F.2d 752 (11th Cir. 1983). There the court held that in determining whether a relevant channel of interstate commerce is present it would look at the interstate markets of both the defendant's and the plaintiff's operations. 710 F.2d at 767 n.31. Labeling the *Western Waste* decision—which only considered defendants' activities—as too restrictive, the Tenth Circuit explained that the goal of the antitrust laws is to maintain the integrity of interstate markets and that the integrity can be affected by activities which restrict interstate commerce related to the business of the defendants or the plaintiffs. *Id.* The court distinguished *McLain's* consideration of only defendants' activities as necessary because the plaintiffs in *McLain* were consumers rather than businessmen. *Id.*

75. 721 F.2d at 73.

76. *Id.* at 74. See *Nurse Midwifery Assocs. v. Hibbett*, 577 F. Supp. 1273 (M.D. Tenn. 1983). In this case nurse midwives filed a complaint against defendant hospitals alleging that the hospitals had conspired to prevent the midwives from competing with staff obstetricians by denying them access to hospital facilities. *Id.* at 1275. The district court in *Nurse Midwifery Assoc.* cited the Third Circuit opinion in *Crozer-Chester* to support its holding that a net change in the flow of interstate commerce in and out of the state is not necessary to establish jurisdiction. *Id.* at 1279. See *supra* notes 21-28 and accompanying text.

77. 721 F.2d at 74. See *supra* note 37 and accompanying text. See also *Lease Lights*,

once again the purpose of the Sherman Act—prevention of anticompetitive conduct—in support of his position.<sup>78</sup>

Judge Seitz also discounted the district court's reliance on the net change requirement of *Exxon Corp. v. Governor of Maryland*.<sup>79</sup> In light of the activities which Congress has regulated, and the extent to which it has regulated them under the authority of the Commerce Clause,<sup>80</sup> this discounting is persuasive. Given the intent of Congress in passing the Sherman Act, and the evolution in its application by the Supreme Court, it does not appear doctrinally consistent to require a net change in monetary figures to demonstrate a substantial effect on interstate commerce from anticompetitive conduct. A restraint on competition may well result merely through a shift of interstate commerce if the demand for the product or service remains constant. The shift would affect interstate commerce since the product or service available would not necessarily be of the same quality as that which could be obtained absent the restraint.

An important concept advanced in the district court's opinion in *Crozer-Chester* was not directly considered by the appellate court. The district court reconciled the disparate decisions among the courts on the jurisdiction issue in staff privileges denial cases by distinguishing them on a "practical economic" basis.<sup>81</sup> The district court noted that jurisdiction had been granted and was proper: (1)

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Inc. v. Public Service Co. of Oklahoma, 701 F.2d 794 (10th Cir. 1983), and *Mishler v. St. Anthony's Hospital Systems*, 694 F.2d 1225 (10th Cir. 1981). The Tenth Circuit in *Lease Lights* addressed the issue of whether the plaintiff had to quantify the effect on interstate commerce. Although not expressly holding that a shift in interstate commerce would suffice as a substantial effect, the court stated that the plaintiff did not have to show how the alleged illegal conduct had caused his business to decrease; it was sufficient to show that the alleged conduct was connected to interstate commerce. 701 F.2d at 798-99.

The plaintiff in *Mishler* was a neurosurgeon whom the defendant hospital refused to include on its emergency room referral list. 694 F.2d at 1227. Plaintiff claimed that this resulted in elimination of himself and other qualified but excluded neurosurgeons from the practice of emergency neurosurgery. *Id.* Since non-inclusion did not result in any change in the volume of interstate commerce, the lower court dismissed the complaint. *Id.* The Tenth Circuit noted that even if the revenue from interstate commerce activities had merely been diverted from one group of doctors to another this would not defeat jurisdiction. *Id.* at 1228. The court reasoned that "doctors do not all deliver identical services for identical fees," and used this reasoning to find an effect on interstate commerce. *Id.*

78. 721 F.2d at 74. See *supra* note 37 and accompanying text. See also *supra* notes 52-53 and accompanying text.

79. *Id.* at 73. See *supra* notes 32-34 and accompanying text.

80. See *supra* note 7. See also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (racial discrimination prohibited in motel which was used by people traveling interstate).

81. 552 F. Supp. at 1180.

when the alleged restraint was industry-wide or resulted in total exclusion; and (2) when the plaintiff was a large institution or a hospital-based physician who would be prevented from practicing by the alleged misconduct.<sup>82</sup> This distinction was described by the district court as logical because interstate commerce would more likely be substantially affected if the plaintiffs fell in these two categories, rather than if they were individual physicians whose practices were not primarily hospital-based.<sup>83</sup> The district court appears to have followed this course in an attempt to determine for one area of antitrust litigation, denial of medical staff privileges, specific criteria to be met in fulfilling the demands of the substantial effect on interstate commerce requirement for jurisdiction under the Sherman Act.<sup>84</sup>

The district court approach involves the isolating of one class of antitrust cases from others. In choosing to ignore the district court's extensive analysis of the staff denial cases, the Third Circuit appears to be unwilling to set specific standards for one class of cases. Such specific jurisdictional requirements would be contrary to the purpose of the Sherman Act, which is to prohibit all anticompetitive conduct within its jurisdictional reach.<sup>85</sup> One court *has* noted that the medical industry is "already highly regulated and fraught with serious problems of cost and quality control," and the high cost of antitrust litigation, when plaintiffs rarely prevail, is a burden to be avoided.<sup>86</sup> Nevertheless, this same court noted that "given the decisional gloss of recent years . . . further jurisdictional limitations ought to come from Congress rather than the district courts."<sup>87</sup>

Judge Seitz refused to create for staff denial cases an exception to the general Sherman Act jurisdictional requirements, and based his decision on logical, reasonable interpretations of the purpose of the Sherman Act and of the most recent Supreme Court decisions on Sherman Act jurisdiction. Yet, it is still the case that the test—"a substantial effect on interstate commerce"—does not provide a clear cut rule, and this has caused a divergence of opinions among the circuit courts as to its limits.

The confusion can be attributed to the failure of the Supreme

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82. *Id.* at 1181-83.

83. *Id.* at 1184.

84. *See Crozer-Chester*, 536 F. Supp. at 1069. *See also supra* note 39.

85. *See supra* notes 52-64 and accompanying text.

86. *Pontius v. Children's Hospital*, 552 F. Supp. 1352, 1361 (W.D. Pa. 1982).

87. *Id.*

Court to "articulate a principled test for determining substantial effects upon interstate commerce" in order to establish Sherman Act jurisdiction.<sup>88</sup> The dissenting judge in *Western Waste* summarized the problem in commenting, "I recognize the principles that each Sherman Act case must turn on its own facts, and that jurisdiction is not defeated by plaintiff's failure to quantify the adverse impact of a defendant's conduct. Nevertheless, neither of these is very specific or helpful."<sup>89</sup> He suggested that the Ninth Circuit hear the case *en banc* and define the criteria it would use to determine the substantial effect on interstate commerce.<sup>90</sup>

A number of commentators have suggested solutions which would remove the vagueness from the present test.<sup>91</sup> However, it is for Congress to decide whether specific standards should be set for jurisdiction in different classes of antitrust cases; these are policy decisions which are properly within its province. The Supreme Court, however, could alleviate the confusion by furnishing better guidelines for the present jurisdictional test.

*Linda J. Shorey*

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88. Kissam, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 CALIF. L. REV. 595, 633 (1982).

89. *Western Waste*, 616 F.2d at 1102 (Claiborne, J., dissenting).

90. *Id.*

91. See Kissam, *supra* note 88, at 633-37 (describes two tests: one proposed by Areeda & Turner in ANTITRUST LAW ¶ 232 (1978), and a second based on weighing the constitutional values involved in each case); Note, *The Interstate Commerce Test for Jurisdiction in Sherman Act Cases and Its Substantive Applications*, 15 GA. L. REV. 714, 729-31 (1981) (details a "general-business activity" test based on *McLain*).