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"In the twinkling of an eye": A proporsal for the standard of legality to be applied in hospital staff privileges cases

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"IN THE TWINKLING OF AN EYE":

A PROPOSAL FOR THE STANDARD OF LEGALITY

TO BE APPLIED IN HOSPITAL STAFF PRIVILEGES CASES

by

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CHAPTER ONE

INTRODUCTION

Dr. Derry Crosby, an osteopathic orthopedic surgeon has moved to a rural community with only one hospital. It is the town of his birth and of his wife's. He has a strong desire to raise his two children in a rural setting. There are currently five orthopedic surgeons practicing in the community. The local hospital medical staff, pressured by the already practicing orthopedic surgeons, votes to deny staff privileges to the new surgeon. The hospital authority accedes to the wishes of the hospital medical staff and also votes to deny hospital staff privileges to the new physician. There is only one hospital in the community, so Dr. Crosby's ability to practice his profession is dependent on his admission to the medical staff there. In the subsequently filed antitrust action, the federal district judge must resolve many difficult issues.[1]

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[1]This hypothetical case study is based loosely on the facts of Crosby v. Hospital Authority of Valdosta and Lowndes County, No. 90-23-Val. (M.D. Ga. filed March 14, 1990). Also named as defendants are the medical staff of South Georgia Medical Center and each individual member of the hospital authority and medical staff that were serving on these bodies at the relevant times. This case is currently being litigated in the United States District Court for the Middle District of Georgia.

The defendants filed a motion to dismiss (Fed. R. Civ. P. 12b6). It was subsequently converted to a motion for summary judgment. The court initially indicated that this motion would be denied. However, additional time has been granted for the parties to file affidavits and complete their briefs. The case has been transferred

Antitrust law comes into play in the hospital staff privileges context because of one fact: Physicians who are potential economic competitors of the physician desiring admittance participate in the decision-making process. Consider the ramifications for the physician desiring privileges. His ability to practice his profession is many times dependent on his ability to gain admittance to a hospital staff, particularly in rural areas. Yet the very people that he will be competing against and who are the most economically threatened by his presence are the ones participating in, if not making the decision regarding his admittance to the staff. The hospital must deal with its own need to maximize profits, and make wise decisions regarding staff admittance in order to avoid malpractice liability. The hospital board is generally composed of lay people who rely on the hospital staff for their expertise in making decisions regarding medical issues. The medical staff is arguably the most qualified to evaluate the credentials of applicants. It is easy to discern, considering the competing interests of the various parties, how the legitimate process of peer review could be subverted for the anticompetitive purpose of eliminating competition for the physicians already on the staff.

Medical staff privileges have traditionally accounted for the largest number of private antitrust cases in the health care area.[2] The stakes that are controlled by the hospital authorities and medical staffs in this type of case have always been high. But

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to the federal magistrate for the purpose of exploring the possibilities of settlement.

[2]James H. Sneed, Esq. & David Marx, Jr., Esq. Antitrust: Challenge of the Health Care Field An NHLA Focus Series Publication 93 (1990) and Health Care Committee, Section of Antitrust Law, American Bar Association, The Antitrust Health Care Handbook II 24 (Roxane C. Busey et al. eds., 1993).

the recent unprecedented growth of the medical industry, makes the hospital staff privileges case a burgeoning area of growth in antitrust jurisprudence. Also, as a result of several Supreme Court decisions, the application of antitrust law to the health care area in general and to the hospital staff privileges case is no longer in doubt.[3] The Court, however, has not yet directly addressed the issue of the proper standard of legality to be applied in these cases.

This paper addresses one of the most troublesome aspects of antitrust jurisprudence: what standard of legality governs cases dealing with medical staff privileges decisions. Heretofore, it was generally thought that only two options existed. The most frequently used standard of legality for this type of case is the rule of reason.[4] In using this analysis, the court looks at the restraint of trade in terms of the reasonableness of its nature, and its purpose and effect. The pro-competitive aspects of the conduct are weighed against the restraints that the conduct imposes on competition. In health care cases, courts have looked at the purpose of the restriction

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[3]United States Supreme Court cases that dispel the notion that antitrust principles do not apply to the health care field include American Medical Association v. United States, 317 U.S. 519 (1943) and Arizona v. Maricopa Medical Society, 457 U.S. 332 (1982). For United States Supreme Court cases that specifically address the issue of hospital staff admissions see Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991) and Patrick v. Burget, 486 U.S. 94 (1988).

[4]Virtually every court that has addressed the issue has determined that the rule of reason in the proper legal standard to apply. See e.g. Okansen v. Page Memorial Hospital, 945 F.2d 696, 708-709 (4th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 973 (1992); Flegel v. Christian Hospital, Northeast-Northwest, 4 F.3d 682, 684-686 (8th Cir. 1993), reh'g. denied Oct. 14, 1993; Goss v. Memorial Hospital, 789 F.2d 353, 354-355 (5th Cir. 1986); Bhan v. NME Hospital, Inc., 929 F.2d 1404, 1411-1412 (9th. Cir. 1990); Oltz v. St. Peter's Community Hospital, 861 F.2d 1440, 1445 n.2 (9th Cir. (1988)).

to determine if it is reasonably related to legitimate objectives or whether it is motivated by an anticompetitive intent to damage or eliminate a competitor from the market. The other option, only rarely applied in the context of staff privileges, is the per se standard. The per se rule deems the restraint to be automatic violations of the antitrust laws without any further inquiry into the precise harm or defendant's justifications. Historically, the determination of the standard of legality to be used in hospital staff privileges cases heralded the resolution of the case, with defendants almost always being successful in a rule of reason case and plaintiffs winning the infrequent cases where per se analysis is applied. There appears however, to be emerging a third option in the field of antitrust law generally. This paper will examine the "truncated rule of reason", "quick look" or "twinkling of an eye"[5] analysis and its potential application in the hospital staff privileges context.

Policy arguments suggest that the objectives of any approach in antitrust jurisprudence should be to judge the competitive purpose and effect of the defendant's conduct.[6] Therefore, this quick look analysis would allow the objectives of antitrust law to be met without complex analysis resulting in undue burdens for an already overburdened court system or the opposite problem of too hurriedly categorizing conduct as per se unreasonable and therefore illegal under the Sherman Antitrust framework. This third option has been utilized in other areas of antitrust law and has

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[5]See infra pp. 45-46 for an explanation of the term "in the twinkling of an eye."

[6]Thomas A. Piraino, Jr., Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis, 64 S. Cal. L. Rev. 685 (1991).

already been specifically utilized in a decision in the hospital staff privileges context.[7] Based on the Supreme Court movement towards a truncated rule of reason approach in other restraint of trade cases, it appears to be appropriate to use it in hospital staff privlege cases.

This paper will consist of five chapters, the first being this introduction. The second chapter will outline the basic theory of antitrust and its application in hospital staff privileges cases. It will look at per se analysis generally, its application to staff privileges cases, and then the potential for application of these principles to the hypothetical set of facts presented at the outset. In the third chapter, the rule of reason analysis will be addressed both as to its general theory and as to its application in hospital staff privileges cases. The application of the full-blown rule of reason analysis to Dr. Crosby's situation will be addressed. The new approach of a truncated rule of reason will be the topic of the fourth chapter. First, this chapter will address the development of this rule in general antitrust theory and cases, then its application to health care cases and to hospital staff privilege cases will be considered. In conclusion, the new approach will be applied to Dr. Crosby's situation as an example of how it can balance the needs of all the parties as well as streamline the entire litigation process in this already overburdened area.

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[7]Flegel v. Christian Hospital, Northeast-Northwest 4 F.2d 682 (8th Cir. 1993).

CHAPTER TWO

PER SE ANALYSIS

Introduction

The statutory basis for antitrust law as it relates to hospital staff privileges consists of Sections 1 and 2 of the Sherman Antitrust Act. Section I of the Act prohibits every contract, combination, or conspiracy that restrains trade;[8] while Section 2 prohibits monopolization, attempts to monopolize and conspiracies to monopolizes.[9] This bare bones statutory framework was enacted in 1890 and has remained virtually unchanged since that time. However, the constantly changing economic climate and ever changing legal theories and structure of the courts have combined to create in antitrust law, one of the most difficult and protracted litigation processes that exists today.

At the same time, the structure of the health care industry as a whole has undergone a complete revision. Physicians have gone from being mostly sole practitioners with little or no third party involvement in their practices to the current state of affairs where the typical physician has to concern himself with third party payers and other economic intrusions into his world. The normal free market enterprise

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[8]15 U.S.C. § 1.

[9]15 U.S.C. § 2.

system allows the marketplace, through the role of supply and demand to set the competitive prices. However, in the health care industry the consumer is generally two separate entities -- the individual patient who receives the services and the entity that actually pays for the services. The role of the third party payer who is often an employer, private insurance company or governmental agency makes the health care marketplace a treacherous mine field to navigate for individual physicians practicing in the community. Cost containment pressures from these third party payers will not subside. An increasing degree of control from those payers as well as from the hospital where he practices presents the modern day physician with problems his predecessors never conceived of. The competitive nature of the medical marketplace has been complicated by these changes. Even more drastic changes to the health care industry are foreshadowed by the current political debate surrounding the Clinton health care plan. These structural and competitive changes have altered the face of the health care industry and subjected it to the potential for greater antitrust oversight through private litigation and government supervision. The specific area of hospital staff privileges has not yet garnered as much attention from the governmental authorities that oversee antitrust litigation, as has some other health care issues.[10]

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[10]See the Statements of Antitrust Enforcement Policy in the Health Care Area, U.S. Department of Justice and the Federal Trade Commission, September 15, 1993. This statement addresses six areas of concern of the government agencies charged with antitrust enforcement in the health care area. These areas of concern are (1) hospital mergers; (2) hospital joint ventures involving high-technology or other expensive medical equipment; (3) physicians' provision of information to purchasers of health care services; (4) hospital participation in exchanges of price and cost information; (5) joint purchasing arrangements among health care providers; and (6) physician network joint ventures. The hospital staff privileges area is not addressed by these most recent guidelines.

The usual complaint in the staff privileges case generally first alleges, under Section 1 of the Sherman Antitrust Act that the physicians already on the staff and the hospital through the peer review process participated in a boycott against the physician desiring to be admitted to the hospital staff."[11] This count highlights the horizontal and potentially competitive relationship between the physician desiring privileges and the physicians on the staff who are already practicing in the community. One commentator has written: ". . . the Supreme Court has interpreted "boycott" to mean a concerted refusal to deal engaged in by competitors or by businesses with an existing commercial relationship, for economic or commercial motives, which has the foreseeable effect of excluding a competitor or potential competitor from competition."[12] In the context of hospital staff admissions cases, the physicians already on the hospital staff by voting to deny the new physician privileges have participated in a boycott through their activity. The hospital has participated in this activity by acquiescing to the staff's vote and ultimately denying the new physician admission to the staff.

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[11]See e.g. Crosby v. Hospital Authority of Valdosta and Lowndes County, No. 90-23-Val. (filed March 14, 1990, M.D. Ga.); Vuciecevic v. MacNeal Memorial Hospital, 572 F. Supp. 1424 (N.D. Ill. 1983); Flegel v. Christian Hospital, Northeast-Northwest, 4 F.3d 682 (8th Cir. 1993); Goss v. Memorial Hospital System, 789 F.2d 353 (5th Cir. 1986).

[12]James F. Ponsoldt, The Application of Sherman Act Boycott Law to Industry Self-Regulation: An Analysis Integrating Nonboycott Sherman Act Principles, 55 S. Cal. L. Rev. 1, 10 (1981).

Antitrust law requires that the defendants must have acted in concert to illegally boycott the plaintiff physician.[13] The allegation of a boycott is an attempt by the plaintiff to bring the activity under the per se method of analysis. Traditional antitrust analysis had historically deemed boycotts to be one of the activities that the court would reject out of hand with little or no attempt to consider the defendant's intentions.[14] Boycotting activity was found to be so plainly anticompetitive that all that was required by the plaintiff was for him to plead it in this manner in order to have the per se analysis applied by the courts. This mechanical type of application of the per se analysis to certain categories of activities such as boycotting has been criticized by recent decisions and by commentators on the subject.[15]

Some commentators argue that traditional boycott analysis is not applicable to hospital staff privileges cases."[16] Professor Havighurst, writing before the Northwest Wholesale Stationers[17] decision, argued that analysis considering hospital staff

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[13]See infra text and accompanying notes at pages 21-24.

[14]FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986); Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985); Klor's v. Broadway-Hale Stores, 359 U.S. 207 (1959); Fashion Originator's Guild of America, Inc. v. Federal Trade Commission, 312 U.S. 457 (1941).

[15]FTC, 476 U.S. 447; Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979); and NCAA v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984). See Piraino, supra note 6; 7 P. Areeda, Antitrust Law, An Analysis of Antitrust Principles and Their Application, Chap. 15, par. 1510c, p. 421 (1978).

[16]Havighurst, Doctors and Hospitals: An Antitrust Perspective on Traditional Relationships, 1984 Duke L. J. 1071 at 1104 (1984).

[17]Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985).

privileges to be a concerted refusal to deal is inaccurate.[18] He would restrict per se analysis to "naked horizontal agreements by which competing buyers or sellers adopt a common policy toward one or more suppliers or customers".[19] According to Professor Havighurst, this definition does not encompass a refusal to deal by a single entity. Under his theory, even if a single entity is under the influence of a combination of competitors -- such as a hospital under the influence of its medical staff, it is incapable of being a true boycott or refusal to deal.[20] His position appears to be untenable in light of the holdings of many courts that the medical staff and the hospital are entities capable of conspiring. Commentators evaluating Professor Havighurst's theories state that he has a goal of creating "a legal rule that avoids extensive review of or litigation surrounding privilege decisions of a hospital."[21]

Most staff privileges complaints also allege a combination or conspiracy between the medical staff and the hospital to restrain the practice of medicine.[22] This count consists of a "fall back" position in the event that the court denies the plaintiff the ability to go forward on the boycott count which would utilize the per se analysis. It

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[18]See Havighurst, supra note 16 at 1104-1108.

[19]Id. at 1104-1105.

[20]Id.

[21]Blumstein and Sloan, Antitrust and Hospital Peer Review, 51 Law and Contemp. Probs. 7 (1988).

[22]See e.g. Flegel v. Christian Hospital, Northeast-Northwest, 4 F.3d 682 (8th Cir. 1993); Boczar v. Manatee Hospitals & Health Systems, Inc., 993 F.2d 1514 (11th Cir. 1993); and Crosby v. Hospital-Authority of Valdosta and Lowndes County, No. 90-23-Val. (M.D. Ga. filed March 14, 1990).

is oftentimes pled as a conspiracy to boycott. The rule of reason analysis will almost always be applied to this type of claim.[23]

A staff privileges case also generally alleges, under Section 2 of the Sherman Antitrust Act that a monopoly exists with respect to the hospital and its position in the health care community. Monopolization is the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power as distinguished from acquiring or maintaining such power legitimately through growth or development as a consequence of superior product, business acumen, or historic accident.[24] Monopolization becomes illegal for antitrust purposes when the monopoly power is achieved or maintained through exclusionary, anticompetitive or predatory conduct.[25] This allegation highlights a vertical aspect of the complicated relationships involved in a hospital staff privileges case. The hospital has complete control of the access to it's facility, a necessary aspect of the practice of most physicians. While it would appear that the hospital would desire to maximize it's profits by putting as many people as possible on it's staff, it must also consider the issue of controlling the quality of the care provided at the facility.[26]

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[23]See infra pp. 36-43 discussing the application of the rule of reason analysis to hospital staff privileges cases. Also see pages 51-54 discussing the potential for application of a truncated rule of reason approach to this type of activity.

[24]United States v. Grinnell Corp., 384 U.S. 563, 570-571 (1966).

[25]See e.g. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 610 (1985).

[26]See discussion regarding the quality of care defense infra at pages 36-39. See also Darling v. Charleston Community Memorial Hospital, 33 Ill. 2d 326, (1965), cert. denied, 383 U.S. 946 (1966) (holding that a hospital has an independent duty of care

An essential facilities count is usually pled alleging that the physician cannot practice his trade without access to the hospital and its facilities. This type of claim alleges that the hospital is not granting access on a fair and nondiscriminatory basis to all qualified physicians, thus monopolizing the relevant market. Under the essential facilities doctrine, those in possession of facilities which cannot practically be duplicated must share the facilities with their competitors on fair terms.[27] The three elements of the essential facilities doctrine are as follows: 1) control of an essential facility by a monopolist; 2) the inability to practically or economically duplicate the facility; and 3) the unreasonable denial of the use of the facility to a competitor when such use is economically and technically feasible.[28]

In the context of the denial of hospital staff privileges, it is the third element of the essential facilities doctrine that generally renders the doctrine inapplicable. "The antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately."[29] In applying this element to the denial of hospital staff privileges, most courts have found that the hospitals' exclusion of a physician from its staff was

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to properly select its medical staff, monitor the performance of its staff, and if necessary take action to prevent an unreasonable risk of harm to patients treated in their facilities).

[27]City of Malden, Mo. v. Union Electric Co., 887 F.2d 157, 160 (8th. Cir. 1989).

[28]Id.

[29]Hecht v. Pro-Football, Inc., 570 F.2d 982, 992-993 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (1978).

reasonable because the hospital has the legal responsibility to control admission to their staffs in order to avoid corporate liability for allowing incompetent or unqualified physicians to practice there.[30] Other courts have found the essential facilities doctrine inapplicable in the hospital staff privilege context either because access to a hospital was not found to be essential to the physician's practice of because there were other hospitals that were available to the physician.[31]

Staff privileges cases can and generally do include various other types of claims such as due process violations, state antitrust law claims civil rights claims under Title VII and Title VI, RICO claims, state tort law claims, and contract law claims.[32]

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[30]The essential facilities doctrine was held to be inapplicable to prevent a hospital from denying staff privileges to those it considered unqualified. "We believe it would be singularly inappropriate to apply a doctrine which would prevent a hospital from keeping doctors it had adjudged unqualified off of its staff. Neither public policy nor the Sherman Act can countenance such a result." Pontius v. Children's Hospital, 552 F. Supp. 1352, 1370 (W.D. Pa. 1982).

Relying on this language from Pontius, another court refused to apply the essential facilities doctrine to a hospital staff privileges case. This court also held that practicing medicine was a privilege, not a right. Robles v. Humana Hospital, 785 F. Supp. 989 (N.D. Ga. 1992).

[31]A physician failed to show that a particular hospital's emergency room and obstetrical care unit were essential to his medical practice of emergency and obstetrical care. McKenzie v. Mercy Hospital of Independence, Kansas, 854 F.2d 365 (10th Cir. 1988).

[32]The other types of claims will not be addressed in this paper. Examples of cases thatinclude other types of claims are gathered below. (1) Due Process. Khan v. Suburban Community Hospital, 340 N.E.2d. 398 (1976); 42 U.S.C. § 1983; Goss v. Memorial Hospital System, 789 F.2d 353 (5th. Cir. 1986), Boczar v. Manatee Hospitals & HealthSystems, Inc., 731 F. Supp. 1042 (M.D. Fla. 1990); (2) Contract Claims. Lawler v. Eugene Wuesthoff Memorial Hospital, 497 So.2d 1261 (Fla. All. 1986); (3) Tortious Interference With a Contractual Relationship; McMorris v. Williamsport Hospital, 597 F. Supp. 899 (M.D. Pa 1984); (4) National Origin Employment Discrimination. Title VI, § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Vuciecevic v. MacNeal Memorial Hospital, 572 F. Supp. 1424 (N.D.

The Application of Antitrust Law to Hospital Staff Cases

There appears to be "an undercurrent of judicial concern that antitrust laws were never intended to apply to disputes over medical staff privileges."[33] There is little doubt today however, that antitrust principles will be applied by the courts in the context of hospital staff privileges cases. The Supreme Court has held that professions are not exempt from antitrust liability.[34] The ruling in Pinhas resolved the interstate commerce requirement of antitrust in hospital staff privileges cases.[35] Arguments have been made by defendants that the health care industry is sufficiently different from other commercial markets that an exception from antitrust should be made. The Supreme

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Ill. E.D. 1983); (5) RICO 18 U.S.C. §§ 1961(4), 1962, 1964. Boczar, 731 F. Supp. 1042. (6) Sex discrimination. Title VII of the Civil Rights Act of 1964 § 701 et. seq., 42 U.S.C. § 2000 et. seq. Bozcar, 731 F. Supp. 1042. (7) State law claims Goss, 789 F.2d 353.

[33]Charity Scott, Medical Peer Review, Antitrust, and the Effect of Statutory Reform, 50 Md. L. Rev. 316, 355 (1990). "This case presents an almost classic example of the use of the antitrust laws to obtain relief of doubtful social or economic value, which was never contemplated by the 19th Century trustbusters who drafted these laws." Jaffee v. Horton Memorial Hospital, 680 F. Supp. 125, 127 (S.D.N.Y. (1988). A cause of action under the Sherman Act is not created "every time a lawyer, accountant, or architect is denied partnership status in a national firm, a business executive is fired or denied a promotion by a national corporation, or a physician, surgeon or specialist has hospital privileges denied or revoked." Maresse v. Intergual, Inc., 748 F.2d 373, 393 (7th Cir. (1984)). "Congress did not pass the antitrust laws in order to insure that every young surgeon can perform the type and number of procedures that he considers to be most satisfying" Robinson v. Magovern, 521 F. Supp. 842, 891 (W.D. Pa. 1981) aff'd. 688 F.2d 824 (3d Cir.), cert. denied, 459 U.S. 971 (1982).

[34]See Goldfarb v. Virginia State Bar, 421 U.S. 773, 787-788 (1975).

[35]Summit Health Ltd. v. Pinhas, 111 S.Ct. 1842 (1991). See pp. 19-21 infra. See also Fuentes v. South Hills Cardiology, 946 F.2d 196 (3d Cir. 1991) (A nuclear cardiologist met the interstate commerce requirement by alleging that his practice attracted a significant number of out-of-state patients).

Court has thus far declined to make this exemption or relax the level of antitrust applied to this industry.[36]

The Supreme Court ruling in Patrick v. Burget also made the application of antitrust principles to the hospital staff privileges case clear.[37] Patrick arose out of a peer review proceeding in Astoria, Oregon, where there was one hospital in a city of about 10,000. Dr. Patrick, a surgeon had been an associate of a medical clinic there and on the medical staff of the hospital. He eventually left the clinic and established his own independent medical practice. He alleged that the members of the clinic, his former associates, attempted to restrain his practice by refusing to consult with him, refusing to refer surgery cases to him, and refusing to cover for his patients in the hospital while criticizing Dr. Patrick for failing to make arrangements for such coverage. Subsequently, a peer review process was instigated against Dr. Patrick, at the hospital. Many of his former associates at the clinic were involved in the proceedings against him. Dr. Patrick filed a suit against the hospital and the individual doctors who were his former associates, alleging violations of Sections 1 and 2 of the Sherman Act. The hospital settled on the eve of the trial, and a jury subsequently returned a guilty verdict and a judgment in excess of $2 million against the physicians on the Section I count and against the clinic on the Section 2 count. Much of the importance of Patrick relates to its holdings regarding the state action doctrine and the

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[36]See Arizona v. Maricopa County Medical Society, 45 U.S. 332, 348-350 (1982). This case involved price-fixing and the Supreme Court stated that one uniform rule would be applied to all industries.

[37]Patrick v. Burget, 486 U.S. 94 (1988).

peer review process in general. The principal holdings relate to the composition of the review panel and the fairness of the peer review proceedings. The Court also held that because no state actor in Oregon actively supervises hospital peer review decisions, the state action doctrine does not protect the process in this case from application of the federal antitrust laws.[38]

The Court however, recognized that there is potential conflict between antitrust principles and the process of peer review.[39] The defendants had argued that any threat of antitrust liability could deter physicians from participating in peer review which is essential to maintaining quality of care. According to the Court, that argument "essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch."[40] The Court recognized that Congress had potentially addressed this issue by the passage of the Health Care Quality Improvement Act of 1986.[41]

Justice Marshall, speaking for a unanimous court stated that antitrust laws' will remain fully applicable to the peer review process, "To the extent that Congress has declined to exempt medical peer review from the reach of antitrust laws, peer review is immune from antitrust only if the state has made this conduct its own."[42] Oregon

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[38]Id. at 105.

[39]Id. at 105.

[40]Id. at 105.

[41]The Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 et. seq., was not applicable to Dr. Patrick's case because it had not been enacted until after the relevant events had occurred and because the Act is not retroactive.

[42]Id. at 105.

had not done so. According to the decision, if physicians desire a different result they should "take that matter up with Congress."[43]

The Health Care Quality Improvement Act of 1986 establishes that physicians participating in peer review activities will not be liable in a suit for damages in private litigation for "professional review action" by health care entities that comply with the Act's requirements.[44] This Act was passed by Congress in response to the concerns of physicians participating in the peer review process and the results of cases like Patrick. The immunity is intended to give physicians more incentive to engage in peer review activities by reducing the possibility that peer review decisions will result in law suits. The Act defines professional peer review action as an action or recommendation made in the course of professional review activity that is based on a physician's competence or professional conduct and which may affect adversely the physician's clinical privileges or membership in a professional society.[45]

The Act requires that the professional review action be taken (1) in the reasonable belief that it furthers quality health care, (2) after reasonable effort to obtain the facts, (3) after adequate notice and a hearing or other fair procedures under the circumstances, and (4) in the reasonable belief that the action was warranted by such facts and after

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[43]Id. at 105-106 n.8.

[44]42 U.S.C. §§ 11101 et seq.

[45]42 U.S.C. § 11151(9).

meeting the requirements of paragraph three.[46] The Act also requires the reporting of certain information, including adverse professional review action taken by health care entities to the board of medical examiners.[47] The Act established a nationwide computerized system for reporting physician incompetence or malpractice.[48] The drafters of the Act envisioned a program that would encourage the medical profession to bring cases of incompetence to the attention of disciplinary authorities and also would keep track of such cases and other malpractice claims.[49]

The Health Care Quality Improvement Act has granted an immunity to physicians that is so limited that it becomes virtually nonexistent in the context of antitrust litigation.[50] A sponsor of the legislation stated repeatedly during the congressional debates that the peer reviewers in Patrick would not have been immunized under the Act had it been in place.[51] They would not have met the reasonable belief and the due process requirements for immunity. The evidence was that their predominant purpose was to exclude competition rather than to promote health care and that the members of the staff committees reviewing Dr. Patrick's case were not sufficiently impartial to

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[46]42 U.S.C. §§ 11111-11113. (Especially 42 U.S.C. § 11112(a)).

[47]42 U.S.C. §§ 11133 et. seq.

[48]42 U.S.C. §§ 11131-11137.

[49]Scott, supra note 33 at 319.

[50]Id. at 357.

[51]Id. at 356-357. (Quoting Congressman Henry Waxman at 132 Cong. Rec. H11,590 (daily ed. Oct. 17, 1986)).

qualify for the Act's protection.[52] It appears that if the plaintiff physician can raise genuine issues of fact regarding the peer reviewer's motivation or the reasonableness of the peer review process the court should not apply the immunity of the Act.[53]

In every federal antitrust case, the threshold question of whether the parties' activities involve interstate commerce must be resolved. A Supreme Court case addressed the issue of whether the interstate commerce requirement necessary to establish antitrust jurisdiction was present where the hospital staff privileges of a ophthalmologist in the Los Angeles area were revoked.[54] There are essentially two ways to satisfy the interstate commerce requirement. First, the activity itself must be "in" interstate commerce. Second, even if the activity is local in nature, it may "affect" interstate commerce in more than a "de minimis" manner.[55]

Dr. Pinhas failed to allege that the particular peer-review decision to terminate his privileges impacted interstate commerce. He had attempted to establish the interstate commerce requirement by stating that the "provision of ophthalmological services affects interstate commerce because both physicians and hospitals serve nonresident patients and receive reimbursement through medical payments" and because "reports concerning peer-review proceedings are routinely distributed across state lines and

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[52]Id. at 357.

[53]Id. at 406.

[54]Summit Health, Ltd. v. Pinhas, 111 S. Ct. 1842 (1991). See also Detwiler, W. F., Redefining "Interstate Commerce" Jurisdiction Under The Sherman Act: Summit Health, Ltd. v. Pinhas, 37 Vill. L. Rev. 373 (1992), for further discussion of this topic.

[55]Mclain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 242 (1980).

affect doctors' employment opportunities throughout the nation."[56] The trial court granted defendant's motion to dismiss based on the finding that Dr. Pinhas' exclusion did not satisfy the interstate commerce requirement.

The Ninth Circuit reversed, holding that Pinhas need only show that the "peer-review process in general ... has a no insubstantial effect on the interstate commerce involved."[57] A fact, the court observed, "that can hardly be disputed" because the "peer-review proceedings affect the entire staff at Midway and thus affect the hospital's interstate commerce."[58]

In a 5-4 decision, the majority found that Dr. Pinhas' allegations met the necessary test in that ophthalmological services were performed on out-of-state patients and generated revenues from out-of-state sources and a conspiracy caused a reduction in the provision of ophthalmological services in Los Angeles. The Court held that the "competitive significance of Pinhas' exclusion from the market must be measured not just by a particularized evaluation of his own practice, but rather a general evaluation of the impact of the restraint on other participants and potential participants in the market."[59] The Court stated first, that "because the essence of any violation of § 1 is the illegal agreement itself rather than the overt acts performed in furtherance of it . . . proper analysis focuses not upon actual consequences, but rather upon the potential

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[56]Summit Health v. Pinhas, 111 S.Ct. at 1846.

[57]Pinhas v. Summit Health, Ltd., 894 F.2d 1024, 1032 (9th Cir. 1989) (quoting McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 246 (1980)).

[58]Id. at 1032.

[59]Summit Health, 111 S.Ct. at 1848.

harm that would ensue if the conspiracy were successful."[60] Secondly, the Court stated that "if the conspiracy alleged in the complaint is successful, 'as a matter of practical economics' there will be a reduction in the provision of ophthalmological services in the Los Angeles market" because "if a violation of the Sherman Act has occurred, the case is necessarily more significant than the fate of 'just one merchant whose business is so small that his destruction makes little difference to the economy'"[61] because the restraint was accomplished "by an alleged misuse of a congressionally regulated peer-review process which Pinhas characterizes as the gateway that controls access to the market for his services," and that the misuse of this process by Midway and certain of its physicians could harm not only Pinhas, but "other participants and potential participants in the market" as well.[62] This holding which changes the focus of the inquiry from the impact resulting from the exclusion of a single physician from a single hospital to a "general evaluation of the impact of the restraint on other participants and potential participants in the market"[63] essentially eliminated the possibility that hospital antitrust claims will be dismissed for lack of impact on interstate commerce.

Another aspect of hospital staff privileges cases and of antitrust cases in general is the requirement of two or more separate entities capable of conspiring, combining or

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[60]Id. at 1847.

[61]Id. at 1848.

[62]Id.

[63]Id.

agreeing with each other to restrain trade.[64] Activity by a single entity will not be condemned under antitrust analysis, except in the context of a monopoly by one entity. In the context of hospital staff privilege cases this question takes on particular significance because of the varying and complicated relationships that exist in a modern hospital. The Ninth and Eleventh Circuits have held that medical staff members are capable of conspiring with the hospital for purposes of violating the federal antitrust laws.[65]

In Bolt, the Eleventh Circuit held that the hospital and medical staff "are legally separate entities" and that members of the medical staff are capable of conspiring with one another, since each physician practices medicine in an individual capacity and with individual economic interests.[66] Defendants had analogized their position to that of a parent corporation (the hospital) and its subsidiary (the medical staff or its peer review committee), hoping to come under the established principal of law that a corporation cannot conspire with its subsidiary.[67] The court rejected this argument by

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[64]See Copeland, W. M. and Brown, P. E., Hospital Medical Staff Privilege Issues: "Brother's Keeper" Revisited, 17 N. Ky. L. Rev. 513 (1990) for a general discussion of this issue. Also Laurent, C., Okansen v. Page Memorial Hospital: The Fourth Circuit's Antitrust Analysis For Peer Review Actions Under The Sherman Act, 6 B.Y.U. J. Pub. L. 603 (1992).

[65]See Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1455 and n.29 (11th Cir. 1991), Oltz v. St. Peter's Community Hospital, 861 F.2d 1440, 1450 (9th Cir. 1988), and Bolt v. Halifax Hosp. Medical Ctr., 851 F.2d 1273 (11th Cir. 1988), vacated, 861 F.2d 1233 (11th Cir. 1988) (en banc), on remand, 891 F.2d 810 (11th Cir. 1990), cert. denied, 495 U.S. 924 (1990), vacated and remanded 1993-1 Trade Cas. (CCH) P. 70,092 (11th Cir. 1993).

[66]Bolt, 851 F.2d at 1280.

[67]Id.

finding that while in the usual situation a parent corporation and its subsidiary have common goals and the parent has control over a subsidiary, this relationship does not exist in the context of a hospital and its medical staff.[68] In Oltz, the Ninth Circuit held that a group of the hospital's anesthesiologists were capable of conspiring with the hospital to deny a nurse anesthetist's staff privileges.[69]

Other courts consider the medical staff to be an integral part of the hospital and consequently hold that a hospital cannot conspire with its own medical staff during peer review as the staff and hospital are considered to be a single entity under this theory.[70] The Fourth and Sixth Circuits have held that individual physicians could conspire among themselves, however.[71] A medical staff which consists of independent physicians, has been held to be capable of conspiring with itself.[72] When at least some of the members of the peer review groups are competitors of the plaintiff

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[68]Id.

[69]Oltz, 861 F.2d at 1450.

[70]See Okansen v. Page Memorial Hospital, 945 F.2d at 705 (4th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 973 (1992) and Nurse Midwifery Assoc. v. Hibbett, 918 F.2d 605 (6th Cir. 1990), modification on reh'g, 927 F.2d 904 (6th Cir. 1991), cert. denied, 112 S. Ct. 406 (1991).

[71]Id.

[72]Weiss v. York Hospital, 745 F.2d at 814, 816 (3rd Cir. 1984), cert. denied, 470 U.S. 1060 (1985). In Weiss, the court stated that the medical staff being a combination of individual physicians, is a combination as a matter of law.

physician and have an economic interest separate from the hospital, conspiracies are most likely to be found.[73]

Other defenses and exceptions to antitrust in this context include the requirement that the plaintiff suffer injury before he can recover in a private antitrust action. The injury must also be of "the type the antitrust laws were intended to forestall."[74] In the context of hospital staff privilege cases, this requirement can present a problem for plaintiffs who have the ability to practice in other hospitals.[75] The vitality of the formerly often used defenses of state and local action immunity has been seriously reduced by the Patrick decision.

Case Law Development of the Per Se Analysis

Plaintiff physicians almost always plead that by denying him admission to the staff the defendants have participated in a boycott or a concerted refusal to deal. It is pled in this manner in an attempt to have the courts use a per se analysis in assessing the claim. Some categories of restraints have been condemned under Section I of the Sherman Antitrust Act without analyzing their effects on competition as is required by

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[73]See e.g. Bolt v. Halifax Hospital Medical Center, 851 F.2d at 1273 at 1285 (11th Cir. (1988)), vacated, 861 F.2d 1233 (11th Cir. 1988) (en banc), on remand, 891 F.2d 810 (11th Cir. 1990), cert. denied, 495 U.S. 924 (1990), vacated and remanded 1993-1 Trade Cas. (CCH) P. 70,092 (11th Cir. 1993); Summit Health v. Pinhas, 894 F.2d at 1032; and Patrick v. Burget, 486 U.S. 94 (1988).

[74]Cargill v. Montfort of Colo., Inc., 479 U.S. 104 (1986); Brunswick Corp. v. Pueblo Bowl-O-matic, Inc., 429 U.S. 477 (1977).

[75]See e.g., Jackson v. Radcliffe, 795 F. Supp. 197, 205 (S.D. Tex. 1992) (The court states the plaintiff was never precluded from practicing elsewhere by the defendant's actions).

the rule of reason analysis. Historically, courts have made judgments about the reasonableness of a restraint on a case-by-case basis. When this reasonableness judgment is generalized for a class of behavior it is termed a per se analysis.[76] The courts have labeled some activities to be presumptively unreasonable and therefore illegal thus negating the need for elaborate inquiry as to the harm they have caused or the reasons for the defendants conduct.[77] Some of the types of restraints that have historically been held to be per se illegal include price-fixing agreements, group boycotts, concerted refusals to deal, territorial or customer allocation, resale price maintenance and some tying arrangements.[78]

The courts have applied a per se analysis to restraints where they determine that they have enough experience with the type of conduct being challenged to make a decision regarding it. Also application of the per se rule has been applied to restraints where the activity inevitably resulted in findings of an anticompetitive effect. Courts using a per se analysis do not generally inquire into the precise nature or scope of the harm or the possible business justifications for the defendant's actions.[79] Per se analysis, when properly applied, has the positive benefits of saving court time and

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[76]Areeda, supra note 15 at par. 1509, p. 408.

[77]See Northern Pacific Railway v. United States, 356 U.S. 1, 5 (1958).

[78]Arizona v. Maricopa County Medical Society, 457 U.S. 332, 344 n.15 (1982).

[79]United States v. Topco Assocs., Inc., 405 U.S. 596, 607 (1972); National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978).

thereby saving plaintiff time and expense. Courts have been reluctant, however, to expand the categories of conduct to which a per se analysis applies.[80]

When the Supreme Court decided the first Sherman Act case on the merits, all restraints of trade were declared to be illegal under a literal interpretation of the language of Section 1 of the Sherman Act.[81] The Court then moved through a series of decisions to the Standard Oil decision where the distinction between the per se analysis and the rule of reason was introduced.[82] The Standard Oil court recognized that certain conduct is inherently anticompetitive and thus unreasonable. This type of conduct would not need to be evaluated under the rule of reason in order to determine the actual effects. Although the Court did not use the term "per se", this analysis foretold the development of this type of reasoning.

Sixteen years after the Standard Oil decision, the Court in Trenton Potteries, another price-fixing case, stated that some agreements were unreasonable in and of themselves, at least if they create market power.[83] The Supreme Court held that price fixing by those who controlled a trade or business was prohibited despite the reasonableness of the price agreed upon.

In a later price-fixing case, the Court held that a conspiracy that "tampers with the price structure" is per se unlawful.[84] The Court stated that conduct which directly

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[80]Indiana Federation of Dentists v. United States, 476 U.S. at 457-459 (1986).

[81]United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1987).

[82]Standard Oil v. United States, 221 U.S. 1 (1911).

[83]United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[84]United States v. Socony Vacuum Co., 310 U.S. 150 (1940).

affects price by its nature and necessary effect has no social utility and should be condemned without further consideration.[85] The Socony Court made it clear that determining defendants' market power was not necessary in making this determination.[86]

Per se analysis was applied for the first time to professionals in 1982.[87] In Maricopa, the Court struck down a maximum fee schedule for reimbursement by insurance companies that had been agreed upon by physicians. The Court's ruling turned on the fact that the physician's agreement was not necessary to achieve the desired results for the physicians or whether a less restrictive alternative was available.[88]

Application of the Per Se Analysis to Staff Privilege Cases

As has previously been stated, antitrust analysis requires the plaintiff to establish that the agreement between the defendants constitutes an "unreasonable" restraint of trade. A restraint may be found to be unreasonable if "it fits within a class of restraints that has been found to be 'per se' unreasonable or because it violates the 'Rule of Reason.'"[89] "Agreements whose nature and necessary effect are so plainly

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[85]Id. at 224.

[86]Id. at n.59.

[87]Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982).

[88]Id. at 356-357 and n.33.

[89]Federal Trade Commission v. Indiana Federation of Dentists, 476 U.S. 447, 457-458 (1986).

anticompetitive that no elaborate study of the industry is needed to establish their illegality" historically have made up the per se category of restraints.[90] The staff privileges case resembles a group boycott in many respects and is generally pled in that manner by the plaintiff physician in an attempt to bring the defendant's conduct under a per se analysis. If the plaintiff is successful in its position that the per se analysis should be applied, then the actions of the defendants could be condemned without an analysis of the harm caused by the denial of privileges or any justification for it.[91]

There have been no hospital staff privileges cases dealing with the denial or revocation of an individual physician's privileges where the reviewing court has applied the per se analysis in determining whether the actions of the defendants will be rejected out of hand. Various reasons have been set forth for not applying the per se analysis.[92]

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[90]National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978).

[91]Weiss v. York Hospital, 745 F.2d 786, 820 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985). See also Northern Pacific Railway Co. v. United States, 356 U.S. 1, at 5 (1958).

[92](1) The restraint was vertical rather then horizontal; see Dos Santos v. Columbus-Cuneo-Cabrini Medical Center, 684 F.2d 1346 (7th Cir. 1982). (2) The hospital had a legitimate medical or business reason for the decision; see Robinson v. Magovern, 521 F. Supp. 842 (W.D. Pa. 1981), aff'd. mem., 688 F.2d 824 (3d Cir.), cert. denied, 459 U.S. 971 (1982). (3) The action was related to the public service or ethical norms of a profession; see generally Goldfarb v. Virginia State Bar, 421 U.S. 773, 778 n.17 (1975), see also Wilk v. American Medical Ass'n., 719 F.2d 207 (7th Cir. 1983). (4) The boycott was not used to enforce an agreement that itself was per se illegal; see generally Maresse v. American Academy of Orthopaedic Surgeons, 706 F.2d 1488 (7th Cir. 1983). (5) The anticompetitive effect of the action is unclear; see Bhan v. NME Hospital, Inc., 929 F.2d 1401 (9th Cir.), cert. denied, 112 S.Ct. 617 (1991). (6) The exclusion falls within the category of "industry self-regulation"; see Flegel v. Christian Hospital, Northeast-Northwest, 4 F.3d 682, (8th. Cir. Mo. 1993),

However, some courts have indicated that they would consider doing so if the appropriate circumstances were presented. For example in dicta, one court indicated that in the context of boycott of one professional by a group of professionals it would have applied the per se rule if three elements are satisfied. Those elements being (1) the hospital not following its own procedures in rejecting the application of the physician, thus denying the applicant adequate procedural due process; (2) there being no mandate for self-regulation; and (3) the action being inconsistent with policy justifying self-regulation and being no more extensive that necessary.[93]

In the one hospital staff privilege case where the reviewing court applied the per se analysis, a class of physicians, osteopaths, had been denied privileges at a hospital in York, Pennsylvania.[94] The individual physicians on the medical staff were found to be "independent economic entities" that control the staff privilege decision-making of the hospital.[95] The lack of evidence of coercion of the hospital administration on the part of the physicians on the staff was found to be irrelevant. "A boycott is not illegal under the antitrust laws because of opposition to the use of coercion, but because it involves the use by businesses of an existing relationship with a supplier to exclude competition."[96]

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reh'g. denied Oct. 14, 1993.

[93]Vuciecevic v. MacNeal Memorial Hospital, 572 F. Supp. 1424 (N.D. Ill. 1983).

[94]Weiss v. York Hospital, 745 F.2d 786 (1984).

[95]Id. at 819.

[96]Id.

The court noted that the hospital did have monopoly power in the York area so it did not reach the issue of whether market power in the relevant market was an essential element in their determination of whether to apply the per se analysis.[97] There was evidence of differing application standards being applied to medical doctors and osteopaths and "second class citizenship" being afforded to the osteopaths upon admission.[98] These factors created an adverse impact on the applications of osteopaths for staff privileges at York. York also had not contended that osteopaths were as a group less qualified than medical doctors. The Third Circuit found that the actions by the hospital were "in purpose and effect sufficiently close to the traditional boycott"[99] and that a "per se rule should be applied, since the effect of the practice is identical to the that of the traditional boycott, and plainly anticompetitive."[100]

The York court stated that the hospital is entitled to exclude from it's staff, individual physicians who lack professional competence or who exhibit unprofessional conduct. It also said, citing to a treatise by Professor Sullivan, in the context of industry self-regulation that the rule of reason analysis would apply.[101] The court found, however, this case to be different for the above-stated reasons.

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[97]Id.

[98]Id.

[99]Id. at 820.

[100]Id.

[101]Id.

Application to Dr. Crosby's Case

It would appear that strict per se analysis is generally inappropriate in a hospital staff privilege case. No court has ever applied a per se rule when an individual has been denied hospital staff privileges.[102] The primary reason courts have given for denying the application of per se analysis to staff privilege cases is that hospitals have a duty to maintain high standards of quality in their medical staffs in order to avoid liability. This appears to be a legitimate exercise of the control that hospitals should exercise in order to maintain the quality of their facilities. Per se analysis would preclude defendants from exercising their ability to control their facilities. However, when the control of the decisions regarding medical staff accessibility is in the hands of the other physicians on the medical staff, who are the competitors of the plaintiff physician, it is possible to see how the otherwise legitimate peer review process could be subverted, resulting in antitrust liability.

All courts considering the possibility of per se analysis in this context have recognized the responsibility of the hospital to control the quality of its staff. Even the Weiss decision, which applied a per se analysis recognized this concept. Pe se analysis should be limited to those instances where the actions of the defendants always would have an anticompetitive effect. Courts have stated that the peer review process is not an activity that always would have produces such a result.[103] Therefore, it appears

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[102]von Kalinowski, J. 6 Antitrust Laws and Trade Regulations, § 52.03[1] (1992).

[103]Flegel, 4 F.3d 682, 686.

appropriate to apply some form of the rule of reason in cases resulting from the denial of hospital staff privileges.

CHAPTER THREE

The Development and Formulation of the Rule of Reason

Section 1 of the Sherman Antitrust Act when read literally forbids ". . . every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. . .".[104] The very first cases brought under the new legislation followed the mandate literally.[105] As early as 1911, the Supreme Court began to fashion a rule of reason applicable to restraint of trade cases. In the Standard Oil case the Court held that:

> the standard of reason . . . was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.[106]

The Supreme Court and various lower courts have struggled with the definition of the rule of reason ever since it was first articulated as the standard. Many types of activity are covered under the prohibitions of Section 1. However, the only restraints to be condemned under this section are now by case law, the unreasonable ones.

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[104]15 U.S.C. § 1.

[105]United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897).

[106]Standard Oil Co. v. United States, 221 U.S. 1, at 60 (1911).

The classic formulation of the rule of reason is given to us by Judge Brandeis in Chicago Board of Trade.[107] In that case the Court considered the legality of an agreement that regulated the price that could be paid for grain after the Board's normal closing hour. The Court announced its test as being "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[108] The Court then listed several factors that are determinative of such an inquiry, those factors being "peculiar to the business to which the restraint is imposed;" specifically

(1) the condition before and after the restraint is imposed;

(2) the nature of the restraint and it's effect,

actual or probable;

(3) the history of the restraint;

(4) the evil believed to exist;

(5) the reason for adopting the particular remedy;

(6) the purpose or end sought to be attained.[109]

Justice Brandeis, in using this type of formulation furthered those values which he perceived to be essential under section one of the Sherman Act. Those values are the protection of small business in a pluralistic society that was being increasingly

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[107]Board of Trade of the City of Chicago v. United States, 246 U.S. 231 (1918).

[108]Id. at 238.

[109]Id. Numbers do not appear in the original text.

dominated by big business.[110] This exhaustive list which gives no real direction as to which factors should be determinative has been criticized by commentators and judges.[111] The only real certainty that emerges from this checklist type of approach is that courts will be required to become entangled in the lengthy and difficult process of evaluating the market impact of the restraint.[112]

Professor Philip Areeda sees this list as directing courts to engage in a three step analysis. First, courts must evaluate the harm to competition that results or may result from the defendants activities; second, courts must consider the object the defendants are trying to achieve, its legitimacy and significance; and third, whether the restraint is reasonably necessary for the achievement of the legitimate objectives.[113] The application of the rule of reason generally requires the balancing of the procompetitive effects of a restraint against the anticompetitive effects.[114]

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[110]Chicago Board of Trade, 246 U.S. 231 at 240 (1918). See also Sullivan, The Economic Jurisprudence of the Burger Court Antitrust Policy: The First Thirteen Years, 58 Notre Dame L. Rev. 1, 12-13 (1982) also Sullivan and Harrison, Understanding Antitrust and Its Economic Implications, § 4.05 (1988).

[111]Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust Law Journal 135, 153 (1984); Piraino, supra note 6.

[112]Piraino, supra note 6, at 2.

[113]Areeda, supra note 15 par. 1502, p. 371 (1986).

[114]Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977).

The Application of the Rule of Reason to Staff Privileges Cases

In 1986, the Fifth Circuit dealt specifically with the Supreme Court's then recent pronouncements regarding boycott analysis in Northwest Wholesale[115] and the distinction between the rule of reason and per se analysis in the context of a hospital staff privilege case.[116] Dr. Goss's hospital staff privileges were suspended at two Houston hospitals. He alleged that the defendants conspired to boycott him from practicing his profession and that they were motivated by an anticompetitive state of mind. The sole basis for the appeal to the Fifth Circuit was the failure of the district court to apply the per se rule to this set of facts.[117] After going through the basic distinctions between rule of reason and per se analysis, the court quoted Northwest Wholesale for the proposition that "a plaintiff seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects."[118] The court then found that Dr. Goss's loss of hospital staff privileges through the use of the hospitals' internal review procedures did not imply anticompetitive state of mind. This was based on a finding that review procedures are necessary to insure the competency of hospital staff members.

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[115]See infra pp. 49-50 regarding the Northwest Wholesale decision.

[116]Goss v. Memorial Hospital System, 789 F.2d 353 (5th Cir. 1986).

[117]Id. at 353.

[118]Id. at 354.

The court also held that the defendants did not "possess market power or unique access to a business element necessary for effective competition."[119] In the two relevant years, the two hospitals were two out of sixty one and two out of sixty three hospitals in Harris County, Texas. So there was no evidence that the hospitals had "unique access to a business element" needed by Dr. Goss to compete with other physicians.[120] In the two relevant years, the two hospitals combined had 5.88% and 5.61% of the total available hospital beds in Harris County and 6.79% and 6.61% of the total patient admissions.[121] The court found, based on these figures, that the defendants did not possess market power.[122] Dr. Goss's contention that the defendants acted with anticompetitive animus was found to be "appropriately evaluated under the rule of reason analysis."[123]

The Goss court very specifically finds that the rule of reason analysis is the appropriate standard to be used in the case of the group boycott alleged by Dr. Goss. The opinion does not address the issue of what factors are to be considered under a rule of reason analysis because Dr. Goss had conceded that the district court properly had found no antitrust violation under a rule of reason analysis.[124]

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[119]Id. at 355.

[120]Id. at 355.

[121]Id. at 355.

[122]Id.

[123]Id., (quoting from Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 585, n.7).

[124]Id. at 353.

However, a later case decided in the same circuit as Goss and citing Northwest Wholesale stated that the lack of evidence of either an unlawful purpose to restrain trade or of an anticompetitive effect entitled defendants to a summary judgment in a hospital staff privilege case.[125] The defendants in that case lacked market power, there was no evidence that the defendants' actions affected the market for radiology services in Harris County and the plaintiff physician was never precluded from practicing medicine elsewhere.[126]

The vast majority of cases that have arisen in the context of hospital staff privileges have been analyzed using the rule of reason. Various justifications have been given by the courts for this result.[127] Probably the most frequently given is legitimate business or health care justifications such as increased quality of care for the hospital.[128]

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[125]Jackson v. Radcliffe, 795 F. Supp. 197 at 205 (S.D. Tex. 1992).

[126]Id. at 205.

[127]Courts have said that they lack sufficient experience with restraints of trade in the health care area to use the per se analysis. Sweeney v. Athens Regional Medical Center, 709 F. Supp. 1563, 1573 n.4. (M.D. Ga. 1989). Some courts have said that per se analysis will not be used because the anticompetitive consequences of defendants actions were not clear. Oltz v. St. Peter's Community Hospital, 861 F.2d 1440, 1445 n.1 (9th. Cir. 1988). Some courts have rejected the per se analysis because defendants actions do not fit the classic boycott situation. McElhinney v. Medical Protective Co., 549 F. Supp. 121 131-132 (E.D. Ky. 1982) remanded on other grounds, 738 F.2d 439 (6th Cir. 1984).

[128]Some of the law review articles that address the issue of quality of care as an adequate defense to antitrust allegations are: Ann R. Gough, Notes, Quality of Care, Staff Privileges and Antitrust Law, 64 U. Det. L. Rev. 505 (1987), Thomas L. Greaney, Quality of Care and Market Failure Defenses in Antitrust Health Care Litigation, 21 Conn. L. Rev. 605 (1989); Thomas E. Kauper, The Role of Quality of Health Care Considerations in Antitrust Analysis, Law & Contemp. Probs. 93 (1988).

There exists much controversy as to whether or not quality of care should be considered an adequate defense to antitrust allegations in the hospital staff privilege context. In defense of an antitrust challenge, defendants have often asserted that their motive was not anticompetitive, but rather was concern for the quality of care provided to the patients at the hospital. The lower courts are split on this issue and the United States Supreme Court has not yet squarely addressed it in the hospital staff context. The Supreme Court has stated, however, that a good intention will not save an otherwise objectionable restraint.[129]

Many lower court decisions have addressed the issue of quality of care as a defense to antitrust claims. For example, the Third Circuit in Weiss, stated "it seems obvious that by restricting staff privilege to doctors who have achieved a predetermined level of medical competence, a hospital will enhance its reputation and the quality of medical care that it delivers."[130] Other lower courts have expressly accepted quality of care assertions as a justification for the application of the rule of reason to hospital staff privilege cases as well as a defense to liability.[131] Peer review can be viewed as the

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[129]See Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1917). See also National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 101 n.23 (1984) ("good motives will not validate an otherwise anticompetitive practice").

[130]Weiss at 821.

[131]Scott, supra note 33 at 363. Evidence of quality of care objectives has been used by courts to determine the existence of a conspiracy among the defendants. Bolt v. Halifax Hospital Medical Center, 891 F.2d 810, 820-822 (11th Cir. 1990), cert. denied, 495 U.S. 924 (1990) and Freedman v. Delaware County Memorial Hospital, 672 F. Supp. 171, 190-191 (E.D. Pa. 1987) aff'd, 849 F.2d 600 (3rd Cir. 1988). Evidence of concerns relating to quality of patient care has also been used to evaluate the reasonableness of the challenged restraint. Miller v. Indiana Hospital, 843 F.2d

type of conduct, that although it eliminates a competitor, is reasonably ancillary to the hospital's main concern of protecting the quality of care it delivers.

Rule of reason analysis requires the plaintiff physician to show, among other things, injury to competition by the defendant's actions. The determination of market power is the most difficult factor in rule of reason analysis.[132] This requires the plaintiff to define the relevant product or service and geographic markets.[133] A proper market definition should show the percentage of the market that is being supplied by the defendants and therefore, how the defendants can manipulate price and output in order to exercise market power.[134]

The product market is defined as those goods or services that are "reasonably interchangeable" in use.[135] In staff privileges cases, the product market has generally encompassed the plaintiff physician's specialty.[136] The geographic market has been

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139, 144-145 (3rd Cir. 1988), cert. denied, 488 U.S. 870 (1988) and Bhan v. NME Hospitals, Inc., 929 F.2d 1404 (9th Cir. 1991).

[132]Piraino, supra note 6, at 689.

[133]For a general discussion of market power and its impact on antitrust litigation see Landis and Posner, Market Power in Antitrust Cases, 94 Harv. L. Rev. 937 (1981); Warden, The History of Antitrust Market Delineation, 76 Marq. L. Rev. 123 (1992); White, Countervailing Power--Different Rules for Different Markets? Conduct and Context in Antitrust Law and Economics, 41 Duke L. J. 1045 (1992).

[134]Blumenthal, "Relevant Markets in the Health Care Industry" in Developments in Antitrust Health Care Law, 187-209 (P. Proger and R. Busey, T. Miller, eds., 1990).

[135]Oltz v. St. Peter's Community Hospital, 861 F.2d at 1447-1448.

[136](1) Pediatric thoracic and cardiovascular surgery. Pontius v. Children's Hospital, 552 F. Supp. 1352 (W.D. Pa. 1982); (2) Urologist's services. Flegel v. Christian Hospital, Northeast-Northwest, 4 F.3d 682 (8th Cir. 1993); (3) Obstetrical and gynecological services. Farr v. Healtheast, Inc., 1993-1 Trade Cases P 70,294

defined as the area of effective competition in which potential buyers can avail themselves of sources of supply. In many staff privileges cases the geographic market is defined by the distance that patients will travel to obtain a particular service in response to a price increase or decrease.[137] Geographic market determinations have varied widely in staff privileges cases.[138] Relevant information used to define geographic markets include patient flow statistics and physician admitting patterns.[139] Courts have also looked to the hospital's own business and marketing plans to determine their geographic market.

After the determination has been made regarding the relevant geographic and product markets, the market impact of the restraint is evaluated. The issue of the defendants' possession of market power can determine whether such market impact

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(E.D. Pa. 1993); (4) Anesthesiology services. Konik v. Champlain Valley Physician's Hospital Medical Center, 733 F.2d 1007 (2d Cir.), cert. denied, 469 U.S. 884 (1984); (5) Adult open heart surgery. Robinson v. Magovern, 521 F. Supp. 842 (W.D. Pa. 1981), aff'd. mem., 688 F.2d 824 (3d Cir.), cert. denied, 459 U.S. 971 (1982).

[137]Antitrust Health Care Handbook II, supra note 2, at 12.

[138](1) Geographic market for open heart surgery is a sixteen county area. Robinson v. Magovern, 521 F. Supp. 842, 881 (W.D. 1981) aff'd. mem. 688 F.2d 824 (3d Cir. 1982). (2) Geographic market for anaesthetic services is Helena, Montana. Oltz v. St. Peter's Community Hospital, 861 F.2d 1440, at 1446 (9th Cir. 1988). (3) Geographic market is a three state area. Pontius v. Children's Hospital, 552 F. Supp. 1352, 1366 (W.D. Pa.) (3) Geographic market for radiology services is a one-hundred mile radius. Capital Imaging Assoc., P.C. v. Mohawk Valley Medical Assoc., Inc., 791 F. Supp. 956 (N.D. N.Y. 1992).

[139]Hospital Corp. of America v. Federal Trade Commission, 106 F.T.C. 351, 468 (1985), aff'd, 807 F.2d 1381 (7th Cir. 1986).

exists.[140] It logically follows that the more narrowly the market is drawn, the greater the market power impact of the defendants and the greater the market impact that could result from an adverse privilege decision. Market power can be proven by direct evidence of a defendant's actual control of prices or exclusion of competition. "Market power exists whenever prices can be raised above the levels that would be charged in a competitive market."[141]

A defendant's market power can be gauged indirectly from the share of the market for the product or service within the relevant geographic market.[142] There has been little agreement among lower courts regarding what.percentage of the relevant market defines market power. However, defendants with market shares of twenty percent or less have generally been found to lack market power.[143] The purpose of looking into market and power is to determine whether an agreement has the potential for adverse effects on competition. Market power has been called a surrogate for actual anticompetitive effects.[144] Market power was described by the Ninth Circuit as not

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[140]Market power has been defined as the ability to raise price or reduce output. Goss v. Memorial Hospital System, 789 F.2d 353 (5th Cir. 1986); see also NCAA v. Board of Regents, 468 U.S. 85 (1984).

[141]Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 27 n.46 (1984).

[142]See Goss, 789 F.2d at 355.

[143](1) A market share of between 5.61 and 6.79 percent did not establish market power in hospital beds. Goss, 789 F.2d at 355. (2) A market share of 6 percent did not establish market power. Rothery Storage v. Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987).

[144]Indiana Federation of Dentists, 476 U.S. 447 at 460-461 (quoting 7 P. Areeda, Antitrust Law: An Analysis of Antitrust Principles and Their Application, para. 1511 at 429 (1986)).

an end in itself but a "tool designed to uncover competitive harm."[145] So, if a plaintiff could allege actual detrimental effects, a court could conclude that the agreement is unreasonable "even in the absence of elaborate market analysis."[146]

Application to Dr. Crosby's Situation

In the hypothetical situation set out the beginning of this paper, Dr. Derry Crosby has been denied hospital staff privileges at a rural hospital. There are countless aspects of this situation that will be examined by a court in using the case-by-case evaluation called for under the rule of reason analysis. A full-blown rule of reason case can include the court's evaluation of the evidence of: (1) the alleged reason for the decision of the hospital; (2) the standards used by the hospital in denying the plaintiff physician's privileges; (3) the extent to which the standards reasonably advance the legitimate objectives of the hospital; (4) the relevant product or service and geographic markets affected by the denial of staff privileges; (5) the extent to which the denial of the plaintiff's staff privileges excludes the plaintiff from the relevant market or affects a patient's choice of health care providers or otherwise injures competition; and (6) the extent to which the defendants acted for any anticompetitive reason.

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[145]Oltz, 861 F.2d at 1448.

[146]Indiana Federation of Dentists, 476 U.S. at 461. See the discussion in chapter 4 infra regarding the truncated rule of reason analysis.

Very few plaintiffs have prevailed in hospital staff privilege cases.[147] It is easy to see from this extensive, but not exhaustive list that the amount and type of evidence required to privately prosecute this type of claim is overwhelming to the plaintiff. The expense of proving all of these factors and the fact that defendants control most of the information required to prevail is likely to deter plaintiffs from filing legitimate claims.[148] Plaintiff physicians find it difficult, if not impossible, to prove the anticompetitive effect required to prevail under a full-blown rule of reason analysis. Defendants are generally better able to withstand the massive expense of both time and revenue that this type of discovery entails. The protracted discovery process in this type of case has been described as a "wearing down of the plaintiff," rather than a legitimate exercise in fact finding.[149]

In Dr. Crosby's case, the discovery phase of the litigation has lasted for four years and continues to this day. Extensive depositions of parties and expert witnesses has already consumed hundreds of hours of time on the part of the attorneys and parties involved, according to conservative estimates. Countless hours devoted to research and correspondence have already been expended. Several conferences involving court personnel have also taken place during the discovery period. If the case is tried, it is estimated that the trial alone will consume at least two weeks of federal district court

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[147]For the reported cases in which the plaintiff has prevailed see e.g. Patrick v. Burget, 486 U.S. 94 (1988); Oltz v. St. Peter's Community Hospital Hosp., 861 F.2d 1440 (9th Cir. 1988); Bozcar v. Manatee Hospital & Health Systems, Inc., 993 F.2d 1514 (M.D. Fla. 1993).

[148]Piraino, supra note 6, at 689.

[149]Id., at 694.

personnel's time, notwithstanding the potential for appeals and other post judgment matters. These are legitimate considerations that point to a need for a more streamlined approach to the issue.

CHAPTER FOUR

"IN THE TWINKLING OF AN EYE"

Introduction

There exists a middle ground between the strict per se analysis and a full-blown rule of reason analysis for restraints of trade under Section 1 of the Sherman Antitrust Act. This middle ground approach has evolved from a series of Supreme Court decisions.[150] The Supreme Court, in its first rule of reason case in which the defendants were found to be liable without a showing that they had the power to affect price or the purpose to do so, stated that "the essential point is that the rule of reason can sometimes be applied in the twinkling of an eye."[151] Professor Areeda states, referring to the NCAA decision:

> Although it certainly did not abolish the reasonableness-per se distinction, the Court made clear that the distinction was more a spectrum than a sharp

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[150]See Broadcast Music Inc. v. CBS Inc., 441 U.S. 1 (1979), cert. denied, 450 U.S. 970, reh'g. denied, 450 U.S. 1050 (1981). NCAA v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984). Northwest Wholesale Stationers, Inc. v. Pacific Stationery Co., 472 U.S. 284 (1985). FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986).

[151]N.C.A.A. v. University of Oklahoma, 468 U.S. 85, 110 n.39 (1984), quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37-38 (Federal Judicial Center, June 1981). In Professor Areeda's later publication, Antitrust Law, An Analysis of Antitrust Principles and Their Application, Volume VII, P. 1511 p. 433 (1986), he further explains his earlier version which the Supreme Court quoted here.

> dichotomy. "Indeed, there is no bright line separating" them. The rule of reason does not require "elaborate" proof of power, and "can sometimes be applied in the twinkling of an eye." And in all cases, "the essential inquiry remains the same -- whether or not the challenged restraint enhances competition."[152]

Case Law Development of the New Approach

The most recent series of Supreme Court rulings in the restraint of trade area have begun to blur the distinction between rule of reason and per se analysis.[153] Broadcast Music, Inc. was one of the first cases in which the Supreme court evidenced a shift away from strict per se analysis in the context of conduct resembling price fixing.[154] In that case, music composers and publishing houses formed two organizations which sold blanket licenses allowing purchasers unlimited use of the organizations' compositions, accepted fees from the purchasers, and distributed the fees to the copyright holders. That was termed price-fixing "in the literal sense" by the Court.[155] The Court held that this conduct did not fall into a category that required per se analysis. The Court criticized literal definitions of price fixing as "overly simplistic and often overbroad," finding price fixing to be a "shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable."[156]

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[152]Areeda, supra note 15 par. 1511, p. 436, quoting from NCAA, 468 U.S. 85 (1984).

[153]Blumstein, J. F. and Sloan, F. A., Antitrust and Hospital Peer Review, 51 Spring, Law and Contemporary Problems 7 at p. 55 (1988).

[154]Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

[155]Id. at 8.

[156]Id. at 9.

The Court further stated that in considering whether to use the per se analysis, courts must take into account "whether the practice facially appears to be one that would always or almost always tends to restrict competition and decrease output, and in what portion of the market," or if the conduct increases economic efficiency and renders markets more, rather than less, competitive.[157] The licenses were not a naked restraint but rather accompanied an "integration of sales, monitoring, and enforcement against unauthorized copyright use" meant to allow the copyright holders to market their product more efficiently.[158]

The Court found the blanket licenses to be a product that had unique characteristics different from the licenses for individual composition use, so the blanket licenses did not create horizontal price fixing among competitors selling the same product.[159] The Court remanded the case for a rule of reason analysis.

Following the Broadcast Music decision, the Supreme Court applied the rule of reason rather than a per se analysis to a case involving horizontal price and output restraints.[160] In NCAA, two colleges challenged the NCAA restrictions on the televising of the members' college football games as illegal price and output restraints. The NCAA had restricted the number of times each school's football team could appear on television and established the amount each school could receive from the networks

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[157]Id. at 19-20 (quoting United States v. United States Gypsum Co., 438 U.S. 441 n.16 (1978).

[158]Id. at 20.

[159]Id. at 22.

[160]NCAA v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984).

for its appearances. NCAA members were barred from making other television arrangements.[161] The Court found the arrangement to be "an agreement among competitors on the way in which they will compete with each other," which had the effect of decreasing the output of college football game programs.[162] The Court held that it would be "inappropriate to apply a per se rule to this case," although "horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal per se' approach."[163] Reasons given by the Court for the rejection of the per se analysis do not include (1) a lack of judicial experience with this type of case, (2) the fact the NCAA is nonprofit, or (3) the fact that the NCAA is well respected for it's historic role in the preservation of collegiate athletics.[164] What was critical to the analysis of the Court was the fact that a certain degree of cooperation is necessary if the product is to be available at all.[165]

Although the Court chose to use a rule of reason analysis, it noted that "the rule of reason and per se analysis are employed to form a judgment about the competitive significance of the restraint."[166] Under either approach, "the essential inquiry remains

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[161]Id. at 91-95.

[162]Id. at 99.

[163]Id. at 100.

[164]Id. at 67.

[165]Id. at 68.

[166]Id. at 103 (quoting National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978)).

the same -- whether or not the challenged restraint enhances competition.[167] Justice Stevens, writing for the majority, held that the NCAA should have an opportunity to justify the restrictions under the rule of reason. Finding that no legitimate competitive reason existed for the restrictions on the schools, television rights, the Court concluded that the restrictions were illegal.[168]

The Court in its Northwest Wholesale decision, recognized that "there is more confusion about the scope and practice of the per se rule against group boycotts than in reference to any other aspect of the per se doctrine."[169] That case stemmed from a member's expulsion from a buying cooperative. Northwest Wholesale was a cooperative of one-hundred office supply retailers acting as a wholesale purchasing and warehouse agent for its members. The Court considered the possible procompetitive justifications for the cooperative's existence, instead of categorizing the conduct as per se illegal. Economies of scale in purchasing and warehousing, ready access to inventory and other possible efficiencies were identified by the Court. The Court then held that given such potential beneficial effects the plaintiff should have the burden of making a threshold showing that "the cooperative possesses market power or exclusive

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[167]Id. at 103.

[168]Id. at 104-120.

[169]Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 585 (1985) (quoting L Sullivan Law of Antitrust, 229-230 (1977)).

access to an element essential to effective competition."[170] Since the plaintiff had made no such showing, the Court ruled the per se analysis was inappropriate.[171]

The Court also addressed the issues of market power and the essential facility doctrine.

> In these cases, the boycott often cuts off access to a supply, facility, or market necessary to enable the boycotted firm to compete.... and frequently the boycotting firms possessed a dominant position in the relevant market ... In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive. Under such circumstances the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.[172]

It is arguable, based on this language that an exclusion from a hospital should be actionable only in the event that the defendant controls access to the market or an essential facility. Also the language suggests that the quality of care defense will continue to have application in the hospital staff privilege case.

Application to Health Care Cases

The Supreme Court has applied the quick look analysis to a case involving health care. In Indiana Federation of Dentists, the Court applied a quick look analysis to a policy adopted by the Federation which amounted to a horizontal agreement among

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[170]Id. at 296.

[171]Id. at 298.

[172]Id. at 294 (quoting L. Sullivan, Handbook of the Law of Antitrust, § 92 (1977)).

participating dentists to withhold services from insurers.[173] The arrangement had aspects of both boycott and price fixing. X-rays were used by the insurance companies as a check on the charges made by the dentists and a cost containment measure. The dentists refused to submit the x-rays to the insurance companies with their insurance claim forms. This was called a "refusal to compete with respect to the package of services offered to customers."[174] This refusal "impairs the ability of the market to advance the goals of consumer welfare."[175] The Court looked to defendants to come forward with pro-competitive effects. They failed to do so, consequently it was found that their policy violated the Sherman Act.

There was proof of actual anticompetitive effect in that the insurers were unable to obtain x-rays in two areas. This proof "obviated the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'"[176] The Court noted that "application of the Rule of Reason to these facts is not a matter of great difficulty."[177]

Application to Staff Privileges Cases

The Eighth Circuit Court of Appeals has applied the truncated rule of reason analysis to a case involving the denial of hospital staff privileges to two osteopathic

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[173]FTC v. Indiana Federation of Dentists, 106 S. Ct. 2009 (1986).

[174]Id. at 459.

[175]Id.

[176]Id. at 461 (quoting 7 P. Areeda Antitrust Law: An Analysis of Antitrust Principles and Their Application, para. 1511, at p. 429 (1986)).

[177]Id. at 459.

urologists.[178] The court first found that the rule of reason analysis was appropriate in this instance because "the per se rule should be invoked for a group boycott when the challenged activity would almost always tend to be predominantly anti-competitive."[179] The court upheld the hospital's responsibility to make choices about the types of qualifications that a physician must have to attain privileges there in order to "provide more efficient, higher quality services in order to compete against other hospitals."[180] This is seen by the court as "sharpening competition by making the hospital a more attractive competitor in the patient market."[181]

The court then went on to describe, in dicta, that a plaintiff physician might be able to establish that physicians were conspiring to drive out other providers for economic and anti-competitive purposes, with the hospital acceding to the doctor's wishes. That would be anti-competitive in the eyes of the court and although it is not specifically addressed, seemingly subject to per se analysis under their reasoning.

Under the truncated rule of reason analysis that the court employs, the legality of a restraint of trade is determined by focusing on the detrimental effects to competition. Often this is determined by defining the relevant market and the defendants' power

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[178]Flegel v. Christian Hospital, Northeast-Northwest, 4 F.3d 682 (8th Cir. 1993) r'hg. denied October 14, 1993.

[179]Id. at 685.

[180]Id. at 686. (The court citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 446 U.S. 2, 30 (1984) and 6 J. von Kalinowski, Antitrust Laws & Trade Regulations, § 52.03[1], at 52-54 (1990) for this proposition).

[181]Id. at 686.

within that market.[182] The court then makes its most important statements for purposes of the truncated rule of reason analysis, by stating that market definition and market power are not always necessary elements of this type of analysis. Market power is a "'surrogate for detrimental effects"' and "'proof of actual detrimental effects, such as a reduction of output' can obviate the need for an inquiry into market power."[183] Either by showing market power or actual detrimental effect the plaintiff shifts the burden to the defendants to demonstrate pro-competitive effects.[184] If the plaintiff is driven to this point, then he must "try to show that any legitimate objectives can be achieved in a substantially less restrictive manner," and the court then weighs "the harms and benefits to determine if the behavior is reasonable on balance."[185]

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[182]Id. (citing Capital Imaging Assoc., P.C. v. Mohawk Valley Medical Assoc., Inc., 996 F.2d 537, 546 (2d Cir. 1993)).

[183]Id. at 686. (The court quoting from FTC v. Indiana Federation of Dentists, 476 U.S. 447 at 460-61 (1986)., quoting 7 Areeda, P. Antitrust Law: An Analysis of Antitrust Principles and Their Application, P. 1511, at 429 (1986)).

[184]Id. at n. 4. In a footnote, the court gives some examples of how this showing could be made citing Blumstein, J.F. and Sloan, F.A., Antitrust and Hospital Peer Review, 51 Law & Contemp. Probs. 7, 61 (1988). First stating that more than simple assertions are required, the court says that the hospital must demonstrate the articulated procompetitive rationale is consistent with the overall conduct of the hospital. For example, by showing their personnel restrictions as a marketing, image-building strategy through an aggressive quality-monitoring program or advertising or other marketing initiatives. The hospital would have to show that they were in fact pursuing their goals as a "rational economic actor and that it could justify its conduct by reference to rational, procompetitive economic principles."

[185]Id. at 686 quoting from Bhan v. NME Hosp., Inc., 929 F.2d 1401 at 1412 (9th Cir.), cert. denied, 112 S. Ct. 617 (1991).

In Drs. Flegel and Still's case, the court found that there was insufficient evidence that the denial of privileges by the hospital caused detrimental effects to competition.[186] In a footnote the court states that there may have been a detrimental effect individually to Drs. Flegel and Still, but not to competition.[187] The court then engages in an elaborate discussion of relevant market definition and market power, eventually finding that the defendants did not have a dominant market share in a well-defined market, and thus affirming the order of the district court granting summary judgment to the defendants.[188]

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[186] Id.

[187] Id. at n.6.

[188] Id. at 690.

CHAPTER FIVE

CONCLUSION

As has been noted, the historical distinction between the rule of reason and per se analysis in antitrust jurisprudence has become increasingly blurred. Recent Supreme Court decisions in the area of restraint of trade foretell a shift from the formalistic labeling approach to an approach that takes into account the realities of defendants' actions. A middle ground of analysis falling between the per se and the rule of reason analysis has emerged from a series of Supreme Court decisions and has been utilized in the Eighth Circuit in a hospital staff admissions case.[189]

In the context of hospital staff admissions cases, the per se analysis is inappropriate because of the legitimate responsibility of the hospital to maintain a high quality on its medical staff. The full-blown rule of reason approach, which has been used by almost all courts considering these cases has resulted in virtually consistent rulings for defendants. The extensive amount of evidence required to privately litigate a claim, could also discourage plaintiffs from pursuing legitimate actions.[190]

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[189]Flegel v. Christian Hospital, Northeast-Northwest 4 F.3d 682 (8th Cir. 1993) r'hg. denied October 14, 1993.

[190]Piraino, supra note 6, at 696.

A truncated rule of reason approach seems to be appropriate to the hospital staff decision litigation process. It would not have the harsh effect of the per se approach nor would it consider the numerous the factors that a full-blown rule of reason analysis requires. The decisive issue should be whether the defendant's intent is to restrict competition or to promote their legitimate purposes. Market analysis is the factor that has proven to be the most costly to analyze and is not a necessary factor to the determination.[191] A defendant should have the opportunity to explain the justifications for his conduct. A complicated market analysis can be avoided because the anticompetitive effects are clear. The Supreme Court in NCAA, Indiana Federation of Dentists and Maricopa considered the competitive purpose of the defendant's conduct in an abbreviated fashion without any detailed market analysis.[192] The defendants have the power to accomplish their goals. If they did not, the litigation would not have ensued. The courts should engage in some level of factual inquiry, for the limited purpose of confirming or denying the defendants' competitive intent.

In a hospital staff decision that utilized the truncated rule of reason approach, the Eighth Circuit enunciated the steps to be taken as:

> (1) Plaintiff must make an initial showing of defendant's market power or the detrimental effect on competition of the defendant's actions.

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[191]Id. at 689.

[192]NCAA v. University of Oklahoma, 468 U.S. 85 (1984); FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986); Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982).

(2) The burden then shifts to the defendants to show the procompetitive effects of their actions.

(3) If driven to this point, plaintiffs must show that the defendants' legitimate objectives could be achieved in a less restrictive manner.

(4) The court then weighs the harms and benefits to determine if the action of defendants is reasonable on balance.

The major difference between this approach and a full blown rule of reason approach is the lack of the necessity of proving the defendants' market power in order to prove the existence of a restraint of trade. In reliance on the type of reasoning that the court utilized in the Pinhas decision, the effect of the defendants' actions on competition could possibly be assumed without the necessity of further proof. In eliminating this requirement from the formula, the burden on the plaintiff is greatly reduced. Also, the goals of antitrust jurisprudence are still being met. The hospital still has the ability to keep incompetent physicians off of its staff. The plaintiff physician has an opportunity to litigate his claim in a more equitable atmosphere. The other staff physicians have the opportunity to function properly as peer reviewers, but cannot use their position to improperly eliminate competition.

The vast majority of hospital staff decisions are made without the necessity of resorting to legal recourse to resolve the issue. In the cases where it appears there will be problems it is in the best interest of the hospital to eliminate or to limit the role of staff physicians with independent economic interests. In doing so the hospital could reduce the possibility that a court would find an unlawful conspiracy. This would also eliminate the specter of impropriety from the process.

As a practical example of this concept, the direct and indirect competitors of Dr. Derry Crosby should be eliminated from the decision making process regarding his staff privileges at South Georgia Medical Center. One possible solution would be to have outside experts evaluate Dr. Crosby's credentials, thus eliminating the possibility of the decision being based on the personal economic considerations of his competitors. This could be accomplished by having a committee chosen both by the hospital and Dr. Crosby, in some equitable manner to evaluate his training and experience as an orthopedic physician.

In Dr. Flegel and Still's case, the plaintiffs alleged that the hospital's refusal to grant them privileges resulted in a reduction of the quality of care at Christian Hospital and as such is proof of actual detrimental effects on competition obviating the need for an inquiry into market power.[193] The Eighth Circuit found the evidence presented was insufficient to avoid the need to prove market power.[194]

It is possible that in reliance upon the type of reasoning the Supreme Court in Pinhas decision, the effect of the hospital's decision could be looked at in a broader context. Pinhas obviously relates to another aspect of antitrust jurisprudence (the necessity of proving effect on interstate commerce), but the reasoning and more relaxed view of the interstate commerce requirement by the Court could logically be extended to determine whether defendants' actions had a detrimental effect on competition. Pinhas and its progeny have had the effect of broadening the reach of federal antitrust

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[193]Flegel, 4 F.3d at 686.

[194]Id. at 687.

laws in the health care field. This policy by the Court allows plaintiffs to litigate their claims in a more equitable arena.

If the plaintiffs are able to show a detrimental effect on competition by analogy to the reasoning in Pinhas, the burden would shift to the defendants to show the procompetitive effects of their actions. Legitimate equality of care concerns on the part of the hospital would be evaluated at this stage. Footnote four of Flegel articulates the necessity that this showing consist of "more than simple assertions."[195] This would allow the hospital to function properly to exclude incompetent or unqualified physicians from its staff, thereby benefitting patient's quality of care. The legitimate purpose of the defendants' actions would be balanced against the injury to competition.

According to the analysis utilized in Flegel, the plaintiffs then must show that the defendants' legitimate objectives could be achieved in a less restrictive manner. The court then must weigh the harms and benefits to determine if the action is reasonable on balance.[196]

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[195]Id. at n.4. See also a more complete discussion of this footnote at page 53.

[196]Id. at 687.