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Denial of Hospital Admitting Privileges for Non-Physician Providers—A Per Se Antitrust Violation?

Rapidly rising health care costs have focused the nation's attention on the health care industry.¹ Experts suggest that increased competition may reduce some of these costs.² A parallel development in health care has been the increased number of non-physician providers such as podiatrists, nurse practitioners, nurse midwives, and chiropractors. In general, these providers specialize in a limited area of health care and offer services related to, but distinct from, medical care.³ State law regulates their licensing and clinical practice.⁴

Within their practices, these non-physician providers may need to utilize hospital facilities and diagnostic equipment.⁵ When these hospital services are unavailable because the hospital refuses to grant admitting privileges, the provider loses a competitive advantage.⁶ Accordingly, denial of admitting privileges to non-physicians constitutes a barrier to competition in the health care industry.

This note examines the application of federal antitrust law, specifically section 1 of the Sherman Act,⁷ to hospitals' denial of admitting privileges to non-physicians. Part I discusses the purpose, scope, and judicial interpretation of section 1 of the Sherman Act. Part II defines group boycotts and describes their treatment under section 1. Part III explains how denial of admitting privileges to non-physicians can constitute an unlawful group boycott.

1 Health care costs account for over 10% of the gross national product. In 1983, U.S. expenditures for health care totaled approximately \$355 billion, \$1,459 per person. This represents an increase of 10.3% over 1982 levels. Forty-one percent of the 1983 health care expenditures stemmed from hospital care, and 19% from payment for physicians' services. See Gibson, Levit, Lazenby & Waldo, *National Health Expenditures, 1983*, 6 HEALTH CARE FINANCING REV., Winter 1984, at 1.

2 See generally Baron, *Licensure of Health Care Professionals: The Consumer's Case for Abolition*, 9 AM. J.L. & MED. 335, 348-55 (1983); Enthoven, *Health Care Cost Control Through Incentives and Competition*, in COST SHARING IN HEALTH CARE 29, 41-42 (1980); Symposium: *Market-Oriented Approaches to Achieving Health Policy Goals*, 34 VAND. L. REV. 849 (1981).

3 See Dolan & Ralson, *Hospital Admitting Privileges and the Sherman Act*, 18 HOUS. L. REV. 707, 728-29 (1981).

4 *Id.* at 731.

5 *Id.* at 713. See also Jost, *The Joint Commission on Accreditations of Hospitals: Private Regulation of Health Care and the Public Interest*, 24 B.C.L. REV. 835, 873 (1983).

6 See Dolan & Ralson, *supra* note 3, at 711-14; Havighurst & King, *Private Credentialing of Health Care Personnel: An Antitrust Perspective* (Part One), 9 AM. J.L. & MED. 131, 145 (1983); Note, *Hospital Staff Privileges and the Group Boycott Rule*, 25 B.C.L. REV. 383, 388-89 (1984).

7 15 U.S.C. § 1 (1982). Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States . . . is declared to be illegal."

It also examines the rationale behind both a "per se" and "rule of reason" analysis of this conduct, and explains that a per se analysis should apply.

I. Sherman Act, Section 1

In broad language, the Sherman Act prohibits agreements which unduly restrain interstate trade or commerce.⁸ Courts use one of two analytical approaches in determining whether the challenged conduct violates the Sherman Act. These approaches are the per se rule and the rule of reason.

Under the per se approach, courts presume, based upon judicial experience with certain types of conduct, that the conduct unduly restrains competition and can be condemned without analyzing the purpose or effect of the restraint.⁹ The Supreme Court has classified group boycotts as per se illegal.¹⁰

When the challenged conduct does not "fit" within a per se category, courts apply the rule of reason and examine the purpose and probable effects of the conduct to determine if, on balance, it is

8 The statute literally provides a blanket prohibition of *every* agreement which restrains trade. However, Supreme Court decisions have modified the statute's all-inclusive nature by limiting its application to situations involving "undue restraints" on competition. *See, e.g.,* United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (Sherman Act prohibits monopolies and combinations which unduly restrict trade or commerce); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 609 (1914) (Sherman Act prohibits combinations which restrict the "free and natural flow" of interstate commerce); United States v. American Tobacco Co., 221 U.S. 106, 179-80 (1911) (section 1 prohibits undue restraints on commerce); Standard Oil Co. v. United States, 221 U.S. 1, 58-60 (1911) (section 1 prohibits activities which unduly restrict competition).

9 In Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), the Court explained the rationale for the per se rule:

There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness . . . avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved . . . in an effort to determine at large whether a particular restraint has been unreasonable.

Id. at 5.

The per se rule does not apply until the judiciary has had sufficient experience with the type of restraint involved to conclusively presume that it causes or will likely cause significant anticompetitive effects. *See, e.g.,* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 344 (1982); United States v. Topco Assocs., 405 U.S. 596, 607-08 (1972).

10 *See* note 17 *infra* and accompanying text. Other conduct which the Supreme Court has classified as per se illegal under the Sherman Act includes price-fixing (*see, e.g.,* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982); Keifer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)), horizontal market divisions (*see, e.g.,* United States v. Topco Assocs., 405 U.S. 596 (1972)), and tying arrangements (*see, e.g.,* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958). *But see* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S. Ct. 1551 (1984) (indicating that the Court may not apply the per se rule as readily to tying arrangements)).

pro- or anticompetitive.¹¹ The rule of reason approach involves a more extensive economic analysis than the per se rule.¹²

For the plaintiff, the advantage of a strict per se analysis is that he does not have to prove the actual effect of the challenged conduct.¹³ Furthermore, once the court determines that the conduct falls within the per se rule, the court will not consider the defendant's justifications for the restraint.¹⁴ The major obstacle which the plaintiff faces is convincing the court that the challenged activity is within the per se category.¹⁵

II. Group Boycott Doctrine

Although the Supreme Court has consistently condemned group boycotts¹⁶ as per se illegal under the Sherman Act,¹⁷ it is not

11 Rule of reason analysis requires the examination of several factors to determine the effect of the restraint on competition. These factors include the nature of the industry involved before and after the restraint was imposed, and the type of restraint imposed. In examining the nature of the restraint, courts study both its purpose and actual or probable effect. See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). See also L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* § 68, at 187-88 (1977).

12 Although the per se rule requires less extensive analysis of the purpose and effect of the challenged conduct, the focus of both the per se rule and the rule of reason remains the same—the effect of the restraint on competition. In practice, the distinction between the two types often becomes blurred. Even under the per se rule, courts may require an extensive examination of the market and circumstances surrounding the challenged activity. See *National Collegiate Athletic Ass'n v. Board of Regents*, 104 S. Ct. 2948, 2962 n.26 (1984).

13 See *Pontius v. Children's Hosp.*, 552 F. Supp. 1352, 1367 (W.D. Pa. 1982) (under a per se rule, plaintiff is not required to establish the actual harm from the challenged conduct); Kissan, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 CALIF. L. REV. 595, 604 (1982) (per se rules reduce plaintiff's burden of proof because no showing of specific anticompetitive effects is required).

14 See, e.g., *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959) (group boycotts are per se illegal and not justified by reasonableness of restraint); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 468 (1941) (reasonableness of defendants' conduct is not relevant where activity is found to be a per se illegal group boycott).

15 Professor Sullivan notes that two requirements must be met before the per se rule applies: (1) the activity must be likely to cause substantial injury to competition; and (2) analysis of the effect of the activity on competition must be costly (both in terms of dollars and time), complex, and uncertain. Where these requirements are met, the courts should condemn the activity based upon judicial economy. L. SULLIVAN, *supra* note 11, § 70, at 193.

16 Group boycott or concerted refusal to deal, as used in this note, refers to joint activities by competitors either to keep other competitors from entering the field or to drive existing competitors out of the field. Professor Sullivan distinguishes these activities from concerted actions intended to reach some goal other than driving the competitor out of the market. Conduct within the latter group should not be analyzed under the per se rule. See L. SULLIVAN, *supra* note 11, § 83, at 232. Professor Bauer defines group boycotts as agreements between two or more parties that one or more of the parties either will not deal at all or will deal only on disadvantageous terms with another party. Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685, 685 n.5 (1979); cf. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 544-45 (1978). The common theme of these definitions is that joint actions by competitors for the purpose of restraining another competitor and thereby improving their own competitive advantage should be condemned as per se illegal.

clear what parameters the Court uses to determine that certain activities constitute a group boycott.¹⁸ An examination of the cases involving concerted activities classified by the Court as per se illegal, however, does yield certain common characteristics.

One characteristic of a group boycott is an agreement, between two or more parties, not to deal with a third party. This agreement may be express or inferred from the parties' conduct.¹⁹

17 See, e.g., *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941).

18 The uncertainty surrounding the group boycott per se illegality rule has led to much criticism from commentators. See, e.g., Bauer, *supra* note 16, at 685; McCormick, *Group Boycotts—Per Se or Not Per Se, That Is the Question*, 7 SETON HALL L. REV. 703 (1976); Woolley, *Is a Boycott a Per Se Violation of the Antitrust Laws?*, 27 RUTGERS L. REV. 773 (1974).

The question of the continued vitality of traditional per se analysis as applied to group boycotts was recently argued before the Supreme Court in *Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc.*, 715 F.2d 1393 (9th Cir. 1983), *cert. granted*, 105 S. Ct. 77 (1984). Northwest Wholesale is a buying cooperative composed of retail sellers of office supplies. Co-op members can purchase supplies at a discount because of the association's ability to buy in large volumes. In addition, members receive a yearly rebate on purchases. Pacific Stationery, a member of the co-op for over 20 years, was expelled from the association without notice. 715 F.2d at 1394-95.

Pacific brought suit against Northwest alleging that the expulsion constituted a per se violation of § 1 of the Sherman Act. The district court granted Northwest's motion for summary judgment. The court was unwilling to apply the per se rule on these facts and held that the claim failed under the rule of reason because Pacific failed to show sufficient anticompetitive effect in the relevant market. The Court of Appeals for the Ninth Circuit reversed, holding that the facts of the case supported application of the per se rule because the defendant had acted primarily out of anticompetitive animus. *Id.* at 1395-96.

In the United States Supreme Court, Northwest argued, *inter alia*, that any analysis of alleged group boycott activity must include an analysis of the defendant's market power and the effect of the challenged conduct. The courts should take a "quick look" at the market impact of the challenged activity before characterizing it as per se illegal. Brief of Petitioner at 14-15, 32-33, *Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc.*, 715 F.2d 1393 (9th Cir. 1983), *cert. granted*, 105 S. Ct. 77 (1984).

Pacific, although arguing that traditional per se analysis should apply in this case, recognized that the Court might articulate some modification of the traditional rule. Notwithstanding any modification, per se illegality should still apply where the defendant acted with the primary intent to injure the competitive advantage of another competitor and the conduct lacks any economic justification. Brief of Respondent at 22-28, *Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc.*, 715 F.2d 1393 (9th Cir. 1983), *cert. granted*, 105 S. Ct. 77 (1984). This approach echoes the "quick look" urged by petitioner.

Should the Court adopt the "quick look" approach in group boycott cases, the plaintiff will lose many of the advantages of traditional per se analysis. See notes 13-14 *supra* and accompanying text. Specifically, the plaintiff would be required to support his claim by some type of market analysis of the effect of the challenged conduct. Proof of the existence of an agreement not to deal with the plaintiff-competitor, standing alone, would not suffice.

19 In an early case, *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914), the Supreme Court held that the circulation among members of a retail lumber association of "blacklists", which identified wholesalers who sold directly to the public, constituted a violation of the Sherman Act. Without using "per se" language, the Court condemned this activity because it caused retailers to refuse to deal with the named wholesalers. *Eastern States* did not involve an explicit agreement among retailers not to deal with the named wholesalers. Nevertheless, the Court inferred a conspiracy based on the "natural tendency" for retailers to stop dealing with the wholesalers after the retailers had

Per se illegal group boycotts also involve an intent to destroy or seriously hinder another's competitive position.²⁰ Logical inferences based upon circumstantial evidence can support a finding of anticompetitive animus. For example, in *Associated Press v. United States*,²¹ the Court held unlawful the Association's bylaws which restricted news service to members only, and gave current members veto power over the membership applications of nonmember competitors.²² The Court found that, although no such purpose was expressed, the bylaws functioned to hinder or destroy competition.²³

The effect of the challenged conduct also influences characterization of the activity. When concerted action potentially limits the

received the blacklists. *Id.* at 608-09. See also *Theatre Enters. Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954) (courts may infer an agreement from circumstantial evidence of the parties' business behavior); cf. *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 208 (3d Cir. 1980); *McElhinney v. Medical Protective Co.*, 549 F. Supp. 121, 128 (E.D. Ky. 1982).

20 See, e.g., *United States v. General Motors*, 384 U.S. 127, 140 (1966) ("classic conspiracy" in restraint of trade involves collective action to eliminate competitors by refusing to deal with them); *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 210-13 (1959) (allegations that appliance manufacturers, distributors and retailer agreed that the manufacturers and distributors would not deal with plaintiff-retailer, or would deal only on unfavorable terms, show more than a "private quarrel" between retailers; allegations clearly show a group boycott which limits the plaintiff's ability to compete in the market); *Associated Press v. United States*, 326 U.S. 1, 14-16 (1945) (Sherman Act prohibits collective action intended to destroy competition); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 467-68 (1941) (group boycott is per se illegal where parties intend to destroy business of a competitor).

21 326 U.S. 1 (1945).

22 The bylaws prescribed a simple admission procedure for applicants who did not compete with current members. In contrast, a competitor-applicant faced a much tougher procedure. If any member objected to the competitor's application, the board of directors referred the application to a full meeting of the Association. Before the competitor could attain membership, he was required to pay substantial fees (in some cases the fees exceeded \$1,000,000). In addition, the potential member must either give up any exclusive rights he held to news or news picture services or arrange for the competitor-member to receive the same services on equivalent terms. Finally, a majority of the members had to approve the application. *Id.* at 10-11.

23 *Id.* at 16. See also *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963). In *Silver*, an over-the-counter market securities dealer, who was not a member of the New York Stock Exchange ("Exchange"), obtained "temporary approval" from the Exchange for private wire connections with Exchange members. The Exchange discontinued these connections without notice or explanation. The issue before the Court involved whether the Securities Act of 1934 impliedly exempted the Exchange from antitrust immunity. The Court stated that in the absence of the Securities Act, the Exchange's withdrawal of wire connections without notice or explanation would constitute a per se illegal group boycott. *Id.* at 347.

In characterizing the Exchange's actions as a group boycott, the Court emphasized that Silver had lost a service which, by its nature, was vital to maintaining a competitive position within the industry. *Id.* at 348 n.5. The plaintiff relied heavily on instant communication with Exchange members. The Exchange's action deprived him of an essential service and caused a significant decrease in the plaintiff's volume of business. *Id.* at 345. Although the Court did not specifically discuss purpose, the Court's language suggests that without statutory justification (i.e., the Securities Act of 1934), the only logical purpose of such actions would have been to drive a competitor out of the field. See *id.* at 348.

freedom of remaining competitors to deal in the market²⁴ or prevents competitors from obtaining access to the market,²⁵ the activity more closely resembles a per se illegal group boycott. Although per se analysis does not require proof of specific effects, the plaintiff probably must show some potential for anticompetitive results before the court will classify the activity as within the per se rule.

A final element relevant to characterization as a per se illegal group boycott is some showing of the defendant's market power, although proof of monopoly power is not required.²⁶ Where the challenged conduct has a "tendency to monopolize," the activity is more properly classified as within the per se category.²⁷

The Supreme Court has never clearly stated the proper analysis for determining when the per se rule should apply to concerted activity. Recent cases suggest that the Court uses a "continuum" approach with no clear demarcation between per se analysis and rule of reason analysis.²⁸ Therefore, if the plaintiff can make a strong showing of an anticompetitive purpose and effect, plus market power, a court should be more willing to apply the per se rule.

III. Denial of Admitting Privileges—An Antitrust Violation

The extent to which non-physician providers can be truly competitive with physicians depends, in part, on their access to hospital facilities.²⁹ Access to these facilities requires admitting privileges.

24 See, e.g., *United States v. General Motors*, 384 U.S. 127, 140 (1966) (per se illegal group boycott found where concerted action limited the freedom of non-boycotted retailers to deal with discount merchants); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 465 (1941) (explicit agreement to boycott certain retailers held within the per se rule because it reduced retailers' sales outlets and supply sources and restricted retailers' freedom of action).

25 See, e.g., *General Motors*, 384 U.S. at 146 (conspiracy to exclude traders from the market is per se illegal); *Associated Press*, 326 U.S. at 13-14 (trade restraints which limit access to the market for potential competitors violate Sherman Act policies). See also *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659-60 (1961) (allegation that defendants conspired to block plaintiff's access to market is sufficient to state a cause of action under § 1).

26 See, e.g., *Associated Press*, 326 U.S. at 13 (restrictive bylaws of the largest news agency in the United States held facially invalid as a violation of the Sherman Act; fact that the Association held less than monopoly power deemed irrelevant); *Fashion Originators' Guild*, 312 U.S. at 462, 467 (where association controlled up to 60% of the market, agreement among association's members to boycott certain retailers held per se illegal as a group boycott).

27 See, e.g., *Klor's, Inc. v. Broadway-Hale Stores* 359 U.S. 207, 213-14 (1959); *Fashion Originators' Guild*, 312 U.S. at 466.

28 See *National Collegiate Athletic Ass'n v. Board of Regents*, 104 S. Ct. 2948, 2962 n.26 (1984); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551, 1556-58 (1984). See also Bauer, *supra* note 16, at 704; Liebenluft & Pollard, *Antitrust Scrutiny of the Health Professions: Developing a Framework for Assessing Private Restraints*, 34 VAND. L. REV. 927, 946 (1981).

29 See *Dolan & Ralston*, *supra* note 3, at 713-14 (lack of admitting privileges can result in loss of patients and therefore loss of revenue; lack of privileges may also result in general

Normally the medical staff (composed of physicians) controls the system whereby privileges are either granted or denied even if, on paper, the final decision emanates from the hospital's board of directors.³⁰ The potential for group boycott activity is inherent in this system.³¹

To successfully litigate an antitrust challenge to a hospital's denial of staff privileges, a non-physician provider must establish three elements under section 1 of the Sherman Act: (1) contract, combination, or conspiracy; (2) effect on interstate commerce; and (3) restraint of trade.³² This note will treat each element separately.

A. *Contract, Combination, or Conspiracy*

The first element of a section 1 violation is plurality of action.³³ In terms of hospital admitting privileges, the board of directors' decision to grant or deny privileges stems from the recommendations of the medical staff. This action does not constitute a conspiracy between the hospital and medical staff, however, because employees cannot conspire with their employer, within the meaning of a section 1 conspiracy.³⁴

Nevertheless, the requisite concerted action has been found among hospital staff members as independent practitioners. In *Weiss v. York Hospital*,³⁵ the United States Court of Appeals for the Third Circuit held, as a matter of law, that a medical staff, as a combination of individual physicians, may conspire within itself even though the hospital cannot legally conspire with its own medical staff.³⁶ In reaching this conclusion, the *Weiss* court characterized the medical staff as independent economic entities in competition with other physicians in the community and on the medical staff. As such, their actions satisfied the contract, combination, or conspiracy requirement.³⁷ Accordingly, the court of appeals found an-

perception that practitioner without privileges is "second class"); Note, *supra* note 6, at 388 (practitioner without hospital privileges is less attractive to patients who may assume incompetence, or desire a practitioner who can provide both in-patient and out-patient services; lack of hospital privileges eliminates a potential source of referrals within the hospital).

30 Dolan & Ralston, *supra* note 3, at 709-12.

31 See note 16 *supra*.

32 15 U.S.C. § 1 (1982).

33 L. SULLIVAN, *supra* note 11, § 108.

34 See *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731, 2741 (1984).

35 745 F.2d 786 (3d Cir. 1984) (osteopath challenged denial of hospital admitting privileges under § 1 of the Sherman Act, alleging that medical staff engaged in an unlawful group boycott), *cert. denied*, 105 S. Ct. 1777 (1985).

36 *Id.* at 814.

37 *Id.* at 816. Other courts have not interpreted the conspiracy requirement as liberally in the context of antitrust challenges to denial of admitting privileges. See *Feldman v. Jackson Memorial Hosp.*, 571 F. Supp. 1000, 1007-09 (S.D. Fla. 1983) (complaint alleging un-

itrust scrutiny appropriate "to insure that [the staff] members do not abuse otherwise legitimate organizations to secure an unfair advantage over their competitors."³⁸

The *Weiss* court approached the conspiracy issue pragmatically. Medical staff physicians frequently maintain independent private practices.³⁹ As independent practitioners they compete directly with non-physician providers for certain types of patients.⁴⁰ Medical staff decisions to deny admitting privileges to non-physician competitors enhances the competitive position of the individual staff members. Because Congress designed the Sherman Act to prevent this type of anticompetitive behavior,⁴¹ courts should look beyond the "medical staff" label and examine the physicians' independent economic interests to determine if the necessary concerted action exists. Only if all medical staff members have no independent interests, for example when the physicians are salaried hospital employees without private practices, should the courts consider the medical staff as hospital employees and therefore incapable of conspiring within the meaning of section 1. Otherwise,

lawful conspiracy fails where plaintiff does not establish either that other staff members were his competitors or evidence of an agreement among staff members); *Pontius v. Children's Hosp.*, 552 F. Supp. 1352, 1375-76 (W.D. Pa. 1982) (complaint alleging group boycott fails because alleged conspirators did not directly compete with plaintiff). *But see* *McElhinney v. Medical Protective Co.*, 549 F. Supp. 121, 128 (E.D. Ky. 1982), *remanded on other grounds*, 1984-1 Trade Cas. (CCH) ¶ 66,054 (conspiracy to boycott plaintiff inferred from conduct of individual staff members); *Nurse Midwifery Assocs. v. Hibbett*, 549 F. Supp. 1185, 1190 (M.D. Tenn. 1982) (corporation controlled by medical doctors with a board of directors dominated by medical doctors may be capable of concerted action); *Williams v. Kleaveland*, 534 F. Supp. 912, 920 (W.D. Mich. 1981) (conspiracy requirement satisfied if plaintiff can show that staff members acted for personal benefit).

38 *Weiss*, 745 F.2d at 816. The *Weiss* court relied on Supreme Court dicta in *Associated Press and Silver* in concluding that medical staff members may legally conspire among themselves to deny admitting privileges. *Id.* at 815 n.49. In neither case did the Supreme Court specifically discuss whether members of an association may be considered as independent entities for antitrust purposes. In *Associated Press*, however, the Court condemned the association's bylaws, which gave members veto power over the application of nonmember competitors, as per se illegal under § 1 of the Sherman Act. In *Silver*, the Court found that, but for the legislative mandate of self-regulation, the action of New York Stock Exchange members, in discontinuing wire services to nonmembers without notice, constituted a violation of § 1. Since conspiracy is a requisite element of a § 1 violation, a reasonable inference from these cases is that members of an association may be considered as independent entities capable of entering into an illegal conspiracy.

39 See *Dolan & Ralston*, *supra* note 3, at 711; *Kissam, Webber, Bigus & Holzgraeffe*, *supra* note 13, at 639-40.

40 Physicians compete directly with non-physicians according to specialty area. For example, obstetricians compete with nurse midwives for patients who can reasonably be expected to have uncomplicated pregnancies and deliveries. Orthopedic surgeons compete with podiatrists for patients with medical problems involving the feet.

41 In *Associated Press*, the Supreme Court stated: "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete." 326 U.S. at 15.

courts should view staff members as independent entities capable of joint action.

Under this standard, a plaintiff would meet his burden of proof on the conspiracy issue by showing: (1) that at least some staff members maintained private practices; and (2) that the decision to deny admitting privileges emanated from the medical staff.⁴² The existence of independent practices establishes the ability of medical staff members to conspire with one another. This conspiracy is effectuated when the board of directors acts upon an adverse decision from the medical staff.⁴³

B. *Effect on Interstate Commerce*

Next, the plaintiff must prove an effect on interstate commerce.⁴⁴ Denial of admitting privileges implicates interstate commerce in one of three ways: (1) by affecting the plaintiff's activity in interstate commerce;⁴⁵ (2) by affecting the defendant's general business activity;⁴⁶ or (3) by affecting the defendant's specific activi-

42 One commentator and some lower courts suggest that a finding of conspiracy requires proof that staff members compete directly with the applicant. See Drexel, *The Anti-trust Implications of the Denial of Hospital Staff Privileges*, 36 U. MIAMI L. REV. 207, 223-24 (1982). See also note 37 *supra*. The existence of a conspiracy should not depend upon whether staff members compete directly with non-physicians. The court should consider the question of direct competition only in relation to restraint of trade issues, such as the probable effect of the challenged conduct on the availability of services.

In *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731 (1984), the Supreme Court defined conspiracy as joint action between two or more entities to achieve a common benefit, where the entities previously acted independently in their own interests. *Id.* at 2741. As private practitioners, physicians act independently in their own economic interests. As medical staff members, physicians have the opportunity to use their joint power to further their interests by denying admitting privileges to non-physicians. For example, even though an obstetrician does not compete directly with podiatrists, by denying privileges to this class of non-physicians, obstetricians can indirectly enhance their own interests in excluding other non-physicians, such as nurse midwives. Therefore, by denying privileges to all non-physicians, staff members can protect their general economic interests as physicians.

43 In the typical hospital organizational plan, the final decision regarding admitting privileges emanates from the board of directors, based upon recommendations from the medical staff. Looking behind the formal structure, the power to grant or deny privileges rests with the medical staff. See Dolan & Ralston, *supra* note 3, at 709-12; Kissam, Webber, Bigus & Holzgraefe, *supra* note 13, at 607-08.

44 A plaintiff may meet the interstate commerce requirement by showing either that the defendant's activity is within interstate commerce or substantially affects interstate commerce. See *McLain v. Real Estate Bd.*, 444 U.S. 232 (1980). The provision of hospital services and health care is essentially a local activity. Therefore, a plaintiff challenging the denial of admitting privileges will usually rely on the "affecting commerce" test to meet the jurisdictional requirement. See Kissam, Webber, Bigus & Holzgraefe, *supra* note 13, at 628-29; Note, *supra* note 6, at 395.

45 See, e.g., *Maresse v. Interqual*, 748 F.2d 373 (7th Cir. 1984); *Cardio-Medical Assocs. v. Crozer-Chester Medical Center*, 721 F.2d 68 (3d Cir. 1983); *Hahn v. Oregon Physicians Servs.*, 689 F.2d 840 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 3115 (1983); *Nara v. American Dental Ass'n*, 526 F. Supp. 452 (W.D. Mich. 1981).

46 See, e.g., *Feldman v. Jackson Memorial Hosp.*, 571 F. Supp. 1000 (S.D. Fla. 1983);

ties related to the denial of privileges.⁴⁷ Lower courts which focus on the defendant's activities are split regarding the correct interpretation of the interstate commerce requirement.⁴⁸ Some courts require only that the defendant's general business activity affect interstate commerce, while others require a more particularized showing that the challenged conduct itself affects interstate commerce.

The plaintiff's burden of proof changes significantly according to the standard adopted by the court. If the court focuses solely on the challenged conduct's effect on the plaintiff's activity in interstate commerce, the non-physician provider will often be unable to meet the jurisdictional requirement. Physicians can satisfy this standard by showing that potential patients receive Medicare or Medicaid benefits,⁴⁹ that they travel across state lines to obtain

Miller v. Indiana Hosp., 562 F. Supp. 1259 (W.D. Pa. 1983); Williams v. Kleaveland, 534 F. Supp. 912 (W.D. Mich. 1981); McDonald v. Saint Joseph's Hosp., 524 F. Supp. 122 (N.D. Ga. 1981).

47 See, e.g., Hayden v. Bracy, 744 F.2d 1338 (8th Cir. 1984); McElhinney v. Medical Protective Co., 1984-1 Trade Cas. (CCH) ¶ 66,054; Furlong v. Long Island College Hosp., 710 F.2d 922 (2d Cir. 1983); Crane v. Intermountain Health Care, Inc., 637 F.2d 715 (10th Cir. 1981) (en banc).

48 The controversy regarding the interstate commerce requirement stems from the Supreme Court's decision in *McLain v. Real Estate Bd.*, 444 U.S. 232 (1980). *McLain* involved a challenge to the business practices of local real estate agents under federal anti-trust laws. The complaint alleged that the defendants' local real estate activities affected interstate commerce because purchasers and sellers of real estate moved in interstate channels, and financing for these transactions came from out-of-state sources. *Id.* at 235-36.

The district court dismissed the complaint for failure to establish a sufficient nexus with interstate commerce. According to the district court, the challenged brokerage activities were intrastate in nature with only incidental connections to interstate commerce. *Id.* at 239-40. The Court of Appeals for the Fifth Circuit affirmed, taking the position that realty and brokerage activities were purely local in nature, and the interstate financing transactions were not an integral part of these local activities. *Id.* at 240.

The Supreme Court vacated the lower court decisions, holding that the brokers' activities which were "infected" by the illegal conduct could be shown to have a substantial effect on interstate commerce. *Id.* at 246-47. Sherman Act jurisdiction requires an allegation in the pleadings "either that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce." *Id.* at 242.

The Court declined to require a particularized showing of the effect on interstate commerce arising from the challenged activity. To require such a showing would circumvent the purpose of the interstate commerce requirement where the challenged activity failed to produce the desired restraint. *Id.* at 242-43.

The language of *McLain* suggests that courts should broadly construe the interstate commerce requirement. Some lower courts, however, have been reluctant to do so. See note 54 *infra*. For an analysis of *McLain* and possible interpretations of the interstate commerce requirement, see Kissam, Webber, Bigus & Holzgraefe, *supra* note 13, at 632-36; Note, *Jurisdiction Under the Sherman Act: A Close Look at the Affects Test*, 60 NOTRE DAME L. REV. 603 (1985).

49 Zamiri v. William Beaumont Hosp., 430 F. Supp. 875, 877 (E.D. Mich. 1977).

services,⁵⁰ or that the physician receives reimbursement from out-of-state insurers.⁵¹ Denial of admitting privileges will affect interstate commerce through these channels. A non-physician provider, however, may be ineligible for direct reimbursement from third-party insurers,⁵² or not sufficiently established to draw patients from across state lines.

But, if the court considers the defendant's activity in interstate commerce, the plaintiff's burden is eased. In considering the defendant's conduct, the courts generally apply one of two tests: (1) the general business activities test,⁵³ or (2) the challenged conduct test.⁵⁴ Under the "general business activities" test, the plaintiff need only show that the hospital's overall conduct affects interstate commerce. Because hospitals generally purchase supplies from out-of-state companies or receive reimbursements from out-of-state insurers,⁵⁵ the plaintiff will generally have little difficulty in meeting the interstate commerce requirement under this test.⁵⁶

The plaintiff will have more difficulty if the court requires a

50 *Feminist Women's Health Center v. Mohammed*, 586 F.2d 530, 540 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979).

51 *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 744 (1976).

52 See *Dolan & Ralston*, *supra* note 3, at 722.

53 The Third and Ninth Circuits have adopted a broad interpretation of *McLain*, holding that if the defendant's overall business activity affects interstate commerce then jurisdiction under the Sherman Act exists. This reasoning draws on the expansive power of Congress to regulate interstate commerce under the commerce clause. Therefore, even "local" activity falls within the reach of the Sherman Act if some aspect of the activity burdens interstate commerce. See *Cardio-Medical Assocs. v. Crozer-Chester Medical Center*, 721 F.2d 68 (3d Cir. 1983); *cf. Weiss v. York Hosp.*, 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1777 (1985); *Hahn v. Oregon Physicians Servs.*, 689 F.2d 840 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 3115 (1983).

54 The First, Second, Sixth, Eighth, and Tenth Circuits interpret *McLain* narrowly and require a showing that the challenged activity affects interstate commerce. See *Hayden v. Bracy*, 744 F.2d 1338 (8th Cir. 1984); *McElhinney v. Medical Protective Co.*, 1984-1 Trade Cas. (CCH) ¶ 66,054; *Furlong v. Long Island College Hosp.*, 710 F.2d 922 (2d Cir. 1983); *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank*, 649 F.2d 36 (1st Cir. 1981); *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1981) (en banc).

These cases do not clearly indicate to what degree the plaintiff must show an effect on interstate commerce. For example, in *Furlong*, allegations by the plaintiff that he received third-party reimbursement for patient care from out-of-state sources, that he purchased goods from out-of-state suppliers, and that the defendant received money from the federal government were deemed insufficient to establish the requisite jurisdictional nexus. 710 F.2d at 924. Yet, the Second Circuit also stated that the plaintiff does not have to make an explicit showing of a causal link between interstate commerce and the allegedly unlawful conduct. *Id.* at 926.

In *Intermountain Health*, the Tenth Circuit adopted the "narrow" interpretation of *McLain* but found that the plaintiff's allegations that the defendant served patients from a tri-state area, that he received third-party reimbursement from out-of-state insurers, and that the plaintiff purchased substantial amounts of supplies from out-of-state suppliers satisfied the jurisdictional requirement. 637 F.2d at 725.

55 See Note, *supra* note 6, at 395.

56 See note 46 *supra*.

showing that the *challenged conduct* itself affects interstate commerce. Courts adopting this standard require a more particularized showing of the effect on interstate commerce. Unfortunately, these courts have not articulated clear standards by which they judge the sufficiency of complaints, other than stating that general allegations regarding the hospital's overall business activities will not suffice.⁵⁷

In the spirit of *McLain v. Real Estate Board of New Orleans*,⁵⁸ courts should broadly construe the jurisdictional requirement under the Sherman Act. Hospital activities affect interstate commerce through transactions with interstate insurers and suppliers and the movement of patients across state lines. Access to hospital facilities, through admitting privileges, opens channels of interstate commerce to health care providers. Conversely, these channels may be closed when privileges are denied. If, as the Supreme Court has indicated, the reach of the Sherman Act corresponds to the breadth of congressional power under the commerce clause,⁵⁹ challenges to the denial of admitting privileges clearly fall within Sherman Act jurisdiction.

C. *Restraint of Trade*

Finally, the plaintiff must prove that the activity in question constitutes an unreasonable restraint of trade. In challenging the denial of hospital admitting privileges as a group boycott,⁶⁰ the non-physician provider faces the major obstacle of characterization.⁶¹ If the court finds that the conduct meets the requirements of a "classic" group boycott, the per se rule of illegality applies. On the other hand, if the plaintiff fails to establish that the activity falls within the per se category, then the rule of reason applies. In this case, the court will engage in extensive economic analyses of the purpose and effect of the restraint to determine if it unduly restrains competition. Under either the per se rule or the rule of reason, however, the non-physician provider should prevail whenever

⁵⁷ See note 47 *supra*.

⁵⁸ 444 U.S. 232 (1980). See note 48 *supra*.

⁵⁹ See *McLain v. Real Estate Bd.*, 444 U.S. 232, 241 (1980); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 743 n.2 (1976); *United States v. Employing Plasterers Ass'n*, 347 U.S. 186, 189 (1954). See also Blumstein & Sloan, *Redefining Government's Role in Health Care: Is a Dose of Competition What the Doctor Should Order?*, 34 VAND. L. REV. 849, 912-15 (1981).

⁶⁰ When a hospital denies admitting privileges to non-physician providers, these providers cannot enter the field of hospital-based health care services. Physicians effectively control the process whereby privileges are granted or denied. See note 30 *supra* and accompanying text. Therefore, the denial represents an attempt by physicians to prevent potential competitors from entering the marketplace. This constitutes a group boycott or concerted refusal to deal. See also *Dolan & Ralston*, *supra* note 3, at 752; *Drexel*, *supra* note 42, at 222; Kissam, *Antitrust Boycott Doctrine*, 69 IOWA L. REV. 1165, 1212-13 (1984).

⁶¹ See note 15 *supra* and accompanying text.

the hospital has denied privileges on grounds unrelated to individual competence.⁶²

Denial of admitting privileges to a class of competitors closely resembles the classic group boycott consistently condemned by the Supreme Court as per se illegal.⁶³ An element of group boycott activity is an agreement between two or more parties not to deal with a third party. This agreement may be express or implied.⁶⁴

An express agreement may take the form of hospital policies or bylaws which prohibit granting of admitting privileges to non-physicians. When the medical staff acts pursuant to these policies, the individual physicians, in effect, act pursuant to an agreement to deny potential competitors access to services needed to maintain parity in competition.⁶⁵ In other contexts, the Supreme Court has condemned such activity as per se illegal.⁶⁶

In the absence of an express agreement, when a hospital consistently denies admitting privileges to non-physicians or subjects them to more rigorous application procedures, the court may infer the necessary agreement from this conduct. For example, in *Weiss v. York Hospital*,⁶⁷ an osteopath challenged the denial of admitting privileges to York Hospital under section 1 of the Sherman Act. Based upon the jury's findings that the hospital applied more rigorous and unreasonable application procedures to osteopaths than it did to medical doctors, the district court held that the medical staff had engaged in a group boycott against osteopaths. The Court of Appeals for the Third Circuit affirmed this portion of the lower court's ruling.⁶⁸ Other evidence from which a court may infer an agreement includes a departure from normal review procedures,

62 This note only addresses the denial of admitting privileges because of the applicant's status as a non-physician. Legitimate denials based upon proven individual incompetence in a particular field should not be subject to antitrust scrutiny. The latter decision involves reasonable restrictions designed to maintain the hospital's quality of care and thus has pro-competitive effects. In contrast, the former decision, by providing a blanket prohibition, effectively insulates the medical staff from economic competition provided by non-physicians. This anticompetitive result lies within the prohibitions of antitrust laws. *Cf. Weiss v. York Hosp.* 745 F.2d 786, 820, n.60 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1777 (1985).

63 See notes 19-27 *supra* and accompanying text.

64 See note 19 *supra* and accompanying text.

65 This situation parallels the bylaws struck down by the Supreme Court in *Associated Press*. See notes 21-22 *supra* and accompanying text.

66 See *Associated Press v. United States*, 326 U.S. 1 (1945) (bylaws giving association members veto power over applications of competitor nonmembers struck down as facially restrictive of trade, in violation of the Sherman Act); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941) (explicit agreement between designers and manufacturers not to deal with retailer who sold products manufactured by "style pirates" constitutes a per se illegal group boycott).

67 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1777 (1985).

68 *Id.* at 818-19. See also *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 608-09 (1914) (conspiracy inferred based on parties' conduct); *Kissan, Weber, Bigus & Holzgraefe*, *supra* note 13, at 640 (agreement suggested by history of physician

such as ad hoc meetings regarding the applicant outside of the hospital,⁶⁹ staff members' threats to resign if an applicant receives admitting privileges,⁷⁰ economic incentives for defendants to refuse to deal with the plaintiff,⁷¹ and close contact or contractual agreements among alleged conspirators.⁷²

Per se illegal group boycotts also involve a purpose to destroy competition or seriously damage the competitive position of a rival.⁷³ Blanket denials of admitting privileges to non-physicians effectuate these purposes by reducing access to necessary services and thereby eliminating one form of competition.⁷⁴

Generally, neither the hospital nor its medical staff would admit such a blatantly anticompetitive purpose. They would probably attempt to justify their actions based on concerns for patient safety or ethical norms. Many courts have accepted these justifications as a basis for applying the rule of reason, rather than the per se rule.⁷⁵ These justifications, however, are inappropriate in the context of blanket denial of admitting privileges to non-physicians.

Differential treatment of professionals under the antitrust laws stems from *Goldfarb v. Virginia State Bar*.⁷⁶ In *Goldfarb*, the Supreme Court held that a minimum fee schedule promulgated by a local bar association constituted price-fixing and violated section 1 of the Sherman Act.⁷⁷ The Court indicated, however, that situations involving the "public service aspect or other features of the professions" may receive more lenient treatment under antitrust

domination over privilege decisions, economic interests of physicians in limiting admitting privileges, and hospital accreditation standards).

69 See *McElhinney v. Medical Protective Co.*, 549 F. Supp. 121, 130 (E.D. Ky. 1982), remanded on other grounds, 1984-1 Trade Cas. (CCH) ¶ 66,054.

70 *Id.*

71 See *Trident Neuro-Imaging Laboratory v. Blue Cross*, 568 F. Supp. 1474, 1478 (D.S.C. 1983).

72 *Id.*

73 See note 20 *supra* and accompanying text.

74 See *Dolan & Ralston*, *supra* note 3, at 753 (purpose of hospital and medical staff boycotts includes putting the competitor out of business).

75 See, e.g., *Wilk v. American Medical Ass'n*, 719 F.2d 207, 221 (7th Cir. 1983) (evidence of a patient care motive mandates application of the rule of reason), *cert. denied*, 104 S. Ct. 2398 (1984); *McElhinney v. Medical Protective Co.*, 549 F. Supp. 121, 133 (E.D. Ky. 1983), (restraints based on public service or ethical norms analyzed under rule of reason), remanded on other grounds, 1984-1 Trade Cas. (CCH) ¶ 66,054. See also *Weiss v. York Hosp.*, 745 F.2d 786, 821 n.61 (3d Cir. 1984) (rule of reason analysis would apply where defendant asserts a public welfare or ethical norm justification), *cert. denied*, 105 S. Ct. 1777 (1985); *Veizaga v. National Bd. for Respiratory Therapy*, 1977-1 Trade Cas. (CCH) ¶ 61,274 (N.D. Ill. 1977) (antitrust challenges to noncommercial professional activity governed by rule of reason). But see, *Feminist Women's Health Center v. Mohammed*, 586 F.2d 530, 546-47 (5th Cir. 1978) (industry self-regulation may be subject to per se rule if plaintiff shows at least minimal indicia of anticompetitive purpose), *cert. denied*, 444 U.S. 924 (1979).

76 421 U.S. 773 (1975).

77 Without using "per se" language, the Court condemned the fee schedule as a "classic illustration of price fixing." *Id.* at 783.

analysis.⁷⁸

The Court clarified this public service caveat in *National Society of Professional Engineers v. United States*⁷⁹ by limiting the "exception" to restraints which regulate and promote competition.⁸⁰ The opinion suggests that such restraints would be analyzed under the rule of reason rather than the per se rule.⁸¹ Therefore, the "exception" under antitrust analysis for professional activity only applies to restraints which have a pro-competitive purpose. The "exception" is not an exemption. Rather, it merely removes the case from per se treatment.⁸²

When a defendant in a privilege denial case offers a public service justification, courts must determine whether the denial has a pro-competitive purpose.⁸³ In the absence of such a purpose, the per se rule should apply where the challenged conduct meets the other requirements of a group boycott.

Blanket denials of admitting privileges to non-physicians do not have a pro-competitive purpose. Although this conduct regu-

78 *Id.* at 788 n.17. The defendants in *Goldfarb* did not attempt to justify their actions based on public service. The Court's public service caveat would seem to indicate that if this defense had been offered, rule of reason rather than per se analysis would apply.

79 435 U.S. 679 (1978). *Professional Engineers* involved an antitrust challenge to the engineering society's ethical canon which prohibited competitive bidding by its members. The society claimed, as an affirmative defense, that competitive bidding would lead to inferior work and jeopardize public safety. *Id.* at 684-85. The Court rejected this defense and held that the ethical canon, on its face, violated § 1 of the Sherman Act. *Id.* at 693. Therefore, the district court had correctly refused to consider evidence regarding the degree to which competitive bidding could negatively affect public welfare. *Id.* at 681.

In refusing to consider the reasonableness of the defendant's claimed justifications, the Court appears to have applied the per se rule to invalidate the ethical canon. Therefore, even restrictive activities which allegedly protect the public welfare, remain susceptible to per se treatment absent a showing of some procompetitive effect. *See Liebenluft & Pollard, supra* note 28, at 938.

80 435 U.S. at 696. As an example, the Court cited marketing restraints related to product safety which had neither an anticompetitive effect nor a primary purpose of hindering competition. *Id.* at 696 n.22.

81 *See Kissam, Webber, Bigus & Holzgraefe, supra* note 13, at 644 n.239 (in *Professional Engineers*, Supreme Court applied per se rule; Court refused to recognize defendant's affirmative defense that competition itself is unreasonable and therefore rejected rule of reason analysis).

82 *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) supports this interpretation of the "public service" exception. In *Maricopa County*, the Court held that maximum-fee schedules established by local medical foundations were per se illegal under § 1 of the Sherman Act as a form of price-fixing. The medical foundations justified their action as a means of improving the marketability of their services. Since this restraint did not regulate and promote competition within the meaning of *Professional Engineers*, the Court applied the per se rule. *Id.* at 349.

83 Where the hospital defends its conduct as a form of standard setting or self-regulation, at a minimum, the activity must provide objective standards for evaluation and procedural safeguards. *See Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961). *See also Liebenluft & Pollard, supra* note 28, at 953.

lates competition, it does so only by excluding potential competitors from the market for hospital-based services. The Supreme Court has long held this type of activity per se illegal.⁸⁴

Some restraints may enhance the quality of professional services, justifying rule of reason analysis.⁸⁵ Examples include educational and licensing requirements which promote minimal standards of competence, denial or revocation of admitting privileges based on demonstrated individual incompetence, and restrictions on staff size based on the availability of resources and support personnel. These restraints are pro-competitive because they stimulate intraprofessional competition, thereby raising the standard of care.⁸⁶

Blanket denials to non-physicians, on the other hand, do not stimulate competition. First, blanket denials eliminate a potential source of competitors for physicians, decreasing their incentive to remain efficient. Second, non-physicians lose a market for their services and cannot compete at all in the area of hospital-based care. When faced with a public service justification for the denial of staff privileges to non-physicians, courts should recognize this lack of pro-competitive purpose and not automatically apply the rule of reason. When other elements of a "classic" group boycott exist, courts should condemn the restraint as per se illegal.

To determine whether an activity constitutes a group boycott, courts examine the effect of the restraint on competition. If the restraint primarily limits the freedom of competitors to deal in the marketplace or denies market access to potential competitors, the conduct resembles a per se illegal boycott.⁸⁷

Denial of admitting privileges to non-physicians as a class has three primary effects. First, the non-physicians cannot enter the market for hospital-based services, leaving them at a distinct competitive disadvantage.⁸⁸ Not only will they lose business by having to refer patients in need of such services to physicians with admitting privileges, but also many potential patients will not seek the services of non-physicians because they cannot provide both in-pa-

84 See, e.g., *United States v. General Motors*, 384 U.S. 127 (1966); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); *Associated Press v. United States*, 326 U.S. 1 (1945).

85 *Maricopa County* suggests that justifications based upon improvement in professional services would satisfy the pro-competitive requirement of the public service exception. 457 U.S. at 349.

86 For a discussion of the pro-competitive aspects of improved standards of care, see Kissam, Webber, Bigus & Holzgraefe, *supra* note 13, at 611.

87 See notes 24-25 *supra* and accompanying text.

88 Where a restraint causes a class of competitors to lose access to a necessary service, the Supreme Court has condemned the activity as per se illegal. See, e.g., *United States v. General Motors*, 384 U.S. 127, 145 (1966); *Silver v. New York Stock Exch.*, 373 U.S. 341, 348-49 (1963); *Associated Press v. United States*, 326 U.S. 1, 13 (1945).

tient and out-patient care.⁸⁹

Second, physicians with admitting privileges cannot consult or refer patients to non-physicians. This adversely affects health care costs because the physician—and ultimately the patient—has no access to the lower cost services of non-physician providers. Furthermore, both physicians and non-physicians lose a potential reciprocal source of patient referrals.⁹⁰

For a physician with admitting privileges, the economic consequences of denying privileges to non-physicians are positive. The physician has an interest in limiting the number of practitioners in his or her specialty area because as the demand for that type of service increases the physician will benefit from more patients.⁹¹ The patient, on the other hand, has an interest in an increased pool of providers and lower costs.⁹² When non-physician providers cannot gain access to hospitals, however, patients in need of hospital services have no choice but to resort to physicians. Because these patients become, in effect, a “captive audience,” physicians have less incentive to keep costs down in order to remain competitive.

The third effect of restricting admitting privileges only to physicians is the concentration of economic power in the hands of a small group of providers, another hallmark of per se illegal activity.⁹³ Physicians become the sole source of access to hospital-based care.

Overall, blanket denial of admitting privileges to non-physicians suppresses competition between these providers and physicians, and reduces consumer choice in the health care industry. Such effects support characterization of the conduct as a group boycott and condemnation under the per se rule.

The final characteristic of a classic group boycott is market power.⁹⁴ In a rural setting with few hospitals, the plaintiff easily should establish that the defendant has the requisite market power.⁹⁵ In an urban area with many hospitals, the necessary market power could still be established, depending on the court's definition of the appropriate market.⁹⁶

89 See note 6 *supra* and accompanying text.

90 See Dolan & Ralston, *supra* note 3, at 713-14; Note, *supra* note 6, at 388.

91 See Dolan & Ralston, *supra* note 3, at 714-17; Kissam, Webber, Bigus & Holzgraefe, *supra* note 13, at 609-10.

92 See Dolan & Ralston, *supra* note 3, at 719-21.

93 See, e.g., *Klors, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 213-14 (1959); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 466-67 (1941).

94 See note 26 *supra* and accompanying text.

95 See Dolan & Ralston, *supra* note 3, at 742.

96 The relevant market can be defined in terms of both a product and a geographic market. See L. SULLIVAN, *supra* note 11, § 12, at 41. In the health care industry, the product market includes services which consumers consider a reasonable substitute for one another. The geographic market encompasses the area in which a consumer can seek alternative

Factors which a court should consider in determining the appropriate market include whether the hospital specializes in a particular type of service or has diagnostic equipment unavailable elsewhere,⁹⁷ the degree to which the hospital draws its patient population from a certain geographic location,⁹⁸ and the degree to which denial of privileges at one hospital reduces the opportunity to obtain privileges elsewhere. In addition, the court should consider that economic constraints and regulatory controls make it impossible for a non-physician provider, unable to obtain admitting privileges in an existing institution, to remedy this situation by establishing his own institution.⁹⁹ Because these factors vary widely among hospitals, courts will necessarily determine the market power issue on a case-by-case basis.

Even though denial of admitting privileges to non-physician providers as a class has all the characteristics of a per se illegal group boycott, courts are reluctant to apply the per se rule.¹⁰⁰ But

services when one source of supply becomes unavailable. See *Pontius v. Children's Hosp.*, 552 F. Supp. 1352, 1366-67 (W.D. Pa. 1982); *Robinson v. Magovern*, 521 F. Supp. 842, 877-78 (W.D. Pa. 1981). Therefore, the extent to which consumers view hospital services as interchangeable and the geographic proximity of hospitals will significantly affect the size of the appropriate market.

97 *Fortner Enters. v. United States Steel Corp. (Fortner I)*, 394 U.S. 495, 505-06 & n.2 (1969) (where the defendant offers a unique product which is unavailable to competitors, likelihood increases that market power exists).

98 See *Dolan & Ralston*, *supra* note 3, at 742. But see *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551 (1984) (where 30% of residents use the challenged hospital, sufficient market power not established to justify condemnation of the hospital's conduct as a per se illegal tying arrangement). In the context of hospital market power, the court should exercise caution in using geographic drawing power as a criterion. Unlike many traditional commercial enterprises, hospitals do not draw their patient populations primarily from the immediate geographic location. Because a physician may only have admitting privileges at a few hospitals, the patient's choice is necessarily limited. Furthermore, depending on the nature of treatment required, the patient may be forced to enter the single hospital in the area offering such a service. Only in emergency situations will the hospital's location become the single decisive factor in patient admission.

99 See *Associated Press*, 326 U.S. at 13 & n.10 (market power implied where an individual could not maintain a separate organization for gathering news worldwide comparable to that of Associated Press).

100 See, e.g., *Vucicevic v. MacNeal Memorial Hosp.*, 572 F. Supp. 1424 (N.D. Ill. 1983) (claim of group boycott analyzed under rule of reason); *McElhinney v. Medical Protective Co.*, 549 F. Supp. 121 (E.D. Ky. 1982) (rule of reason, rather than per se analysis, applies to charge of group boycott against hospital and staff members); *Pontius v. Children's Hosp.*, 552 F. Supp. 1352 (W.D. Pa. 1982) (alleged group boycott by hospital and physicians analyzed under the rule of reason, not the per se rule); *Nara v. American Dental Ass'n*, 526 F. Supp. 452 (W.D. Mich. 1981) (even if Sherman Act jurisdiction applied, defendants would be exempt because activities were noncommercial and intended to benefit the public); *Veizaga v. National Bd. for Respiratory Therapy*, 1977-1 Trade Cas. (CCH) ¶ 61,274 (N.D. Ill. 1977) (group boycott claim against professional organization analyzed under the rule of reason if noncommercial activity involved). But see *Weiss v. York Hosp.*, 745 F.2d 786 (3d Cir. 1984) (action by medical staff denying admitting privileges to osteopath constitutes a group boycott and is per se illegal), *cert. denied*, 105 S. Ct. 1777 (1985).

A case from the Seventh Circuit, *Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th

even under rule of reason analysis, the non-physician provider should prevail. A balancing of the pro- and anticompetitive effects of denying hospital admitting privileges to non-physicians shows that this is anticompetitive conduct.

Pro-competitive justifications arguably include improved quality of care, professional standards, and reputation. The result, however, may be the opposite.

Without competition, physicians have less incentive to practice efficiently. This can result in higher health care costs, less innovation, and fewer choices for the consumer. Other anticompetitive effects of blanket denials include elimination of an entire class of competitors from the market, non-physicians' loss of business, and concentration of economic power in the physicians' hands. These anticompetitive effects outweigh any pro-competitive benefits that may exist.

Finally, policy reasons favor condemnation of blanket denials under both *per se* and rule of reason analysis. When a hospital, through its medical staff, follows a policy of blanket denials, the staff acts as a form of "extra-governmental" agency condemned by

Cir. 1983), *cert. denied*, 104 S. Ct. 2398 (1984), illustrates this preference for rule of reason analysis in cases involving health care professionals. Chiropractors charged the American Medical Association ("AMA"), other professional medical associations, and individual physicians with conspiring to eliminate the practice of chiropractic, in violation of § 1 of the Sherman Act. The alleged boycott stemmed from promulgation and enforcement of the AMA's ethical principle prohibiting professional association with chiropractors. *Id.* at 213. At the trial court, the jury found for the defendants, based upon jury instructions which implied that "public interest" motivation constitutes an affirmative defense to *per se* illegal activity. *Id.* at 220. The court of appeals held that although the jury instructions were erroneous, they constituted harmless error because the *per se* rule did not apply at all to the case. *Id.* at 221.

According to the court, a *per se* rule applies to boycott activity only where the purpose of the boycott is to enforce an agreement which is illegal *per se*. Furthermore, the existence of a "patient care" motive removed the case from the *per se* category. The court then remanded the case for a new trial under a "modified" rule of reason. *Id.*

The Seventh Circuit relied on the Supreme Court's "public service" exception, *see* notes 77-82 *supra* and accompanying text, as authority for allowing the defendants to justify their actions based on concern for the quality of care provided by chiropractors. 719 F.2d at 226. The Supreme Court, however, has not "modified" the rule of reason, even for cases involving professionals. The Court has consistently held that under either *per se* treatment or the rule of reason, the inquiry focuses on the effect on competition. Noneconomic considerations are irrelevant. *See, e.g.,* National Collegiate Athletic Ass'n v. Board of Regents, 104 S. Ct. 2948, 2962 n.26 (1984); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978); Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36, 49 (1977); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

The Seventh Circuit also failed to recognize that the Supreme Court developed the "public service" exception within the contours of intraprofessional regulation. The Court did not provide sweeping authority for one group of professionals to regulate the scope of practice of their competitors. *See* Kissam, *supra* note 60, at 1214-16 (criticizing the *Will* decision as contrary to the Supreme Court's holding in *Professional Engineers*).

the Supreme Court in other contexts.¹⁰¹ In essence, one group of professionals takes responsibility for determining the validity of the practices of an independent group of professionals. Neither the boycotting professionals nor the courts should make this decision.

State licensing and practice acts regulate the scope of professional activity, and any changes in scope fall within the realm of legislative authority.¹⁰² Arguments for or against such changes must be addressed to that body.

IV. Conclusion

Non-physician providers need access to hospital services before they can be truly competitive in the health care industry. Where access is blocked by blanket denials of admitting privileges, section 1 of the Sherman Act may provide relief. Such denials have the characteristics of a "classic" group boycott and as such the courts should condemn the activity as per se illegal. Even if the court declines to apply the per se rule, blanket denials still fail under the rule of reason because the anticompetitive effects outweigh pro-competitive benefits.

Properly applied, antitrust law can open the door to true competition in health care. The gains to society from such competition

101 See *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 465 (1941); *cf. Associated Press v. United States*, 326 U.S. 1, 19 (1945).

102 Hospitals are generally subject to state regulation and licensing requirements, and may claim immunity from antitrust laws under the state action doctrine. See, e.g., *Maresse v. Interqual*, 748 F.2d 373 (7th Cir. 1984) (hospital's medical peer review activity exempt from Sherman Act under the doctrine of state action). The Supreme Court articulated this exemption in *Parker v. Brown*, 317 U.S. 341 (1943), where a raisin producer-packer challenged a state program, which reduced competition among growers, as a violation of federal antitrust laws. The Court held that the Sherman Act did not apply where the state "as sovereign, imposed the restraint as an act of government." *Id.* at 352; *cf. Bates v. State Bar*, 433 U.S. 350 (1977) (*Parker* immunity applies where a state supreme court acts in a legislative rather than judicial capacity).

Where a nongovernment entity acts pursuant to a legislative mandate, *Parker* immunity may apply if: (1) the state policy clearly expresses a preference for regulation over competition, and (2) the state actively supervises the conduct. See *Hoover v. Ronwin*, 104 S. Ct. 1989, 1995 (1984); *California Retail Liquor Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). See also *Blumstein & Sloan*, *supra* note 59, at 918-20.

A state may delegate authority to hospitals to develop and implement standards for granting admitting privileges in order to improve the quality of patient care. Although this policy expresses a preference for some regulation, it does not sanction total exclusion of non-physicians from the market. In this context, the hospital has available the less restrictive alternative of objectively evaluating non-physician applicants on an individual basis to determine individual competence in a particular field. Courts should be wary of allowing the state action defense to develop into a "cover up" for anticompetitive conduct intended to eliminate a class of competitors from the health care field.

include lower costs and the increased availability of services—proper goals of the antitrust laws.

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