1992

**Antitrust - Third Circuit Addresses Adequacy of Pleading to Establish Subject Matter Jurisdiction under Sherman Act**

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1992]

ANTITRUST—THIRD CIRCUIT ADDRESSES ADEQUACY OF PLEADING TO ESTABLISH SUBJECT MATTER JURISDICTION UNDER SHERMAN ACT:

Fuentes v. South Hills Cardiology (1991)

INTRODUCTION

In Fuentes v. South Hills Cardiology, the United States Court of Appeals for the Third Circuit addressed the controversial issue of the adequacy of pleadings necessary to establish subject matter jurisdiction under § 1 of the Sherman Act (§ 1). The Sherman Act was designed to prevent restraint of trade, and thereby, to enhance the United States' economy by promoting competition. To this end, the United States Supreme Court has construed the broad language of § 1 narrowly, making illegal only unreasonable restraints of trade.

To establish subject matter jurisdiction under § 1, a plaintiff must 'allege and prove a sufficient connection between the defendant's activities and interstate commerce.' This is known as the "effect on com-

1. 946 F.2d 196 (3d Cir. 1991).
2. Id. at 197. Section 1 states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Sherman Act, 15 U.S.C. § 1 (1988). In Fuentes, the Third Circuit went on to examine whether or not there was a claim under § 1 upon which relief could be granted. Fuentes, 946 F.2d at 201. Once the jurisdictional element of "effect on interstate commerce" had been established, the court was free to examine whether the other two elements necessary to establish a claim of group boycott, conspiracy and restraint of trade, had been met. Id. The court found that these elements had been met and that a group boycott which unlawfully restrained trade had actually occurred. Id. at 202. This casebrief will focus, however, on the jurisdictional element of interstate commerce.
3. Robert D. Eckinger, Recent Development, Conflicting Interpretations of the Sherman Act's Jurisdictional Requirement, 32 VAND. L. REV. 1215, 1215 (1979). Of this purpose, the Supreme Court has said:

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 interaction of 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. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

4. Northern Pac., 356 U.S. at 5. The Court noted that although the language of section 1 is "all-encompassing," it has been interpreted to be limited only to "those contracts or combinations which 'unreasonably' restrain competition." Id.
merce" theory and has been the subject of much debate among the circuits. Varying interpretations of the Supreme Court's broad language in *McLain v. Real Estate Board* under the lack of agreement in this area. The *McLain* Court held that in order to satisfy the "effect on commerce test," petitioner need only show "a substantial effect on interstate commerce generated by respondents' brokerage activity." Several jurisdiction has been distinguished from the three elements necessary to sustain a cause of action under § 1. *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884 (3d Cir. 1977). To establish a cause of action under § 1, activity must in fact constitute: (1) a contract, combination, or conspiracy; (2) in restraint of trade; (3) which has a resulting effect on interstate commerce. Sherman Act, 15 U.S.C. § 1; see also *Weiss v. York Hosp.*, 745 F.2d 786, 812 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985). For a discussion of the distinction between establishing jurisdiction and establishing a cause of action for purposes of dismissal, see infra note 31.

6. For a discussion of the historical underpinnings of the scope of the jurisdictional requirement under § 1, see infra note 42.

7. For a discussion of this debate, see infra notes 11-12.


9. For a discussion of these differing interpretations, see infra notes 11-12.

10. *McLain*, 444 U.S. at 242 (emphasis added). *McLain* involved a private antitrust action brought by real estate buyers and sellers against brokers in the greater New Orleans area alleging a price-fixing conspiracy among the brokers in violation of § 1. *Id.* at 234. The complaint was made individually by petitioners and also on behalf of the class of people who employed any respondent's services during the four years preceding the filing of the complaint. *Id.* at 234-35. Respondents moved to dismiss the complaint for failure to state a claim under § 1. *Id.* at 236. In support of their motion, respondents filed a memorandum which attempted to distinguish their case from *Goldfarb* v. Virginia State Bar, 421 U.S. 773 (1975), wherein a § 1 violation was found to exist because of adherence to a minimum-fee schedule for title examination services issued by the state bar association. *McLain*, 444 U.S. at 236. Respondents in *McLain* contended that *Goldfarb*'s applicability is limited by the following language: "[T]he activities of lawyers . . . [are] inseparable and integral part[s] of the interstate commerce . . . ." *Id.* (citing *Goldfarb*, 421 U.S. at 784-85). Respondents in *McLain* asserted that there was no inseparable or integral connection between real estate brokers and interstate commerce. *Id.*

In *McLain*, the district court reasoned that the appropriate standard was that of *Goldfarb*. *McLain v. Real Estate Bd.*, 432 F. Supp. 982, 983 (E.D. La. 1977), aff'd, 583 F.2d 1315 (5th Cir. 1978), vacated, 444 U.S. 232 (1980). The court stated that "any inquiry based upon [*Goldfarb*] must be twofold: 1) whether a "substantial" volume of interstate commerce is involved in the overall real estate transaction, 2) whether the challenged activity is an essential, integral part of the transaction and inseparable from its interstate aspects." *Id.* at 984. The court presumed that some aspects of the New Orleans real estate market were interstate in nature, but that the broker's participation in these transactions was "incidental rather than indispensable" and thus federal jurisdiction was not established. *Id.* at 985. The court granted the motion for dismissal. *Id.* On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the dismissal. *McLain v. Real Estate Bd.*, 583 F.2d 1315 (5th Cir. 1978), vacated, 444 U.S. 232 (1980).

The Fifth Circuit held that the specific acts complained of did not meet the "in commerce" test. *Id.* at 1519. The court found that real property was a local product and the broker activity described was entirely intrastate. *Id.* In addition, the Fifth Circuit agreed that real estate brokers are "neither necessary nor
circuits have concluded that, under *McLain*, petitioner must show a nexus between respondent's allegedly illegal activity and interstate commerce.\(^1\) Other circuits, following *McLain*, have concluded that petitioner must merely show that respondent's *general* business activity affects interstate commerce.\(^2\)

integral participants in the 'interstate aspects' of realty financing and insurance.' *Id.* at 1322. Finally, the Fifth Circuit concluded that dismissal was appropriate on the grounds of lack of subject matter jurisdiction, rather than failure to state a claim as the district court had reasoned, and affirmed dismissal on this basis. *Id.* at 1324.

The Fifth Circuit recognized that regardless of which method of dismissal is utilized, the interstate commerce analysis is the same. *Id.* The court, however, quoted the Seventh Circuit for the proposition that "if a court is without jurisdiction of the subject matter it is without power to adjudicate and the case could be properly disposed of only by dismissal of the complaint for lack of jurisdiction." *Id.* (quoting Stewart v. United States, 199 F.2d 517, 519 (7th Cir. 1952)). Because the Supreme Court in *McLain* found a sufficient basis for satisfying the jurisdictional requirement of section 1, the Court did not discuss theories of dismissal. *McLain*, 444 U.S. at 246-47.

11. The First, Second, Sixth, Seventh, Eighth and Tenth Circuits have been fairly consistent in holding that the requisite effect on interstate commerce must be caused by the defendant's allegedly illegal activity. See Nelson v. Monroe Regional Medical Ctr., 925 F.2d 1555, 1565 (7th Cir.), *cert. denied sub nom.* Monroe Clinic v. Nelson, 112 S. Ct. 285 (1991) (finding that "district court erred in looking to the nexus between defendant's business activities as a whole . . . rather than the relationship between the alleged antitrust violation and interstate commerce"); Anesthesia Advantage, Inc. v. Metz Group, 912 F.2d 397, 401 (10th Cir. 1990) (noting that "[t]he Tenth Circuit is among those circuits which hold that the requisite nexus must be between the defendant's challenged activities and interstate commerce"); Sarin v. Samaritan Health Ctr., 815 F.2d 755, 758 (6th Cir. 1987) (holding that "plaintiff must allege sufficient facts . . . to support an inference that defendants' activities infected by illegality either have had or can reasonably be expected to have a not insubstantial effect on commerce"). Additionally, the First, Second, Seventh and Eighth Circuits have all accepted the proposition that "the inquiry must be whether the defendants' activity that has allegedly been 'infected' by unlawful conduct can be shown . . . to have had a not insubstantial effect on the interstate commerce involved." Seglin v. Esau, 769 F.2d 1274, 1280 (7th Cir. 1985) (quoting *McLain*, 444 U.S. at 246); Hayden v. Bracy, 744 F.2d 1338, 1343 (8th Cir. 1984); Furlong v. Long Island College Hosp., 710 F.2d 922, 926 (2d Cir. 1983); Cordova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36, 45-46 (1st Cir. 1981).

12. The Ninth Circuit has been the staunchest supporter of the view that it is only necessary to show that defendant's general business activities affect interstate commerce. See *Mitchell* v. Frank R. Howard Memorial Hosp., 853 F.2d 762 (9th Cir. 1988), *cert. denied*, 489 U.S. 1015 (1989). In *Mitchell*, the court reasoned that "to establish jurisdiction under the Sherman Act, [plaintiff] is required to identify a relevant aspect of interstate commerce and then show 'as a matter of practical economics' that the [defendant's] activities have a 'not insubstantial effect on the interstate commerce involved.'" *Id.* at 764 (quoting Palmer v. Roosevelt Lake Log Owners Ass'n, Inc., 651 F.2d 1289, 1291 (9th Cir. 1981)). Thus, the court looked to the defendant's general activities, rather than those specifically alleged to be illegal in making the determination regarding "effect on interstate commerce." See *id*.

The Fifth and Eleventh Circuits, as well as the Third Circuit, have generally been in agreement with the Ninth Circuit, concerning this issue. See *Park* v. El
The Third Circuit has followed the latter view, that a petitioner need only show that respondent's general business activity affects interstate commerce. Specifically, in Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center, the Third Circuit held that after the Court's decision in McLain, a petitioner no longer needed to show a connection between the allegedly illegal activities and effect on interstate commerce, but "require[d] only that plaintiffs show a substantial and adverse effect on commerce." The Third Circuit reaffirmed Cardio-Medical a year later in Weiss v. York Hospital. In Weiss, the Third Circuit again concluded that petitioner must merely show that defendant's general business ac-

Paso Bd. of Realtors, 764 F.2d 1053, 1063 (5th Cir. 1985), cert. denied, 474 U.S. 1102 (1986) (holding that "[i]n a conspiracy case, the plaintiff need not show that the business of each individual member of the conspiracy had a substantial effect on interstate commerce, as long as the coconspirators in general had such an effect"); Construction Aggregate Transp. v. Florida Rock Indus., Inc., 710 F.2d 752, 767 n.31 (11th Cir. 1983) (noting that "when determining whether interstate commerce is affected by an alleged violation courts will often examine . . . the defendant's relationship with interstate markets"); Cardio-Medical Assocs., Ltd. v. Crozer-Chester Medical Ctr., 721 F.2d 68, 74 (3d Cir. 1983) (holding that plaintiffs no longer need to show connection between allegedly illegal activities and effect on interstate commerce).

13. For a discussion of the view held by the Third Circuit, see supra note 12 and infra notes 14-17 and accompanying text.

14. 721 F.2d 68 (3d Cir. 1983). In Cardio-Medical, plaintiffs consisted of four physicians and Cardio-Medical Associates, their employer. Id. at 71. Defendants were the Crozer-Chester Medical Center and some of its employees. Id. Plaintiffs' offices were located in a building within the defendants' complex. Id. Plaintiffs alleged that the defendants, through contracts and other agreements, had tried to prevent the plaintiffs from using specialized cardiological equipment located within the complex. Id. Plaintiffs claimed that this was "a conspiracy to restrain trade and monopolize the local market for cardiological services." Id. In response, the defendants filed a motion alleging a failure to state a claim and lack of subject matter jurisdiction. Id. The district court granted defendants' motion and dismissed the Sherman Act claims without prejudice, allowing the plaintiffs to file an amended complaint. Id. After the plaintiffs filed an amended complaint, the defendants successfully moved to dismiss the amended complaint. Id.

On appeal, the Third Circuit agreed to review the complaint to determine whether plaintiffs had alleged "a substantial and adverse, or a not insubstantial, effect on interstate commerce." Id. at 75. The Third Circuit held that the plaintiffs need not have alleged a net change in volume of the interstate commerce involved. Id. Finally, the court noted its willingness to "examine the defendants' conduct both as it affects interstate commerce through the person of the plaintiff and as it affects commerce independently." Id.

15. Id. at 72. The Cardio-Medical court initially described a "tripartite test" that the district court used to determine whether the challenged activity had the required "effect" on commerce. Id. On appeal, however, the court held that this test disintegrated after the finding in McLain, stating: "We therefore require only that plaintiffs show a substantial and adverse effect on commerce." Id. In so doing, the court found that McLain erased the requirement of showing "the requisite nexus between the challenged activities of defendants and the effect on the relevant channel of interstate commerce." Id.

activity affected interstate commerce.17

The Supreme Court recently decided Summit Health Ltd. v. Pinhas,18 in which the Court potentially could have resolved the question of the scope of the "effect on commerce" theory. In Summit Health, the Court held that "[t]he competitive significance of respondent's exclusion from the market must be measured . . . by a general evaluation of the impact of the restraint on other participants in the market from which he has been excluded."19 Thus, although the Court claimed to use the same analysis as that applied in McLain, the dissent in Summit Health contended that the majority had announced a new standard by issuing such a holding.20

Fuentes v. South Hills Cardiology21 represents the Third Circuit's interpretation of the Supreme Court's decision in Summit Health. Fuentes indicates that the standard announced in Summit Health does not resolve the dispute among the circuits and may not substantially alter the Third Circuit's analysis of this jurisdictional issue.22 Thus, the Third Circuit in Fuentes implied that the only change in its analysis resulting from the Summit Health decision is the addition of a third method of establishing jurisdiction under § 1.23

17. Id. at 824-25. In Weiss, an osteopath brought a class action alleging antitrust violations against York Hospital and its staff. Id. at 791. The Third Circuit held that the focus should be on the effect that the defendant's activities in general have on interstate commerce, rather than a mere examination of this effect through the "person of the plaintiff." Id. at 824-25 (citing Cardio-Medical, 721 F.2d at 75).

Similarly, in Miller v. Indiana Hospital, the district court stated that "[w]e think it quite clear that the Court in McLain focused upon the Defendants' general business activities for its jurisdictional inquiry rather than the specific conduct alleged to be unlawful." 562 F. Supp. 1259, 1285 (W.D. Pa. 1983), rev'd on other grounds, 843 F.2d 139 (3d Cir.), cert. denied, 488 U.S. 870 (1988). For a discussion of the facts of Miller, see infra note 32. Upon appeal to the Third Circuit, this issue was not disputed. See Miller v. Indiana Hosp., 843 F.2d 139 (3d Cir.), cert. denied, 488 U.S. 870 (1988).


19. Summit Health, 111 S. Ct. 1848 (emphasis added). For a further discussion of this holding, see infra note 63 and accompanying text.

20. Summit Health, 111 S. Ct. 1850 (Scalia, J., dissenting). For a discussion of the dissenting opinion, see infra note 63.

21. 946 F.2d 196 (3d Cir. 1991). For a discussion of the only two cases decided prior to Fuentes which mention Summit Health, see infra note 54.

22. Although in Fuentes the Third Circuit merely applied the test presented in Summit Health and found that the complaint met this test, the Fuentes court left open the question of whether the dispute between the circuits was resolved by Summit Health. Fuentes, 946 F.2d at 201. For the language used by the Fuentes court which specifically failed to address this dispute, see infra note 70 and accompanying text.

23. See Fuentes, 946 F.2d at 201. The court in Fuentes explicitly left open the question of whether jurisdiction under § 1 could be established by evaluating the effect of defendant's general business activities on interstate commerce independent of the effect on plaintiff. Id. For a discussion of this language, see infra note 70 and accompanying text.
Dr. Michael Fuentes had been a cardiologist at South Hills Cardiology for approximately two months when he was terminated because of a disagreement about patient care. Despite repeated efforts to secure a new position as a cardiologist, Dr. Fuentes failed to find employment within or outside the state of Pennsylvania. Dr. Fuentes brought an action in the United States District Court for the Western District of Pennsylvania, claiming that concerted action between doctors and hospitals had effected an interstate boycott against him in violation of § 1. The defendants moved to dismiss the claim on the ground that the court lacked jurisdiction over the § 1 claim.

The district court referred the case to a United States Magistrate Judge (Magistrate) who allowed Dr. Fuentes to amend his complaint to be more specific in alleging jurisdictional matters. In his amended complaint, Dr. Fuentes included a separate count for "Violation of Interstate Commerce." Within this new count, he included four allegations: (1) at the time of his termination, many of St. Clair’s facilities were financed through funds received from the federal government or other out-of-state organizations; (2) at the time of his termination, much of the hospital’s revenue was from Medicare, Medicaid or out-of-state insurers; (3) his practice had a national reputation and attracted many out-of-state patients; and (4) the negative recommendations made

In Summit Health, the Court concluded that the test is the effect of exclusion "by a general evaluation of the impact of the restraint on other participants." Summit Health, 111 S. Ct. at 1848 (emphasis added). The Third Circuit construed this language as not necessarily precluding a consideration of the effect of general business activity on interstate commerce. See Fuentes, 946 F.2d at 201. If the Third Circuit read this language as meaning that it was only the "restraint" which could be examined, it would not have expressly left open the question of general activity. See id. Accordingly, such language indicates that this jurisdictional issue has not been conclusively resolved by Summit Health.

24. Fuentes, 946 F.2d at 197. From July 1, 1986 through August 29, 1986, Dr. Fuentes worked at South Hills Cardiology. Id. On September 4, 1986, his staff privileges at St. Clair Hospital were also terminated. Id.

25. Id. at 197-98.

26. Id. at 198. Fuentes brought this action in March, 1989 against South Hills Cardiology, St. Clair Hospital and five physicians alleging that they acted in concert against him to effect an interstate boycott. Id. The five physicians included four cardiologists, who were partners at South Hills, and one anesthesiologist, who was vice president of medical affairs at St. Clair and was responsible for deciding which doctors received staff privileges at the hospital. Id. at 198 n.2.

27. Id. at 198.

28. Id. The Magistrate allowed Fuentes to amend his complaint “to set forth with specificity those jurisdictional and factual issues upon which he relies.” Id. (alteration in original) (quoting unpublished Magistrate’s Report).

29. Id.
by the defendants restricted his access to practicing his profession.\textsuperscript{30}

Despite the amended complaint, the defendants again moved for dismissal, and the Magistrate recommended granting the motion.\textsuperscript{31} The

\textit{Id.} The exact allegations made by Dr. Fuentes in his amended complaint were, \textit{inter alia}:

\begin{itemize}
\item At the time of Dr. Fuentes' termination of hospital privileges, a major portion of St. Clair Hospital's facilities had been financed by federal or out of state funds.
\item At the same time, a substantial portion of the hospital's revenue was generated from federal funds such as Medicare and Medicaid or third party payers located outside of the state.
\item Dr. Fuentes' practice, which included nuclear cardiology at St. Clair's department, generated a national reputation and attracted a significant number of out of state patients.
\item Furthermore, the negative recommendations offered by the Defendants to other health providers to which Dr. Fuentes made application prohibited and/or restricted him free access to practice his profession.
\end{itemize}

\textit{Id.} The defendants' grounds for dismissal were based on Federal Rules of Civil Procedure Rule 12(b)(1), lack of subject matter jurisdiction, "and/or" Rule 12(b)(6), failure to state a claim. \textit{Id.} The Magistrate agreed that dismissal on both grounds was the proper course of action. \textit{Id.} In reaching this conclusion, the Magistrate found that "[the] amended complaint [does] not show that defendants' conduct affects interstate commerce or that defendants maintain an interstate practice . . . [and Fuentes has] not shown the existence of a group boycott." \textit{Id.} (quoting unpublished Magistrate's Report).

The Third Circuit has held that "the nexus of interstate commerce necessary to sustain jurisdiction is inextricably related to the interstate effects plaintiffs will have to establish to succeed on the merits of . . . [a] claim brought . . . under Sherman [§ 1]." Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 890 (3d Cir. 1977). Thus, the Third Circuit has established that this third element of a § 1 cause of action is "both an element of the offense and a vital prerequisite for federal jurisdiction . . . ." \textit{Id.} at 890-91.

The difference between 12(b)(1) and 12(b)(6) motions is that 12(b)(6) requires a decision based on the merits, while 12(b)(1) deals with defects in procedure. \textit{Id.} at 891. In a case being examined under a 12(b)(6) motion, the plaintiff is "safeguarded" by having "all [plaintiff's] allegations taken as true and all inferences favorable to plaintiff . . . drawn." \textit{Id.} In contrast, because trial court jurisdiction is the issue upon which a 12(b)(1) motion is based, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." \textit{Id.} Thus, the burden of proof for the plaintiff is much greater when a 12(b)(1) motion is sought. \textit{Id.} In a 12(b)(6) motion, plaintiff must merely plead "a sufficient nexus with interstate commerce"; whereas if the same nexus was attacked in a 12(b)(1) motion, "plaintiff must either prove the truth of the alleged nexus or stand by while the court evaluates those allegations . . . ." \textit{Id.} Nevertheless, the Third Circuit has recognized that the United States Supreme Court created an exception for antitrust cases, making this distinction irrelevant. \textit{Id.} at 896 (citing Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976)).

In \textit{Hospital Building Co. v. Trustees of Rex Hospital}, Justice Marshall noted that the analysis for dismissal in the antitrust case before the Court would be the same if regarded as a 12(b)(1) motion or as a 12(b)(6) motion. Hosp. Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 742 n.1. The Court distinguished antitrust cases as being different than other cases in that "the proof is largely in the
Magistrate’s Report based its conclusion on *Miller v. Indiana Hospital*.\(^{32}\)
Relying on *Miller*, the Magistrate found that the complaint lacked an ade-
quate showing of an effect on interstate commerce.\(^{35}\)

The district court adopted the Magistrate’s report as its opinion and
granted the dismissal.\(^{34}\) Dr. Fuentes then appealed the dismissal to the
Third Circuit.\(^{35}\)

**District Court Analysis**

In *Fuentes*, the district court granted the defendants’ motion for dis-
missal based on the Magistrate’s finding that the complaint lacked a suf-
ficient showing that the allegedly illegal conduct had an effect on
interstate commerce.\(^{36}\) Without such a showing, the court lacked juris-

domains of the alleged conspirators’ [so] dismissals prior to giving the plaintiff
ample opportunity for discovery should be granted very sparingly.” *Id.* at 746
(citation omitted). Thus, given that the analysis is the same for either motion,
there is support for granting dismissal on both grounds. *See id.*

In *Seglin v. Esau*, 769 F.2d 1274, 1278 (7th Cir. 1985), the Seventh Circuit
discussed whether failure to sufficiently allege an effect on interstate commerce is
a failure to state a claim (12(b)(6) violation) or a failure to allege subject mat-
ter jurisdiction (12(b)(1) violation). *Id.* The *Seglin* court concluded that it was
unnecessary to decide this issue because “plaintiff ha[d] simply failed to ade-
quately allege any nexus with interstate commerce.” *Id.* at 1278-79.

In *Fuentes*, the Magistrate used the same reasoning to grant dismissal on
both 12(b)(1) and 12(b)(6) grounds. *Fuentes*, 946 F.2d at 198. By contrast, in
*McLain v. Real Estate Bd.*, 583 F.2d 1315 (5th Cir. 1978), *vacated*, 444 U.S. 292
(1980), the court concluded that the proper designation of such a dismissal was
for lack of subject-matter jurisdiction. *Id.* at 1324.

(3d Cir.), *cert. denied*, 488 U.S. 870 (1988). Dr. Ralph J. Miller was both a physi-
cian and a surgeon whose practice was located in Indiana, Pennsylvania. *Id.* at
1268. Dr. Miller claimed that the individuals running the defendant hospital
viewed his involvement in a nearby medical center as a threat to the hospital. *Id.*
at 1268 n.18. After one of Dr. Miller’s patients died in the hospital, Dr. Miller
was reported to the president of the medical staff for allegedly providing unac-
ceptable care. *Id.* at 1269. The hospital held a hearing based on the complaint,
after which the hospital revoked Dr. Miller’s staff privileges. *Id.* Dr. Miller
brought an antitrust action, but the court found that he had not alleged sufficient
specific facts necessary to establish the interstate commerce element for
jurisdiction under the Act. *Id.* at 1285-86. The *Miller* court relied on *McLain* in
reaching its decision. *Id.* at 1284. For a discussion of *McLain*, see supra note 10.

33. *Fuentes*, 946 F.2d at 199. For a further discussion of the Magistrate’s
finding concerning the effect on interstate commerce, see infra note 84.

34. *Fuentes*, 946 F.2d at 198.\(^{36}\)

35. *Id.* at 197. Because the district court had dismissed the action before
responsive pleadings had been filed, the court upon appeal simply accepted the
facts in the complaint as true. *Id.* It is a well-recognized proposition within the
Third Circuit that “[t]he test to be applied in deciding a motion to dismiss . . .
requires [a] court to accept as true the factual allegations in the complaint and
already reasonable inferences that can be drawn from them . . . .” *Ransom v. Mar-
razzo*, 848 F.2d 398, 401 (5d Cir. 1988).

diction over the claim under § 1.37 In analyzing Dr. Fuentes’ claim, the district court first reviewed the three elements necessary to establish a cause of action under § 1: “[1] a contract, combination or conspiracy; [2] a restraint of trade; and [3] an effect on interstate commerce.”38 Focusing solely on the third element, the Magistrate found that the “amended complaint [does] not show that defendants’ conduct affects interstate commerce or that defendants maintain an interstate practice.”39

The Magistrate recognized that there are two ways in which a defendant’s conduct may satisfy the “effect on interstate commerce” element.40 First, if the defendant’s “proscribed” activities are themselves in “the stream of commerce,” the “effect on commerce” element would be satisfied.41 Alternatively, if the defendant’s “proscribed” activities have had a “substantial and adverse effect on interstate commerce,” the “effect on interstate commerce” element would be satisfied.42 Despite the fact that either of these methods may be used to show that the defendant’s activity affects interstate commerce, the Magistrate concluded that Dr. Fuentes’ complaint did not sufficiently establish this jurisdictional element.43 Specifically, the Magistrate stated that the complaint

37. See id. at 198.
39. Fuentes, 946 F.2d at 198. The “effect on commerce” element was the basis for dispute in Fuentes. Id. The Third Circuit has noted that “the jurisdictional basis and an element of the violation are both found in one phrase: ‘in restraint of trade or commerce among the several States.’ That the same phrase is both an element of the offense and a vital prerequisite for federal jurisdiction has caused considerable confusion.” Mortensen v. First Fed. Sav. & Loan Ass’n, 549 F.2d 884, 890 (3d Cir. 1977) (citation omitted).
40. Fuentes, 946 F.2d at 198-99.
41. Id.
42. Id. at 199. To support this proposition the court cited Weiss. Id. The Weiss decision in turn relied primarily on McLain. See Weiss v. York Hosp., 745 F.2d 786, 824 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985). For the facts of McLain, see supra note 10.
43. Fuentes, 946 F.2d at 199. The Magistrate’s finding that Dr. Fuentes’ complaint was not sufficient to establish jurisdiction was made in the face of precedent holding that for jurisdictional purposes, no elaborate particularized showing is required. See Goldfarb v. Virginia State Bar, 421 U.S. 773, 785
was conclusory, and, relying on Miller, held that "Fuentes inadequately quantified the alleged effect on interstate commerce."\(^{44}\)

In Miller, the district court had concluded that a plaintiff must establish the "existence of a demonstrable nexus between the defendants' activity and interstate commerce."\(^{45}\) Based on this standard, the district court in Fuentes found that the allegations made by Dr. Fuentes were not sufficiently detailed to satisfy the jurisdictional requirement of a demonstrable nexus.\(^{46}\) The Magistrate further noted, however, that the Third Circuit in Miller recognized in dicta that a hospital's treatment of out-of-state patients, a hospital's purchase of out-of-state medical supplies, and a hospital's receipt of money from outside the state were sufficient to satisfy the requirement of an effect on interstate commerce."\(^{47}\) Finally, (1975) (noting that "once an effect is shown, no specific magnitude need be proved"). For additional commentary regarding the Magistrate's decision, see infra note 84.

\(^{44}\) Fuentes, 946 F.2d at 199. In Miller, the district court had allowed Dr. Miller to amend his complaint and even suggested the detailed allegations which would satisfy the required nexus, thus indicating that details were, in fact, necessary for a successful complaint. Miller v. Indiana Hosp., 562 F. Supp. 1259, 1285 (W.D. Pa. 1983), rev'd on other grounds, 843 F.2d 139 (3d Cir.), cert. denied, 488 U.S. 870 (1988). The court in Miller suggested that Dr. Miller include such detailed information as, "what percentage of Defendants' patients are out-of-state residents or domiciliaries." Id. Merely elaborating on the percentages of hospital income from Medicare, Medicaid and the amount of federal grants-in-aid received by the hospital was considered insufficient "to show that the Defendants' activities had a substantial impact on interstate commerce." Id. at 1285-86.

\(^{45}\) Fuentes, 946 F.2d at 199 (quoting Miller, 562 F. Supp. at 1284 (quoting McLain, 444 U.S. at 246)). For a detailed discussion of the circuit split caused by this language, see supra notes 11-12.

The Court in McLain established that a petitioner may not presume that a relationship exists between a respondent's local activity and an unidentified aspect of interstate commerce. McLain, 444 U.S. at 242. The petitioner must specify within the pleadings the contended relationship. Id.

\(^{46}\) Fuentes, 946 F.2d at 199. The district court adopted verbatim the Magistrate's Report, which concluded:

The plaintiff has failed to show, for instance, the percentage of out-of-state patients [a]ffected by the defendants' actions, .... or the percentage of the hospital's annual income derived from Medicare and/or amounts it receives from federal grants-in-aid, .... the amount of drugs and equipment purchased by the hospital in interstate commerce, .... or the percentage of patient bills paid by third-party payors, ....

Id. (alteration in original) (quoting unpublished Magistrate's Report).

\(^{47}\) Id. (quoting Miller v. Indiana Hosp., 843 F.2d 139, 144 n.5 (3d Cir.), cert. denied, 488 U.S. 870 (1988)). The Miller dicta addressed the issue which has caused a split among the circuits: Whether the effect of defendant's general business activity on interstate commerce is sufficient to satisfy the third jurisdictional element, or whether a plaintiff must assert that defendant's allegedly illegal activity has an effect on interstate commerce. See Miller v. Indiana, 843 F.2d 139, 144 n.5 (3d Cir.), cert. denied, 488 U.S. 870 (1988). The Third Circuit held that an allegation of nexus between interstate commerce and general business activity was sufficient for pleading the jurisdictional element of an effect on interstate commerce. Id.
the Magistrate relied on Weiss v. York Hospital for the proposition that to maintain jurisdiction under § 1, it is the defendant’s conduct and not the plaintiff’s conduct which must be shown to have affected interstate commerce.

Thus, based on both Miller and Weiss, the Magistrate’s Report recommended dismissal due to inadequate quantification and specificity of an effect on interstate commerce. Upon appeal to the Third Circuit, Fuentes was decided in light of the recent Supreme Court decision in Summit Health, Ltd. v. Pinhas in which the Supreme Court again examined the issue of the interstate commerce jurisdictional requirement.

Third Circuit Analysis Based On Summit Health

The Third Circuit delayed its decision in Fuentes until the Supreme Court had rendered its decision in Summit Health. In Summit Health, the Supreme Court revisited the issue of what is necessary to satisfy the interstate commerce element to establish jurisdiction under § 1. Fuentes was the first circuit court case to address this issue after the Court decided Summit Health. Based on the standard set forth by the Court in Summit Health, the Third Circuit held that Dr. Fuentes had “adequately pled the element of interstate commerce necessary to invoke federal jur-

49. Fuentes, 946 F.2d at 199 (citing Weiss, 745 F.2d at 824 n.65).
50. Id. at 198-99. The Magistrate based his finding that “Fuentes inadequately quantified the alleged effect on interstate commerce” on Miller. Id. at 199 (noting unpublished Magistrate’s Report). The Magistrate’s finding that it is the defendant’s conduct at issue rather than the plaintiff’s was based on Weiss. Id.
52. Fuentes, 946 F.2d at 197. In a footnote, the court noted that “we took this case under advisement . . . and held it c.a.v. pending the Supreme Court’s decision in Summit Health.” Id. at 197 n.1. The term c.a.v. is “[a]n abbreviation for curia advisari vult, the court will advise, the court will consider.” Black’s Law Dictionary 382 (6th ed. 1990).
53. Summit Health, 111 S. Ct. 1842, 1844. The Supreme Court had not specifically examined this issue since McLain.
54. Two cases which mention Summit Health were decided prior to the Fuentes decision and after the Supreme Court had rendered its decision in Summit Health, however, neither of these cases attempted to interpret the standard announced in Summit Health, as the Third Circuit did in Fuentes. In Shafi v. Saint Francis Hospital, 937 F.2d 603 (Table) (unpublished opinion), the Fourth Circuit vacated its summary judgment ruling and remanded the case to be reconsidered based on the decision in Summit Health. In Oksanen v. Page Memorial Hospital, 945 F.2d 696 (4th Cir. 1991), cert. denied, 112 S. Ct. 973 (1992), the Fourth Circuit cited Summit Health in a footnote to support the proposition that “[d]emonstrating that an alleged agreement would affect interstate commerce has been treated as a jurisdictional prerequisite to bringing a section one claim that must be satisfied before the other two elements of such a claim are addressed.” Id. at 702 n.1.
The facts of Summit Health are similar to those in Fuentes, insofar as each case dealt with the complaint of an individual doctor. In Summit Health, the respondent was an ophthalmologist who had asserted that petitioner, Midway Hospital (Midway), violated § 1 through its peer review process. Petitioners in Summit Health first contended that the complaint did not satisfy the necessary jurisdictional requirements because it did not "describe a factual nexus between the alleged boycott and interstate commerce." Second, the Summit Health petitioners contended that boycotting one surgeon did not affect interstate commerce as there were sufficient additional surgeons to take his place. Rejecting petitioner's argument, the Court found that in spite of the fact

55. Fuentes, 946 F.2d at 197.
56. See id. at 199.
57. Summit Health, 111 S. Ct. at 1846. Dr. Pinhas, plaintiff in the original action, alleged in his complaint that respondents were part of "a conspiracy to drive him out of business 'so that other ophthalmologists and eye physicians . . . will have a greater share of the eye care and ophthalmic surgery in Los Angeles.'" Id. at 1844. The district court granted Midway's motion to dismiss, but the Ninth Circuit reinstated the antitrust claim. Id.

The Ninth Circuit determined that Dr. Pinhas only needed to prove that "'as a matter of practical economics' the activities of [the petitioners]—the peer review process in general—have a 'not insubstantial effect on the interstate commerce involved.'" Pinhas v. Summit Health, Ltd., 894 F.2d 1024, 1032 (9th Cir. 1989) (quoting McClain v. Real Estate Bd., 444 U.S. 232, 246 (1980), aff'd, 111 S. Ct. 1842 (1991). The court recognized that "'[i]n order to establish jurisdiction under the Sherman Act, a plaintiff must 'identify a relevant aspect of interstate commerce and then show 'as a matter of practical economics' that the Hospital's activities have a 'not insubstantial effect on the interstate commerce involved.'"' Id. at 1031-32 (quoting Mitchell v. Frank P. Howard Memorial Hosp., 853 F.2d 762, 764 (9th Cir. 1988), cert. denied, 489 U.S. 1013 (1989) for the purpose of summarizing the Ninth Circuit's interpretation of McLain). Accordingly, the Ninth Circuit remained loyal to its standard of only requiring a connection between interstate commerce and the general activity of the accused, rather than specifically with the challenged activity. For further discussion of the view held by the Ninth Circuit, see supra note 12.

58. Summit Health, 111 S. Ct. at 1844-45 (citing McLain v. Real Estate Bd., 444 U.S. 232, 242 (1980). The Summit Health Court began by noting several undisputed factual propositions in this case, including, inter alia, that Midway and its parent hospital Summit were engaged in interstate commerce. Id. at 1847. The Court stated that "although Midway's primary activity is the provision of health care services in a local market, it also engages in interstate commerce . . . . A conspiracy to eliminate the entire ophthalmological department of the hospital, like a conspiracy to destroy the hospital itself, would unquestionably affect interstate commerce." Id. Thus, because the hospital itself was involved in interstate commerce, the ophthalmological department, as part of the hospital, was also involved in interstate commerce. See id. The Court also noted that "[o]phthalmological services are regularly performed for out-of-state patients and generate revenues from out-of-state sources . . . ." Id. The Court found that even independent of the hospital's interstate characteristics, this department itself was sufficiently involved in interstate commerce to be protected under the Sherman Act despite petitioners's contention. Id.

59. Id. at 1847.
that only one surgeon was involved, if successful, the conspiracy would result in decreasing availability of ophthalmological services in that market.60

In Fuentes, the Third Circuit first recognized that the Court in Summit Health focused its analysis on the harm that might have occurred if the conspiracy had been successful, rather than on the harm that had actually occurred.61 Second, the Third Circuit noted that the Court did not adopt the view that "effect on trade" was limited only to the specific doctor involved.62 The Third Circuit observed that the Court concluded its Summit Health opinion by setting forth the following standard: "The competitive significance of [respondent's] exclusion from the market must be measured, not just by a particularized evaluation of his own practice, but rather, by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which he has been excluded."63

60. Id. at 1848.
61. Fuentes, 946 F.2d at 199 (citing Summit Health, 111 S. Ct. at 1847). The court noted that Summit Health focused "not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy was successful." Id. The Court in Summit Health recognized that specificity in alleging a "factual nexus between restraint on . . . one surgeon's practice and interstate commerce" is unnecessary as "respondent need not allege, or prove, an actual effect on interstate commerce to support federal jurisdiction." Summit Health, 111 S. Ct. at 1847-48. Rather, in some instances, the Court has been willing to "base[] jurisdiction on a general conclusion that the defendants' agreement 'almost surely' had a market-wide impact and therefore an effect on interstate commerce . . . ." Id. (quoting Burke v. Ford, 389 U.S. 320 (1967) (per curiam)).
62. Fuentes, 946 F.2d at 199. The court in Fuentes quoted Summit Health for the proposition that "[a] violation of the Sherman Act . . . is necessarily more significant than the fate of 'just one merchant whose business is so small that its destruction makes little difference to the economy.' " Id. (quoting Summit Health, 111 S. Ct. at 1848 (quoting Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959))).
63. Id. at 200 (quoting Summit Health, 111 S. Ct. at 1848). This has been interpreted as a new standard. For instance, in Fuentes the court spoke of "[t]he standard announced in Summit Health" even though the Supreme Court claimed to be using the same analysis that it had used in McLain. Id. The Court in Summit Health indicated that "[a]lthough plaintiffs in McLain were consumers of the conspirators' real estate brokerage services, and plaintiff in this case is a competing surgeon whose complaint identifies only himself as the victim of the alleged boycott, the same analysis applies." Summit Health, 111 S. Ct. at 1848 (emphasis added).

The decision in Summit Health carried only a 5-4 majority. The dissent, authored by Justice Scalia and joined by Justices O'Connor, Kennedy and Souter, identified many potential problems inherent in the majority opinion. Id. at 1849 (Scalia, J., dissenting). Specifically, the dissenting Justices did not support the expansiveness of the McLain opinion, although they conceded that most courts did not change their jurisdictional standards based on that opinion. Id. at 1850 (Scalia, J., dissenting). Rather, as the dissent noted, "[m]ost courts simply finessed the language of McLain and said that nothing had changed, i.e., that the ultimate question was still whether the unlawful conduct itself, if successful, would have a substantial effect on interstate commerce." Id. (Scalia, J., dissenting). The dissent asserted that the Court squandered an opportunity to elimi-
The Third Circuit then compared the standard set forth in Summit Health with the approach previously used in the Third Circuit. The court relied on its decisions in both Weiss and Cardio-Medical for its conclusion that Summit Health was consistent with Third Circuit precedent. As previously noted, Weiss stands for the proposition that it is the defendant's conduct which must be shown to have affected interstate commerce rather than the conduct of the plaintiff. Cardio-Medical indicates that a court may consider "a defendant's conduct both as it affects interstate commerce through the person of the plaintiff and as it affects commerce directly." The Third Circuit thus held that even though Dr. Fuentes alleged "Violation of Interstate Commerce" as a separate claim

nate the confusion that has surrounded this jurisdictional issue since McLain. Id. (Scalia, J., dissenting).

The dissent argued that instead of limiting McLain, or in some way disassociating itself from the expansive view therein contemplated, the majority developed a new standard, and thereby further complicated the issue. Id. (Scalia, J., dissenting). The dissent stated that in determining jurisdiction under section 1, the majority "looks neither to the effect on commerce of the restraint, nor to the effect on commerce of the defendants' infected activity, but rather, it seems, to the effect on commerce of the activity from which the plaintiff has been excluded." Id. (Scalia, J., dissenting). Justice Scalia then tested his understanding of the majority's holding by extending the standard to its logical conclusion:

[The test of Sherman Act jurisdiction is whether the entire line of commerce from which Dr. Pinhas has been excluded affects interstate commerce. Since excluding him from eye surgery at Midway Hospital effectively excluded him from the entire Los Angeles market for eye surgery (because no other Los Angeles hospital would accord him practice privileges after Midway rejected him), the jurisdictional question is simply whether that market affects interstate commerce, which of course it does. This analysis tells us nothing about the substantiality of the impact on interstate commerce generated by the particular conduct at issue here.]

Id. (Scalia, J., dissenting) (footnote omitted).

The dissent was concerned that a literal interpretation of this new standard would greatly expand the jurisdiction of the federal courts under the Sherman Act. See id. at 1854 (Scalia, J., dissenting). Justice Scalia recognized that the standard announced by the majority makes obtaining jurisdiction in federal court too easy and will contribute to "the trivialization of the federal courts." Id. (Scalia, J., dissenting).

64. Fuentes, 946 F.2d at 200.

65. Id. The court cited Weiss and Cardio-Medical as Third Circuit cases which offer approaches consistent with that espoused in Summit Health. Id. The court in Fuentes noted that both Supreme Court and Third Circuit precedent support the proposition that "no quantum of evidence is required to state a claim; rather it is the effect on interstate commerce that must be demonstrated." Id. The Fuentes court also observed that the Cardio-Medical court's conclusion that the relevant relationship is that of the defendant's activities to interstate commerce is very similar to the standard announced in Summit Health. Id. For the language used by the Third Circuit, see infra text accompanying note 67. For the language used in Summit Health to announce the Court's standard, see supra text accompanying note 63.


67. Cardio-Medical Assocs. v. Crozer-Chester Medical Ctr., 721 F.2d 68,
in his amended complaint, his pleading was sufficient for jurisdictional purposes under the standard announced in *Summit Health.*

Finally, the Third Circuit discussed Dr. Fuentes' additional claim that the activities and financing of the Hospital had an effect on interstate commerce directly, aside from their impact on Dr. Fuentes. Although the court noted that these allegations would add to a finding of effect on interstate commerce, the court declined to decide whether such effect on interstate commerce by defendant's general activity was alone sufficient to satisfy the jurisdictional requirements for a claim under § 1 following *Summit Health.*

**CONCLUSION**

As previously noted, *Fuentes* was the first circuit court case to be decided based on the standard announced in *Summit Health.* The decision in *Fuentes* leaves many questions unanswered. For instance, the court in *Fuentes* announced that the standard under *Summit Health* focused not only on the effect of the exclusion on the respondent's practice, but also on the effect of the exclusion on other participants in the healthcare market. For a discussion of the facts of *Cardio-Medical,* see supra note 14.

*Fuentes,* 946 F.2d at 200. For a discussion of the language in the amended complaint, see supra note 30 and accompanying text. The *Fuentes* court noted that it was not necessary for Dr. Fuentes to "have pled a specific quantum of interstate commerce affected" in order to obtain jurisdiction for his Sherman Act claim. *Fuentes,* 946 F.2d at 200; see also Goldfarb v. Virginia State Bar, 421 U.S. 773, 785 (1975) (noting that "once an effect is shown, no specific magnitude need be proved"). The court found that Dr. Fuentes' allegation that his practice had a national reputation was sufficient because the court was willing to infer that out-of-state patients would not have made the journey out of state if it had not been for Dr. Fuentes. *Fuentes,* 946 F.2d at 200. Because Dr. Fuentes' amended complaint indicated the restraint of trade on other market participants (such as patients), the complaint met the necessary jurisdictional requirements. *Id.* For the language used by the court in reaching this determination, see infra note 73.

*Fuentes,* 946 F.2d at 201. Dr. Fuentes had additionally alleged that "a major portion of St. Clair Hospital's facilities had been financed by federal or out-of-state funds," and that "a substantial portion of the hospital's revenue was generated from federal funds." *Id.*

*Id.* The court stated that "[w]e need not decide ... whether the allegations concerning the effect on interstate commerce of activities of St. Clair Hospital apart from the allegedly unlawful conduct directed at Fuentes would alone satisfy the jurisdiction requirement since that question is not squarely before us here." *Id.*

The court went on to consider whether Dr. Fuentes had adequately alleged the other two elements necessary to establish a cause of action under § 1, "contract, combination or conspiracy [and] restraint of trade." *Id.* at 201-02. The court found both to be sufficiently alleged and thus it reversed the district court's order granting dismissal and remanded the case. *Id.* at 202.

For a discussion of cases in other circuits which mention the decision in *Summit Health,* see supra note 54 and accompanying text.
market.72 The Third Circuit applied this test and found that Dr. Fuentes' allegations were sufficient under that standard.73 Nevertheless, even though the court in Fuentes applied the test proposed in Summit Health, this does not end the controversy that has developed among the circuits regarding this jurisdictional issue.74

The Fuentes court stated that "[t]he jurisdictional test also to be applied on a case-by-case basis, requires that the defendants' anticompetitive conduct 'be shown "as a matter of practical economics" to have a not insubstantial effect on the interstate commerce involved.'"75 This appears to indicate that the Third Circuit's interpretation of McLain has changed following Summit Health.76 The Third Circuit now seems to adopt the more narrow view that the nexus must be between interstate commerce and the allegedly illegal activity, rather than the general business activity of the defendant.77 However, this interpretation was later qualified, as the court in Fuentes specifically left open the question of whether a nexus between general business activities and interstate commerce would be sufficient for jurisdictional purposes.78 Following Fuentes, the "effect on commerce" analysis is not conclusively limited to examination only of the allegedly illegal activity, but rather, leaves open the possibility that the general activity may be considered as well.79

Based on Fuentes, the Third Circuit appears to agree with the dissent in Summit Health that the standard proposed by the majority does not decisively settle the controversy between the circuits and that the new standard is merely an additional method of establishing jurisdiction.

72. Fuentes, 946 F.2d at 200. For a further discussion of the Third Circuit's interpretation of the standard of Summit Health, see supra note 63 and accompanying text.

73. Fuentes, 946 F.2d at 200. The court concluded that "[a]s Fuentes's allegation involves the impact of the alleged restraint of trade on other participants, i.e. patients, Fuentes meets that test." Id. For further discussion of this conclusion, see supra note 68.

74. For a discussion of this jurisdictional dispute, see supra note 11-12 and accompanying text.


76. For a discussion of Third Circuit interpretation before Summit Health, see supra notes 14-17 and accompanying text.

77. See Fuentes, 946 F.2d at 200.

78. Id. at 201. For a discussion of the language which leaves this question open, see supra note 70.

79. Fuentes, 946 F.2d at 201. The standard in Summit Health appears to limit the scope of inquiry only to the allegedly illegal activity by stating that it is the "impact of the restraint on other participants and potential participants in the market" which is important. Summit Health, Ltd. v. Pinhas, 111 S. Ct. 1842, 1848 (1991). The Third Circuit, however, does not appear to interpret this language to definitively limit the inquiry only to the allegedly illegal activity, and instead leaves that question open. See Fuentes, 946 F.2d at 201.
under the Act. A potential problem not mentioned by the Summit Health dissent is that the majority in Summit Health claimed to use the same analysis as that applied in McLain. The disparity in interpretations among the circuits based on ambiguous language in McLain may continue because the Summit Health majority does not state that it is introducing a new standard.

The view that one may consider general business activity in analyzing "effect on interstate commerce" is also strengthened by the Fuentes court's contention that Third Circuit cases offer approaches consistent with that proposed in Summit Health. Because the Third Circuit has generally found the connection of defendant's general business activity with interstate commerce sufficient to satisfy this jurisdictional element, the court's reliance upon these cases militates against the inference that the Third Circuit is narrowing its inquiry to permit only an allegation of a nexus between interstate commerce and the defendant's allegedly illegal activity to establish subject matter jurisdiction under § 1. Thus, by

80. See Summit Health, 111 S. Ct. at 1849-51 (Scalia, J., dissenting). In Fuentes, the court left open the question of whether it is sufficient to allege a nexus between general business activity and interstate commerce rather than having to allege a nexus between defendants' allegedly illegal activity and interstate commerce. See Fuentes, 946 F.2d at 201.

Similarly, the dissent in Summit Health noted that "[t]oday the Court could have cleared up the confusion created by McLain, . . . [i]nstead, it compounds the confusion by . . . adding yet a third candidate to the field . . . ." Summit Health, 111 S. Ct. at 1850 (Scalia, J., dissenting).

81. Summit Health, 111 S. Ct. at 1848. The Court noted that "[a]lthough plaintiffs in McLain were consumers of the conspirators' real estate brokerage services, and plaintiff in this case is a competing surgeon whose complaint identifies only himself as the victim of the alleged boycott, the same analysis applies." Id. (emphasis added).

82. Id. For a discussion of the circuit split caused by ambiguous language in McLain, see supra notes 11-12.

83. Fuentes, 946 F.2d at 200. Precedent in the Third Circuit allows consideration of general business activities. See e.g., Cardio-Medical Assoc's. v. Crozer-Chester Medical Ctr., 721 F.2d 68, 71 (3d Cir. 1983) (holding that plaintiffs no longer need to show connection between allegedly illegal activities and effect on interstate commerce). For a discussion of Third Circuit precedent, see supra notes 14-17 and accompanying text.

84. The Third Circuit has focused on the general business activity rather than merely on the allegedly illegal activity. For a discussion of relevant Third Circuit precedent, see supra notes 14-17 and accompanying text.

The Magistrate and district court in Fuentes, however, found that the plaintiff made an insufficient showing of adverse effects on interstate commerce based on defendant's activity. Fuentes, 946 F.2d at 198. To make this finding, the Magistrate relied on Miller, stating that the "jurisdictional prerequisite 'is the existence of a demonstrable nexus between the defendants' activity and interstate commerce.'" Id. at 199 (quoting Miller v. Indiana Hosp., 562 F. Supp. 1259, 1284 (W.D. Pa. 1983), rev'd on other grounds, 843 F.2d 1299 (3d Cir.), cert. denied, 488 U.S. 870 (1988)). The Magistrate interpreted "defendant's activity" narrowly to mean the defendant's allegedly illegal activity. Id. at 198-99. Consequently, the Magistrate found an insufficient connection between this narrow activity and interstate commerce. Id. at 199.
leaving unanswered the question of whether general activity would be sufficient, and by deciding that Summit Health is consistent with precedent of the Third Circuit, the Fuentes court indicates that, although the facts of this case support a finding that allegedly illegal activity affected interstate commerce, such a specific showing may not be required in future Third Circuit cases.\textsuperscript{85}

\begin{quote}
Nina Amster
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There is broad support in other circuits for the Magistrate's position that the necessary connection is that between the allegedly illegal activity and interstate commerce. For a discussion of cases supporting the Magistrate's position, see supra note 11. However, such a narrow reading generally has not been accepted in the Third Circuit. For a discussion of the Third Circuit approach, see supra notes 12-17 and accompanying text.

Thus, in adopting the Magistrate's report, the district court in Fuentes did not follow general Third Circuit precedent although it claimed to have done so. \textit{See} Fuentes, 946 F.2d at 199. For example, the Magistrate's Report claimed to have relied on Weiss, yet in Weiss the court "did not address the quantum of evidence required for jurisdiction." \textit{Id.} (citing Weiss v. York Hosp., 745 F.2d 786, 824-25 (3d Cir. 1984), \textit{cert. denied}, 470 U.S. 1060 (1985)). Upon appeal, however, the Third Circuit left open the question of whether a nexus between general activities and interstate commerce is sufficient to establish jurisdiction. \textit{See} \textit{id.} at 201. Thus, the Third Circuit does not appear to endorse the position taken by the district court. \textit{See id.}

\textsuperscript{85} \textit{See} Fuentes, 946 F.2d at 200-01.