Redefining Interstate Commerce Jurisdiction under the Sherman Act: Summit Health, Ltd. v. Pinhas

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Notes

REDEFINING "INTERSTATE COMMERCE" JURISDICTION UNDER THE SHERMAN ACT: SUMMIT HEALTH, LTD. v. PINHAS

I. INTRODUCTION

The Constitution of the United States confers on Congress the power to regulate interstate commerce.¹ In an attempt to exercise its broad regulatory power over interstate commerce, Congress enacted the Sherman Act (the Act).² Section 1 of the Act prohibits the undertaking of any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."³ The language of section 1 evidences Congress' intent to make the jurisdictional reach of the Act coextensive with Congress' power to regulate commerce.⁴ Therefore, in civil or criminal antitrust cases brought

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¹. U.S. CONST. art. I, § 8, cl. 3. Congress is given the power "[t]o regulate Commerce . . . among the several States." Id. The United States Supreme Court has consistently upheld Congress' power to regulate interstate commerce. See, e.g., Katzenbach v. McClung, 379 U.S. 294, 302 (1964) (Congress' power to regulate interstate commerce extends to retail businesses "which directly or indirectly burden or obstruct interstate commerce"); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 255 (1964) ("[T]he determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is 'commerce which concerns more States than one' and has a real and substantial relation to the national interest."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 193-94 (1824) (Congress' power to regulate interstate commerce extends to every type of commercial intercourse including commerce among states).

². Sherman Act, 15 U.S.C.A. §§ 1-7 (West 1991); see also Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 434 (1932) (Court stated § 1 of Act was enacted pursuant to Congress' specific power to regulate commerce).

³. Sherman Act, 15 U.S.C.A. § 1. Section 1 states:

Every 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000 or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id.

⁴. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558, reh'g denied, 323 U.S. 811 (1944). In enacting § 1 of the Act, "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements." Id. Senator George of the Senate Judiciary Committee, discussing the Sherman Act, noted that "[t]he bill has been very ingeniously and
under section 1, before jurisdiction under the Act can be invoked, a court must determine whether the alleged restraint implicates interstate commerce. This necessarily requires a court to define and apply the concept of "interstate commerce" and subsequently to evaluate the nature and extent of the alleged restraint's impact on interstate commerce.5

The boundaries of what activities constitute "interstate commerce" have been gradually expanded and redefined by the United States Supreme Court since the enactment of the Act over 100 years ago.6 Through its expansion of the concept of interstate commerce, however, the Court has concomitantly redefined and, at times, expanded the reach of the Act.7 Unfortunately, rather than clearly demarcating the boundaries of the Act, the Court's redefinition of interstate commerce has resulted in increased uncertainty with respect to the Act's jurisdictional scope.8

properly drawn to cover every case which comes within what is called the commercial power of Congress." 21 CONG. REC. 3147 (1890); see also 1 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 232a, at 228-29 (1978) (reach of Act expands with broadening of federal commerce power).

5. Comment, Sherman Act "Jurisdiction" in Hospital Staff Exclusion Cases, 132 U. PA. L. REV. 121, 123, 128 (1983). For the purposes of this Note, when referring to "jurisdiction" under the Act, the term addresses whether the allegedly illegal activity has a substantial impact on interstate commerce, thus bringing it within the purview of the Act. At the jurisdictional level, "plaintiff must show that interstate commerce is implicated in some way." Id. at 122. In making its jurisdictional determination, a court must ask whether the Sherman Act "covers" the commercial activity involved. Another way of phrasing that issue is to ask whether the parties' activity lies within "the scope" of the Sherman Act. An activity lies within the scope of the Act if Congress intended the proscriptions of the Act to apply to that activity. If an activity is within the scope of the Act, a court should apply antitrust analysis to determine if the defendant's specific conduct violates the Sherman Act. Id. at 128. Note, however, that "[a]n activity may be within the scope of the Act and yet not violate the Act." Id. at 129.

6. Richard A. Mann, The Affecting Commerce Test: The Aftermath of McLain, 24 HOUS. L. REV. 849, 850 (1987). "Whereas the United States Supreme Court has engaged in a continual . . . trend towards expanding the jurisdictional reach of the Sherman Act, the lower courts have undermined this tendency by adopting conflicting interpretations of the Supreme Court's decisions." Id. (footnote omitted). For a discussion of the judicial expansion of the concept of interstate commerce, see infra notes 33-65 and accompanying text.

7. The Court has recognized that "[d]uring the past century, as the dimensions and complexity of our economy have grown, the federal power over commerce, and the concomitant coverage of the Sherman Act, have experienced similar expansion." Summit Health, Ltd. v. Pinhas, 111 S. Ct. 1842, 1846 (1991). For a further discussion of the Court's expansion of the Act's jurisdictional requirement, see infra notes 33-65 and accompanying text.

8. Seglin v. Esau, 769 F.2d 1274 (7th Cir. 1985). The Seventh Circuit in Seglin stated: "A split among the circuits exists as to whether the interstate commerce nexus requirement is satisfied when the plaintiff alleges that any of defendants' activities affect interstate commerce or only when the plaintiff alleges
The most recent decision in the Court's effort to clarify the jurisdictional reach of the Act is *Summit Health, Ltd. v. Pinhas.* Prior to *Summit Health,* the jurisdictional reach of the Act was most recently addressed in *McLain v. Real Estate Board, Inc.* During the period between *McLain* and *Summit Health,* a split in the United States Courts of Appeals had developed over the issue of what constitutes the proper jurisdictional reach of the Act.

In *McLain,* petitioners, a class of real estate buyers and sellers, alleged that New Orleans real estate brokers conspired to fix brokerage commission rates in violation of the Act. The Court held that jurisdiction under the Act would be found by a showing that the brokers' activities, which allegedly had been infected by a price-fixing conspiracy, "as a matter of practical economics" have a "not insubstantial effect on the interstate commerce involved."

A minority of circuit courts which have addressed the issue of the Act's jurisdictional reach after *McLain* have interpreted *McLain* as eliminating the necessity of proving an actual nexus between the alleged illegal restraint and its effect on interstate commerce. However, the majority of the circuits have held that the Court's opinion in *McLain* does not alter the jurisdictional test under the Act. Thus, under the majority approach, the plaintiff must prove that the allegedly illegal restraint substantially affects interstate commerce. Recently, the Court again addressed the issue of the scope of the Act's interstate commerce jurisdiction in *Summit Health, Ltd. v. Pinhas.* *Summit Health* provided an opportunity for the Court to settle the confusion generated by its 1980 decision in *McLain.* As this Note will conclude, however, the *Summit Health* majority decision did not resolve the conflict in the lower courts.

that defendants' allegedly unlawful conduct somehow affects interstate commerce." *Id.* at 1280.


11. For a discussion of the split in the circuits that occurred after *McLain,* see infra notes 66-68 and accompanying text.


13. *Id.* at 246 (quoting Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976)). For a further discussion of the Court's holding in *McLain,* see infra notes 56-65 and accompanying text.

14. For a discussion of the approach taken by a minority of circuits, see cases cited infra note 68; see also *Summit Health,* 111 S. Ct. at 1850 (Scalia, J., dissenting) (stating that minority of courts, in addressing the same issue, "took *McLain* at face value" and eliminated nexus between interstate commerce and alleged restraint).

15. For a discussion of the approach taken by the majority of the circuits, see cases cited infra note 67; see also *Summit Health,* 111 S. Ct. at 1850 (Scalia, J., dissenting) (most courts found ultimate question was still whether unlawful conduct, if successful, would have substantial effect on interstate commerce).

In *Summit Health*, the Court reviewed whether the interstate commerce jurisdictional requirement of the Act was met when Simon J. Pinhas, M.D. (Dr. Pinhas) alleged that Summit Health, Ltd. (Summit Health), Midway Hospital Medical Center (Midway) and its medical staff conspired to restrain him from competing for a share of the ophthalmological services market in Los Angeles, California, in violation of section 1 of the Act. In addressing the threshold issue of whether the alleged restraint impacted interstate commerce, the Court held that Dr. Pinhas' claims presented sufficient evidence that the alleged restraint had the required nexus with interstate commerce to support federal jurisdiction under the Act. In finding the required nexus, the Court employed a new standard. This standard called for a general analysis of the effect of the restraint on "other participants and potential participants" in the Los Angeles ophthalmological services market. The Court's language further muddied the waters because it did not expressly adopt one of the competing interpretations of the jurisdictional reach of the Act.

This Note will briefly trace the history of the Act from its development and adoption through the subsequent judicial interpretation and expansion of the Act's jurisdictional reach. This Note will address the question of whether the Court's decision in *Summit Health* presents a significant expansion of what activities constitute "interstate commerce" under the Act or whether the decision simply refines the previous standard used by the Court in *McLain*. This Note will also analyze the effect the *Summit Health* decision will have on jurisdictional questions arising under the Act and how this Court's interpretation will be applied to future section 1 actions. Finally, this Note will address *Summit Health*'s likely effects on the health care industry. This Note will conclude that

17. See *Summit Health*, 111 S. Ct. at 1850 (Scalia, J., dissenting). Justice Scalia, having noted the existence of the split, stated that "[the Court] compounds the confusion by rejecting the two competing interpretations of *McLain* and adding yet a third candidate to the field." *Id.* (Scalia, J., dissenting). For a complete discussion of Justice Scalia's dissenting opinion, see *infra* notes 113-122 and accompanying text.


19. *Id.* at 1848-49. For a further discussion of the facts and the majority opinion in *Summit Health*, see *infra* notes 69-112 and accompanying text.

20. *Summit Health*, 111 S. Ct. at 1848. The majority held, in a five to four decision, that the relevant market from which Dr. Pinhas was excluded was the Los Angeles ophthalmological services market. For a further discussion of *Summit Health*, see *infra* notes 69-122 and accompanying text.

21. For a further discussion of the competing interpretations of the jurisdictional reach of the Act, see *infra* notes 66-68 & 127-37 and accompanying text.

22. The jurisdictional issue is especially important in the health care industry. The health care industry is generally characterized as having "local features." Thus, the broader the Court interprets the jurisdictional reach of the Act, the more it will further the main purpose of antitrust laws, which is to compel competition and, ultimately, to lower health care costs. For a further discus-
Summit Health establishes a new and expanded jurisdictional standard for section 1 of the Act.

II. BACKGROUND

A. The Genesis of the Sherman Act

The Sherman Act was enacted in response to fundamental changes in the American economy following the Civil War. As the postwar industrial expansion developed in earnest, economic competition increased among businesses. Public resentment toward these organizations generated a political and social debate that eventually involved the executive and legislative branches of the federal government. The cry for antitrust legislation found support in both political parties. On August 14, 1888, Senator John Sherman of Ohio introduced to the Fiftieth Congress his initial antitrust legislation, Senate Bill

Resolution of the implications of the Court's decision in Summit Health for the health care industry, see infra notes 156-72 and accompanying text.


24. I KINTNER, supra note 23, at 9. This rapid industrialization of the United States was noted by Senator Jones, in the Senate debates on the Act, as changing the complexion of the economy from what it was when the Constitution was adopted. CONG. REC. 1457 (1889). He stated:

Whether, if this vast and intricate system of "commerce among the States" had been comprehended in all its immensity by the framers of the Constitution, this power of control, unlimited save by the discretion of Congress, would have been conferred upon us we may well doubt; and, doubting this, we should proceed with caution in the exercise of this great power.

Id.

Pools and trusts, which at the time were new forms of American business organizations, were formed in an attempt to harness a competitive, and sometimes dominant, edge in many different industries. I KINTNER, supra note 23, at 10. A "pool" was a joint agreement between competitors "to divide markets, share profits, discriminate jointly against less-favored entities, and otherwise wield their economic power." Id. at 10. Pools were unstable arrangements due to their voluntary nature and lack of enforceability. Id. Trusts provided a more stable organization whereby the member corporations would typically transfer their stock to a separate board of trustees. Id. The board would assume full control over the trust giving the member corporations trust certificates in return for their shares and the right to receive a pro-rata share of the trust's profits. Id.

25. I KINTNER, supra note 23, at 11-12. Small business owners and the general public began to despise these organizations as they brutally crushed competition and caused consumer prices to rise. Id. at 11. The public resentment towards these organizations became an important political issue as the 1888 elections approached. Id. at 13. Resolutions were introduced into the Fiftieth Congress that allowed for the investigation of pools and trusts and the generation of appropriate legislation. Id.

26. Id. at 12-13. At the time, the Democrats, who typically supported fewer restrictions on foreign trade, protested against the trusts and the government's protective trade policy. Id. at 12. The Republican Party, also known as the "Party of Big Business," may have supported the antitrust legislation as a way to combat the public outrage towards the trusts. Id. at 12-13.
The Senate's deliberations on Senator Sherman's bill primarily focused on the source and scope of Congress' authority to regulate interstate commerce, and the constitutionality of the bill. The Fifty-First Congress, in debating Senator Sherman's Senate Bill 1 (identical to Senate Bill 3445), addressed similar concerns regarding the constitutionality of such legislation. Finally, on July 2, 1890, President Benjamin Harrison signed Senate Bill 1 into law, leaving the issue of the Act's jurisdictional scope to the courts.

27. Id. at 14. The Senate bill consisted of a single section that was entitled: "To declare unlawful trusts and combinations in restraint of trade and production." S. 3445, 50th Cong., 1st Sess. (1888), reprinted in I KINTNER, supra note 23, at 63-64. On September 11, 1888, the Senate Committee on Finance sent back a revised version of Senate Bill 3445, which provided in part:

[All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view, or which tend, to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States or in the production, manufacture, or sale of articles of domestic growth or production, or domestic raw material ... which shall be transported from one State or Territory to another ... are hereby declared to be against public policy, unlawful, and void.]

S. 3445, 50th Cong., 1st Sess. (1888) (as reported by the Senate Committee on Finance), reprinted in I KINTNER, supra note 23, at 65-66.

28. 20 CONG. REC. 1167 (1889), reprinted in I KINTNER, supra note 23, at 69. Senator Sherman stated that the Bill would go as far as the Constitution permits Congress to go, because it only deals with two classes of matters: contracts which affect the importation of goods into the United States, which is foreign commerce, and contracts which affect the transportation and passage of goods from one State to another. The Congress of the United States can go no farther than that.

29. Representative Culberson of Texas, summarizing the prevailing view on Congress' ability to regulate interstate commerce, stated that the Act addressed a new area of legislation, "and as the Constitution has wisely left with the several States of this Union the right to local self-government, the legislative field of Congress with reference to questions of this character, except in a few instances where power has been granted to the Federal or General Government, is extremely limited." 21 CONG. REC. 4089 (1890), reprinted in I KINTNER, supra note 23, at 299. Representative Culberson also expressed uncertainty regarding the scope of the Act, adding that "just what contracts, what combinations in the form of trusts, or what conspiracies will be in restraint of the trade or commerce mentioned in the bill will not be known until the courts have construed and interpreted this provision." Id. Senator Gray added that he could not vote for a bill that exercises powers not given to Congress by the Constitution. Id. at 2657.

Senator Reagan of Texas stated, on the subject of restraints of trade, that Congress does not have a limited power; but the exercise of its power under the Constitution and the doing of what it may do rightfully under the Constitution will not give relief to the people of the country unless the Legislatures of the several States take hold of the subject and make provisions there which will cover the larger number and the greater amount of the wrongs complained of by the people.

21 CONG. REC. at 2470; see also id. at 2566 (Senator Stewart of Nevada stated: "I find no warrant in the Constitution for Congress to pass this kind of a law.").

The Act's jurisdictional scope has been substantially expanded by courts in the intervening years, while the text of the Sherman Act has remained virtually unchanged since its promulgation in 1890.

B. The Expansion of Jurisdiction Under the Sherman Act

One of the Supreme Court's first decisions addressing the jurisdictional scope of the Act was United States v. E.C. Knight Co. In E.C. Knight, the Court interpreted the Act's jurisdictional reach narrowly, holding that manufacturing did not impact interstate commerce. This decision was significant because the Court rendered its decision without reaching the merits of the case. Effectively, the Court bifurcated the jurisdictional and substantive aspects of the "interstate commerce" inquiry under the Act. It is noteworthy, however, that the plain language of the Act makes no mention of separating the jurisdictional and substantive aspects of the "interstate commerce" analysis.

In Addyston Pipe & Steel Co. v. United States, the Court expanded the "interstate commerce" jurisdiction of the Act to include restraints of

31. For a discussion of this expansion, see infra notes 33-65 and accompanying text.
32. 1 Kintner, supra note 23, at 30. Commentators suggest that "it is largely because of its general terms evoking Congress' plenary commerce power that the Sherman Act has served essentially without alteration as the cornerstone of American antitrust law." Id.
33. 156 U.S. 1 (1895); see Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 229 (1948) (Knight was "the first decision under the Sherman Act").
34. Knight, 156 U.S. at 17. In Knight, a New Jersey corporation, already controlling a majority of the domestic refined sugar market, purchased stock of four Philadelphia sugar refineries. Id. at 9. The Court held that the purchase created a monopoly in the manufacture of sugar, but not a monopoly within the scope of Act. Id. at 17. The Court held that "the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States." Id. Therefore, it was not within the scope of the Act. Id.
35. The Court further held that manufacturing did not "put a restraint upon trade or commerce," therefore the Court could not grant jurisdiction under the Act. Id. The Court stated, "it does not follow that an attempt to monopolize... the manufacture was an attempt, whether executory or consummated, to monopolize commerce even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked." Id.
36. The Act does not specifically refer to the jurisdictional or substantive aspects of an alleged restraint. The Act simply states that "[e]very person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony." 15 U.S.C.A. § 1 (West 1991). For the full text of § 1, see supra note 3.
37. 175 U.S. 211 (1899).
trade that not only restrain manufacturing, but also the purchase and sale of manufactured products between several states. This decision went well beyond the Court’s holding in E.C. Knight. Furthermore, the United States Court of Appeals for the Sixth Circuit in Addyston Pipe held that the alleged restraint was unlawful under both the common law and the Act. Writing for the Sixth Circuit, Judge Taft held that, where the intent of the parties to an agreement is to restrain trade and competition, the agreement is void. The Supreme Court generally affirmed the Sixth Circuit’s opinion with only minor modification.

38. Id. at 241-42. In Addyston Pipe, domestic iron pipe manufacturers combined to divide their territory into “reserved” cities and “pay” territory. Id. at 213-14, 218. The “reserved” cities were apportioned to specific members of the combination, free from any true competition. Id. In these cities, other members of the combination submitted sham bids at pre-arranged prices, in order to introduce evidence of competition. Id. In the “pay” territories, any offers to buy pipe were reviewed by a committee of the combination’s members. Id. The committee fixed the contract price and awarded the contract to the member which offered to pay the largest “bonus.” Id. This bonus was split between the other members of the combination. Id. The combination’s alleged sole purpose was to raise the price for their iron pipe. Id. at 213.

39. United States v. Addyston Pipe & Steel Co., 85 F. 271, 279 (6th Cir. 1898), modified, 175 U.S. 211 (1899). The defendants contended that the combination was valid under common law. Id. at 278. Furthermore, defendants argued that their combination was not void under the Act since the Act was not intended to void any agreements that were enforceable under common law. Id.

Circuit Judge Taft’s opinion presented a clear and concise survey of the common law that served as the Act’s foundation. Judge Taft noted that English courts of equity refused to enforce even voluntary restraints of trade for a variety of reasons. Id. at 279. One reason was that voluntary restraints prevented people “from earning a livelihood with the risk of becoming a public charge, and deprived the community of the benefit of his labor.” Id. The second reason given was that “such restraints tended to give to the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same means might exclude others.” Id.

The common law eventually settled on a standard that analyzed the legality of an alleged restraint in terms of whether it was “reasonable in the light of accepted business conduct and merely incidental to arrangements primarily designed to carry out such conduct, or whether [it] exceeded the acceptable limits so as to constitute unreasonable restraints upon commercial activity.” T KINNER, supra note 23, at 8 (citing HARRY AUBREY TOULMIN, JR., A TREATISE ON THE ANTI-TRUST LAWS OF THE UNITED STATES 24-92, §§ 2.14-.17 (1949)); see also WILLIAM L. LETWIN, The English Common Law Concerning Monopolies, 21 U. CHI. L. REV. 355, 378 (1954) (reasonableness referred specifically to whether restraint was reasonable to interests of affected parties, and to interests of public).

Judge Taft noted that American courts of equity, such as the Supreme Judicial Court of Massachusetts, in Alger v. Thacher, restated similar objections to “the unreasonableness of contracts in restraint of trade and business.” Addyston Pipe, 85 F. at 280 (quoting Alger v. Thacher, 36 Mass. (19 Pick.) 51, 54 (1837)). Such contracts were held to be void and unenforceable. Addyston Pipe, 85 F. at 280. Judge Taft interpreted the Act to render such restraints illegal and punishable as a misdemeanor. Id.

40. Addyston Pipe, 85 F. at 291-94.
1. The Continued Expansion and Development of the Flow of Commerce Test

Following Addyston Pipe, the Court decided two cases, Swift & Co. v. United States and United States v. South-Eastern Underwriters Association, which substantially expanded the jurisdictional scope of the Act. In Swift, Justice Holmes developed the “flow of commerce” test, which expanded the Act’s jurisdictional scope to include commercial transactions no matter how far removed from interstate transactions. The test was premised on an expectation that goods which are sent for sale will eventually end up in another state, and that the practice was “constantly recurring.” Accordingly, the Court found jurisdiction because of the interstate shipment of the goods at issue (the cattle), even though the alleged restraint (the price-fixing agreement) occurred in a single state. Under the “flow of commerce” test, Justice Holmes described

41. 196 U.S. 375 (1905). For a discussion of Swift, see infra notes 43-46 and accompanying text.
42. 322 U.S. 533 (1944). For a discussion of South-Eastern, see infra notes 47-51 and accompanying text.
43. 1 AREEDA & TURNER, supra note 4, ¶ 232c, at 231; see Swift, 196 U.S. at 398-99 (item enters “current of commerce” when it is sent for sale from one state to another state, with expectation it will be sold to buyer from another state). In Swift, the defendants were engaged in the business of buying livestock at midwestern stockyards and slaughtering the livestock at their plants throughout the Midwest. Id. at 391. The defendants then sold the fresh meat from their plants to suppliers and consumers in other states. Id. The defendants allegedly engaged in a combination that required that the defendants’ purchasing agents at the stockyards not bid against each other. Id. The agreement resulted in the livestock owners selling at lower prices than they would have received under competitive bidding. Id.

The Court granted jurisdiction under the Act because defendants regularly transported livestock across state lines to slaughterhouses. Id. at 398. Here, the Court found a nexus between the illegal price-fixing agreement and the interstate shipments of the purchased livestock. Id. at 398-400. As Justice Holmes concluded, the Act was implicated because the livestock entered the “flow of commerce” when they were shipped across state lines to the slaughterhouses. Id. at 398-99.

44. Swift, 196 U.S. at 399. Justice Holmes explained the application of the test to the facts in Swift as:
When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. Id. at 398-99 (emphasis added).

45. Id. at 399-400. Commentators have interpreted the Swift test as consisting of two general “flow” rules: “(1) goods enter the flow of commerce when dispatched for sale with the understanding of both parties that they are destined for transport to another state; (2) the flow ends when goods are transformed in a material way.” 1 AREEDA & TURNER, supra note 4, ¶ 233b, at 243. If these flow rules are met, then according to commentators, federal jurisdiction will attach. Id.
the jurisdictional analysis under section 1 of the Act as "not a technical
legal conception, but a practical one, drawn from the course of busi-
ness." As posited by Justice Holmes, the "flow of commerce" test rep-
resented a substantial expansion of the jurisdictional reach of the Act.

Almost 40 years after Swift, the Court decided United States v. South-
Eastern Underwriters Association. In South-Eastern, the defendant, an asso-
ciation of fire insurance companies, was charged with conspiring to fix
premium rates and sales agents' commissions and conducting boycotts
to force other fire insurance companies into the conspiracy. South-
Eastern argued that Congress did not intend the Act's jurisdiction to
extend to interstate insurance transactions. Again, the Court applied
the "flow of commerce" test and found that the price-fixing conspiracy
restrained interstate trade. The Court's decision was a notable expan-
sion of the Act's jurisdictional reach because of its observation that the
plain language of the Act "shows a carefully studied attempt to bring
within the Act every person engaged in business whose activities might
restrain or monopolize commercial intercourse among the states."

2. From the "Flow" to the "Effects" Test

Mandeville Island Farms, Inc. v. American Crystal Sugar Co. represents
an important shift in the Supreme Court's view of the Act's jurisdictional

46. Swift, 196 U.S. at 398. Commentators credit Holmes' opinion in Swift
with originating the "flow of commerce" test. 1 Areeda & Turner, supra note 4,
¶ 233b, at 242.
47. 322 U.S. 533 (1944). Although there is a forty-year gap between Swift
and South-Eastern, Swift represents the next noteworthy refinement of the
jurisdiction test for interstate commerce under the Act.
48. South-Eastern, 322 U.S. at 534-35. South-Eastern Underwriters Associa-
tion (SEUA) was composed of 200 private stock fire insurance companies and 27
individuals. Id. at 534. The member companies of SEUA controlled 90% of the
fire insurance in the six states where the conspiracy was centered. Id. at 535.
Corporations that did not join South-Eastern were unable to reinsure their poli-
cies and had their reputations disparaged. Id. at 535. The conspiracy was pol-
iced by state and local insurance rating boards. Id. at 536. The purpose of the
conspiracy was to force persons in need of insurance to buy only from a SEUA
company on SEUA's terms. Id. at 535.
49. Id. at 553. The Court disagreed and held that there was no evidence that
"the Congress of 1890 specifically intended to exempt insurance companies
from the all-inclusive scope of the Sherman Act." Id. at 560.
50. Id. at 550. Although the Court did not use the precise terminology
"flow of commerce," it stated that "[p]remiums collected from policyholders in
every part of the United States flow into these companies for investment. As
policies become payable, checks and drafts flow back to the many states where
the policyholders reside. The result is a continuous and indivisible stream of inter-
course among the states." Id. at 541 (emphasis added).
51. Id. at 553. This interpretation appears to be consistent with the intent
of the Act's drafters, because Senator Sherman stated that "I do not wish to
single out any particular trust or combination. It is not a particular trust, but the
system I [aim] at." 21 Cong. Rec. 2457 (1890).
52. 334 U.S. 219 (1948).
The Court, in analyzing jurisdiction, made a fundamental shift from the “flow” test to the “effects” test, stating that “the vital thing is the effect on commerce, not the precise point at which the restraint occurs or begins to take effect.” This shift expanded the scope of the Act to reach any and all restraints “affecting commerce,” and set the stage for the current confusion over the jurisdictional scope of the Act.

The Court considered whether a price-fixing arrangement among sugar refiners was within the jurisdictional scope of the Act. The Court held that a price-fixing agreement between California sugar beet farmers violated the Act even though beets were processed into sugar before being distributed into interstate commerce.

It should be noted that the Court previously had invoked language suggesting that it would examine the “effect” of an illegal restraint on interstate commerce. In Apex Hosiery Co. v. Leader, the Court considered jurisdiction by “the nature of the restraint and its effect on interstate commerce and not the amount of the commerce.” Apex Hosiery Co. v. Leader, 310 U.S. 469, 485 (1940) (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)); see also 1 AREEDA & TURNER, supra note 4, ¶ 232d, at 232-34. The authors noted that “the Court abandoned the direct-indirect effects distinction, and articulated a new concept of the Sherman Act’s commerce requirement. Rather than focusing on the location of the defendant’s conduct, the Court emphasized the effects of that conduct.” Id. at 232.

The Court’s shift from the “flow” test to the “effects” test erased the distinction between jurisdictional and substantive issues under the Act. Id. at 232. Jurisdiction under the “flow” test was determined by defining the geographic location of the alleged illegal restraint. Id. at 232-33. If the restraint was in the “flow of commerce,” the court could address the substantive issue(s), which sometimes required separate standards of proof. Id. Under the “effects” test in Mandeville Island, the Court held that the alleged restraint violated the Act as long as the Court had jurisdiction, which now had to be proved by the existence of an interstate effect on commerce. Mandeville Island, 334 U.S. at 242; see also 1 AREEDA & TURNER, supra note 4, ¶ 232d, at 233.
3. McLain v. Real Estate Board, Inc.

The Court's decision in *McLain v. Real Estate Board, Inc.* created significant controversy regarding Sherman Act jurisdiction. In *McLain*, petitioner, representing a class of real estate purchasers and sellers, alleged that the Real Estate Board of New Orleans (the Board) conspired to fix the rate of brokerage commissions on the sale of residential property. McLain claimed that the Board's alleged restraint "injured [the class] in their business or property because the fees and commissions charged for brokerage services ha[d] been maintained at an artificially high and noncompetitive level, with the effect that the prices of residential properties ha[d] been artificially raised." In addressing the jurisdictional issue of whether the alleged conduct sufficiently impacted interstate commerce, the Court in *McLain* held that "[t]o establish federal jurisdiction . . . there remains only the requirement that respondents' activities which allegedly have been infected by a price-fixing conspiracy be shown 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved." Plaintiffs, under the Sherman Act, need not make a "more

59. Id. McLain sought injunctive relief and treble damages. *Id.*
60. *Id.* at 246 (quoting Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 745 (1976)). In *Hospital Building*, Hospital Building Co. (Hospital), which operated a 49-bed hospital in Raleigh, North Carolina, alleged that the trustees of Rex Hospital (Rex), a private, tax-exempt hospital in Raleigh, conspired to block Hospital from relocating and expanding in Raleigh. *Hospital Bldg.*, 425 U.S. at 740. The complaint alleged that approximately 80% or $112,000 of Hospital's medical supplies were provided by out-of-state vendors. *Id.* at 741. More importantly, a large portion of Hospital's revenue was from out-of-state insurance companies or from the federal government. *Id.* Hospital also claimed that a sizable number of Hospital's patients came from out-of-state. *Id.* Hospital was also paying a management fee to Hospital's out-of-state parent company. *Id.*

In passing on the application of the Act to the facts averred by Hospital, the Court stated that a restraint can be local in nature yet still meet the required interstate commerce nexus, "[a]s long as the restraint in question 'substantially and adversely affects interstate commerce,'" *Id.* at 743 (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974); United States v. Employing Plasterers Ass'n, 347 U.S. 186, 189 (1954)).

The Court stated that even though the effect on interstate commerce might be characterized as " 'indirect' because the conduct producing it is not 'purposely directed' toward interstate commerce [that] does not lead to a conclusion that the conduct at issue is outside the scope of the Sherman Act." *Id.* at 744.

The Court held that the combination of the interstate effects alleged by Hospital was "sufficient to establish a 'substantial effect' on interstate commerce under the Sherman Act." *Id.* The Court held that the applicable test was whether the alleged restraint substantially affected interstate commerce "as a matter of practical economics." *Id.* at 744-45; see also *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 784 (1975); *Burke v. Ford*, 389 U.S. 320, 321-22 (1967).
particularized showing of an effect on interstate commerce by the alleged conspiracy." Accordingly, the Court vacated the Fifth Circuit's opinion, which had affirmed the district court's dismissal of McLain's complaint, and remanded the case.

The McLain decision is significant in the jurisprudence of the Act for two reasons. First, implicit in the McLain Court's holding is the idea that interstate commerce has to be proven twice, once at the jurisdictional level and then again at trial. Second, the Court states that "the jurisdictional requirement of the Sherman Act may be satisfied under either the 'in commerce' or the 'effect on commerce' theory." This is

The Court in McLain determined that the broker's main purpose was to facilitate the reaching of an agreement between the buyer and seller of residential property. McLain, 444 U.S. at 246. The broker charged fees for this service based on a percentage of the sale price. Id. The Court held that since a broker's tactics "necessarily affect both the frequency and the terms of residential sales transactions," any action affecting the sales volume necessarily affects the demand for financing and title insurance, which are "two commercial activities that on this record [were] shown to have occurred in interstate commerce." Id.

In reaching this holding, the Court expressly disagreed with the lower court's application of Goldfarb v. Virginia State Bar. McLain, 444 U.S. at 244-45. Goldfarb involved plaintiff home-buyers' effort to hire a local attorney to conduct a title examination for less than the minimum fee proposed by the county bar association. Goldfarb, 421 U.S. at 775-76. Plaintiffs sued under § 1 of the Act, alleging the minimum-fee schedule was a violation. Id. at 775. The Court established jurisdiction by finding that a title examination was substantially within the stream of interstate commerce. Id. at 784-85. The Court in McLain stated that "[t]he Goldfarb holding was not addressed to the 'effect on commerce' test of jurisdiction and in no way restricted it to those challenged activities that have an integral relationship to an activity in interstate commerce." McLain, 444 U.S. at 244.

The Court held that jurisdiction will be granted if plaintiffs "demonstrate a substantial effect on interstate commerce generated by [defendants'] brokerage activity." Id. at 242. "[L]iability may be established by proof of either an unlawful purpose or an anticompetitive effect." Id. at 243. Interstate commerce jurisdiction, as "one of the requisites of a cause of action" under the Act, is proved by "a demonstrable nexus between the defendants' activity and interstate commerce." Id. at 246. The Court held that such a showing was sufficient "for satisfying the Act's jurisdictional requirements under the effect-on-commerce theory so as to entitle the petitioners to go forward." Id. at 246-47.

The Court added that []] to establish jurisdiction a plaintiff must allege the critical relationship in the pleadings and if these allegations are controverted must proceed to demonstrate by submission of evidence beyond the pleadings either that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce.

Id. (citing Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 202 (1974)). The
significant because the conceptual difference between the two themes is that the "effect on commerce" theory encompasses a broader range of activity. Its burden of proof is a showing that the defendant's business activities which are allegedly infected by an illegal restraint "as a matter of practical economics" have "a not insubstantial effect on the interstate commerce involved." 65

4. The Circuit Split After McLain

As a result of the patent ambiguity in the McLain opinion, a jurisdictional split has developed between the circuit courts that have decided Sherman Act cases since McLain. 66 A majority of the courts interpret McLain as holding that the jurisdictional test is whether the "particular" alleged restraint has a substantial effect on interstate commerce. 67

Court held, in discussing the burden of proof at the jurisdictional level, that "[i]t is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id. at 246 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

65. Id. (quoting Hospital Bldg., 425 U.S. at 745).
67. See, e.g., Crane v. Intermountain Health Care, Inc., 637 F.2d 715, 724 (10th Cir. 1980). "[W]e do not believe McLain signals a shift in analytical focus away from the challenged activity and towards the defendant's general or overall business." Id. at 724; see also Stone v. William Beaumont Hosp., 782 F.2d 609, 613-14 (6th Cir. 1986) (holding that jurisdiction depends on showing allegedly unlawful conduct infected general business activities of defendant affecting or likely to affect interstate commerce) (citing Furlong v. Long Island Hosp., 710 F.2d 922, 926 (2d Cir. 1983)); Seglin v. Esau, 769 F.2d 1274, 1280 (7th Cir. 1985) (same); Hayden v. Bracy, 744 F.2d 1338, 1343 (8th Cir. 1984) ("For federal jurisdiction to arise, the antitrust plaintiff must show that the alleged restraint would tend, 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved."); (footnote omitted)); Furlong, 710 F.2d at 926 ("[I]t would not be prudent to extract from McLain a generalized rule that antitrust jurisdiction can be established simply by showing that some aspects of a defendant's business have a relationship to interstate commerce."); Cordova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank, N.A., 649 F.2d 36, 44 (1st Cir. 1981) ("It is well established that to satisfy the 'interstate commerce' requirements of these provisions, the challenged activity must either occur 'in interstate commerce' or 'while wholly local in nature, nevertheless substantially affect interstate commerce.'" (quoting McLain, 444 U.S. at 241)).

The facts in Seglin are nearly identical to the facts in Summit Health. The court in Seglin affirmed the dismissal of an antitrust claim on the grounds of lack of subject matter jurisdiction and failure to state a claim. Seglin, 769 F.2d at 1274. Seglin, a member of defendant hospital's physician staff, whose staff privileges were revoked, brought an antitrust action against the hospital. Id. at 1275-76. Seglin alleged that since some of the defendant's business activities affected interstate commerce, his claim was within the scope of the Act. Id. at 1280.

The court held, on the basis of Furlong and Cordova, that the Act's jurisdictional requirement cannot be "established simply by 'showing that some aspects of a defendant's business have a relationship to interstate commerce.'" Id.
Thus, under the majority's reading of McLain, the test for jurisdiction remains unchanged. These courts hold that to gain federal jurisdiction under the Act, the plaintiff must show that the unlawful activity itself has a substantial effect on interstate commerce. However, a minority of courts interpret McLain as greatly expanding the reach of the Act and holding that jurisdiction is established under the Act by a mere showing that the general business activities of the defendant have a substantial effect on interstate commerce.68 It is against this backdrop of confusion in the circuit courts that Summit Health was decided by the Court.

68. See, e.g., Mitchell v. Frank R. Howard Memorial Hosp., 853 F.2d 762, 765 (9th Cir. 1988) ("[W]hether a hospital's activities sufficiently affect interstate commerce to create Sherman Act jurisdiction is a highly fact-based question . . . ."); cert. denied, 489 U.S. 1013 (1989); Shahaway v. Harrison, 778 F.2d 636, 641 (11th Cir. 1985) ("[J]urisdiction requires allegations that defendant's business activities have a substantial impact on interstate commerce."); Cardio-Medical Assocs. v. Crozer-Chester Medical Ctr., 721 F.2d 68, 74-75 (3d Cir. 1983) (for jurisdictional purposes court considered "defendant's conduct both as it affects interstate commerce through the person of the plaintiff and as it affects commerce directly"); Western Waste Serv. Sys. v. Universal Waste Control, 616 F.2d 1094, 1097 (9th Cir.) (Universal's rubbish collection business "substantially affected interstate commerce" independent of the alleged restraints), cert. denied, 449 U.S. 869 (1980). But see, e.g., Areeda & Hovenkamp, supra note 66, ¶ 232.1c, at 254-55. These commentators argue that the Ninth Circuit in Western Waste misinterpreted McLain. "[T]he [C]ourt made clear that there must be a nexus, at least 'as a matter of practical economics' between the challenged conduct and interstate commerce." Id. at 242.

The Ninth Circuit, in Mitchell, affirmed the lower court's dismissal of the plaintiff-doctor's antitrust claim under the Act. Mitchell, 853 F.2d at 765-66. Mitchell, a radiologist, sued the defendant-hospital because the hospital terminated its contract with Mitchell and entered into an exclusive agreement with another radiologist. Id. at 763. In affirming the lower court's opinion, the Ninth Circuit interpreted McLain and Western Waste as requiring for jurisdiction under the Act that the "general business' activities test which requires examination of all of the Hospital's business activities." Id. at 764 n.1.

The Third Circuit, in Cardio-Medical Associates, used the "substantial and adverse effect" on interstate commerce test. Cardio-Medical Assocs., 721 F.2d at 75. The court stated that "[w]e agree that the decisions in McLain and Hospital Building Co. do not require any particular type of substantial effect on commerce." Id. at 72. The Third Circuit was unwilling to follow the district court's requirement of proof of the net effect on the hospital's flow of commerce into and out of the state. Id. at 73.
III. **SUMMIT HEALTH LTD. v. PINHAS**

A. Facts

In *Summit Health*, Dr. Pinhas was a member of the medical staff of Midway Hospital from October 1981 until April 1987. Dr. Pinhas was a widely respected and successful specialist in corneal eye surgery, performing general eye surgery, cornea transplants, cataract removal, and interocular lens replacement.

Prior to February 1986, the common procedure at Midway Hospital and other Los Angeles County hospitals was to have eye surgeries performed by a primary surgeon and a second, assistant surgeon. This practice significantly increased the cost of these procedures. In February 1986, Medicare, the federal health insurance program for the elderly, concluded that assistant surgeons were not necessary to the successful completion of these surgical procedures and terminated reimbursement for the cost of assistant surgeons. While nearly all South-
ern California hospitals complied with Medicare's new policy, Midway and Cedars-Sinai Medical Center, whose medical staffs overlap, refused to eliminate their assistant physician requirement.\(^7\)

On or about January 26, 1987, Midway tried to induce Dr. Pinhas into signing a "sham" contract in order to reimburse his additional expense of complying with its assistant physician requirement.\(^7\) The contract purported to hire Dr. Pinhas for $36,000 per year (later raised orally to $60,000) for special services that he would not be required to perform.\(^7\) Dr. Pinhas refused to sign or return the "sham" contract, even though the Chief of Staff of Midway threatened Dr. Pinhas with peer review proceedings.\(^7\)

On April 13, 1987, Dr. Pinhas was notified by letter from Summit Health and Midway that he was summarily suspended as of that date and that he would be subject to peer review proceedings.\(^7\) As a result of these proceedings, Dr. Pinhas was eventually terminated, losing his medical staff privileges.\(^8\)

In response to his termination, Dr. Pinhas brought suit.\(^8\) Dr. Pinhas notified Midway that the hospital's policy would cost him an additional $60,000 per year. \(^8\) Dr. Pinhas expressed his desire to remain at Midway but stated that he would move his practice if the assistant physician requirement was not abolished. \(^8\)

Dr. Pinhas was told that numerous members of Midway's medical staff had similar contracts. \(\text{Id.}\)

Amended Complaint at ¶ 28. After Dr. Pinhas' refusal, Midway made one monthly $5,000 payment to him that was "buried" in a reimbursement check. \(\text{Id.}\) at ¶ 28. Dr. Pinhas recorded this amount as an overpayment and a credit to the amount that Midway otherwise owed him. \(\text{Id.}\)

Amended Complaint at ¶ 28. After Dr. Pinhas' refusal, Midway made one monthly $5,000 payment to him that was "buried" in a reimbursement check. \(\text{Id.}\) at ¶ 28. Dr. Pinhas recorded this amount as an overpayment and a credit to the amount that Midway otherwise owed him. \(\text{Id.}\)

Amended Complaint at ¶ 29. The peer review proceedings allegedly considered questions regarding the "appropriateness of surgical procedures in light of patient's medical condition; adequacy of documentation in medical records; and an ongoing pattern of identified problems." \(\text{Summit Health, 111 S. Ct. at 1845 (quoting Amended Complaint at ¶ 29).}\)

Dr. Pinhas' first hearing was before Midway's Executive Committee, which upheld his summary suspension with the recommendation that his staff privileges at Midway be terminated. \(\text{Id. at 1845; see Amended Complaint at ¶ 32.}\) Dr. Pinhas appealed this decision to Midway's Judicial Review Committee, which on June 29, 1987, upheld the decision of the Executive Committee. \(\text{Summit Health, 111 S. Ct. at 1845; see Amended Complaint at ¶¶ 32-33.}\)

Summit Health and Midway were also preparing to distribute the adverse peer review report about Dr. Pinhas to other health care facilities. \(\text{Summit Health, 111 S. Ct. at 1845.}\) Summit Health and Midway had already distributed the report to Cedars-Sinai Medical Center in Los Angeles. \(\text{Id. at 1845 n.6.}\) Pinhas was subsequently denied staff privileges at Cedars-Sinai. \(\text{Id.}\)

In his amended complaint, Dr. Pinhas named as defendants Summit
Pinhas alleged, among other charges, that Summit Health and Midway violated section 1 of the Sherman Act through its conspiracy to exclude Dr. Pinhas from the Los Angeles ophthalmological services market. 82

The United States District Court for the Central District of California granted Summit Health's 12(b)(6) 83 motion to dismiss Dr. Pinhas' Amended Complaint without leave to amend. 84 Dr. Pinhas appealed the dismissal of several of his claims to the United States Court of Appeals for the Ninth Circuit. 85 The Ninth Circuit reversed the dismissal of Dr. Pinhas' antitrust claim and affirmed both the dismissal of the § 1983 claim and the request for declaratory judgment. 86

The Ninth Circuit, in reversing the dismissal of Dr. Pinhas' antitrust claim, held that in order to invoke the jurisdiction of the Act, Dr. Pinhas had to "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.' " 87 The court was satisfied that Dr. Pinhas' complaint proved that the peer re-

82. Dr. Pinhas' first claim of relief was a request for declaratory relief against Summit Health. Id. at ¶¶ 79-108. The second and third claims for relief were for damages for violations of Dr. Pinhas' constitutional rights and the Civil Rights Act, 42 U.S.C.A. §§ 1983, 1985(3) (West 1991). Id. at ¶¶ 109-19. Dr. Pinhas' fourth claim for relief was for treble damages for violation of the Act. Id. at ¶ 120-26. In the fourth claim, Dr. Pinhas alleged that Summit Health and its medical staff entered into a combination and conspiracy to boycott and drive Dr. Pinhas out of business in order to secure for the defendant-physicians a greater share of the ophthalmic surgery market in Los Angeles. Id. at ¶ 124. In his fifth claim, Dr. Pinhas asked for injunctive relief against all defendants. Id. at ¶¶ 127-29.

83. FED. R. Civ. P. 12(b)(6).
85. Id. at 1025.
86. Id. at 1026. In reviewing the district court's dismissal of Dr. Pinhas' amended complaint for failure to state a claim, the Ninth Circuit reviewed the lower court's ruling de novo. Id. at 1028. The Ninth Circuit restricted its review to the contents of Dr. Pinhas' Amended Complaint. Id.; see Fort Vancouver Plywood Co. v. United States, 747 F.2d 547, 552 (9th Cir. 1984). The Ninth Circuit, in reviewing the district court's dismissal of the complaint, stated that a "complaint should not be dismissed... 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " Pinhas, 894 F.2d at 1028 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).
87. Pinhas, 894 F.2d at 1031-32 (citing Mitchell v. Frank R. Howard Memorial Hosp., 853 F.2d 762, 764 (9th Cir. 1988)). This holding appears to reaffirm the Ninth Circuit's adoption of the minority interpretation of McLain that jurisdiction under the Act is met if the general business activities of the defendant have a substantial impact on interstate commerce. For a further discussion of the minority interpretation of McLain, see supra note 68 and accompanying text.
view process at Summit Health substantially affected interstate commerce, since the process impacted the entire staff at the hospital. Specifically, the court relied on Dr. Pinhas’ allegations that Summit Health and Midway illegally conspired to prevent him from providing his patients “with lower prices as a result of his ability to perform operations at a rate quicker than that of his competitors.” As a result, the court found that Dr. Pinhas alleged facts sufficient to show that Summit Health’s “activities” had a substantial effect on interstate commerce.

Summit Health filed a petition for writ of certiorari to the United States Supreme Court to review the Ninth Circuit’s decision on Dr. Pinhas’ antitrust claim, claiming that Dr. Pinhas’ amended complaint did not meet the jurisdictional requirements of the Act, as enunciated in McLain. Specifically, Summit Health maintained that Dr. Pinhas had failed to prove a “factual nexus between the alleged boycott and interstate commerce.” The Court granted certiorari to consider Summit Health’s assertion. The issue as framed in Summit Health provided an opportunity for the Court to resolve the split in the circuits concerning the jurisdictional aspect of interstate commerce under the Act. That aspect was whether defendants’ alleged illegal activity in conspiring to exclude Dr. Pinhas from the practice of ophthalmic surgery in Los Angeles had a nexus with interstate commerce sufficient enough for the Act’s

88. Pinhas, 894 F.2d at 1032. The court stated that Dr. Pinhas did not need to make “the more particularized showing of the effect on interstate commerce caused by the alleged conspiracy to keep him from working.” Id.

The Ninth Circuit also held that the state action doctrine did not provide a peer review board with immunity from an antitrust action. Id. at 1028-30. In construing the Supreme Court’s decision in Patrick v. Burget, the Ninth Circuit applied the rigorous two-pronged test of California Retail Liquor Dealers Association v. Midcal Aluminum, Inc. Pinhas, 894 F.2d at 1028 (citing Patrick v. Burget, 486 U.S. 94 (1988) and California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)). The Midcal test requires that the alleged restraint must be “one clearly articulated and affirmatively expressed as state policy” and “the [alleged] conduct must be actively supervised by the State itself.” Id. at 1029 (quoting Patrick, 486 U.S. at 100 (quoting Midcal, 445 U.S. at 105)).

89. Pinhas, 894 F.2d at 1032.

90. Id. at 1031-32. The Ninth Circuit’s decision in Pinhas supports the minority interpretation of McLain eliminating the necessity of proving a nexus between the alleged illegal restraint and its effect on interstate commerce. For an analysis of the split between the circuits on this issue, see supra notes 66-68 and accompanying text.


92. Summit Health, 111 S. Ct. at 1845.

93. Id. at 1844.

94. For a discussion of the split in the circuits following McLain, see supra notes 66-68 and accompanying text.
jurisdiction to attach. 95

B. Justice Stevens' Majority Opinion

Prior to reaching a decision as to whether Dr. Pinhas' allegations were sufficient to meet the interstate commerce requirements under the Act, the Court stated several undisputed propositions. 96 First, the Court concluded that Summit Health was "unquestionably engaged in interstate commerce." 97 The Court further stated that Midway, although primarily providing health care services in a local market, was involved in interstate commerce. 98

In response to the Court's reasoning, Summit Health and Midway contended that the restraint's exclusion of one physician from a market had no factual nexus with interstate commerce. 99 However, the Court concluded that Dr. Pinhas' allegations were sufficient to implicate inter-

95. Summit Health, 111 S. Ct. at 1844.
96. Id. at 1847. The majority opinion of the Court was delivered by Justice Stevens, in which Chief Justice Rehnquist and Justices White, Marshall and Blackmun joined. Justice Scalia filed a dissenting opinion, in which Justices O'Connor, Kennedy and Souter joined. For a further discussion of Justice Scalia's dissenting opinion, see infra notes 113-22 and accompanying text. For a further discussion of the procedural aspects of this appeal, see supra notes 83-95 and accompanying text.
97. Summit Health, 111 S. Ct. at 1847. The Court based this conclusion on the facts alleged in Dr. Pinhas' Amended Complaint, indicating that Summit Health owned and operated 19 hospitals and 49 other health care facilities in seven states and Saudi Arabia. Id. at 1846; see Amended Complaint at ¶ 6.
98. Summit Health, 111 S. Ct. at 1847. In adopting this proposition, the Court posited, hypothetically, that the Act would cover any conspiracy that attempted to exclude Midway from a relevant health services market, even though the actual effect, if any, on interstate commerce would be "indirect." Id. The Summit Health Court also noted that peer review reports are regularly distributed to out-of-state hospitals and affect a doctor's employment opportunities in other states. Id. at 1846.

The Court cited Hospital Building Co. v. Trustees of Rex Hospital, as support for the conclusion that the interstate nexus required under § 1 of the Act is established by the fact that Midway's services are "regularly performed for out-of-state patients and generate revenues from out-of-state sources." Id. at 1847 (citing Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976)). The Summit Health Court stated that "[n]o specific purpose to restrain interstate commerce is required." Id. For a further discussion of Hospital Building, see supra note 60 and accompanying text.

The Summit Health Court posited that Midway's "provision of ophthalmological services affects interstate commerce because both physicians and hospitals serve nonresident patients and receive reimbursements through Medicare payments." Summit Health, 111 S. Ct. at 1846. There was no allegation in Dr. Pinhas' Amended Complaint or in the briefs submitted to the Court that Summit Health or Midway serviced out-of-state patients, or received payment from out-of-state sources. Apparently, the Court drew these conclusions sua sponte.
99. Summit Health, 111 S. Ct. at 1847. Petitioners contended that Dr. Pinhas' complaint did not deny the fact that there was an "adequate supply" of other physicians to perform the same services for all of Dr. Pinhas' current and future patients. Id.
In reaching its conclusion, the Court addressed two fatal errors made by both Summit Health and Midway in arguing that the exclusion of Dr. Pinhas did not sufficiently impact interstate commerce.

First, the Court concluded that Summit Health incorrectly argued that Dr. Pinhas was required to allege, under *McLain*, that the conspiracy to exclude him had an actual effect on interstate commerce in order to obtain federal jurisdiction under the Act. The Court held, however, that the crux of a violation of section 1 of the Act is the illegal agreement itself, not the "overt acts performed in furtherance of it." According to the Court, an analysis under section 1 of the Act should focus on "the potential harm that would ensue if the conspiracy were successful," rather than on the actual effects. One potential harm of Summit Health's offending activity mentioned by the Court was a general reduction in available ophthalmological services in the Los Angeles area. Therefore, the Court concluded that Dr. Pinhas did not need to allege, or evidence, an actual effect on interstate commerce in order to obtain jurisdiction under the Act.

A second error the Court found in Summit Health's argument was that Summit Health mistakenly analyzed the competitive significance of Dr. Pinhas' exclusion from the ophthalmological market based only upon a "particularized evaluation of his own practice." Instead, the Court focused on the broader effects of a successful conspiracy and concluded that "as a matter of practical economics" the ophthalmological services market in Los Angeles would be reduced by Dr. Pinhas' exclusion. The Court significantly expanded the scope of the Act's jurisdictional reach by holding that not only must the analysis address the restraint's impact on Dr. Pinhas' own practice, but that it must also address the restraint's potential impact on other hospitals, doctors, patients and participants and potential participants in the Los Angeles ophthalmological services market. This new test is a significant expansion of even the broadest of the jurisdictional tests adopted by the circuit courts or identified by commentators. For a discussion of the identified tests, see *infra* notes 127-37 and accompanying text.
Thus, according to the Court, this reduction in ophthalmological services provided a sufficient nexus with interstate commerce to support jurisdiction under the Act. In applying McLain to the holding that the reduction of ophthalmological services impacted interstate commerce, the Summit Health Court quoted extensively from the McLain opinion, but, ultimately, the Court did not adopt the language of the McLain Court. The McLain Court

107. Summit Health, 111 S. Ct. at 1848 (quoting McLain, 444 U.S. at 246). The Court did, however, state that the case involved not only an alleged restraint on Dr. Pinhas' access to the practice of ophthalmology at Midway by Midway and its medical staff, but also an alleged restraint on Dr. Pinhas' access to the practice of ophthalmology at Midway and other area hospitals through Summit Health's alleged misuse of the federally regulated peer review process and adherence to "an unnecessarily costly procedure." Id. For a further discussion of the Health Care Quality Improvement Act of 1986, which is federal legislation regulating peer review boards and granting them limited immunity from antitrust violations, see infra notes 166-71 and accompanying text.

108. Summit Health, 111 S. Ct. at 1848-49. As support for this conclusion, the Court cited cases involving illegal agreements allocating territories and fixing prices within a single state. The Court held in Burke v. Ford that an agreement to divide a liquor distribution market within a single state "almost surely" had a market-wide impact, thus affecting interstate commerce. Id. (quoting Burke v. Ford, 389 U.S. 320, 322 (1967)). The plaintiffs in Burke, Oklahoma liquor retailers, sued under § 1 of the Act to enjoin an "alleged state-wide market division by all Oklahoma liquor wholesalers." Burke, 389 U.S. at 320. The Court noted that Oklahoma had no in-state liquor distilleries, which meant that liquor is shipped to Oklahoma wholesalers from out-of-state distilleries. Id. at 321. The Court stated that "[h]orizontal territorial divisions almost invariably reduce competition among the participants." Id. The market division reduced competition, which in turn raised prices and lowered unit sales. Id. at 322. The Court held that the market division "almost surely resulted in fewer sales to retailers—hence fewer purchases from out-of-state distillers—than would have occurred had free competition prevailed among the wholesalers." Id. This case demonstrated the Court's willingness to find an impact on interstate commerce when the alleged restraint is apparently only an intrastate activity.

Similarly, in McLain, the Court held that the real estate brokers' price-fixing conspiracy "'necessarily affect[ed]' the volume of residential [home] sales and therefore the demand for financing and title insurance provided by out-of-state concerns." Summit Health, 111 S. Ct. at 1848 (quoting McLain, 444 U.S. at 246). In McLain, the Court held that jurisdiction is established by a demonstration of a "substantial effect on interstate commerce generated by [the real estate] brokerage activity." McLain, 444 U.S. at 242. The Court further stated that "the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of [the brokers'] activity that are alleged to be unlawful, need not be made." Id. For a further discussion of McLain, see supra notes 56-65 and accompanying text.

In Summit Health, the Court stated that the same analysis used in McLain applied to the facts of the instant case, even though the McLain plaintiffs were consumers of the conspirator's brokerage services, Dr. Pinhas was a competitor of the conspirators, and Dr. Pinhas identified himself in his complaint as the sole victim of the alleged conspiracy. Summit Health, 111 S. Ct. at 1848. The Court held that the same analysis applied because a violation of the Act is far more significant than the conspiracy's effect on a single plaintiff. Id.

109. Id. at 1850 (Scalia, J., dissenting). The Summit Health majority rejected the two previously competing interpretations of McLain. Id. (Scalia, J., dissent-
held that jurisdiction under the Act was available upon a showing that the alleged "infected" activities be shown, "as a matter of practical economics," to have a substantial effect on interstate commerce.\textsuperscript{110} The impact of the alleged restraint on other participants and its potential harm in the relevant market from which plaintiff was excluded was not addressed in \textit{McLain}. The \textit{McLain} Court did not demand that plaintiffs speculate on potential harm to potential participants in the relevant market in order to gain federal jurisdiction.

Instead of adopting the language of \textit{McLain}, the \textit{Summit Health} majority focused upon the "competitive significance" of Dr. Pinhas' exclusion from the relevant market. Under the Act, the \textit{Summit Health} Court held that the jurisdictional issue must be evaluated on the basis of the restraint's effect "on other participants and potential participants in the [relevant] market."\textsuperscript{111} The Court concluded that the alleged conspiracy, which excluded Dr. Pinhas from the Los Angeles ophthalmological services market, had a sufficient nexus with interstate commerce to support federal jurisdiction under the Act.\textsuperscript{112}

\subsection*{C. Justice Scalia's Dissenting Opinion}

Four members of the Court disagreed with the majority's creation of a new interpretation of the \textit{McLain} jurisdiction standard. Justice Scalia argued for the dissent that the correct jurisdictional test should examine whether the illegal conspiracy \textit{actually} has a substantial effect on interstate commerce by restricting interstate commerce, or by interrupting its "flow," rather than assessing its impact on potential participants in the market.\textsuperscript{113} Instead of settling the jurisdictional split, Justice Scalia complained that the majority's approach to the jurisdictional test "compounds the confusion by rejecting the two competing interpretations of \textit{McLain} and adding yet a third candidate to the field, one that no court or commentator has ever suggested, let alone endorsed."\textsuperscript{114}

As an alternative test, Justice Scalia suggested that the jurisdictional issue should be decided by applying the pre-\textit{McLain} jurisdictional standard.\textsuperscript{115} Justice Scalia cited the Court's holding in \textit{United States v. Oregon} (1976) for a further discussion of the Court's holding in \textit{McLain}, see supra notes 56-59 and accompanying text.

\begin{footnotesize}

\item[111.] \textit{Summit Health}, 111 S. Ct. at 1848.

\item[112.] \textit{Id.} at 1848-49.

\item[113.] \textit{Id.} at 1851 (Scalia, J., dissenting). Justice Scalia was joined in dissent by Justices O'Connor, Kennedy and Souter.

\item[114.] \textit{Id.} at 1850 (Scalia, J., dissenting). Justice Scalia complained that the majority's approach completely ignored the substantiality of the alleged restraint's impact on interstate commerce. \textit{Id.} (Scalia, J., dissenting).

\item[115.] \textit{Id.} at 1853 (Scalia, J., dissenting) (recommending re-application of

\end{footnotesize}
State Medical Society\textsuperscript{116} to illustrate such a "workable jurisdictional test".\textsuperscript{117} Justice Scalia recommended applying the stricter pre-McLain test in order to prevent easy access to the federal forum, where treble damages are possible.\textsuperscript{118}

Furthermore, Justice Scalia argued that a vital part of antitrust analysis is defining the "market" for the goods or services in question.\textsuperscript{119} Justice Scalia argued that Dr. Pinhas never alleged that the restraint was aimed at the entire Los Angeles ophthalmological market.\textsuperscript{120} Instead, Dr. Pinhas only alleged that Summit Health and Midway conspired to exclude him from the market by effecting "a sort of group boycott,"

workable jurisdictional approach established before the Court's holding in McLain confused issue).

\textsuperscript{116} 343 U.S. 326 (1952).

\textsuperscript{117} Summit Health, 111 S. Ct. at 1853 (Scalia, J., dissenting). In Oregon Medical Society, the United States alleged that the Oregon State Medical Society, eight county medical societies, a doctor-sponsored corporation engaged in the sale of prepaid medical services, and eight doctors violated § 1 of the Act through their conspiracy to monopolize the provision of prepaid medical services in Oregon. Oregon Medical Soc'y, 343 U.S. at 328. The conspiracy was successful because the corporation that sold prepaid medical services entered into an agreement not to sell such services in the territory covered by eight county medical societies. \textit{Id.}

The Court was asked to decide whether the business of providing prepaid medical services was interstate commerce. \textit{Id.} at 391-32. The Court held that in order for the government to prove a nexus with interstate commerce, the government must demonstrate that the restraint had a substantially detrimental impact on interstate commerce. \textit{Id.} at 338-39. In adopting the test set forth in Oregon Medical Society, Justice Scalia concluded that the district court was correct in dismissing Dr. Pinhas' amended complaint. \textit{Summit Health}, 111 S. Ct. at 1853 (Scalia, J., dissenting).

\textsuperscript{118} Summit Health, 111 S. Ct. at 1854 (Scalia, J., dissenting). Justice Scalia stated that "[d]isputes over the denial of hospital practice privileges are common, and most of the circuits to which they have been presented . . . have rejected them on jurisdictional grounds." \textit{Id.} (Scalia, J., dissenting). Justice Scalia did not believe that federal jurisdiction was warranted because Dr. Pinhas simply alleged he and the defendants were both involved in interstate commerce, but gave no specific evidence of the level of interstate commerce involvement. \textit{Id.} at 1853 (Scalia, J., dissenting); see Amended Complaint at ¶¶ 5-10. Justice Scalia found no allegations of the treatment of any out-of-state patients. \textit{Summit Health}, 111 S. Ct. at 1853 (Scalia, J., dissenting). Furthermore, Justice Scalia found that, even if there were a substantial number of out-of-state patients, there was no evidence that if Summit Health and Midway's second physician requirement resulted in an overcharging of Medicare that this requirement would substantially effect interstate commerce. \textit{Id.} (Scalia, J., dissenting). Justice Scalia also found no allegations of out-of-state insurance payments for the overcharges or the use of out-of-state suppliers by the hospital. \textit{Id.} (Scalia, J., dissenting). Justice Scalia argued that Dr. Pinhas may have had a valid business tort claim arising from negligent peer review, but this claim would not fall within the scope of the Act. \textit{Id.} at 1853-54 (Scalia, J., dissenting) (citing for comparison Hayden v. Bracy, 744 F.2d 1338, 1343-45 (8th Cir. 1984)).

\textsuperscript{119} Summit Health, 111 S. Ct. at 1850-51 (Scalia, J., dissenting). By "market," Justice Scalia meant "the scope of other products or services against which [the goods or services in question] must compete." \textit{Id.} (Scalia, J., dissenting).

\textsuperscript{120} \textit{Id.} at 1851 (Scalia, J., dissenting).
which is a per se violation of the Act. In noting that there was no allegation made that Midway’s conspiracy affected the peer review proceedings at other Los Angeles hospitals, Justice Scalia stated that, concomitantly, there was no justification for the majority’s assumption that the alleged conspiracy affected the entire Los Angeles market.

IV. THE NEWEST EXPANSION OF THE ACT’S INTERSTATE COMMERCE JURISDICTIONAL SCOPE

The Court’s decision in Summit Health is remarkable in several ways. First, the Court failed to resolve the split in the circuits over the issue of the Act’s interstate commerce jurisdictional scope. Rather, the Court’s majority opinion formulated a unique interpretation and expansion of the McLain Court’s jurisdictional standard, which does not clarify the jurisdictional standard under section 1 of the Act. Second, the majority’s broad interpretation of the McLain test appears to remove altogether any jurisdictional obstacle to private plaintiffs suing under the Act. Finally, the expansion of the jurisdictional test will create a result which seems to run counter to the intent of other federal legislation.

A. A New Expansion of the McLain Tests

As noted previously, Summit Health provided the Court with an opportunity to resolve the split in the circuits regarding the scope of the interstate commerce jurisdiction test of the Act. However, the Summit Health Court did not specifically address the circuit court split regarding the competing interpretations of McLain, and accordingly, the Court did not resolve the conflict among the circuits. Therefore, following

121. Id. (Scalia, J., dissenting). “Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be [] forbidden . . . .” Klor’s, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959). The common understanding of a per se violation in antitrust law is that it implies that certain types of business arrangements, such as price-fixing, are considered inherently anti-competitive and injurious to the public without any need to determine if the agreement injured market competition. BLACK’S LAW DICTIONARY 1142 (6th ed. 1990).

122. Summit Health, 111 S. Ct. at 1852 (Scalia, J., dissenting). Justice Scalia stated that these facts prove the “truly local nature of the restraint” and contravene the holding that the conspiracy affected competition in the Los Angeles market. Id.

123. For a further discussion of the split in the circuits, see supra notes 66-68 and accompanying text.

124. Specifically, the Health Care Quality Improvement Act (HCQIA) of 1986, intended to promote effective peer review, provides peer review boards with a potential defense to antitrust claims from physicians denied staff privileges. 42 U.S.C.A. §§ 11101-52 (West Supp. 1992). For a complete discussion of the HCQIA, see supra notes 166-71 and accompanying text.

125. For a complete discussion of Summit Health, see supra notes 69-122 and accompanying text.

126. Summit Health, 111 S. Ct. at 1850 (Scalia, J., dissenting). Justice Scalia addressed the split by stating that “the Court could have cleared up the confu-
Summit Health, there are arguably four distinct jurisdictional tests under the Act.

Although the circuit split has produced only two competing interpretations of the McLain test, commentators have isolated three distinct jurisdictional tests applied by various courts when interpreting the Court's holding in McLain.127

The first test which courts have extracted from McLain is characterized by commentators as the “general business activities” test.128 Under this expansive test, jurisdiction is granted if the defendant’s general business activities have a substantial effect on interstate commerce.129 This is essentially the test adopted by the minority of the

127. For a discussion of the first test, the “general business activities” test, see infra notes 128-32 and accompanying text. For a discussion of the second test, the “infected activities” test, see infra notes 133-35 and accompanying text. For a discussion of the third test, the particularized wrongful conduct test, see infra notes 136-37 and accompanying text.

128. Comment, supra note 5, at 132. This commentator stated that compelling language in McLain seemingly requires only that the defendant’s “general business activities,” not the allegedly illegal activity, must have a substantial impact on interstate commerce. Id. The Ninth Circuit’s decision in Western Waste provides a fine example of the application of this standard. Western Waste Sys. v. Universal Waste Control, 616 F.2d 1094, 1096-99 (9th Cir.), cert. denied, 449 U.S. 869 (1980). Western Waste involved two competing Arizona distributors of garbage compactors manufactured by out-of-state companies. Id. at 1096. Western Waste was the dealer of Blackwelder, a California manufacturer of compactors. Id. Universal induced Blackwelder to terminate its distributorship with Western Waste and to select Universal as its exclusive distributor in Phoenix. Id. Universal began advertising itself as the exclusive distributor of Blackwelder compactors in the Phoenix market. Id. In applying McLain, the Western Waste court held that federal jurisdiction under the Act attached if Universal’s rubbish collection business substantially affected interstate commerce. Id. at 1097. As evidence of its effects on interstate commerce, the court found that Universal spent $69,680 in 1975 and $356,061 in 1976 for equipment purchased from out-of-state sellers, while Western Waste spent $88,355 and $124,007 in the respective years. Id. at 1098; see generally Richard A. Mann, The Applicability of Antitrust Law to Activities of Real Estate Boards: Before and After McLain, 18 Hous. L. Rev. 317, 334-35 (1981) (general business activities test views nearly all business activity of defendant as satisfying jurisdictional test of Act); Mann, supra note 6, at 866 (“expansive interpretation” of McLain holds that defendant’s “general business activities” must have substantial impact on interstate commerce); Brief for Respondent at 10, Summit Health (No. 89-1679), reprinted in 24 Trade Reg. Series 133, 149 (No. 1, 1990-1991) (if defendant’s “general business activities” have substantial effect on interstate commerce, then federal jurisdiction under Act is available).

129. Comment, supra note 5, at 132. This expansive test is in line with the broad regulatory powers given to Congress by the Commerce Clause of the Constitution. Id. at 133-34. For a further discussion of the broad power given by the Commerce Clause, see supra note 1 and accompanying text.
circuits that have addressed this precise issue. As applied to the facts of Summit Health, jurisdiction under the Act would appear to attach if the "aggregation of all hospital staff activities substantially affects interstate commerce." General adoption of this test would effectively abolish the interstate commerce jurisdictional test of the Act, because the total aggregation of any defendant's business activities are likely to somehow affect interstate commerce.

The second test adopted by courts and identified by commentators presents a somewhat narrower interpretation of McLain and is referred to as the "infected activities" test. This test appears to be based upon a literal interpretation of the McLain holding that defendants' activities that have been infected by the alleged restraint must be shown to have a substantial impact on interstate commerce. Under the facts presented in Summit Health, a showing that the general activities of the peer review board substantially affected interstate commerce appears to be necessary in order for jurisdiction under the Act to attach under the "infected activities" test.

130. For a further discussion of the interpretation of McLain by a minority of the circuits, see supra note 68 and accompanying text.

131. Comment, supra note 5, at 134. Thus, for Dr. Pinhas to obtain federal jurisdiction under the Act, he would need to demonstrate that the normal operating activities of Summit Health and Midway affect interstate commerce. Such effect could be shown by the purchase of supplies and equipment from out-of-state suppliers. Also, the treatment of out-of-state patients, and the receipt of reimbursement for services from out-of-state insurance companies or other sources would also likely evidence the requisite interstate effect.

132. Philip C. Kissam et al., Antitrust and Hospital Privileges: Testing the Conventional Wisdom, 70 CAL. L. REV. 595, 632-33 (1982). This language in McLain appears to be simple dicta that has been taken out of context by courts and commentators. Id. The offending language in McLain states that it would be sufficient for a plaintiff to "demonstrate a substantial effect on interstate commerce generated by [defendants'] brokerage activity." McLain, 444 U.S. at 243. Later in the opinion, the Court also stated that one element of a successful cause of action under the Act requires that there be a demonstrable nexus between "the defendant's activity and interstate commerce." Id. at 246.

133. Kissam et al., supra note 132, at 632. The authors contend that a literal reading of the McLain opinion demonstrates that the Court held that the "infected activities" of New Orleans real estate brokers had an effect on interstate commerce sufficient to establish jurisdiction under the Act. Id. (citing McLain, 444 U.S. at 242, 246).


135. Most likely, Dr. Pinhas would need to show that actions of the peer
The third and narrowest interpretation of the McLain test employed by the circuits is referred to as the "particular wrongful conduct" test. Under this test, jurisdiction would be granted if the allegedly illegal conduct or restraint, as identified by the plaintiff, has a substantial effect on interstate commerce. As applied to the facts of Summit Health, Dr. Pinhas would have to show that the exclusionary and conspiratorial conduct of the peer review board had a substantial effect on interstate commerce in order to invoke jurisdiction under the "particular wrongful conduct" test.

These conflicting interpretations were evidenced in the arguments of Summit Health and Dr. Pinhas before the Court. In promoting the use of the "particular wrongful conduct" test, Summit Health contended that the exclusion of a single physician from the Los Angeles ophthalmological market had no substantial effect on interstate commerce. Conversely, Dr. Pinhas argued, in advocating the affirmance of the Ninth Circuit's opinion, that the Ninth Circuit correctly adopted the "infected activities" test.

Instead of addressing these conflicting interpretations of the McLain opinion, the Court focused, not upon the actual effect of the allegedly illegal restraint, "but rather upon the potential harm that would ensue if the conspiracy were successful." This addition of "potential harm" into the jurisdictional equation not only does not address the split in the circuits, but it appears to be a further expansion of the McLain test.

Review board in terminating his staff privileges led to a decline in the number of out-of-state patients that Midway admitted. Other possible evidence would be a demonstration that Dr. Pinhas was excluded from practicing at out-of-state hospitals on the basis of Midway's negative peer review proceeding.

136. Comment, supra note 5, at 139-40. Under this test, "the plaintiff must allege that the required effect on interstate commerce flows not simply from that portion of the defendant's conduct that plaintiff asserts is illegal under the antitrust laws." Id. at 140.

137. Id. at 140. This is essentially the approach adopted by the majority of the circuits that have addressed the issue. For a discussion of the majority's approach, see supra note 67 and accompanying text.

138. Summit Health, 111 S. Ct. at 1847. Summit Health argued that "[Dr. Pinhas'] complaint is insufficient because there is no factual nexus between the restraint on this one surgeon's practice and interstate commerce." Id. See Brief for the Petitioners at 9-10, Summit Health (No. 89-1679), reprinted in 24 Trade Reg. Series 103, 119-20 (No. 1, 1990-1991).

139. Brief for Respondent at 5-6, Summit Health (No. 86-1679), reprinted in 24 Trade Reg. Series 103, 144-45 (No. 1, 1990-1991). Dr. Pinhas contended that "[t]he peer review process, which controls the admission of physicians to the hospital staff, necessarily affects the provision of hospital services because the hospital can provide its services only through the physicians on its medical staff." Id. at 5, reprinted in 24 Trade Reg. Series at 144. For a discussion of the "infected activities" test, see supra notes 133-35 and accompanying text.

140. Summit Health, 111 S. Ct. at 1847.

141. For a discussion of the split among the circuits over the McLain test, see supra notes 66-68 and accompanying text.
The majority’s opinion looks neither to the restraint’s ultimate effect on interstate commerce, nor to the “infected” activity’s effect on interstate commerce.142 Instead, the majority focuses upon the exclusion of Dr. Pinhas from the Los Angeles ophthalmological services market and how that market impacts interstate commerce.143 From this “market impact” perspective, the majority analyzes the potential harm likely to result from the restraint’s impact on potential participants in the defined market from which Dr. Pinhas was excluded.144

The majority’s new standard is properly characterized as expansionist. Instead of analyzing whether the defendants’ general business activities or infected activities, or the defendants’ alleged restraint affect interstate commerce, the majority analyzes whether the Los Angeles ophthalmological services market, from which Dr. Pinhas was excluded, has a nexus with interstate commerce. Once the Court determines that the affected market impacts interstate commerce, the Court then speculates as to the potential harm suffered by current and potential participants in the infected market.145

Seemingly, the exclusion of one ophthalmologist from the Los Angeles market area could not have a substantial effect on interstate commerce.

142. Summit Health, 111 S. Ct. at 1850 (Scalia, J., dissenting). As discussed previously, a test for jurisdiction under the Act which considers the alleged restraint’s ultimate effect on interstate commerce has been advocated by a number of commentators. For a discussion of the “infected activities” test, see supra notes 133-35 and accompanying text.

143. Summit Health, 111 S. Ct. at 1850 (Scalia, J., dissenting). The majority does not appear, as does Justice Scalia, to use “market” as a term of art. According to Justice Scalia, the majority misinterpreted the scope of the restraint to be the entire eye surgery market in Los Angeles. Id. at 1852 (Scalia, J., dissenting). Instead, Justice Scalia contended that, under the standard antitrust analysis, the alleged restraint defines the extent of the market. Id. (Scalia, J., dissenting). On the basis of this analysis, Justice Scalia viewed the relevant market as eye surgery at Midway, not in Los Angeles. Id. (Scalia, J., dissenting). Justice Scalia contended that it was “irrational” and without basis to conclude that the alleged restraint’s market power, and its corresponding effect on competition, encompassed all of Los Angeles. Id. (Scalia, J., dissenting). Rather, Justice Scalia posited that the facts of Summit Health evidence the “truly local nature of the restraint” and, therefore, the restraint had no effect on the Los Angeles market on the whole. Id. (Scalia, J., dissenting).

144. Id. at 1848.

145. Id. at 1850 (Scalia, J., dissenting). Justice Scalia claimed that the majority’s “market” analysis was incorrect. Id. (Scalia, J., dissenting). The term “market” is described by Justice Scalia as the “scope of other products or services against which it must compete.” Id. at 1850-51 (Scalia, J., dissenting). Justice Scalia could not understand the majority’s opinion that the exclusion of a single physician could have a market-wide effect in Los Angeles. Id. at 1851 (Scalia, J., dissenting). Instead, Justice Scalia isolated a completely different issue in this case: “[W]hether the Act does apply, and that must be answered by determining whether, in its practical economic consequences, the boycott substantially affects interstate commerce by restricting competition.” Id. (Scalia, J., dissenting).
merce. The conspiracy undertaken by Midway's peer review board was directed, not against all ophthalmologists in the Los Angeles market, but against Dr. Pinhas only. Midway denied staff privileges to Dr. Pinhas because he would not participate in its second physician requirement—not to obtain a monopoly in the Los Angeles ophthalmological services market. Yet, under the "potential harm" approach advocated by the Court, the Court is nonetheless able to conclude that such an exclusion from a single hospital was sufficient to invoke the jurisdiction of the Act. As this result suggests, and as Justice Scalia argues in his dissent, the proper focus of a court in assessing the jurisdictional issue under the Act should be "the nature and potential effect of each particular restraint," rather than the "potential harm" which might result from a single practitioner's exclusion from the market. Under this approach, advocated by the majority of the circuits, the exclusion of Dr. Pinhas under the circumstances indicated in the record would have a sufficient nexus with interstate commerce to trigger jurisdiction under the Act. Indeed, the *Summit Health* majority's focus on the potential harm will likely raise new factual and definitional issues in future litigation under the Act.

In addition, the expansion of the *McLain* test will allow federal law enforcement agencies to bring actions against businesses and industries that were previously too localized for the scope of the Sherman Act. The United States, as amicus curiae in *Summit Health*, claimed that a variety of previously "too localized" conspiracies could be regulated, such as "rigged bids on school milk sales, rigged auction rings, rigged bids on local road building contracts, and rigged bids in small-scale military procurement." For example, assume the United States brought an action under the Act alleging that contractors in a local city rigged the bids on the contract...
construction of a municipal office building. Under Summit Health, the Justice Department could allege that the bid rigging conspiracy affects interstate commerce because the line of business (construction) necessarily affects interstate commerce, even though the individual transaction might have only a localized impact.\textsuperscript{151} Summit Health's expansion of the McLain test will provide the Justice Department with an effective enforcement weapon, since it will likely provide a gateway into new areas of antitrust enforcement and regulation that were previously too localized for the Act's jurisdictional scope.

B. A Practical Approach to Obtaining Jurisdiction Under the Act After Summit Health

Instead of settling the split in the circuits over the jurisdictional scope of the Act by selecting one of the previously enumerated tests,\textsuperscript{152} the Summit Health Court settled the split by removing any jurisdictional hurdle to securing federal jurisdiction under the Act. The Court's new interpretation of the McLain standard, which previously required a showing that the infected activities have a "not insubstantial effect" on interstate commerce "as a matter of practical economics," substantially expands the Act's jurisdictional scope.\textsuperscript{153} Using this new formulation, a plaintiff can now establish jurisdiction under the Act by simply averring that the alleged restraint, if successful, would have an impact on other potential competitors in the market from which the plaintiff was excluded.\textsuperscript{154} Under Summit Health, a plaintiff, to obtain jurisdiction under the Act, need only aver that the market, infected by the illegal restraint, affects interstate commerce. An averment of an actual effect on interstate commerce is no longer necessary to support federal jurisdiction under the Act.\textsuperscript{155} This formulation for all intents and purposes abolishes the jurisdictional hurdle of the Act, because today a plaintiff can easily aver that nearly all commercial entities have some effect on interstate commerce.

One cautionary note is that lower courts may continue to use the previously identified jurisdictional tests to draw arbitrary distinctions in order to prevent multitudes of new plaintiffs, attempting to gain the benefits of federal jurisdiction, from alleging violations of the Act. It

\textsuperscript{151} See Perez v. United States, 402 U.S. 146 (1971) (petitioner, appealing his conviction of loansharking, claimed two extortionate loans had no interstate commerce impact). The Court held that even if the individual transaction has only intrastate effects, the Court has jurisdiction over the action if the "class of activity" in the aggregate impacts interstate commerce. \textit{Id.} at 154-55.

\textsuperscript{152} For a complete discussion of the identified tests resulting from the Court's opinion in McLain, see supra notes 125-37 and accompanying text.

\textsuperscript{153} McLain, 444 U.S. 232, 246 (1980). For a detailed discussion of McLain, see supra notes 56-65 and accompanying text.

\textsuperscript{154} Summit Health, 111 S. Ct. at 1848 (citing McLain, 444 U.S. at 242-43).

\textsuperscript{155} \textit{Id.} (citing McLain, 444 U.S. at 242-43).
could be that the existing circuit split over the jurisdictional reach of the Act has developed in response to the Court's continued expansion of the jurisdictional reach of the Act. After Summit Health, a majority of the Court appears to be intent on providing jurisdiction under the Act to any plaintiff averring that an alleged restraint produces even the slightest nexus with interstate commerce.

C. Application of the Act to the Health Care Industry After Summit Health

Moreover, as the facts of Summit Health demonstrate, the expansion of the Act's jurisdiction following Summit Health will have a direct impact upon the health care industry. As the health care industry has become more competitive, hospitals have attempted to provide a higher quality of care at a lower price. This added competitive pressure has had a profound influence on the operation of many hospitals. One such area which has been influenced by these pressures is the granting of medical staff privileges at many hospitals. Staff privileges at many hospitals are controlled by a peer review board. The competitive pressures of the industry have forced many hospitals and peer review boards to become more restrictive with their staff privileges. As a

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156. Ann R. Gough, Note, Quality of Care, Staff Privileges, and Antitrust Law, 64 U. Det. L. Rev. 505, 505 (1987). Hospitals have faced pressure from three sources: the public, the government, and the courts. Id. at 505-06.

157. Gough, supra note 156, at 505. These competitive pressures have resulted in hospitals becoming more restrictive in granting medical staff privileges to physicians. For a complete discussion of medical staff privileges, see infra note 158 and accompanying text.

158. Gough, supra note 156, at 505-06. The term "staff privileges" generally refers to the right of a physician to admit patients and to perform medical procedures at the hospital. See id. at 505-07. Staff privileges are a scarce but vital commodity for any doctor, because these privileges are hard to obtain, giving an attending physician the right to admit patients and to use a hospital's facilities and equipment. Kissam et al., supra note 132, at 598. "Attending physicians are not salaried employees but rather unique kinds of independent contractors, who obtain the privilege of admitting and treating patients in the hospital in return for a commitment to perform some hospital work..." Id. at 606.

159. Gough, supra note 156, at 507. Although custom varies from hospital to hospital, many hospitals have adopted by-laws that provide for minimum accreditation standards for its attending physicians. Kissam et al., supra note 132, at 606. These standards generally conform to the guidelines promulgated by the Joint Commission for Accreditation of Healthcare Organizations. Id. Generally, a peer review board, consisting of members of the medical staff, evaluates the hospital's medical staff and makes recommendations regarding staff privileges to the hospital's governing board. Id. A peer review board examines each physician's resume "to determine the extent of his past medical training and performance, whether he is licensed and board certified, whether he carries malpractice insurance, and any other information that they believe is relevant." John Neff, Note, Physician Staff Privilege Cases: Antitrust Liability and the Health Care Quality Improvement Act, 29 Wm. & Mary L. Rev. 609, 613-14 (1988).

result, many hospitals and their peer review boards have become defendants to antitrust actions brought by physicians who have been denied staff privileges by that hospital. These cases have generally been referred to as "hospital staff exclusion" cases.

As in other cases under the Act, the threshold issue in exclusion cases is whether the alleged restraint has any sufficient nexus with interstate commerce to invoke the jurisdiction of the Act. Hospitals have become increasingly cognizant of this potential liability, since courts have held that some activities of a hospital, no matter how local in nature, can have a sufficient effect on interstate commerce to support an antitrust claim. The Summit Health Court's expansion of the interstate

161. See, e.g., Mitchell v. Frank R. Howard Memorial Hosp., 853 F.2d 762 (9th Cir. 1988) (radiologist Mitchell brought antitrust claim against hospital after its termination of oral employment agreement); Shahaway v. Harrison, 778 F.2d 636 (11th Cir. 1985) (antitrust claim against defendant hospital committee and officers over denial of staff privileges), amended, 790 F.2d 75 (7th Cir. 1986); Seglin v. Esau, 769 F.2d 1274 (7th Cir. 1985) (antitrust claim after denial of staff privileges by hospital's peer review board); Cardio-Medical Assocs., Ltd. v. Crozer-Chester Medical Center, 721 F.2d 68 (3d Cir. 1983) (antitrust claim based on denial of hospital staff privileges).

The exclusion of a physician from practicing at a hospital can have serious and detrimental professional repercussions on the physician's career and reputation. Kissam et al., supra note 132, at 599-600.

Anything more than minimal involvement by the medical staff in the final decision [to deny staff privileges], which is made by governing [board], can be construed as a conspiracy to exclude a competing physician from the benefits of staff membership. Staff members may advocate denial of privileges based on reasons unconnected with the physician's professional qualifications. If the hospital then relies on the staff not only for its opinion of the physician's skills but also for a recommendation on whether to approve or deny the physician's application, an illegal conspiracy may exist.

Neff, supra note 159, at 619-20. "Because staff privileges are of major economic importance to doctors, a physician who has been denied staff privileges may bring suit to contest a hospital's action." Id. at 614.

162. Comment, supra note 5, at 123. Generally, these cases are brought by physicians, under § 1 of the Act, challenging their denial of staff privileges as an attempt by the hospital or peer review board to monopolize the market by boycotting competing medical practitioners, or foreclosing competition in specialized medical services, and controlling access to facilities essential to a medical practice. Id. at 122. For a discussion of such cases, see supra note 161 and accompanying text.


164. Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 739-40 (1976). These actions typically allege that hospitals and their peer review boards have conspired to boycott certain doctors, "monopolize local markets or foreclose competition in specialized medical services, and control access to facilities essential to a medical practice." Comment, supra note 5, at 122; see, e.g., Stone v. William Beaumont Hosp., 782 F.2d 609, 611 (6th Cir. 1986) (plaintiff alleged denial of his application for staff privileges due to concerted activity by defendants violating federal and state antitrust laws); Seglin, 769 F.2d at 1275
commerce test for jurisdiction under the Act is likely to subject hospitals to far more expensive litigation. The increase in litigation will likely result in a substantial rise in a hospital’s insurance premiums, and these additional costs will only make health care more expensive.

Furthermore, the expansion of the jurisdictional test appears to lessen the impact of the Health Care Quality Improvement Act of 1986 (HCQIA). This federal legislation provides peer review boards with a potential defense to antitrust claims from physicians denied staff privileges. HCQIA provides qualified immunity from private actions under federal and state law. However, before the antitrust immunity attaches, a peer review board must establish that it has adhered to the professional peer review guidelines provided in HCQIA.

The legislative intent behind HCQIA was to promote effective peer

(physician, denied staff privileges, sued hospital’s peer review board members alleging defendants “conspired and combined to violate sections 1 and 2 of the Sherman Antitrust Act”); Cardio-Medical Assocs., 721 F.2d at 71 (plaintiffs alleged defendants hospital and physicians entered into illegal contracts “to prevent plaintiffs from using certain of defendants’ specialized cardiological equipment”); Crane v. Intermountain Health Care, Inc., 637 F.2d 715, 719 (10th Cir. 1981) (plaintiff alleged defendants conspired to exclude him from performing pathology services at defendants’ facilities).

165. Brief for the Petitioners at 19-20, Summit Health (No. 89-1679), reprinted in 24 Trade Reg. Series 103, 129-30 (No. 1, 1990-1991). Summit Health and Midway contended that the elimination of the Act’s jurisdictional test would subject hospitals and their medical staffs to costly antitrust litigation. Id. Summit Health and Midway claim that, more often than not, physicians will choose to sue under federal antitrust law rather than state antitrust law or other available remedies because of the Act’s threat of treble damages, and to avoid the prospect of “state law discovery privileges and immunities imposed by the states in regulating their peer review activities.” Id. at 130.


167. See id. § 11111(a)(1). This section provides that if a peer review proceeding conforms to the established procedures, the participants “shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action.” Id.


169. See 42 U.S.C.A. § 11112(a). Peer review action must be taken:

(1) in the reasonable belief that the action was in the furtherance of quality health care,
(2) after a reasonable effort to obtain the facts of the matter,
(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

Id.
review by protecting physicians from antitrust liability in their performance of peer review duties.\textsuperscript{170} One of Congress' findings stated that "[t]he threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective peer review."\textsuperscript{171}

In \textit{Summit Health}, it was established that the required interstate commerce nexus can be established by averring that the line of business infected by the restraint impacts interstate commerce.\textsuperscript{172} Under the Act, however, this expansion of the jurisdictional standard by the \textit{Summit Health} Court will allow less deserving plaintiffs to simply allege that his or her denial of staff privileges by a review board entitles the plaintiff to bring the case to trial. The finding that peer review proceedings affect interstate commerce will definitely impede the practice of effective peer review procedures in hospitals nationwide.

\textbf{V. Conclusion}

In order to settle the confusion generated by the courts of appeals following \textit{McLain}, the Court in \textit{Summit Health} should have adopted a single standard that evenly weighs the competing concerns of providing

\textsuperscript{170} Id. § 11101. Congress relied upon the following findings of fact in enacting HCQIA:

- (1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems
- (2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.
- (3) This nationwide problem can be remedied through effective professional peer review.
- (4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective peer review.

\textsuperscript{171} Id. § 11101. Representative Waxman of California, sponsor of the HCQIA, stated in House deliberations on the bill that

\texttt{t}he limited immunity [provisions of] this bill [are] essential to encourage physicians and hospitals to participate in conducting effective peer review. The immunity provisions have been restricted so as not to protect illegitimate actions taken under the guise of furthering the quality of health care. Actions ... that are really taken for anticompetitive purposes will not be protected under this bill.

\textsuperscript{172} For a further discussion of the \textit{Summit Health} majority's holding, see \textit{supra} notes 96-112 and accompanying text.
injured plaintiffs a forum for recovery, while protecting business from unsubstantiated antitrust claims. However, the *Summit Health* Court did not do this. Rather, the Court further expanded the scope of the Act's jurisdiction by formulating an entirely new jurisdictional standard. One negative ramification of this new rule is that less deserving plaintiffs will be able to secure jurisdiction under the Act. However, this expansion provides a means for the Justice Department to inject a competitive element into numerous lines of business that were previously considered too localized for jurisdiction under the Act.\(^{173}\)

An acceptable rule that balances these competing interests is necessary. Such a rule would be one similar to the standard used prior to *Summit Health* by the majority of the circuits.\(^{174}\) Such a test would better protect, for example, the interests of the hospital in performing effective peer review, while protecting the plaintiff against illegal restraints.\(^{175}\)

Jurisdiction under the Act should only be found if the plaintiff alleges a more profound effect on interstate commerce. Justice Scalia appeared to have these competing interests in mind when he advocated returning to the more stringent pre-*McLain* test that asked whether the illegal restraint, "if successful, would have a substantial effect on interstate commerce."\(^{176}\)

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173. Indeed, the ability of the government to reach purely local activities under the Act should enhance local competition. Specifically, by expanding the Act to purely local activities, local competitors will operate under the threat of criminal and civil prosecution should they engage in price-fixing, conspiracies, or any other illegal restraint. Applying this theory specifically to the health care industry, James Rill, Assistant Attorney General of the Antitrust Division of the United States Department of Justice, stated "[f]or competition to take hold, the market must be allowed to operate free of the illegal exercise of market power. Competition is our best vehicle for curbing spiraling health care costs, and antitrust enforcement is the most efficient and least intrusive method of preserving the market for competition." James F. Rill, Health Care Cost Containment and Competition, Address Before "A Day with Justice," A Symposium of the National Legal Center for the Public Interest (Apr. 23, 1991) at 2-3.

174. For a discussion of the rule adopted by the majority of the circuit courts, see *supra* note 67 and accompanying text.


176. *Id.* at 1849 (Scalia, J., dissenting).