The Confusing World of Interstate Commerce and Jurisdiction under the Sherman Act - A Look at the Development and Future of the Currently Employed Jurisdictional Tests

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THE CONFUSING WORLD OF INTERSTATE COMMERCE AND JURISDICTION UNDER THE SHERMAN ACT — A LOOK AT THE DEVELOPMENT AND FUTURE OF THE CURRENTLY EMPLOYED JURISDICTIONAL TESTS

I. Introduction

In 1890, the Sherman Act1 — this country's first antitrust statute — was passed to foster competition thought necessary to a capitalist economy.2 Pursuant to its power under the commerce clause of the United States Constitution,3 Congress proscribed contracts, combinations and conspiracies "in restraint of trade among the several States"4 and monopolization or attempted monopolization of "any part of trade or commerce among the several States."5 Since the enactment of the Sherman Act, one of the most perplexing issues confronting the courts and the antitrust bar has been the jurisdictional reach of the act.

Some of the early judicial decisions dealing with the jurisdictional scope of the statute reflected such a restrictive attitude that the ultimate success of antitrust enforcement appeared doubtful.6 For example, in United States v. E.C. Knight Co.,7 the first Sherman Act case to reach


"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

356 U.S. at 4.
3. U.S. CONST. art. I, § 8. The commerce clause provides in pertinent part:

"The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." Id.
4. 15 U.S.C. § 1 (Supp. V, 1975). Section 1 of the Sherman Act provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal . . . ." Id.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . .

Id.
7. 156 U.S. 1 (1895).
the United States Supreme Court, the Court held that there was no federal jurisdiction over a Philadelphia firm's alleged monopolization of sugar refining because manufacturing was deemed to be a wholly local activity notwithstanding the fact that raw materials and refined sugar were shipped into and out of Pennsylvania.8 Similarly, in Federal Base-
ball Club v. National League of Professional Baseball Clubs,9 the Court ruled that since the actual playing of a baseball game occurred within only one state at any given time, there was no federal jurisdiction despite the interstate travel of the teams.10

Despite these early decisions, a more favorable judicial attitude soon began to develop towards antitrust regulation.11 Within 4 years of the Knight decision, the Supreme Court began to reevaluate its prior restrictive jurisdictional approach. In Addyston Pipe & Steel Co. v. United States,12 the Court ruled that a price fixing agreement among six iron pipe manufacturers in several states fell within the Act's juris-
diction since the combination directly affected both the manufacture of the pipe and its national distribution.13 Six years later, the Court extended its view of the jurisdictional scope of the Sherman Act still further in Swift & Co. v. United States,14 wherein it announced that a price fixing agreement between local meat dealers was federally adjudica-
bale because it was "aimed" at the flow of meat in interstate commerce.15

8. Id. at 12, 17. See also Hopkins v. United States, 171 U.S. 578 (1898).
10. Id. at 208-09.
11. While the Court was changing its initial views of the jurisdictional require-
12. 175 U.S. 211 (1899).
13. Id. at 240-41. The Court distinguished Knight upon the ground that the sugar monopoly in Knight was only concerned with manufacturing, a local activity, and therefore had no direct connection with interstate commerce, while in Addyston Pipe the illegal agreement itself was directed at both manufacturing and interstate distribution. Id. at 240.
15. Id. at 398-99. The Court observed:
Although the combination alleged embraces restraint and monopoly of trade within a single State, its effect upon commerce among the States is not accidental, secondary, remote or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single State is an object of attack.
By 1931, the early decisions had apparently become dead letter law. As the Court observed:

[W]hile manufacture [sic] is not interstate commerce, agreements concerning it which tend to limit the supply or fix the price of goods entering into interstate commerce, or which have been executed for that purpose, are within the prohibition of the Act. 16

And, although the Federal Baseball decision has never been overruled, 17 it has come to be understood as an aberration of the general rule in which Congress has acquiesced 18 rather than an illustration of a general limitation upon jurisdiction under the Sherman Act.

Today, the jurisdictional reach of the Sherman Act is extensive in comparison to both the early decisions and the jurisdictional operation of other antitrust statutes. 19 Unfortunately, this jurisdictional expansion has proceeded at the expense of clearly defined and relatively easy-to-apply rules. 20 As a result of this uncertainty some courts have recently demonstrated an unwillingness to consider jurisdiction as a preliminary issue. 21 Notwithstanding this judicial reluctance to give preliminary consideration to the issue, and the fact that this area now encompasses many contradictory and confusing decisions, 22 it is submitted that this area is one


19. See note 11 supra and note 36 infra.


21. See Section II infra. Typically, the courts will refuse to rule upon motions to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b) (1), and instead deal only with the merits.

22. As the Third Circuit observed:

[N]o single, satisfactory test emerges from the precedent. When courts do speak in terms of a test, the formulations used are, of necessity, so broad and generalized that instead of providing a guide to the solution of the problems they do no more than restate the issue. In reality, they are not tests at all. We believe that a more accurate appraisal of the question is made by courts which concede that the issue requires “a practical case-by-case economic judgment, not a conclusion derived from application of abstract or mechanistic formulae.” . . . That is, the issue is one of degree which defies tests and which necessarily yields somewhat imprecise resolutions.

As a result, the precedent in this area is unlikely to dictate the outcome in any given case. Instead, it is more likely to communicate a general sense as to
still worthy of close examination. The threshold determination of jurisdiction can still be critically important and desirable since antitrust litigation can be both time-consuming and expensive. Quick consideration and resolution of such a fundamental issue can often expedite a settlement or save unnecessary delay and cost. Accordingly, this comment will examine the current state of the jurisdictional law under the Sherman Act by focusing upon: 1) The reason for the present confusion surrounding the jurisdictional requirements of the Sherman Act and the resultant refusal by some courts to consider jurisdictional questions; 2) The tests which have been developed for examining jurisdictional challenges to the application of the Sherman Act; and 3) The impact of Golfarb v. Virginia State Bar, the Supreme Court's latest examination of this problem under the Sherman Act.

II. Judicial Reluctance to Summarily Consider the Jurisdictional Issue

The basis of most of the confusion surrounding the jurisdictional reach of the Sherman Act may be traced to the act's rather curt and enigmatic statutory language. The Sherman Act refers only to monopolies and restraints of trade among the several states. In effect, this language defines both the prohibited conduct and the jurisdictional range of the statute. As a result, questions dealing with jurisdiction and questions dealing with the merits are often factually interwoven since a restraint of interstate commerce is not only a prerequisite for jurisdiction, but also constitutes an element of the substantive violation. Because of this interconnection, some courts have suggested that a summary disposition upon jurisdictional grounds is inappropriate in most antitrust actions. As the Fifth Circuit observed:

Undoubtedly, under Rule 12(d) of the Federal Rules of Civil Procedure [now rule 12(b)(1)] a court may determine the prerequisites of jurisdiction in advance of a trial on the merits. However, where the factual and jurisdictional issues are completely intermeshed the jurisdictional issues should be referred to the merits, for it is impossible to decide the one without the other.

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20. The connection required between the conduct and interstate commerce may vary depending on whether the allegations constitute a per se violation of the Sherman Act. Theoretically some connection is always required although in some contexts it may be judicially presumed. See notes 58-64 and accompanying text infra.

Notwithstanding the Fifth Circuit's view, other courts have recognized that the substantive and jurisdictional inquiries are directed at different factors:

[A]n important distinction should be stressed — the distinction between the jurisdictional question, with which we are concerned, and the question of whether, in other respects, a substantive violation of the Sherman Act is alleged.

... "[T]he phrase 'restraint of trade' which ... had a well-understood meaning at common law, was made the means of defining the activities prohibited. The addition of the words 'or commerce among the several states' was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes. ..."

Whether a defendant's conduct constitutes a substantive Sherman Act violation is entirely a matter of congressional definition: Is the defendant's conduct the type of conduct Congress intended to prohibit? Is that conduct a "restraint of trade" within the meaning of section 1, or an "attempt" or "conspiracy" to "monopolize . . . trade" within the meaning of section 2? The jurisdictional question, on the other hand, concerns Congress' power to reach the defendant's conduct: "[T]he restrain must 'occur in or affect commerce between the states ... for constitutional reasons.'"27

According to this view28 the jurisdictional analysis should be directed toward the possible connection between interstate commerce and the challenged activity. On the other hand, the substantive analysis should focus upon whether, if a connection were found, interstate commerce was restrained unreasonably.29 Of course, it is important to recognize the interrelationship of those two analyses since without the required connection, interstate commerce could not be restrained. Nevertheless, once a connection is found, it does not automatically follow that there is an unreasonable restraint of interstate commerce.30

28. This view has been followed by numerous courts. See, e.g., Hospital Bldg. Co. v. Trustees of the Rex Hosp., 511 F.2d 678 (4th Cir.), cert. granted, 423 U.S. 820 (1975); Sun Valley Disposal v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969); Lieberthal v. North Country Lanes, 332 F.2d 269 (2d Cir. 1964); Page v. Work, 290 F.2d 323 (9th Cir.), cert. denied, 368 U.S. 875 (1961).

It should also be noted that even in those cases where lower court dismissals for lack of subject matter jurisdiction have been reversed, it has usually been because the lower court erred in not finding the requisite connection rather than because the preliminary consideration of subject matter jurisdiction was found inappropriate. See, e.g., United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954); Doctor's Inc. v. Blue Cross, 490 F.2d 48 (3d Cir. 1973).
Several recent circuit court decisions have indicated that the opportunity for all parties to develop a complete record relevant to the jurisdictional issue is the most important factor which should be considered by trial courts in determining the propriety of summary disposition.\textsuperscript{31} It should be noted, that it is unclear whether the judge or jury should resolve questions of fact relating to jurisdiction when this approach is used.\textsuperscript{32} Regretably, a recent discussion of this problem by the Supreme Court has provided little guidance.\textsuperscript{33} Seemingly, the Court has left the resolution of this issue to the discretion of the trial court:

[There is] no objection to reserving the jurisdictional issues until a hearing on the merits. By the same token, however, there is no objection to use, in appropriate cases, of summary judgment procedure to determine whether there is a genuine issue of material fact as to the interstate commerce element.\textsuperscript{34}

III. JURISDICTIONAL ELEMENT OF "INTERSTATE COMMERCE" UNDER THE SHERMAN ACT

The Sherman Act has been construed as embodying the full scope of Congressional power under the commerce clause.\textsuperscript{35} As the boundaries of that power have expanded, so has the extent of the statute's influence.\textsuperscript{36}

\textsuperscript{31} Mims v. Kemp, 1975–1 Trade Cas. ¶ 60,334 (4th Cir. 1975); A. Cherney Disposal Co. v. Chicago & Sub. Refuse Disposal Ass'n, 484 F.2d 751 (7th Cir. 1973). Employing this standard, courts would treat the motion not as one for dismissal due to lack of jurisdiction which is decided based upon the pleadings under Fed. R. Civ. P. 12(b)(1), but rather as one for summary judgment under Fed. R. Civ. P. 12(b)(6) and 56. However, this may result in confusion between the jurisdictional inquiry and a determination of the merits because a motion under rule 12(b)(6) challenges the substantive sufficiency of the complaint. Thus, unless jurisdiction is now considered an element of an antitrust charge or the courts are ignoring the language of the rule, the jurisdictional inquiry may be inadvertently deferred to the merits.


\textsuperscript{34} Id.

\textsuperscript{35} United States v. Frankfort Distilleries, 324 U.S. 293, 298 (1945); United States v. Southeastern Underwriters Ass'n, 322 U.S. 533, 558 (1944); Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 521 (9th Cir. 1973); Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732, 739 (9th Cir. 1954).


In order to fully appreciate the broad scope of the jurisdictional tests which have been developed for the Sherman Act, it is useful to note the more restrictive standards used with other antitrust laws. For example, the Clayton Act, 15 U.S.C. §§ 12–27 (1970), which supplemented the Sherman Act in 1914, has been interpreted to require that the illegal activity must itself occur directly in the flow of interstate commerce. United States v. American Bldg. Maintenance Indus., 422
The tests currently employed for determining jurisdiction were not clearly distinguished until the 1930’s and 1940’s when the Supreme Court began to reexamine Congressional power under the commerce clause. Until that time, this power was generally considered to apply only to activities which were so directly concerned with interstate commerce as to be conceptually included within its flow. Then, in the landmark case of *Wickard v. Filburn*, the Court enunciated an alternative analysis: “[E]ven if . . . activity be local and though it may not be regarded as


Predictably, the validity of this “jurisdictional dichotomy” has occasionally been questioned since “[t]he legislative history does not furnish even a bare suggestion or inference that ‘commerce’ under the Clayton Act meant something less than it meant under the Sherman Act.” Gulf Oil v. Copp Paving Co., supra at 205 (Douglas, J., dissenting). Nevertheless, as recently as 1975 the Supreme Court refused to overrule the established precedent:

This argument [that the statutes should have the same jurisdictional standards] from the history and practical purposes of the Clayton Act is neither without force nor at least a measure of support. But whether it would justify radical expansion of the Clayton Act’s scope beyond that which the statutory language defines — by judicial decision rather than amendatory legislation — is doubtful. Gulf Oil Corp. v. Copp Paving Co., supra at 202 (footnotes omitted).

Interestingly, the “amendatory legislation” required by the Court for change might possibly be forthcoming in light of a recent amendment of the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1970), as amended, (Supp. V, 1975). That statute, like the Clayton and Robinson-Patman Acts, was originally garnered as requiring activity to be “in” interstate commerce for the Commission to have jurisdiction. FTC v. Bunte Bros., 312 U.S. 349 (1941); United States v. Piuma, 40 F. Supp. 119 (S.D. Cal. 1941), aff’d, 126 F.2d 601 (9th Cir.), cert. denied, 317 U.S. 637 (1942). However, early in 1975, section 5 of the Federal Trade Commission Act was amended to prohibit “unfair methods of competition in or affecting interstate commerce, and unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45 (1970), as amended, (Supp. V, 1975). The statute was amended because Congress felt that restricting the Federal Trade Commission’s regulatory power to activities deemed to occur in interstate commerce was “unrealistic” in today’s mobile society, and in view of the reach of the Sherman Act. H.R. Rep. No. 93-1107, 4 U.S. CODE CONC. & AD. NEWS at 7713 (1975). This same rationale may lead Congress in the future to make uniform the scope of all antitrust acts. Indeed, it should be noted that recently a bill was introduced in the House of Representatives which would extend the Clayton Act to include anticompetitive mergers “affecting interstate commerce.” H.R. Rep. No. 9323, 94th Cong., 1st Sess. 1-2 (1975); see BNA 1975 ANTITRUST & TRADE REG. RPR. (No. 729, 9/9/75 at A-14).

37. See generally Stern, supra note 2.


commerce, it may still, whatever its nature, be reached by Congress if it
exerts a substantial economic effect on interstate commerce . . . .”

Utilizing both the new “affecting interstate commerce” analysis and
the traditional “in the flow of interstate commerce” analysis, the Supreme
Court proceeded in the next few years to extend the reach of the Sherman
Act to various local activities. First, jurisdiction was held proper over
local price fixing activities by liquor retailers because of the potential
affect the practice had upon the demand for out-of-state supplies. There-
after, local taxi service for interstate travelers between train stations
was ruled to be part of a continuous interstate trip. Intrastate prepara-
tion of sugar from locally grown sugar beets and local manufacturing of
garments were also subjected to federal scrutiny because of their effect
upon interstate commerce.

In a short time, the two jurisdictional analyses which the Court
employed without entirely distinguishing between them became the two
separate tests applied by the courts today. As the Fourth Circuit observed
in a recent decision:

An antitrust plaintiff may establish the necessary connection
with interstate commerce in either of two ways: by demonstrating
that the alleged anticompetitive conduct occurred in interstate
commerce, or by showing that the conduct, though wholly intrastate,
had a substantial effect on interstate commerce.

While at least one commentator has suggested that a single test in-
corporating an expanded concept of the “flow of interstate commerce”
might be more efficient, the above tests have never been judicially ques-
tioned. As will be discussed below, because of the difference in the re-
quired effect upon interstate commerce under the two standards, it is

40. Id. at 125. This approach was not entirely novel. In 1914 the Court looked
to the economic effect on interstate commerce in permitting Congress to regulate
intrastate railroad rates. Houston, E. & W. Tex. Ry. v. United States (Shreveport
Rate Cases), 234 U.S. 342 (1914), cited in 317 U.S. 123–24. However, this “affecta-
tion” analysis was not expressly applied to Sherman Act cases until after Wickard.
See note 38 and accompanying text supra.

42. United States v. Yellow Cab Co., 332 U.S. 218, 228–29 (1947). However,
other local cab service which dealt with interstate trips only by chance was held to be
neither within the flow of commerce nor to affect it substantially. Id. at 230–33.

43. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219
(1948). This case overruled Knight since it dealt with the local manufacture of sugar.
Id. at 229–35.


1974); accord, Las Vegas Merchant Plumbers Ass’n v. United States, 210 F.2d 732,
739 (9th Cir.), cert. denied, 348 U.S. 817 (1954); United States v. Chrysler Corp.,
180 F.2d 557, 560 (9th Cir. 1950). See generally Eiger, supra note 6; Note, Sherman
Act Challenges to Shopping Center Leases: Restrictive Covenants as Restraints of
Trade Under Section 1, 7 Ga. L. Rev. 311, 315–27 (1973) [hereinafter cited as Sher-
man Act Challenges]; Portrait of the Sherman Act, supra note 20; Comment, The
Antitrust Implications of Restrictive Covenants in Shopping Center Leases, 18 Vill.
L. Rev. 721, 722–25 (1973) [hereinafter cited as Antitrust Implications].

doubtful whether a combination of the two tests would be analytically helpful.

A. The "In Interstate Commerce" Tests

Unfortunately, no precise definition for determining whether an activity occurs within interstate commerce has ever been developed. Instead, the question has been determined on a case-by-case basis in accord with the Supreme Court guideline that

interstate commerce is an intensely practical concept drawn from the normal and accepted course of business . . . . [T]he beginning and end of a particular kind of interstate commerce [must be marked] by its own practical considerations.47

Accordingly, since each case involves different factual situations, prior case law offers no specific legal formula. However, the factual situations involved in Sherman Act precedent do at least illustrate some general parameters of what is considered to be "in" interstate commerce:48 removal and disposal of refuse across state lines,49 distribution of consumer products,50 exhibition of professional sports other than baseball,51 maintenance of taxi service for interstate travelers between train stations,52 dissemination of national news by newspapers,53 and transportation of theatrical companies.54

Although the determination of what is "in" interstate commerce has been decided in each case upon an individual basis, one limitation that has been applied fairly consistently by the courts is that the controversy must involve the interstate activities of one of the parties to the lawsuit.55

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48. See note 22 supra.
55. The Ninth Circuit has noted: "[T]he Congressional power is not over persons but over practices. It is irrelevant that a person is in some way engaged in interstate commerce if the practice complained of is in no way related to that commerce." In re Western Liquid Asphalt Cases, 487 F.2d 202, 204 (9th Cir. 1973), rev'd in part upon other grounds sub nom., Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974); accord, DeVoto v. Pacific Fidelity Life Ins. Co., 516 F.2d 1, 4 (9th Cir.), cert. denied, 423 U.S. 894 (1975); United States v. Finis P. Ernest, Inc., 509 F.2d 1256, 1258-60 (7th Cir.), cert. denied, 423 U.S. 893 (1975); Yellow Cab Co. v. Cab Employees Local 881, 457 F.2d 1032, 1034 (9th Cir. 1972); United States v. Bensinger Co., 430 F.2d 584, 588 (8th Cir. 1970); Lieberholz v. North Country Lanes, Inc., 332 F.2d 269, 272 (2d Cir. 1964). But see St. Bernard Gen. Hosp., Inc. v. Hospital Serv. Ass'n, 510 F.2d 1121, 1123-24 (5th Cir. 1975); Lehman v. Gulf Oil Corp., 464 F.2d 26, 36 (5th Cir.), cert. denied, 409 U.S. 1077 (1972).
As the Ninth Circuit has stated, "The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." The significance of this limitation may be questioned when the alternative "affecting" commerce test is available to invoke jurisdiction. At first glance, it may appear that the "in" interstate commerce test is subsumed by the "affecting" commerce test. However, this is not so because of an important distinction between the two tests. Unlike the "affecting" commerce standard, when the "in" interstate commerce approach is used, it is not always necessary to allege that the complained of activity has had an impact on interstate commerce.

Curiously, the application of this distinction between the two tests depends upon the type of substantive violation alleged. If a per se violation is charged in an "in" interstate commerce context, for jurisdictional as well as substantive purposes "the effect upon interstate commerce follows as a matter of law and is conclusively presumed .... There need be no showing of the amount of commerce involved, and it is no defense that the amount was small." For example, in United States v. Bensinger Co., an alleged price fixing agreement as to a single industrial dishwasher between local suppliers and their national manufacturer was held to be adjudicable under the Sherman Act although the plan was never carried out and the amount of commerce involved was extremely small because the violation was found to have occurred "in" interstate commerce. On the other hand, under the "affecting" commerce doctrine, while per se violations give rise to the same presumption

57. See section III-B infra.
58. It is, of course, questionable that a jurisdictional test should depend upon substantive allegations for its application since, theoretically, once an activity is found to occur within the flow of interstate commerce, given the scope of the Sherman Act, the jurisdictional inquiry should be at an end. See notes 71-76 and accompanying text infra.
60. United States v. Bensinger Co., 430 F.2d 584, 588 (8th Cir. 1970) (citations omitted).
61. 430 F.2d 584 (8th Cir. 1970).
for substantive purposes,\textsuperscript{63} they have no presumptive force for jurisdictional purposes.\textsuperscript{64}

Currently, both private parties and the Government may avail themselves equally of the presumption that interstate commerce is affected by the complained of activity in a \textit{per se} case. At one time, however, private litigants complaining of \textit{per se} violations had a significantly larger burden than did the Government. While the Government only had to show activities \textquoteleft in\textquoteright interstate commerce plus a \textit{per se} violation, private plaintiffs had to show, in addition, that the defendant's actions were harmful to the public by unduly restricting an appreciable part of interstate commerce.\textsuperscript{65} Because of this, private litigants always had to allege an appreciable effect upon commerce to have their actions heard.\textsuperscript{66} However, in \textit{Klor's, Inc. v. Broadway-Hale Stores}\textsuperscript{67} and \textit{Radiant Burners v. Peoples Gas, Light & Coke Co.},\textsuperscript{68} this requirement was abandoned. The Court held:

\begin{quote}
[T]o state a claim upon which relief can be granted under [section 1 of the Sherman Act], allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires.\textsuperscript{69}
\end{quote}


\textsuperscript{64} See Section III-B infra.


\textsuperscript{66} See Eiger, supra note 6, at 293–94. The requirement that the plaintiff allege public harm was not actually jurisdictional but rather substantive as plaintiff's failure to comply was properly challenged with a motion to dismiss for failure to state a cause of action. However, because of the similarity between having to show harm to the public and an effect upon commerce the discussion of this issue is relevant here. It certainly did not help a private plaintiff very much to say that because of his \textit{per se} allegations the effect upon commerce was presumed without any supportive allegations while at the same time such allegations were required to meet the substantive element of "public harm."

\textsuperscript{67} 359 U.S. 207 (1959). \textit{Klor's} involved a group boycott of electrical appliance retailers and suppliers engaged in an attempt to put a small appliance store out of business. \textit{Id.} at 207–08. Although the Court recognized that even if the defendants' aim was accomplished, consumers would not be hurt because of the small size of the plaintiff's operation, the dismissal of the action was reversed. \textit{Id.} at 213.

\textsuperscript{68} 364 U.S. 656 (1961). In \textit{Radiant Burners} plaintiff attacked a group of burner manufacturers and gas suppliers who refused to furnish gas for its burners because of failure to secure design approval. \textit{Id.} at 658.

\textsuperscript{69} \textit{Id.} at 660. Interestingly, although \textit{Radiant Burners} clearly did away with the "public injury" requirement, defendants have continued to raise it. See, e.g., Allied Elec. Co. v. Motorola, Inc., 369 F. Supp. 133 (W.D. Pa. 1973). However, courts have consistently rejected their arguments. \textit{Id.} at 138; accord, Cooper Liquor, Inc. v. Adolph Coors & Co., 506 F.2d 934 (5th Cir. 1975); Knuth v. Erie-Crawford Dairy Coop. Ass'n, 395 F.2d 420 (3d Cir. 1968), cert. denied, 410 U.S. 913 (1973). Today, the only real distinction between the government and private litigants in this area is that the private plaintiff must have sustained injury personally in order to have stand-
On the other hand, it is less certain whether the allegation of an effect upon interstate commerce is required in a "rule of reason"\textsuperscript{70} case. While there is some dicta which indicates that in such a case, an effect upon commerce must be alleged before jurisdiction will be sustained,\textsuperscript{71} it is debatable whether this view is justified. The question of judicial jurisdiction involves the inherent power of the tribunal to decide a given dispute.\textsuperscript{72} Since it is well settled that Congress can regulate activities which occur "in" interstate commerce\textsuperscript{73} and that the Sherman Act is intended to reflect the full scope of this power,\textsuperscript{74} jurisdiction should be taken once it is determined that the violations had occurred in the flow of such commerce.\textsuperscript{75} Therefore, the degree to which commerce is affected should be viewed, not as a jurisdictional requirement,\textsuperscript{76} but rather as a substantive element which the plaintiff must prove — that interstate commerce was unreasonably restrained.

B. The "Affecting Commerce" Test

Unlike other federal antitrust statutes, Sherman Act jurisdiction may still be invoked if the violation did not occur "in" the flow of interstate commerce.\textsuperscript{77} Under the "affecting commerce" test, even if activities are wholly intrastate, there will be federal jurisdiction if they

\textsuperscript{\textit{70}} In a "rule of reason" case an unreasonable restraint of trade must be provided. United States v. Topco, 405 U.S. 99 (1972). As the Supreme Court observed:

An analysis of the reasonableness of particular restraints includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption.

\textit{Id.} at 607.


\textsuperscript{\textit{72}} F. \textsc{James}, \textit{Civil Procedure} 612 (1965).

\textsuperscript{\textit{73}} See generally Stern, supra note 2.

\textsuperscript{\textit{74}} See note 35 and accompanying text supra.

\textsuperscript{\textit{75}} See, e.g., Hospital Bldg. Co. v. Trustees of Rex Hosp., 511 F.2d 678, 683 n.2 (4th Cir. 1975). The Fourth Circuit observed:

The volume, amount, or quantity of interstate commerce involved is irrelevant under the "in commerce" test . . . . [I]f anticompetitive conduct occurs in commerce, to whatever degree, the Sherman Act is triggered.

\textit{Id.}

\textsuperscript{\textit{76}} See notes 29 & 30 and accompanying text supra. Indeed, those few cases which have involved refusals to apply the \textit{per se} presumption have dealt with motions to dismiss for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b) (6) going to the merits rather than motions under the Federal rules challenging jurisdiction. United States v. Bensinger Co., 430 F.2d 584 (8th Cir. 1970); Ford Wholesale Co. v. Fibreboard Paper Prods. Corp., 344 F. Supp. 1323 (N.D. Cal. 1972).

substantially affect interstate commerce. As stated by the United States Supreme Court:

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

Similar to the uncertain standards involved with the “in” interstate commerce analysis, no adequate standard has been devised to determine how substantial an effect is required with the “affecting commerce” analysis. Although this lack of a clear standard has necessitated a case-by-case approach, courts have frequently focused upon factors such as continuity, frequency, and size of the flow of supplies moving through interstate commerce to the parties involved in order to determine whether the effect was substantial. For instance, where constant replenishment of articles from out of state was essential to the operation of the businesses involved and where the violation had a potential detrimental effect upon that demand, jurisdiction has been approved upon the grounds that interstate commerce was substantially affected. In contrast, had the “in commerce” test been applied, jurisdiction probably would have been denied because the supplies would have been deemed to have “come to rest” in the recipient’s possession and were, therefore, out of the flow of commerce.

80. See notes 47–54 and accompanying text supra.
82. See note 22 supra.
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Recently, this "effect on supply flow" analysis has been used to sustain jurisdiction over violations dealing with food distribution and hospital services. In *Detroit City Dairy, Inc. v. Kowalski Sausage Co.*,85 a distributor of Polish hams in the Detroit area sued a local manufacturer of meat products, alleging violations of both the Sherman and Clayton Acts. The defendant-manufacturer purchased and distributed some of the same products as did the plaintiff-distributor, and it was alleged that the defendant had attempted to tie the sale of the overlapping items to both the sale of its own products and the use of a sign bearing the defendant's trademark.86 During the year in question, plaintiff purchased approximately $600,000 and defendant $500,000 worth of merchandise from outside of Michigan.87 Despite these sizable out-of-state purchases of the overlapping products by both the plaintiff and the defendant, the court dismissed the Clayton Act charge finding that the activities had not occurred "in" interstate commerce.88 However, the court retained jurisdiction over the Sherman Act allegation by applying the "affecting commerce" test,89 and by distinguishing the litigation before it from an earlier case, *Marston v. Ann Arbor Property Managers Ass'n*,90 which dealt with an alleged violation of the Sherman Act involving apartment rentals in the Michigan area. In *Marston*, the court held that the effect upon the flow of out-of-state supplies and lessees was "incidental" because the conspiracy in question was aimed only at the local apartment market.91 The *Detroit City Dairy* court found the two situations to be distinguishable because in its case, the alleged restraint was found to be "directly" involved with the flow of the meat products.92 Thus, in view of the

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86. *Id.* at 457. A tying arrangement has been defined as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958). In *Detroit City Dairy* it was charged that the tying arrangement constituted both a violation of section 3 of the Clayton Act, 15 U.S.C. § 14 (1970), and section 1 of the Sherman Act, 15 U.S.C. § 1 (1970). 393 F. Supp. at 457.
87. *Id.* at 475.
88. *Id.* at 475-79. The court ruled that the out-of-state goods which defendant had ordered had "come to rest" in its warehouse and were no longer "in" the flow of commerce because they were not intended for any specific customer. *Id.*; see note 84 *supra*. See also section III-A and note 36 *supra*.
89. 393 F. Supp. at 473-76.
91. 302 F. Supp. at 1279. *But see* Brachter v. Akron Area Bd. of Realtors, 381 F.2d 723 (6th Cir. 1967) (per curiam). *See generally* note 139 *infra*.
92. 393 F. Supp. at 475. *But see* Doctor's, Inc. v. Blue Cross, 490 F.2d 48, 53 (3d Cir. 1973); text accompanying notes 94-103 and section V *infra*.
amount of commerce involved and the potential affect the tying arrangement upon the amount of goods ordered by plaintiff and other distributors, jurisdiction was retained.98

Similarly, in the area of hospital care, the termination of a small hospital's affiliation with a medical insurance carrier was challenged in Doctor's, Inc. v. Blue Cross.94 Prior to Doctor's, medical services generally,96 and hospital services in particular,96 were considered too local an activity for scrutiny under the Sherman Act. The Third Circuit, however, rejected this approach as being inconsistent with the current "supply flow theory" developed in other areas97 and analyzed the allegations in terms of their affect upon hospital supplies. The plaintiff alleged that it annually received $233,000 worth of supplies from out-of-state and asserted that if defendant's plans were carried out it would be forced out of business.98 Additionally, the Doctor's court suggested that defendant's activities could have an identical effect upon 100 other hospitals in the region with similar needs for out-of-state supplies.99 The Third Circuit concluded that the potential effect upon the interstate flow of hospital supplies in the event these institutions ceased to function was sufficient for jurisdictional purposes.100 This position was taken despite the fact that the alleged violation was not "directly" related to the inter-

93. 393 F. Supp. at 475. Although Detroit City Dairy is consistent with past "supply flow" cases, the opinion did contain some potentially confusing dicta. First, the court suggested that even under the "affect commerce" test, jurisdiction can be taken without an allegation of substantial affect upon interstate commerce and that the magnitude of the effect was a substantive question. Id. at 474. However, the court does not seem to have actually relied upon this approach since it found that there was a large amount of supplies involved in the case. Id. at 475. Secondly, although the court used the "affect commerce" test for jurisdiction, it also stated that the litigants were engaged "in" interstate commerce. Id. at 475-76. It is questionable whether the court actually meant that the parties were engaged "in" interstate commerce. If such was the case, given the fact that the tying arrangement alleged was a per se violation, the "in" interstate commerce test would have obviated the need for showing any affect at all for the purposes of jurisdiction. See notes 59-69 and accompanying text supra.

94. 490 F.2d 48 (3d Cir. 1973), noted in The Third Circuit Review, 20 VILL. L. REV. 426 (1975). Plaintiff alleged that Blue Cross, the largest major-medical insurance carrier in Philadelphia and the Hospital Survey Committee, Inc., a private, non-profit advisory planning agency, conspired to control hospital services in the region. 490 F.2d at 49. By terminating plaintiff's affiliation, the defendants could drive it out of business since patients insured with Blue Cross would no longer be able to use its facilities under their policies. Id.


97. 490 F.2d at 52-53.

98. Id. at 51.

99. Id.

100. Id. at 51-53.
state items as was considered important by the Detroit City Dairy court.  

The Third Circuit, citing several Supreme Court opinions, held:

There is no discussion of "directness" or of the specific relationship between the interstate goods affected and the local market controlled . . . . Instead, the Court . . . ends its inquiry when it has satisfied itself that the logical and therefore probable effect of the alleged act is to reduce the flow of goods in interstate commerce.

The "affecting commerce" test has also been applied to the less common situation where activities are alleged to prevent something from ever entering the flow of interstate commerce. In Devoto v. Pacific Fidelity Life Insurance Co., agents of an out-of-state insurance company, challenged an agreement between a local mortgage company and a local insurer whereby the mortgage company supplied lists of mortgagors exclusively to the local insurer to facilitate its solicitation of mortgage insurance. Noting that insurance transactions can fall within the range of antitrust violations, the Ninth Circuit ruled that jurisdiction over the dispute would lie because the agreement interfered with the interstate flow of mortgagor lists, insurance policies, premiums, and information about the defendant's mortgagors. Interestingly, the Devoto court did not comment upon the magnitude of the interstate flow as did the courts in Detroit City and Doctor's.

It should be noted, however, that where the flow of supplies across state borders has not been sufficiently continuous, or where there has been no reason to believe that the flow would be diminished by the complained of practices, jurisdiction has been denied. As one district court observed: "The incidental flow of supplies in interstate commerce does not in itself transform an essentially intrastate activity into an inter-

101. See note 92 and accompanying text supra.
103. 490 F.2d at 53 (footnotes omitted). See also St. Bernard Gen. Hosp., Inc. v. Hospital Serv. Ass'n, 510 F.2d 1121 (5th Cir. 1975); United States Dental Ass'n v. American Ass'n of Orthodontists, 1975-1 Trade Cas. ¶ 60,369 (N.D. Ill. 1975). Although Doctor's may be interpreted as suggesting a very expansive reading of the "affecting commerce" text, the court did not want its decision to be construed as completely negating the interstate commerce requirement for Sherman Act jurisdiction. Id. at 53-54. Indeed, the Third Circuit cited examples of federal courts properly refusing jurisdiction when the "flow of supplies into the state [was not] substantial enough to confer jurisdiction." Id. at 54, citing Lieberthol v. North Country Lanes, 323 F.2d 269 (2d Cir. 1964), and Page v. Work, 290 F.2d 323 (9th Cir. 1961); see notes 109-18 and accompanying text infra.
104. 516 F.2d 1 (9th Cir.), cert. denied, 423 U.S. 894 (1975).
105. Id. at 2-3. In fact, plaintiffs in Devoto had signed a contract with the loan company to receive such lists but the loan company reneged and decided to continue dealing exclusively with its codefendant. Id.
107. 516 F.2d at 5.
108. See notes 96-103 and accompanying text supra.
109. See notes 111-14 and accompanying text infra.
state enterprise."\(^{110}\) For example, in *Lieberthal v. North Country Lanes, Inc.*,\(^{111}\) it was held that the "one shot" event of outfitting a bowling alley with out-of-state equipment did not constitute a sufficient effect upon commerce.\(^{112}\) Similarly, in *Page v. Work*,\(^{113}\) a suit filed by the former owners of a local legal newspaper receiving newsprint from another state charging that they were forced out of business as a result of defendants' alleged illegal activities, jurisdiction was denied because there was no allegation that the new owners ordered any less newsprint from out of state.\(^{114}\) Other examples of courts denying jurisdiction because of a de minimus connection with interstate commerce include: local mortuary services, despite the fact that some of the supplies and bodies came from out of state;\(^{115}\) local taxi service;\(^{116}\) local refuse removal, although the equipment used in the business had initially been purchased in another state,\(^{117}\) and the administration of a state bar review course, notwithstanding an involvement with out-of-state students and advertising.\(^{118}\)

Recently, jurisdiction has been refused in two cases where the jurisdictional allegations were similar to those in *Detroit City Dairy* and *Doctor's*. In *Evans v. S.S. Kresge Co.*,\(^{119}\) the trustee in bankruptcy of a local Pennsylvania supermarket management company challenged the

\(^{110}\) St. Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc., 316 F. Supp. 1045, 1048 (D. Minn. 1970). Indeed, if this were not the case, any business which used out-of-state goods or serviced out-of-state customers, no matter how few, would be subject to federal scrutiny. This would necessarily result in the elimination of the jurisdictional requirement of interstate commerce. See note 103 supra.

\(^{111}\) 332 F.2d 269 (2d Cir. 1964).

\(^{112}\) Id. at 272.

\(^{113}\) 290 F.2d 323 (9th Cir.), cert. denied, 368 U.S. 875 (1961).

\(^{114}\) Id. at 332.


\(^{116}\) United States v. Yellow Cab Co., 332 U.S. 218 (1947). In *Yellow Cab* two types of cab service were involved — normal city wide service and special contract service between interstate train stations. The latter service was found to be an integral part of interstate commerce since it was seen as part of a continuous interstate trip. *Id.* at 228-29; see note 42 and accompanying text supra. However, the normal service was found to be too local to be in interstate commerce or to have any substantial affect upon it. *Id.* at 230-33.

\(^{117}\) Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969). But see United States v. Pennsylvania Refuse Removal Ass'n, 357 F.2d 806 (3d Cir.), cert. denied, 384 U.S. 961 (1966). In *Pennsylvania Refuse*, the Government alleged that the members of the defendant-association transported large amounts of refuse across state lines and for this reason the Third Circuit ruled that the activity was "in" interstate commerce. 357 F.2d at 808. In *Sun Valley*, however, although plaintiff alleged that defendants actually served clients in another state, the Ninth Circuit held that this was a separate part of the defendant's business and not related to the charged violations. 420 F.2d at 343-44.


\(^{119}\) 1975-1 Trade Cas. ¶ 60,349 (W.D. Pa. 1975).
provisions of a licensing agreement with a national discount department store in which the management company agreed to operate several food markets under defendant's trade name and adjacent to defendant's stores.120 Plaintiff objected to, *inter alia*, the requirement that the management corporation adhere to established prices on items sold by both stores.121 In order to establish jurisdiction, plaintiff stressed the fact that $400,000 worth of supplies received by the food stores during the past year had come from outside of Pennsylvania.122

Initially, the *Evans* court noted the confusion surrounding the jurisdictional and substantive requirements of interstate commerce under the Sherman Act.123 Nevertheless, it concluded that in the instant case, summary pretrial disposition of the jurisdictional question was both warranted and proper,124 and further, that it was more appropriate for the court than the jury to decide the issue.125 Jurisdiction under the "in commerce" test was ruled out because the goods which the stores received from other states had "come to rest" on the stores' shelves, and were, therefore, no longer in the flow of commerce.126 Then, as in *Detroit City Dairy*, the court looked to the results of the alleged violation in applying the "affecting commerce" test. The *Evans* court noted that although a large quantity of goods had come into the state, there was no reason to conclude that the agreement had in any way affected their demand. In short, no relation was established between the alleged activity and the interstate goods.127

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120. *Id.* at 66,450–52.
121. *Id.* at 66,541. The other allegations were that plaintiff's bankrupt had to: 1) maintain merchandise competitive in price to that offered in the surrounding trade area; 2) limit merchandising of nonfood items to specific types; 3) refrain from entering into fair trade agreements; 4) refrain from issuing trading stamps; and 5) use equipment furnished by defendant. *Id.* at 66,451–52.
122. *Id.* at 66,458.
123. See generally section II *supra*.
125. *Id.* at 66,456; see note 32 and accompanying text *supra*.
126. 1975–1 Trade Cas. at 66,457–60. The *Evans* court stated:

We hold that the retail sale of groceries to the general public are transactions consummated locally, involving commodities of a local character having been previously diverted from the flow of commerce. *Id.* at 66,460; see note 84 and accompanying text *supra*.
127. 1975–1 Trade Cas. at 66,463–64. The court observed:

We do not believe that any evidence exists which shows or suggests that the interstate commerce in groceries was either enhanced or diminished by the agreement. Nor do we believe that the conduct complained of restricted [the food stores'] latitude in dealing with its suppliers. In short, we find that the alleged conduct had nothing to do with whatever interstate commerce [the stores' management firm] might have engaged in during the course of its operation of the stores in question. Therefore, we have no jurisdiction. *Id.* at 66,464 (footnote omitted).

To reach the decision that it lacked subject matter jurisdiction, the *Evans* court also had to distinguish the case before it from the Supreme Court's decision in *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959). See note 67 and accompanying text *supra*. *Klor's* seemingly stood for the proposition that driving a small
In the other recent case rejecting jurisdiction, Hospital Building Co. v. Trustees of Rex Hospital, a 49-bed hospital in the Raleigh, North Carolina, area charged a competing hospital and other individuals engaged in providing local hospital and medical services with conspiring to prevent it from expanding to 140 beds. For jurisdictional purposes, plaintiff alleged that because it was unable to expand as scheduled, its out-of-state purchases of supplies and management services from its parent corporation, and its billings to national insurance companies and the federal government did not increase as they otherwise would have. Also, the $4 million cost of expansion was to be financed with funds supplied from outside of North Carolina. Despite plaintiff's allegations, the district court dismissed the complaint for lack of jurisdiction. The Fourth Circuit affirmed, holding that the above allegations did not constitute a sufficiently direct and substantial impact upon interstate commerce. Doctor's was distinguished upon the ground that in the instant case there could be no significant comparison between the effect on commerce of one small hospital's delayed expansion, especially when other hospitals contemplate expansion, and the vastly greater effect of the possible closing of a significant percentage of the hospitals in a metropolitan area.

businessman out of business could sufficiently affect interstate commerce for the purposes of jurisdiction, given the possibility of similar attacks upon like enterprises was considered. See Klor's, Inc. v. Broadway-Hale Stores, supra at 213. However, the Evans court distinguished Klor's upon the ground that the plaintiff in Klor's was prevented from buying goods passing in interstate commerce for local resale by an alleged boycott. While in Evans, the court found that the alleged activity had no relation to the demand of interstate goods. 1975-1 Trade Cas. at 66,463-64.


129. Id. at 681. It was charged that the defendants had violated sections 1 and 2 of the Sherman Act when they attempted to block the authorization of the expansion required under North Carolina law and instigated adverse publicity concerning the plaintiff's operations. Id.

130. Id. at 683-84.

131. Id. at 684.

132. The district court's opinion was not reported. The Fourth Circuit was not certain whether the dismissal was for lack of jurisdiction or for failure to state a cause of action as both 12(b)(1) and 12(b)(6) motions were filed. 511 F.2d at 680. However, the circuit court treated the district court's dismissal as a substantive question under rule 12(b)(6) and concluded that jurisdiction over the subject matter was expressly conferred by the Sherman Act. Id. at 680-81. However, it should be noted that in so doing the court ignored the fact that Sherman Act jurisdiction could constitutionally be applied only to transactions having the requisite nexus with interstate commerce. See note 3 supra.

133. 511 F.2d at 684. As in Detroit City Dairy, and unlike Doctor's, the court required that a "direct" affect upon interstate commerce be alleged. Id.; see notes 91, & 98 & 99 and accompanied text supra. The validity of this requirement was strongly disputed by the dissent which suggested that Doctor's was controlling on the point. Id. at 689-89 (Winters, J., dissenting).

134. Id. at 684. The court indicated that it believed the instant situation was closer to Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2d Cir. 1964) and Page v. Work, 290 F.2d 323 (9th Cir.), cert. denied, 368 U.S. 875 (1961), than to Doctor's. 511 F.2d at 684-85. See notes 111-14 and accompanying text supra.
However, the Rex Hospital court did not stop there but further explained that the most important factor in its decision was an examination of the "potential power of [the] conspiracy." Noting that in the instant case, the defendants merely possessed enough influence to delay plaintiff's plans, the majority stated that

the real difference between our case and Doctors, Inc. may be not so much the quantitative difference in effect on interstate commerce as the dramatic difference in anticompetitive power — the danger Congress sought to guard against.

C. Summary

As Sherman Act litigation continued into the 1960's and 1970's plaintiffs began to call upon the federal judiciary to deal with disputes of an increasingly local nature. Not surprisingly, in dealing with these suits courts generally employed the more liberal "affecting commerce" analysis. Unfortunately, since there has been no concrete guidance from the United States Supreme Court, lower federal courts have been forced to fend for themselves. The result is the "patch-quilt" collection of cases presently found in the area. Certainty has been virtually non-existent since each court will approach a given dispute as involving unique factual circumstances.

IV. Goldfarb v. Virginia State Bar: An Analysis

In early 1975, the Supreme Court was presented with the opportunity to clarify jurisdictional law under the Sherman Act in the case of Goldfarb v. Virginia State Bar. However, the Court's treatment of the jurisdictional question could well lead to more confusion about this issue than already exists.

In Goldfarb, the fee schedule of a local bar association which provided for a minimum fee for title searches was challenged as a price fixing

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135. The Fourth Circuit, upon finding that the affect upon interstate commerce was insubstantial or de minimis noted that such determinations were too inexact. The court observed:

Whether or not "deminimis" has ever been an effective litmus for application of the Sherman Act, we doubt that it now is, and we are concerned that conventional impact analysis may sometimes conceal rather than reveal the true rationale of decision.

Id. at 685.

136. Id.

137. Id. at 686 (emphasis supplied by the court). The dissent disagreed with the majority's distinguishing of Doctor's suggesting instead that the anticompetitive power charged was sufficiently substantial:

If by means of conspiracy and harassment those who hold a local market can foreclose or limit the entry of competition, capital, and initiative from out-of-state, then it seems to me that the federal interest in interstate commerce is directly involved.

Id. at 689 (Winters, J., dissenting).

arrangement violative of section 1 of the Sherman Act.\textsuperscript{139} The title searches covered by the price schedule were part of local real estate transactions in which out-of-state money was often used.\textsuperscript{140}

A. Supreme Court's Analysis

In ruling that the local bar association's minimum fee schedule was subject to attack under the Sherman Act, the Supreme Court chose not to analyze plaintiffs' jurisdictional allegations in terms of the tests presently employed by the lower courts.\textsuperscript{141} Because of this, it is submitted that the

\textsuperscript{139} In Goldfarb, petitioners, a husband and wife who wished to purchase a home in Fairfax County, Virginia, objected to the state and local bar associations' minimum fee schedule for a title search which they were required to obtain by their lender. \textit{Id.} at 775-76. Under Virginia law, such an examination could only be performed by an attorney. Unauthorized Practice of Law, Opinion No. 17, August 5, 1942, \textit{Virginia State Bar — Opinions} 239 (1965 ed.). The Goldfarbs found that every practitioner who responded to their inquiries insisted upon charging at least the minimum scheduled amount, which was 1 percent of the value of the property involved. 421 U.S. at 776. Petitioners had the work done by one of the lawyers who billed according to the minimum fee schedule and then filed a class action suit against both the state and local bar associations alleging that the fee suggested by each of the attorneys they contacted constituted price fixing in violation of section 1 of the Sherman Act. \textit{Id.} at 778.

Interestingly, prior to Goldfarb, few cases had ever dealt with the Sherman Act's applicability to seemingly local real estate transactions. Those cases which did examine local real estate transactions often produced conflicting results. For example, in Bratcher v. Akron Area Bd. of Realtors, 381 F.2d 723 (6th Cir. 1967) (per curiam), the Sixth Circuit reversed the district court's dismissal upon jurisdictional grounds of a complaint charging a conspiracy by local realtors to prevent blacks from renting property in white neighborhoods where this impeded the interstate flow of persons, mortgage financing, and building materials. \textit{Id.} at 724. However, 3 years later, in Marston v. Ann Arbor Property Managers Ass'n, 422 F.2d 836 (6th Cir.), \textit{cert. denied}, 399 U.S. 929 (1970), another panel in the same circuit affirmed, without opinion, the dismissal of a complaint filed by university students alleging an effect upon interstate commerce similar to the effects alleged in \textit{Bratcher}. See notes 90 & 91 and accompanying text \textit{supra}.

\textsuperscript{140} 421 U.S. at 783.

\textsuperscript{141} Initially, the district court dismissed the action against the state bar association upon the nonjurisdictional ground that "[i]n its minor role in this matter, the Virginia State Bar was engaged in state action," and was therefore immune from suit under the doctrine of Parker v. Brown, 317 U.S. 341 (1943), which immunized "state action" from antitrust attack. Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 496 (E.D. Va. 1973). However, rejecting the county bar association's claim that its members' activities were too local to permit invocation of the Sherman Act, the trial court sustained the action against the local bar association finding it guilty of the charged violation. \textit{Id.} at 494-96. In so doing, the court rejected the county bar association's claim that its members' activities were entirely too local to permit invocation of the federal statute. \textit{Id.} at 494. The district court also rejected the local association's claim that it was immune from antitrust actions upon the alternative grounds that its activities were included within the "state action" exemption of Parker v. Brown, \textit{supra}, because lawyers, as members of a "learned profession," were not engaged in "trade or commerce" as defined under the Sherman Act. \textit{Id.} at 494-96. Instead, the following factors were held determinative in sustaining jurisdiction against local association: 1) a "significant portion of funds" — tens of millions of out-of-state dollars — were used to finance the home purchases; 2) a "large percentage" of the people who lived in Fairfax County worked outside the state (several thousand people were estimated to work outside of Virginia); and 3) a "significant amount" of
Court's opinion will do little to ameliorate the uncertainty surrounding such questions. Although neither the "in commerce" nor the "affecting commerce" tests lends itself to quick and easy resolution of jurisdictional problems, they do at least provide a workable framework for analysis. The Goldfarb Court, however, utilized a more ad hoc approach, combining elements from both standards in reviewing the findings of the trial court.

Unlike the treatment of the case given by the Fourth Circuit, the United States Supreme Court looked beyond the essentially local nature of the practice of law involved in title searches. Chief Justice Burger, speaking for a unanimous court in finding minimum price schedules for title searches subject to scrutiny under the Sherman Act's ban upon price fixing, focused upon two different factors. First, the Court found that the title searches were "an integral part" of the larger transactions of financing local home purchases with out-of-state money — transactions which occurred in interstate commerce. Secondly, because of the large amount of funds flowing into Virginia, it was held that a sufficiently substantial effect upon interstate commerce for jurisdiction was alleged even though the character of this effect was never described. Inter-

loans on Fairfax County real property were guaranteed by the United States Veterans Administration and the Department of Housing and Urban Development. Id. at 497.

On appeal, the Fourth Circuit reversed the judgment against the local bar association upon the jurisdictional and "learned profession" arguments, and affirmed the district court's decision as to immunity of the state bar association. Goldfarb v. Virginia State Bar, 497 F.2d 1, 13-19 (4th Cir. 1974). The appellate court opined that jurisdiction as to the claim against the local bar would lie only if the effect upon commerce was both "direct and substantial" and the majority concluded that the findings of the district court failed to establish this element. Id. at 16-17. But see notes 101-03 and accompanying text supra. The members of the local bar were concerned solely with the general practice of law in the Fairfax County area and did not solicit out-of-state business. 497 F.2d at 18. It was, the court reasoned, only toward the local practice of law that the restraint was directed and therefore, it was merely "fortuitous" that petitioners sought the help of defendant's members in securing a loan from a non-Virginia source. Id. The Fourth Circuit noted:

We are constrained to hold that the Association sought to regulate only "general local services." The fact that those services are occasionally used by persons who are simultaneously engaged in an ancillary interstate transaction to facilitate the conduct of that transaction is merely "incidental"; this does not justify federal regulation of competitive restraints upon a business which is "wholly local" in character.

Id. at 18.

142. See note 22 supra.

143. In addition to reversing the jurisdictional holding of the Fourth Circuit, the court also ruled that the county bar was not immune under the "state action" exemption and that the practice of law was included in the definition of "trade or commerce" in the Sherman Act. 421 U.S. at 781-93.

144. Id. at 783-84.

145. Id. at 785. Although this was the first case in which the Sherman Act was applied to the legal profession, the Chief Justice stressed that the decision was not to be read as unilaterally subjecting all legal services to such scrutiny. Id. at 792-93. It was the connection that the challenged activity had with a substantial amount of interstate commerce which allowed for the instant examination. It was conceded that there could be legal services which did not have this critical connection and which would therefore be outside of the statute's scope. Id. at 785.
estingly, while it was conceded that there was no allegation of a detrimental effect upon interstate commerce resulting from the defendant’s practices, such a charge was held to be unnecessary.\textsuperscript{146}

B. Meaning of Goldfarb

Goldfarb is subject to three different interpretations.\textsuperscript{147} First, it is arguable that the Court decided that the operation of the two traditional tests had become too restrictive and that it was necessary to apply the Sherman Act more flexibly to keep up with an economy that was becoming increasingly national in scope.\textsuperscript{148} However, such reasoning would appear inconsistent with the present Court’s otherwise conservative attitude towards antitrust jurisdiction as evidenced by its rulings in two recent Clayton Act cases.\textsuperscript{149} In each of these Clayton Act cases, the Court demonstrated a great reluctance to expand the scope of jurisdiction under the statute in light of Congressional inaction in this area.\textsuperscript{150}

If Goldfarb is not to be understood as negating the relevance of the traditional jurisdictional tests, its significance then depends upon whether it is viewed as an “in commerce” or an “affecting commerce” case. Although legal services are normally considered inherently local,\textsuperscript{151} the Court emphasized that title searches were part of an activity occurring in interstate commerce.\textsuperscript{152} Thus characterized, the case would seem to be completely consistent with the earlier “in commerce” cases.\textsuperscript{153} Since

\textsuperscript{146} Id. Although the Court held that “[p]etitioners clearly proved that the fee schedule fixed fees and ‘deprive[d] purchasers or consumers of the advantages which they derived from free competition’” this effect was allegedly only felt in the local legal services market. \textit{Id.} at 783–85. Nowhere did the Court discuss the alleged harm to the flow of out-of-state financing — the basis for jurisdiction — as did the \textit{Doctor’s} and \textit{Detroit City Dairy} courts. \textit{See} notes 85–103 and accompanying text supra. For a discussion of how two cases after Goldfarb have dealt with the problems, \textit{see} notes 170–75 and accompanying text infra.

\textsuperscript{147} A fourth possibility unrelated to antitrust theory, is that the Court, in light of recent developments involving the integrity of government, might have felt compelled to seize the opportunity to show that the judiciary was not hesitant to regulate the legal profession. The Court could have ruled that the practices of the local bar association were too local for federal attention and regulation thereof was to be left to state antitrust administration. \textit{See generally} section III-B supra. Nevertheless, it is doubtful that such a decision would have enhanced the public esteem for the legal profession.

\textsuperscript{148} \textit{See generally} \textit{Portrait of the Sherman Act,} supra note 20, at 323.


\textsuperscript{150} \textit{See generally} note 36 supra.


\textsuperscript{152} 421 U.S. at 784. The defendant argued that the instant case was controlled by United States v. \textit{Yellow Cab} Co., 332 U.S. 218 (1947), in which the Court ruled that ordinary local taxi service was too local for action under the Sherman Act. However, the Goldfarb Court held that the activities in the instant case were more like the contract cab service between interstate train stations also involved in \textit{Yellow Cab} which was found to be in interstate commerce. 421 U.S. at 784 n.13. \textit{See} note 42 supra.

\textsuperscript{153} \textit{See} Section III-A supra.
price fixing is a per se violation, the only jurisdictional allegation which would be required would be a connection between the violation and interstate commerce. This burden could easily be met in Goldfarb since the services for which the prices were fixed formed a part of the interstate transaction.

While Goldfarb may add nothing to jurisdictional law if viewed as an “in commerce” case, if viewed as an “affecting commerce” case it could dramatically change the application of that standard. The flow of out-of-state money was critical in finding jurisdiction in Goldfarb. However, unlike previous “supply flow” cases, there was no allegation of a detrimental effect upon the flow in question. In ruling the absence of this allegation inconsequential, if Goldfarb is considered an “affecting commerce” case, the Court has apparently decided to define the words “affecting commerce” to mean “have a connection with commerce.”

Under this interpretation, the only allegation required under the “affecting commerce” test would be a connection with a substantial amount of interstate commerce.

C. Future Effects of Goldfarb

Presently, it is unclear what effect Goldfarb will have upon the law of Sherman Act jurisdiction. The possibilities range from no effect at all to a vast expansion of jurisdiction if plaintiffs must now show a defendant’s connection with, rather than effect upon, interstate commerce. Two cases decided since Goldfarb, Diversified Brokerage Services, Inc. v. Greater Des Moines Board of Realtors and Mortensen v. First Federal Savings and Loan Association, indicate that the lower courts may be reluctant to interpret Goldfarb as expanding Sherman Act jurisdiction. Both cases involve activities which some courts still consider too local for Sherman Act attention, and both indicate that the traditional “affecting commerce” test element of a detrimental effect upon interstate commerce is still considered a valid requirement for the standard’s application.

In Diversified Brokerage Services, two officers of an Iowa real estate brokerage firm brought suit under the Sherman Act against a local

154. See note 59 supra.
155. See notes 59–64 and accompanying text supra.
156. See notes 82–108 and accompanying text supra.
157. The Court suggested that merely because there was no showing that home buyers were discouraged from securing loans by the defendant’s actions did not mean that no effect upon commerce existed. 221 U.S. at 785. However, the Court never stated what the effect was. See note 146 supra.
158. Using this analysis, the only distinction between the “affecting commerce” test and the “in commerce” test would be that under the “affecting commerce” test the connection would always have to be with a substantial amount of commerce while this might not be required under the “in commerce” standard. See notes 57 & 58 and accompanying text supra.
159. 1975-2 Trade Cas. ¶ 60,443 (8th Cir. Aug. 20, 1975).
board of real estate brokers for its refusal to grant them membership.\textsuperscript{161} In an attempt to show the interstate character of the board's brokerage services, the plaintiffs had cited a survey of 16 percent of the 3000 listings on file with the board for the three years prior to the suit, which indicated that five had involved non-Iowa residents.\textsuperscript{162} Nevertheless, in affirming the lower court's dismissal of the action, the Eighth Circuit distinguished \textit{Goldfarb} upon the ground that the movement of only a few non-Iowa residents into the state failed to show that the matter in question had the necessary "interstate character" for jurisdiction.\textsuperscript{163} Although this finding of a lack of a connection with a substantial amount of interstate commerce was enough to deny jurisdiction under \textit{Goldfarb}, the \textit{Diversified} court additionally noted plaintiffs' failure to demonstrate that any of defendant's activities placed a burden upon interstate commerce.\textsuperscript{164}

\textit{Mortensen}, too, presented a factual situation similar to that involved in \textit{Goldfarb}. In \textit{Mortensen}, a couple which had obtained a mortgage from a Westfield, New Jersey, lending institution objected to the institution's insistence upon having certain legal services incident to the undertaking performed by its own counsel at the borrowers' expense.\textsuperscript{165} After completing the transaction, plaintiffs brought suit charging, \textit{inter alia}, that defendant's activities constituted an illegal tying arrangement in violation of section 1 of the Sherman Act.\textsuperscript{166} After substantial discovery, defendant moved to dismiss the complaint for lack of jurisdiction.\textsuperscript{167} In response, plaintiffs argued that defendant's actions both "occurred in" and "substantially affected" interstate commerce.\textsuperscript{168} The district court, however, rejected both of plaintiffs' assertions and dismissed the complaint for lack of jurisdiction.\textsuperscript{169} Although plaintiffs' allegations were similar to those involved in \textit{Goldfarb},\textsuperscript{170} the \textit{Mortensen} court ruled that

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\textsuperscript{161} \textit{Id.} at 66,952. Plaintiffs contended that this amounted to a group boycott and was thus a per se violation of section 1 of the Sherman Act as stated in Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959). \textit{See note 67 supra.}

\textsuperscript{162} 1975-2 Trade Cas. at 66,953.

\textsuperscript{163} \textit{Id.} at 66,953-54.

\textsuperscript{164} \textit{Id.} at 66,954.

\textsuperscript{165} 1975-2 Trade Cas. at 67,496. These services routinely consisted of the examination and certification of title, the drafting and recording of mortgages, and the closing of title in the borrower. \textit{Id.} at 67,498.

\textsuperscript{166} \textit{Id.} at 67,496. Plaintiffs also charged that defendant's actions violated New Jersey antitrust law and Federal Home Loan Bank Board Regulations. \textit{Id.} at 67,496-97.

\textsuperscript{167} \textit{Id.} at 67,497.

\textsuperscript{168} \textit{Id.} at 67,498.

\textsuperscript{169} \textit{Id.} at 67,497-502.

\textsuperscript{170} Plaintiff charged that the defendant obtained both investment funds and depositors' insurance from interstate sources, made loans which were guaranteed by federal agencies and other enterprises outside of New Jersey, had perhaps 25% of its customers originate loans while residing outside of the state, and competed for local mortgages with nearby New York banks. \textit{Id.} at 67,498. Also, plaintiffs charged that defendant's actions "impair[ed] the flow of buyers from other states into New Jersey" and "impede[d] insurance, construction and other products and services associated with the transfer of residential real property." \textit{Id.} at 67,500.

\end{footnotesize}
"real estate financing is essentially a local enterprise." Further, while Goldfarb was distinguished upon the ground that that case involved out-of-state lenders while the Mortensen defendant was a local lender, the trial court stressed that the decision to dismiss rested upon the fact that none of the interstate commerce involved would be adversely affected by the charged violation. The Mortensen court, like the Fourth Circuit in Goldfarb, noted that it was solely the local market for legal services that would be substantially influenced by the defendant's practices. The Mortensen court observed:

The logical and probable effects of the [defendant's] activities will be to restrict competition among New Jersey lawyers in the market for legal services, and to deny purchasers in that market a free choice among attorneys. But it is neither logical nor probable that the defendants' conduct will, as plaintiffs claim, exert any effect on demand in the market for real property financing.

V. Conclusion

During the past century, jurisdictional law under the Sherman Act has evolved in such a way as to reach activities once universally considered beyond the scope of federal regulation. However, this constant expansion and redefinition has occurred at the expense of certainty and clarity. In the past 30 years, this situation has perhaps been aggravated by the Supreme Court's failure to give much guidance for the consideration of such problems. Instead, lower federal courts have been left the task of determining which cases could be heard under the Sherman Act. To aid in this determination, two jurisdictional tests have been developed. Though neither test has eliminated the need to consider a case's individual facts, each at least provides a common ground for discussion and interpretation in this area. Nevertheless, other courts have stated that jurisdictional questions in antitrust cases are so interrelated to substantive considerations that the two must be decided together.

In view of the substantial uncertainty in this area, it was somewhat surprising that the Supreme Court in Goldfarb failed to supply much guidance. Possibly the Court was more concerned with the "state action" or "learned profession" issues also involved in the suit. Alternatively, after granting certiorari, the Goldfarb court could have decided that this particular case was not an appropriate vehicle for a major enunciation of Sherman Act jurisdictional guidelines. Perhaps, in choosing to ignore

171. Id. at 67,498.
172. Id. at 67,500-01 n.18.
173. Id. at 67,498-502.
176. See notes 26-27 and accompanying text supra.
recent developments in the field, it was felt that Goldfarb should be read narrowly and that the lower courts should generally be permitted to continue applying their own tests.

The eventual impact of Goldfarb is, of course, at this time unclear. Initially, because of the general nature of the Supreme Court's opinion, courts have been hesitant to ignore what their brothers on the lower federal bench have been doing during the High Court's period of relative inactivity. Thus, they have been slow to read the Chief Justice's opinion as broadly as they might. In the long run, however, Goldfarb's more ad hoc approach could lead to a further expansion of Sherman Act jurisdiction. If so, still more confusion could result in this area since no workable test was laid down for determining the parameters of this new jurisdictional scope.

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177. The most recent case the Court cited in discussing the jurisdictional question was United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956).