Vanderbilt Law Review

Volume 32
Issue 5 *Issue 5 - October 1979*

Article 5

10-1979

Conflicting Interpretations of the Sherman Act's Jurisdictional Requirement

Robert D. Eckinger

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

Part of the Antitrust and Trade Regulation Commons

Recommended Citation

Robert D. Eckinger, Conflicting Interpretations of the Sherman Act's Jurisdictional Requirement, 32 *Vanderbilt Law Review* 1215 (1979)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol32/iss5/5

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

RECENT DEVELOPMENT

Conflicting Interpretations of the Sherman Act's Jurisdictional Requirement

TABLE OF CONTENTS

I.	INTRODUCTION	1215
II.	INITIAL SUPREME COURT DEVELOPMENT OF THE JURISDICTIONAL REQUIREMENT	1218
III.	CONFLICTING APPROACHES TO THE JURISDICTIONAL REQUIREMENT	1221
	A. The Broad Approach	1223
	B. The Narrow Approach	1224
	C. Resulting Inconsistent Decisions	1225
IV.	THE RECENT SUPREME COURT TREND	1226
V.	IMPACT ON THE LOWER COURTS	1230
VI.	ANALYSIS OF THE JURISDICTIONAL REQUIREMENT	1233
VII.	CONCLUSION	1237

I. INTRODUCTION

In 1890, Congress enacted the Sherman Antitrust Act[1] in order to promote competition within our national economy.[2] Pursuant to its constitutional powers under the commerce clause,[3] Congress prohibited contracts, combinations, and conspiracies "in restraint of trade or commerce among the several States"[4] and monopolization or attempted monopolization of "any part of the trade or commerce

1. 15 U.S.C. §§ 1-7 (1976) (originally enacted as Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209).

2. In discussing the policy behind the Sherman Act, the Supreme Court noted in Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958):

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

3. U.S. CONST. art. I, § 8. The commerce clause provides in part: "The Congress shall have Power . . . To regulate Commerce . . . among the Several States . . . ."

4. 15 U.S.C. § 1 (1976). Section 1 of the Sherman Act provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."

among the several States."[5] Although the jurisdictional language in the Sherman Act parallels the language used in the commerce clause, Congress provided no further guidance in defining the Act's jurisdictional scope. Thus, one of the most confusing issues that has developed in the area of antitrust law is the extent to which the Sherman Act governs interstate and/or intrastate activities.[6]

Congress has enacted numerous federal statutes in addition to the Sherman Act pursuant to its power under the commerce clause. In general, these statutes are designed to either protect individual rights or regulate economic matters. An example of the first group of statutes is the Civil Rights Act of 1964,[7] whose jurisdictional requirements have been broadly interpreted to reach acts denying individual rights, even though these acts may not have an apparent impact on interstate commerce.[8] Illustrative of the second group of statutes is the Securities Exchange Act of 1934,[9] whose antifraud provisions have been read to reach fraudulent actions that occurred during an intrastate telephone conversation because the telephone wires also carried interstate messages.[10] This liberal approach towards federal jurisdiction, as exemplified by the federal civil rights and securities laws, has carried over into other substantive areas. For example, the federal regulation of gambling and organized crime,[11] food and drug mislabeling,[12] deceptive sales,[13] and labor

5. 15 U.S.C. § 2 (1976). Section 2 of the Sherman Act provides in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . ."

6. For earlier discussions on this subject see generally Eiger, *The Commerce Element in Federal Antitrust Litigation*, 25 FED. B.J. 282 (1965); Furgeson, *The Commerce Test for Jurisdiction under the Sherman Act*, 12 HOUS. L. REV. 1052 (1975); Kallis, *Local Conduct and the Sherman Act*, 1959 DUKE L.J. 236; Krotinger, *The "Essentially Local" Doctrine and Section 1 of the Sherman Act*, 15 W. RES. L. REV. 66 (1963); Note, *Portrait of the Sherman Act as a Commerce Clause Statute*, 49 N.Y.U. L. REV. 323 (1974); Note, *The Confusing World of Interstate Commerce and Jurisdiction under the Sherman Act*, 21 VILL. L. REV. 721 (1976).

7. 42 U.S.C. §§ 2000a to 2000h-6 (1976).

8. In Daniel v. Paul, 395 U.S. 298 (1969), the Court enjoined the denial of membership to blacks in a recreational facility, partly on the ground that a snack bar on the premises served food whose ingredients had traveled in interstate commerce. *See also* Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

9. 15 U.S.C. §§ 78a-78kk (1976).

10. Myzel v. Fields, 386 F.2d 718, 727-28 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968).

11. United States v. Five Gambling Devices, 346 U.S. 441 (1953); United States v. Chambers, 382 F.2d 910 (6th Cir. 1967); United States v. Barrow, 363 F.2d 62 (3d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); United States v. Zizzo, 338 F.2d 577 (7th Cir. 1964), *cert. denied*, 381 U.S. 915 (1965).

12. United States v. Sullivan, 332 U.S. 689 (1948); United States v. Walsh, 331 U.S. 432 (1947); United States v. Nutrition Serv. Inc., 227 F. Supp. 375 (W.D. Pa. 1964), *aff'd*, 347 F.2d 233 (3d Cir. 1965).

13. FTC v. Mandel Bros., 359 U.S. 385 (1959); Morton's Inc. v. FTC, 286 F.2d 158 (1st Cir. 1961).

standards[14] has seldom been impeded by a failure to find interstate commerce pursuant to the jurisdictional requirements of a particular statute.[15] Although the various federal statutes based upon the commerce clause employ different language in defining their jurisdictional scope, and contain differences in legislative intent, the courts have taken a fairly uniform approach in applying an expansive reading to the jurisdictional requirements of these statutes.

Judicial interpretation of the Sherman Act, however, has not been as uniformly broad as that of the majority of commerce clause statutes. Lacking clear support from the legislative history or specific language of the Act, courts have nonetheless occasionally limited the jurisdictional reach of the Sherman Act. This confusion over the jurisdictional requirements of the Act has led to substantial litigation[16] and often resulted in inconsistent decisions. Although the Supreme Court recently has taken a fairly expansive approach toward the jurisdictional scope of the Sherman Act,[17] some of the lower courts have continued to narrowly interpret the Act's jurisdictional reach.[18]

An individual is entitled to know the legal consequences of his acts. This is especially true in the field of antitrust law where litigation can be excessively time consuming and costly. Unfortunately, antitrust law is often in such a state of flux that predicting one's potential antitrust liability in a particular area can be quite diffi-

14. United States v. Darby, 312 U.S. 100 (1941); Murray v. Noblesville Milling Co., 131 F.2d 470 (7th Cir. 1942), *cert. denied,* 318 U.S. 775 (1943); Flemming v. A. B. Kirschbaum Co., 124 F.2d 567 (3d Cir. 1941). *But see* National League of Cities v. Usery, 426 U.S. 833 (the Court's decision to overrule a federal statute regulating the wages and hours of state employees was not based on the commerce clause analysis, however, but rather on the ground that Congress had impermissibly infringed upon state sovereignty).

15. An exception to this broad approach to the jurisdictional tests is the interstate commerce requirement of both the Clayton and Robinson-Patman Acts, which contain specific statutory language requiring a narrow reading of the jurisdictional requirement. The Clayton Act, 15 U.S.C. §§ 12-27 (1976), for example, which supplemented the Sherman Act in 1914, requires that the illegal activity itself must occur directly in the flow of interstate commerce. United States v. American Bldg. Maintenance Indus., 422 U.S. 271 (1975); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 201-02 (1974). Similarly, for jurisdiction under the Robinson-Patman Act, 15 U.S.C. §§ 13, 13a-c, 21a (1976), an actual interstate sale must be involved. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-201 (1974).

The Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1976), also had a restrictive jurisdictional requirement similar to that of the Clayton and Robinson-Patman Acts. In 1975, however, Congress amended section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976), to prohibit "unfair methods of competition in or affecting interstate commerce, and unfair or deceptive acts or practices in or affecting commerce." The Act was amended in order to broaden the regulatory powers of the FTC in light of our increasingly interconnected national economy and in view of the jurisdictional reach of the Sherman Act. H.R. REP. No. 93-1107, 93d Cong., 2d Sess. 12, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7713.

16. For a detailed listing of cases involving the jurisdictional requirement of the Sherman Act, see 16 VON KALINOWSKI, BUSINESS ORGANIZATIONS § 5.01 (1978).

17. *See* notes 85-106 *infra* and accompanying text.

18. *See* notes 113-25 *infra* and accompanying text.

cult.[19] The confusion surrounding the jurisdictional requirement of the Sherman Act, in turn, has unnecessarily increased this uncertainty. Moreover, the confusion over the jurisdictional reach of the Sherman Act may have an even greater impact if the Supreme Court continues to limit the "state action" doctrine and allows Sherman Act claims against local activities of county and municipal governments.[20] In light of these factors, this Note will describe the confusion surrounding the jurisdictional requirement of the Sherman Act, analyze the Supreme Court's recent cases in this area and their impact on the lower courts, and propose a plan for clarifying much of the confusion over the jurisdictional reach of the Sherman Act.

II. Initial Supreme Court Development of the Jurisdictional Requirement

In the first Sherman Act case to reach the Supreme Court, *United States v. E. C. Knight Co.*,[21] the interstate commerce requirement almost caused the early demise of the Act. In *Knight* the Court held that a national monopoly of sugar manufacturing was beyond the constitutional reach of the Sherman Act because the mere manufacturing of sugar was not "commerce." Manufacturing was deemed to be a wholly local activity despite the fact that raw materials were shipped into the state and the refined sugar was eventually shipped back out of state.[22]

The *Knight* decision, however, was subjected to almost immediate reappraisal. In *Addyston Pipe & Steel Co. v. United States*[23] the Court held that a price-fixing agreement among iron pipe manufacturers located in several states fell within the Sherman Act's jurisdiction because the combination directly affected both the manufacturer of the pipe and its national distribution.[24] The Court

19. *See, e.g.,* White Motor Co. v. United States, 372 U.S. 253 (1963) (vertical restraints are not per se illegal). *But see* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (vertical restraints are per se illegal). Recently, the Court changed its position again in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (vertical restraints are not per se illegal).

20. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) ("state action" doctrine does not automatically exempt governmental entities, whether state agencies or subdivisions of the state, from antitrust laws simply by reason of their status as such); Bates v. State Bar, 433 U.S. 350 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Parker v. Brown, 317 U.S. 341 (1943).

21. 156 U.S. 1 (1895).

22. *Id.* at 12, 17.

23. 175 U.S. 211 (1899).

24. The Court distinguished *Knight* by noting that the sugar monopoly in *Knight* dealt with manufacturing, a local activity, and therefore had no direct connection with interstate

extended its interpretation of the jurisdictional scope of the Sherman Act still further in *Swift & Co. v. United States*[25] by ruling that a price-fixing agreement between meat dealers, although limited in actual operation to a single state, was nonetheless federally adjudicable because it was directed at the flow of meat in interstate commerce. This expansive approach continued in the case of *United States v. American Tobacco Co.*,[26] which involved a tobacco combine that was essentially the same as the sugar monopoly protected in the *Knight* decision.[27] The *American Tobacco* Court held, however, that the restraint exercised by the tobacco trust bore a direct relation to interstate commerce and therefore satisfied the jurisdictional requirements of the Sherman Act.

Thus, with the fading of the *Knight* decision,[28] the Court gradually began to accept the concept of applying the Sherman Act to essentially local activities if they touched either side of an interstate transaction.[29] This approach became known as the "flow of commerce" test. Under this test, an intrastate activity is "in commerce" if it is part of the continuous flow of a good that crosses a state line. Manufacturing a product destined for interstate markets, therefore, places the manufacturer "in commerce" for jurisdictional purposes under the Sherman Act. The continuous flow may be broken if the good comes to rest within a state or is transformed into a different product.[30]

In 1942, the Supreme Court presented an alternative commerce

---

commerce. In *Addyston Pipe,* however, the illegal agreement itself was directed at both manufacturing and interstate distribution. *Id.* at 240.

25. 196 U.S. 375 (1905).

26. 221 U.S. 106 (1911).

27. The Tobacco trust in *American Tobacco* manufactured and sold tobacco products, but did not transport these products in commerce.

28. The rationale of the *Knight* decision was specifically repudiated in Standard Oil Co. v. United States, 283 U.S. 163, 169 (1931), in which the Court stated that although manufacturing itself was not commerce, an agreement concerning manufacturing that would have the effect of limiting the supply or fixing the price of goods entering interstate commerce would fall within the Sherman Act.

One aspect of the *Knight* decision that remains important, however, is that the Court never reached the merits of the government's case because it made the constitutional commerce determination first. Today, most courts still treat the commerce question as a preliminary jurisdictional hurdle in antitrust cases.

29. One exception to this renunciation of the *Knight* rationale was the case of Federal Baseball Club v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922), in which the Court held that since the actual playing of a baseball game occurred within only one state, there was no federal jurisdiction despite the interstate travel by the teams. Although the Court has never overruled this decision, it has come to be viewed as an aberration to which Congress has acquiesced due to the unique features of professional baseball. *See* Flood v. Kuhn, 407 U.S. 258, 282 (1972).

30. *See* P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 232c (1978); 16 VON KALINOWSKI, BUSINESS ORGANIZATIONS § 5.01[2] (1978).

clause test in the case of *Wickard v. Filburn.*[31] In an action arising under the Agriculture Adjustment Act of 1938,[32] the Court held that the growing of wheat for one's family and farm animals falls within the federal commerce power. In reaching this conclusion, the Court stated that "even if . . . activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ."[33] Initially, this decision had only a minimal impact on Sherman Act cases, which continued to adhere to the "flow of commerce" test. In *United States v. Yellow Cab Co.*,[34] for example, the Court held that local taxi service for interstate travelers between rail terminals in Chicago constituted part of a continuous interstate trip and was thus subject to the jurisdictional reach of the Sherman Act.[35] In the same decision, however, the Court ruled that the Sherman Act did not apply to other local cab service that involved the transportation of passengers between their residences, offices or hotels, and the train stations because it was not within the flow of commerce.[36]

In *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*[37] the Court finally followed the lead of the *Wickard* decision and adopted a second test for determining jurisdiction under the Sherman Act. Rather than focus on the location of the alleged anticompetitive conduct, this approach emphasizes the economic effects of that conduct.[38] In applying this "affecting commerce" test,[39] the Court held that agreements between California sugar refiners to fix the price paid local sugar beet growers violated the Sherman Act even though the beets were transformed into sugar before shipment to interstate markets. The Court reasoned that by virtue of the interdependency between growing, refining and distributing the sugar, the restraint and monopoly in the local market inevitably would be reflected in the interstate commerce of the final product.[40]

Following the broad approach taken in the *Mandeville Farms*

---

31. 317 U.S. 111 (1942).

32. 7 U.S.C. §§ 1281-1407 (1976).

33. 317 U.S. at 125.

34. 332 U.S. 218 (1947).

35. *Id.* at 228-29.

36. *Id.* at 230-33.

37. 334 U.S. 219 (1948).

38. The Court noted that "the vital thing is the effect on commerce, not the precise point at which the restraint occurs . . . ." *Id.* at 238. The Court also stressed that "the vital question becomes whether the effect is sufficiently substantial and adverse . . . ." *Id.* at 234.

39. *See* P. AREEDA & D. TURNER, *supra* note 30, at ¶ 232d; 16 VON KALINOWSKI, *supra* note 30, at § 5.01[3].

40. 334 U.S. at 242. One possible effect of the refiners' monopoly is that they would receive the sugar beets at a lower price than competitor-refiners in other states.

decision, the Supreme Court extended the reach of the Sherman Act to various local activities. In *United States v. Women's Sportwear Manufacturers Association*[41] the Court ruled that the manufacturing of garments by local contractors who later sold them to jobbers located in the same state fell within the jurisdictional scope of the Sherman Act. In reaching this conclusion, the Court stated:

> The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.[42]

Similarly, in *United States v. Employing Plasterers Association*[43] the Court considered an alleged conspiracy between a trade association and union officials to restrain competition among Chicago plastering contractors. In overturning the district court's dismissal for lack of jurisdiction, the Court noted "[t]hat wholly local business restraints can produce the effects condemned by the Sherman Act is no longer open to question."[44] The Court apparently found an effect upon interstate commerce without discussing its amount or immediacy.

Thus, by the mid 1950's, the Supreme Court had rendered a fairly expansive reading to the jurisdictional scope of the Sherman Act. Despite the Court's guidance, however, the lower courts have muddled this area with a series of confusing and inconsistent opinions.

III. Conflicting Approaches to the Jurisdictional Requirement

Following the trend established in the Supreme Court decisions, the lower courts for the most part have adopted the "flow of commerce" and the "affecting commerce" tests for determining the jurisdictional reach of the Sherman Act. In *Las Vegas Merchant Plumbers Association v. United States,*[45] for example, which involved price fixing in a local plumbing supply market, the court noted that the act complained of would fall within the jurisdictional scope of the Sherman Act if it were shown that the transaction at the root of the alleged violation was either in interstate commerce or affected interstate commerce.[46]

---

41. 336 U.S. 460 (1949).
42. *Id.* at 464.
43. 347 U.S. 186 (1954).
44. *Id.* at 189.
45. 210 F.2d 732 (9th Cir. 1954).
46. *Id.* at 739-40 n.3. For an extensive list of cases decided under these two tests see 16

With the development of the "affecting commerce" test in the *Mandeville Farms* decision, the earlier "flow of commerce" test has received less attention from the courts. The "flow of commerce" theory applies only if an anticompetitive restraint has been imposed directly upon goods or services in the stream of interstate commerce. The test does not apply to restraints imposed on businesses or goods that merely compete with goods that flow in interstate commerce.[47] In contrast, courts may rely upon the "affecting commerce" test when jurisdiction is sought over such indirect restraints, or over restraints imposed on goods or services before or after their flow through commerce.[48] Although this may suggest that the "affecting commerce" test has subsumed the "flow of commerce" test,[49] there is an important distinction between the two theories. If illegal restraints are placed directly upon goods or services during their flow through commerce, the plaintiff need not demonstrate the effect on interstate commerce. If the transaction is not in the flow of commerce and only affects interstate commerce, however, the plaintiff must allege an actual impact on interstate commerce.[50]

Despite the broad acceptance of these tests, their actual application to specific factual situations by the lower courts has resulted in a quagmire of conflicting decisions. Although conflicts have occurred in the use of the "flow of commerce" test over such issues as where the stream of interstate commerce begins and ends,[51] the vast majority of disputes in this area have concerned application of the "affecting commerce" test. In these cases, it must be shown that the alleged anticompetitive act had an effect on interstate commerce. The critical question is how immediate or large this effect on commerce must be to establish jurisdiction under the Sherman Act.[52]

VON KALINOWSKI, *supra* note 30, at § 5.01[1] nn.15 & 16.

47. Page v. Work, 290 F.2d 323, 330 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961).

48. *See* notes 37-44 *supra* and accompanying text.

49. In discussing the elusive nature of the dividing line between these two tests, the court in Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 527 n.20 (9th Cir.), *cert. denied*, 412 U.S. 950 (1973) noted:

> Too often in this area, judicial discomfort with uncertainty, aggravated by the rapid expansion of traditional conceptions of federal commerce power, has led to a continued grasping for specific, easily applicable standards, standards which regularly had to be "reinterpreted" or discarded altogether in the face of changing economic realities. In the final analysis, the real-world business nature of the Sherman Act's purpose and subject matter permits no easy solution. As noted earlier, it is the duty of the courts to apply "a practical, case-by-case economic judgment" rather than to take refuge in "abstract or mechanistic formulae."

50. *See* 16 VON KALINOWSKI, *supra* note 30, at § 5.01[2] nn.29 & 30.

51. *Id.* at § 35.01[2][b].

52. In the *Wickard* decision, the Court used the language "economic effect." *See* note 33 *supra* and accompanying text. In the *Mandeville Farms* case, however, the Court used the

The courts appear to have divided into two camps on this issue.

A. *The Broad Approach*

Numerous decisions have adopted the view that nearly all economic activity satisfies the jurisdictional requirement of the Sherman Act. The courts' reasoning in these decisions is an outgrowth of the *Mandeville Farms* opinion and is comparable to the expansive approach courts have taken in construing other commerce clause statutes.[53] The analytical foundation on which these courts have justified this broad jurisdictional scope is the belief that Congress intended to secure a competitive business economy by extending the substantive provisions of the Sherman Act to the furthest reaches of its constitutional powers under the commerce clause.[54]

Courts have applied this broad approach to Sherman Act jurisdiction in a variety of cases. Federal courts have declared, for example, that a southern California vehicle locating service,[55] the sale of burial insurance policies,[56] the intrastate manufacture and marketing of a filled milk beverage,[57] the supply of hospital services in Philadelphia,[58] and the sale of hot mix asphalt from storage tanks in Florida to Florida purchasers,[59] all had a sufficient effect on the flow of out-of-state commodities to warrant Sherman Act scrutiny.

In many of these cases, jurisdiction was triggered because the restraint of trade on an intrastate product or services affected the purchase of other products that flow in interstate commerce. An example of this application of the "affecting commerce" test is *Lehrman v. Gulf Oil Corp.*,[60] in which the Ninth Circuit held that an alleged local resale price maintenance scheme was actionable under the Sherman Act because its enforcement might impair the plaintiff resale gas dealer's economic well-being and thus his future purchase of tires, batteries and accessories from other states.[61] In

---

terms "sufficiently substantial" and "adverse" to describe the required effect upon interstate commerce. *See* note 38 *supra*.

53. *See* notes 7-15 *supra* and accompanying text.

54. Gough v. Rossmoor Corp., 487 F.2d 373, 375-76 (9th Cir. 1973) (conspiracy to exclude furniture dealer, who received goods produced in other states, from a local retail market had an adverse effect on interstate commerce).

55. Cartrade, Inc. v. Ford Dealers Advertising Ass'n, 446 F.2d 289, 292 (9th Cir. 1971), *cert. denied*, 405 U.S. 997 (1972).

56. Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39 (5th Cir. 1974).

57. Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 524-38 (9th Cir.), *cert. denied*, 412 U.S. 950 (1973).

58. Doctors, Inc. v. Blue Cross, 490 F.2d 48 (3d Cir. 1973).

59. Hardrives Co. v. East Coast Asphalt Corp., 329 F.2d 868, 869-71 (5th Cir. 1964).

60. 464 F.2d 26 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972).

61. *Id.* at 35-36. The sale of gasoline in this case was a totally intrastate transaction. It was pumped, refined and sold to the final consumer solely in the state of Texas. *Id.* at 31.

reaching this decision, the court noted that "[i]t is the effect on commerce that determines federal jurisdiction under the Sherman Act and not any notion of the 'interstate culpability' of those who engage in anticompetitive practices."[62] Similarly, in *United States v. Finis P. Ernest, Inc.*,[63] in which the defendant was charged with rigging bids for a sewer construction project, the court ruled that the purchase of $9,000 worth of sewer pipe and manhole covers from out-of-state suppliers was sufficient evidence, for jurisdictional purposes, of an effect on interstate commerce. The court also found that the rigged bids increased the cost of the project to the city, which in turn reduced the funds available for other construction projects that required out-of-state goods.[64] Finally, one of the furthest extensions of this jurisdictional approach is *Copper Liquor, Inc. v. Adolph Coors Co.*,[65] in which the court determined that the unavailability of Coors beer at a retail store led to a reduced demand at the store for other products that traveled in interstate commerce. The court suggested that this impact had a sufficient effect on interstate commerce to bring the case within the boundaries of the Sherman Act.[66]

B. *The Narrow Approach*

In contrast to the broad jurisdictional approach that appears to require a minimal and direct effect upon interstate commerce, a significant number of decisions have taken a more restrictive view and have interpreted the reach of the Sherman Act as falling short of its potential range under the federal commerce clause power. These opinions stress that an intrastate activity's incidental effect on the flow of supplies in interstate commerce does not in itself transform this activity into an interstate enterprise. In this vein, lower federal courts have concluded that a local mortuary service that received supplies and bodies from out of state,[67] a county-wide garbage collection company that purchased equipment in another state,[68] the management of a state bar review course that involved out-of-state students and advertising,[69] and the leasing of property in a shopping center to a supermarket that sold interstate goods,[70]

62. *Id.* at 36.
63. 509 F.2d 1256 (7th Cir.), *cert. denied*, 423 U.S. 893 (1975).
64. *Id.* at 1261.
65. 506 F.2d 934 (5th Cir. 1975).
66. *Id.* at 948-49.
67. John Kalin Funeral Home, Inc. v. Fultz, 313 F. Supp. 435 (W.D. Wash. 1970), *aff'd*, 442 F.2d 1342 (9th Cir.), *cert. denied* 404 U.S. 881 (1971).
68. Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969).
69. Kallen v. Nexus Corp., 353 F. Supp. 33 (N.D. Ill. 1973).
70. St. Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc., 316 F. Supp. 1045 (D. Minn. 1970).

present too remote or insubstantial a nexus with interstate commerce to confer Sherman Act jurisdiction.

In narrowly defining the "affecting commerce" test, these opinions have looked for a more immediate impact on interstate markets. In *Page v. Work*,[71] for example, the Ninth Circuit held that an alleged conspiracy to exclude a local newspaper from publishing legal notices was not within the scope of the Sherman Act, even though the plaintiff bought newsprint from outside the state, carried a minimal amount of national news and advertising, and had some out-of-state subscribers. The court found that the conspiracy was directed at legal advertising, not the newsprint market and stated that "[t]he test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business."[72] Similarly, in *Lieberthal v. North Country Lanes, Inc.*[73] the court ruled that the "one shot event" of outfitting a bowling alley with out-of-state equipment did not create a sufficient effect upon interstate commerce. Finally, in *Marston v. Ann Arbor Property Managers Association*[74] a charge was brought under the Sherman Act alleging a conspiracy to raise rents and restrict the construction of apartments in an area surrounding the University of Michigan. In dismissing the complaint, the court held that any effect on the movement of out-of-state students and building materials was incidental because the conspiracy in question was aimed only at the local apartment market.[75]

C. *Resulting Inconsistent Decisions*

As one might expect, the conflict over the jurisdictional reach of the Sherman Act has led to situations in which the courts have rendered different results in factually similar cases. For example, in *Doctors, Inc. v. Blue Cross of Greater Philadelphia*[76] the Third Circuit held that an alleged conspiracy by a hospitalization insurer and a health services agency against a local hospital was within the jurisdictional scope of the Sherman Act because the alleged restraint would sufficiently affect the flow of out-of-state supplies to the hospital. In reaching this conclusion, however, the court was forced to note that the Eighth Circuit in *Spears Free Clinic and*

71. 290 F.2d 323 (9th Cir. 1961).
72. *Id.* at 330.
73. 332 F.2d 269, 272 (2d Cir. 1964).
74. 302 F. Supp. 1276 (E.D. Mich. 1969), *aff'd*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970).
75. 302 F. Supp. at 1279.
76. 490 F.2d 48 (3d Cir. 1973).

Hospital v. Cleere[77] had rendered a totally opposite decision in a nearly identical case dealing with an alleged conspiracy against a chiropractic hospital in Colorado. Furthermore, the *Spears* case was cited as controlling precedent in circuit[78] and district court[79] decisions rendered before *Doctors, Inc.* Conflicting decisions also have been handed down in cases concerning local garbage haulers,[80] intrastate transportation services,[81] and local real estate agencies.[82] There have even been conflicts between federal courts in a single circuit.[83] These inconsistent results have led to confusion among other lower courts and within the antitrust bar. Moreover, prior to the mid-1970's, the Supreme Court had neither settled these differences nor established guidelines to end this diversity of opinion.[84]

IV. The Recent Supreme Court Trend

During the twenty year period that followed *United States v. Employing Plasterers Association*,[85] the Supreme Court generally ignored the question of the jurisdictional reach of the Sherman Act.[86] Thus, it is surprising that in light of the growing conflict

77. 197 F.2d 125 (10th Cir. 1952).

78. Elizabeth Hosp. Inc. v. Richardson, 269 F.2d 167, 171 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959).

79. Nankin Hosp. v. Michigan Hosp. Serv., 361 F. Supp. 1199, 1210 (E.D. Mich. 1973).

80. *Compare* A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Ass'n, 484 F.2d 751 (7th Cir.), *cert. denied*, 414 U.S. 1131 (1974) *with* Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969).

81. *Compare* Evanston Cab Co. v. City of Chicago, 325 F.2d 907 (7th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964) (local taxi-cab operation had insubstantial effect on interstate commerce) *with* A.B.T. Sightseeing Tours, Inc. v. Gray Line Corp., 242 F. Supp. 365 (S.D.N.Y. 1965) (intrastate sightseeing tour had sufficient effect upon interstate commerce).

82. *See* notes 111 & 120 *infra* and accompanying text.

83. *Compare* Gateway Assocs. v. Essex-Costello, Inc., 380 F. Supp. 1089 (N.D. Ill. 1974) *with* A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Ass'n, 484 F.2d 751, 760 (7th Cir.), *cert. denied*, 414 U.S. 1131 (1974). The court in *Gateway* observed:

> Despite the good sense expressed in the *Marston* and *Cotillion* cases, I must decline to follow them due to the Seventh Circuit's holding in A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Ass'n, *supra*. There the Court held the jurisdictional test was met. . . . [although] . . . virtually all of the defendants' activity was local. . . . The law of this Circuit now seems to require the district courts to try antitrust cases on the merits before they may determine whether they even have the jurisdiction or power to do so. Obviously, this makes little sense and adds to the burgeoning caseload of the district courts. Nevertheless, *Cherney* represents the law of this Circuit and it must be followed unless and until it is overruled or reserved.

380 F. Supp. at 1094.

84. *See* McGee, *The Burger Court Looks at the Antitrust Laws: A New Approach*, 2 BARRISTER 21, 26 (Winter 1975).

85. 347 U.S. 186 (1954). *See* notes 43-44 *supra* and accompanying text.

86. The only Supreme Court opinion during this period that focused on the jurisdictional issue was Burke v. Ford, 389 U.S. 320 (1967). In *Burke* Oklahoma liquor retailers brought an action under the Sherman Act against liquor wholesalers in the state, charging that wholesalers had restrained commerce by dividing up the state market into exclusive

among the lower courts, the Supreme Court in 1974 avoided expressly reconciling this issue in *Gulf Oil Corp. v. Copp Paving Co.*[87] The plaintiff in *Gulf Oil* was a California asphaltic concrete dealer whose product was manufactured wholly from components produced and purchased intrastate. California used this concrete in the construction of a portion of its interstate highway system. In a suit alleging various antitrust offenses, the plaintiff relied upon its nexus with this instrumentality of interstate commerce to establish jurisdiction under the Sherman, Clayton and Robinson-Patman Acts. The court of appeals found jurisdiction under all three statutes.[88] Unfortunately, the Supreme Court only granted review of the Clayton and Robinson-Patman charges, holding that the narrow jurisdictional reach of these two statutes did not extend to the restraints in question.[89] In contrasting the jurisdictional scope of these statutes to the more expansive Sherman Act, however, the Court did note "that in enacting § 1 Congress 'wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . . .' "[90] Moreover, in discussing the "flow of commerce" and "affecting commerce" tests, the Court cited *Mandeville Farms*, noting that an act may constitute a restraint under the Sherman Act "if it substantially and adversely affects interstate commerce."[91]

In 1975, the Supreme Court once again had the opportunity to clarify the jurisdictional scope of the Sherman Act in the case of *Goldfarb v. Virginia State Bar.*[92] In *Goldfarb* the Court discussed whether a minimum fee schedule set by a county bar association for real estate title searches acted as a restraint upon interstate commerce. In ruling that the fee schedule was subject to attack under the Sherman Act, the Court chose not to analyze the plaintiff's jurisdictional allegations in terms of either of the two tests employed

territories. In its brief opinion, the Court first discussed the two jurisdictional tests, explaining that "an activity which does not itself occur in interstate commerce comes within the scope of the Sherman Act if it substantially *affects* interstate commerce." *Id.* at 321 (emphasis in original). Although the market diversion in the case was not directed at influencing interstate commerce, the Court found that as a matter of practical economics, the restraint had a substantial effect on the flow of commerce. The Court noted that "[t]he wholesalers' territorial 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.* at 322.

87. 419 U.S. 186 (1974).

88. 487 F.2d 202 (9th Cir. 1973).

89. 419 U.S. at 199.

90. *Id.* at 194-95, citing United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558 (1944).

91. *Id.* at 195.

92. 421 U.S. 773 (1975).

by the lower courts,[93] but rather applied a more ad hoc approach. The Court first noted that in a practical sense, title examiners were an integral part of the interstate aspects of purchasing a home because they are prerequisites for obtaining a home mortgage.[94] Home mortgages were considered interstate transactions because nearly half of the mortgages were granted by out-of-state lenders and many were insured by out-of-state federal agencies. Because of the large amount of real estate funds flowing into the state, the Court held that a sufficiently substantial effect upon interstate commerce for jurisdictional purposes existed, but did not describe the exact character and amount of this effect.[95] Thus, although the Court's ad hoc approach did little to ameliorate the uncertainty found in the lower courts, the opinion did suggest that the Court was leaning toward a fairly broad reading of the Sherman Act's jurisdictional requirements.

In the most recent Supreme Court decision on this subject, *Hospital Building Co. v. Trustees of Rex Hospital*,[96] the Court continued to extend the jurisdictional reach of the Sherman Act. *Rex Hospital* dealt with an allegation by the plaintiff hospital that a nearby non-profit hospital conspired to prevent the plaintiff's relocation and expansion within the same city. The circuit court dismissed plaintiff's complaint because of an insufficient nexus between the alleged antitrust violation and interstate commerce.[97] Plaintiff alleged, however, that a cluster of contacts existed between its operations and interstate commerce: it purchased up to eighty percent of its medicines and supplies from out-of-state sources; received significant revenues from out-of-state insurance companies; remitted management service fees to its out-of-state parent corporation; and would borrow from out-of-state lenders to finance part of its planned expansion.[98]

The Supreme Court held in *Rex Hospital* that this combination of factors was "certainly sufficient to establish a 'substantial effect' on interstate commerce under the Act."[99] In reaching this conclusion

93. *See* notes 45-50 *supra* and accompanying text.

94. 421 U.S. at 784.

95. The Court emphasized that "our cases have shown that, once an effect is shown, no specific magnitude need be proved." *Id.* at 785.

96. 425 U.S. 738 (1976).

97. 511 F.2d 678 (4th Cir. 1975).

98. 425 U.S. at 744. In 1972, for example, the plaintiff spent $112,000 on medicines and supplies from out of state.

99. *Id.* While there was some ambiguity over whether the lower courts' decisions were grounded on Rule 12(b)(1) or Rule 12(b)(6), the Court treated the dismissal as having been based on Rule 12(b)(6), noting, however, that its analysis would be the same if it were based on want of subject matter jurisdiction under Rule 12(b)(1). "In either event, the critical

the Court first noted that its previous decisions had "permitted the reach of the Sherman Act to expand along with expanding notions of congressional power."[100] This expansion resulted in the Sherman Act encompassing far more than restraints on trade designed to limit interstate commerce or whose sole impact was on interstate commerce. The fact that an effect on interstate commerce might be indirect did not remove it from the scope of the Act.[101] The Court stated that " 'wholly local business restraints can produce the effects condemned by the Sherman Act,' "[102] as long as the alleged restraint " 'substantially and adversely affects interstate commerce.' "[103] The Court broadly defined the term "substantial," however, declaring that "[a]n effect can be 'substantial' under the Sherman Act even if its impact on interstate commerce falls far short of causing enterprises to fold or affecting market price."[104]

Prior to the *Goldfarb* and *Rex Hospital* decisions, the lower courts often held that intrastate transactions with an indirect restraint on the flow of goods or services would not have a sufficient effect on interstate commerce.[105] In these two decisions, however, the Court has broadly read the Sherman Act's commerce clause powers to encompass such acts. In referring to these decisions, Justice Blackmun noted:

> It is true that the framers of the Sherman Act expressed the view that certain areas of economic activity were left entirely to state regulation. . . . A careful reading of these standards reveals, however, that they little more than reflect the then-prevailing view that Congress lacked the *power,* under the Commerce Clause, to regulate economic activity that was within the domain of the States. The Court since then has recognized a greatly expanded Commerce Clause power . . . for it has been held that Congress intended the reach of the Sherman Act to expand along with that of the commerce power.[106]

In expanding its jurisdictional powers under the Sherman Act, the

inquiry is into the adequacy of the nexus between respondents' conduct and interstate commerce that is alleged in the complaint." *Id.* at 742 n.1.

100. *Id.* at 743 n.2.

101. *Id.* at 744. The Court noted that an effect would be indirect if the conduct producing it was not purposely directed at interstate commerce. *Id.*

102. *Id.* at 743, citing United States v. Employing Plasterers Ass'n, 347 U.S. 186, 189 (1954).

103. *Id.* citing Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195 (1974) and Mandeville Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 234 (1948). In calculating this effect, the Court stated that it should be based on "practical economics." *Id.* at 745.

104. *Id.* at 745. In its closing paragraph, the Court stressed that only in rare instances should a court dismiss an antitrust complaint before the plaintiff has had ample opportunity for discovery. Thus the Court stated that all that need be alleged to adequately state a claim is that the restraint, if successful, would place "unreasonable burdens on the free and uninterrupted flow of interstate commerce." *Id.* at 746.

105. *See* notes 67-75 *supra* and accompanying text.

106. Cantor v. Detroit Edison Co., 428 U.S. 579, 605-06 (1976) (concurring opinion).

Court nonetheless has suggested that the restraint in question must substantially and adversely affect interstate commerce. The Court's expansive interpretation of this phrase in *Rex Hospital,* however, shows how easy it is to meet this requirement.

V. Impact on the Lower Courts

The vast majority of lower court cases rendered since the *Goldfarb* and *Rex Hospital* decisions have broadly interpreted the jurisdictional requirements of the Sherman Act.[107] In many of these cases, the courts have found Sherman Act jurisdiction when the plaintiff or defendant purchased supplies or services from out-of-state and the restraint in question indirectly affected these purchases. Although some of these decisions have focused on the actual amount of interstate commerce affected, several of the cases have merely discussed the factors that could affect interstate commerce.

An example of this broad trend is the case of *J. P. Mascaro & Sons v. William J. O'Hara, Inc.,*[108] in which a refuse hauler sued various other haulers and landfill operators, alleging that they conspired to fix prices and allocate territories in order to drive him out of business. All of the plaintiff's customers and all but one of the

107. Harold Friedman, Inc. v. Thorofare Markets Inc., 1978-2 Trade Cas. ¶ 62,344 (3d Cir. 1978) (supermarket); United States v. Andrew Carlson & Sons, 1978-2 Trade Cas. ¶ 62,310 (2d Cir. 1978) (pre-cast concrete products); United States v. American Serv. Corp., 1978-2 ¶ 62,238 (5th Cir. 1978) (linen service); Canadian American Oil Co. v. Union Oil Co. of California, 577 F.2d 468 (9th Cir. 1978) (gasoline dealership); United States v. Cadillac Overall Supply Co., 568 F.2d 1078 (5th Cir.), *cert. denied,* 98 S. Ct. 3088 (1978) (garment supplies); J.P. Mascaro & Sons v. William J. O'Hara, Inc., 565 F.2d 264 (3d Cir. 1977) (garbage haulers); City of Fairfax v. Fairfax Hosp. Ass'n, 562 F.2d 280 (4th Cir. 1977) (hospital); Tiger Trash v. Browning-Ferris Indus., 560 F.2d 818 (7th Cir. 1977) (garbage haulers); Americana Indus. v. Wometco de Puerto Rico Inc., 556 F.2d 625 (1st Cir. 1977) (motion picture); Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884 (3d Cir. 1977) (real estate mortgages); Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626 (9th Cir. 1977) (dental association); Evans v. S.S. Kresge Co., 544 F.2d 1184 (3d Cir. 1976) (discount store); Ballard v. Blue Shield Inc., 543 F.2d 1075 (4th Cir. 1976) (chiropractors); Northern v. McGraw-Edison Co., 542 F.2d 1336 (8th Cir. 1976) (dry cleaning franchise); Taxi Weekly, Inc. v. Metropolitan Taxicab Bd., 539 F.2d 907 (2d Cir. 1976) (taxi newspaper); Klein v. Checker Motors Corp., 1978-2 Trade Cas. ¶ 62,330 (N.D. Ill. 1978) (taxi service); United States v. Greater Syracuse Bd. of Realtors, 449 F. Supp. 887 (N.D.N.Y. 1978) (real estate agents); L&H Invs. v. Belvey Corp., 444 F. Supp. 1321 (W.D.N.C. 1978) (shopping center leases); United States v. Jack Foley Realty, Inc., 1977-2 Trade Cas. ¶ 61,678 (D. Md. 1977) (real estate agents); United States v. Southern Motor Carrier Rate Conference, 439 F. Supp. 29 (N.D. Ga. 1977) (motor carriers); United States v. Brighton Bldg. & Maintenance Co., 435 F. Supp. 222 (N.D. Ill. 1977) (highway construction); Weber v. Wynne, 431 F. Supp. 1048 (D.N.J. 1977) (press clipping bureau); Zamiri v. William Beaumont Hosp., 430 F. Supp. 875 (E.D. Mich. 1977) (doctors' services); Presido Golf Club v. National Linen Supply Corp., 1976-2 Trade Cas. ¶ 61,221 (N.D. Cal. 1976) (linen supplies); United States v. Allied Maintenance Corp., 1976-2 Trade Cas. ¶ 61,179 (S.D.N.Y. 1976) (building maintenance service); Joe Westbrook, Inc. v. Chrysler Corp., 419 F. Supp. 824 (N.D. Ga. 1976) (car dealership).

108. 565 F.2d 264 (3d Cir. 1977).

defendants' customers were located in Pennsylvania. During the four year period in question, however, the plaintiff had purchased from local retailers at least $310,000 in equipment and supplies manufactured outside of the state, had paid $55,000 in premiums to out-of-state insurers, and had borrowed $256,000 from out-of-state lending institutions.[109] Based on these factors, the court held that the conspiracy affected interstate commerce.[110]

Another example of this liberal interpretation of the jurisdictional requirement is *United States v. Jack Foley Realty, Inc.*[111] The defendants in *Foley* were criminally charged with conspiring to fix commission rates for the sale of residential real estate in a Maryland county. The indictment alleged that a substantial number of persons using defendants' services were moving to or from places outside the state; that defendants belonged to nationwide referral services; that defendants advertised their listings in newspapers with interstate circulation; and that defendants assisted purchasers in securing financing, much of which came from out-of-state sources. The court denied the defendants' motion to dismiss, holding that the defendants' activities, when considered in the aggregate, had a substantial effect upon interstate commerce.[112]

Despite the expansive approach developed by the Supreme Court, several lower courts have continued to narrowly interpret the jurisdictional scope of the Sherman Act. In many of these cases, the courts appear to be using the jurisdictional requirement as a tool to dismiss complaints concerning relatively local restraints when the substantive antitrust allegations are of doubtful merit.[113] In other cases, courts have denied jurisdiction when a substantial effect on interstate commerce would arguably exist under a broad reading of

---

109. *Id.* at 266. Citing the *Liebenthal* and *Page* cases, see notes 71-73 *supra*, the District Court held that these factors did not offset interstate commerce. The Court of Appeals noted, however, that the *Rex Hospital* decision cast "substantial doubt on the authorities supporting the district court's reasoning," *Id.* The court stressed that "the trend in interpreting the 'affecting commerce' test has been to broaden it." *Id.* at 267.

110. In supporting this conclusion, the court stated:

> The conspiracy is said to be aimed at driving the plaintiff out of business and limiting competition among those remaining in the field. That such a result would significantly decrease the amount of out-of-state purchases by the refuse dealers (and totally eliminate those of Mascaro) as well as increase the amount charged customers who pay from out-of-state is a matter of economic reality.

Id. at 268.

111. 1977-2 Trade Cas. ¶ 61,678 (D. Md. 1977).

112. *Id.* at 72,790.

113. *See* Save Our Cemeteries, Inc. v. The Archdiocese of New Orleans, Inc., 1978-1 Trade Cas. ¶ 61,893 (5th Cir. 1978) (use of wall vaults in a cemetery); Morgan v. Odem, 1977-1 Trade Cas. ¶ 61,432 (5th Cir. 1977) (breach of contract in home construction); Dominion Parking Corp. v. B. & O. R.R., 450 F. Supp. 441 (E.D. Va. 1978) (parking lot lease); Foret v. Point Landing, Inc., 1976-2 Trade Cas. ¶ 61,106 (E.D. La. 1976) (lease of riverfront property).

the Sherman Act's jurisdictional requirement.[114]

This narrow approach to the interstate commerce requirement is exemplified by *Universal Services of Indiana, Inc. v. Central Waste Systems.*[115] This case dealt with an alleged price cutting scheme designed to monopolize the business of refuse removal in two Indiana counties. The plaintiff garbage hauler received over $18,000 per year to service a client in Illinois. Moreover, the plaintiff serviced many large interstate corporations whose refuse removal costs would artificially rise if the defendants were to monopolize the market.[116] Although the court noted the broad approach taken by the Supreme Court in the *Rex Hospital* decision, it nonetheless found that the plaintiff was neither in the flow of commerce nor substantially affected interstate commerce.[117] In concluding that the plaintiff at best affected only a de minimus amount of interstate business, the court approvingly cited *Page v. Work*[118] and the district court opinion in the *J. P. Mascaro*[119] case.

Another narrow interpretation of the Sherman Act's jurisdictional requirement is found in *McLain v. Real Estate Board of New Orleans, Inc.*[120] Although this case was factually indistinguishable from the *Jack Foley* decision,[121] the court nonetheless ruled that the alleged price-fixing activities of local real estate brokers did not substantially affect interstate commerce.[122] The plaintiffs had charged that many of the defendants' customers were from out of state and that the defendants participated in securing home financing and title insurance from sources outside the state. Based on these facts, the plaintiffs argued that their case was controlled by the Supreme Court's decision in *Goldfarb.*[123] The court distin-

114. McLain v. Real Estate Bd., 1978-2 Trade Cas. ¶ 62,341 (5th Cir. 1978) (real estate brokers); Income Realty & Mortgage Inc. v. Denver Bd. of Realtors, 578 F.2d 1326 (10th Cir. 1978) (real estate broker); Bryan v. Stillwater Bd. of Realtors, 1978-1 Trade Cas. ¶ 62,078 (10th Cir. 1977) (real estate broker); Universal Serv. v. Central Waste Sys., 1977-1 Trade Cas. ¶ 61,244 (S.D. Ind. 1977) (garbage haulers).

115. 1977-1 Trade Cas. ¶ 61,244 (S.D. Ind. 1977).

116. *Id.* at 70,723-724. The court did not mention whether the plaintiff brought any out-of-state supplies.

117. *Id.*

118. *See* notes 71-72 *supra* and accompanying text.

119. *See* note 109 *supra.*

120. 1978-2 Trade Cas. ¶ 62,341 (5th Cir. 1978).

121. *See* notes 111-12 *supra* and accompanying text.

122. The district court dismissed the case under Rule 12(b)(6) for failure to state a claim. Although the Fifth Circuit affirmed the dismissal, it did so under Rule 12(b)(1), claiming a lack of subject matter jurisdiction. *See* note 99 *supra. See generally* Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 890-97 (3d Cir. 1977).

123. 1978-2 Trade Cas. at 76,050. The plaintiffs also contended that allegations of per se violations, such as price fixing, give rise to a presumption of a substantial effect on commerce. The basis of this argument probably lies in the theory advanced by Professor

guished *Goldfarb*, however, by ruling that real estate brokers, unlike lawyers, constitute an incidental rather than an integral part of the interstate commerce of title insurance and realty financing and thus could not substantially effect interstate commerce.[124] The court concluded by rejecting the plaintiffs' request for a trial on the merits and thus denied them the opportunity to more fully develop their jurisdictional assertions. Although the court noted that the "dazzling complexity of antitrust litigation rarely commends dismissal in advance of trial," it balanced this concern against the financial hardships imposed on defendants in antitrust trials.[125]

VI. Analysis of the Jurisdictional Requirement

The decisions that have applied a narrow judicial construction to the Sherman Act's jurisdictional requirement have supported this approach on several grounds. One argument is that there must be some limit on the intrusiveness of Sherman Act regulation because every enterprise, however local, inevitably has some effect upon the flow of interstate commerce.[126] This narrow approach is also justified on the ground that our nation is experiencing a growing spirit of federalism manifested at all levels of judicial and legislative decisionmaking.[127] This spirit is fueled by the realization that state processes, including state antitrust laws, are often available to combat local anticompetitive conduct. Finally, these decisions find judicial support for their restrictive interpretation of the jurisdictional reach of the Sherman Act from the series of Supreme Court cases that require the alleged anticompetitive act in question have a "substantial" effect upon interstate commerce.[128] It is suggested that this requirement cannot be met if the anticompetitive act

Areeda who notes that "[i]f certain conduct be held within the antitrust ban because of its potential for harm, regardless of demonstrated harm in any particular case . . . it [is] inconsistent simultaneously to require proof of effects to satisfy the statute's jurisdictional test." P. Areeda, Antitrust Analysis 122 (2d ed. 1974). Citing Professor Areeda, the Seventh Circuit established a reduced jurisdictional threshhold for per se cases in an alternative holding in United States v. Finis P. Ernest, Inc., 509 F.2d 1256, 1260 (7th Cir. 1975). The *McLain* court rejected this argument, however, observing that the per se rule relates to the merits of a claim by conclusively establishing the unreasonableness of a particular restraint and this principle does not eliminate the need for a jurisdictional determination of whether a restraint sufficiently affects interstate commerce. 1978-2 Trade Cas. at 76,051.

124. 1978-2 Trade Cas. at 76,052-053. The court adopted its "incidental" and "integral" language from United States v. Yellow Cab Co., 332 U.S. 218, 231-33 (1947). *See* notes 34-35 *supra* and accompanying text. In discussing the jurisdictional requirements of the Sherman Act, the court did not mention the *Rex Hospital* decision.

125. 1978-2 Trade Cas. at 76,053. *But see* note 104 *supra*.

126. Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 526 (9th Cir. 1972).

127. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976). A similar conviction is expressed in the Revenue Sharing Act, 31 U.S.C. §§1221-1265 (1976).

128. *See* notes 38, 52, 91, 95, 99 and 103 *supra* and accompanying text.

causes only a remote or incidental effect upon the flow of interstate commerce.

Despite these arguments, this narrow view of the scope of the Sherman Act must be rejected in favor of a broad reading of the Act's jurisdictional requirements. The commerce power should not be an inconstant variable, vulnerable to the subjective, ad hoc interpretations of the courts, but rather should be changed only by the general progression of federal authority over a period of time.[129] Its application and scope should be identical under various statutes unless Congress has specifically stated otherwise.[130] No evidence of legislative intent exists to suggest that Congress intended to limit the jurisdictional reach of the Sherman Act to less than the full extent of congressional regulatory power.[131] Moreover, in contrast to the more stringent jurisdictional language of the Clayton and Robinson-Patman Acts,[132] the Sherman Act is worded broadly, suggesting that Congress intended to apply the Act in the most comprehensive manner possible. Congress' recent effort to expand the scope of the Federal Trade Commission Act by altering its jurisdictional language so that it coincides with that of the Sherman Act[133] lends further support to this broad interpretation.

Nor can proponents of a narrow jurisdictional approach hide behind the sporadic resurgence of federalism or the claim that state antitrust laws provide sufficient protection for injured businesses and individuals. Although nearly all states have some form of antitrust law, the content of these laws varies greatly.[134] Furthermore, even if the state has a detailed antitrust statute, numerous factors exist that prevent its full enforcement. These factors include insufficient legislative appropriations; lack of trained, full-time antitrust personnel; cumbersome remedies and sanctions; the fear of many state legislators that vigorous antitrust enforcement will drive business from the state; and the forceful opposition of local businessmen to meaningful state reform.[135] A broad interpretation of the

129. Note, *Portrait of the Sherman Act as a Commerce Clause Statute,* 49 N.Y.U. L. REV. 323, 336-37 (1974).

130. *See* notes 7-15 *supra* and accompanying text.

131. In fact, during debate over the Sherman Act in the House, Representative Stewart remarked: "The provisions of this trust bill are just as broad, sweeping and explicit as the English language can make them to express the power of Congress over this subject under the Constitution." 21 CONG. REC. 6314 (1890).

132. *See* note 15 *supra.*

133. *Id.*

134. *See* Fellmoth & Papageorge, *A Treatise on State Antitrust Law and Enforcement,* 892 ANTITRUST & TRADE REG. REP. (BNA) 1, 24-29 (Supp. 1978); Rubin, *Rethinking State Antitrust Enforcement,* 26 U. FLA. L. REV. 653, 696-99 (1974); Wood, *Resurgence of State Antitrust Action: Prices and Public Awareness,* 9 ANTITRUST L. & ECON. REV. 41, 41-43 (1977).

135. Rubin, *supra* note 134 at 698-99. In 1977, for example, the combined annual state

Sherman Act's jurisdictional requirements not only provides for a uniform application of federal law and the well-established legal precedent supporting it, but also provides plaintiffs with the liberal discovery[136] and class action provisions[137] of the Federal Rules of Civil Procedure.

Admittedly, nearly every economic act in our interconnected national economy will have some effect on the flow of interstate commerce. Rather than support a narrow approach, however, this truism justifies applying the Sherman Act to the full extent of congressional commerce power. The denial of Sherman Act protection merely because a court has arbitrarily determined that an alleged anticompetitive act will have a remote or incidental effect upon interstate commerce can only lead to a myriad of inconsistent decisions that will confuse future courts and practitioners alike as to the jurisdictional reach of the Sherman Act. Instead, the courts should acknowledge the economic realities of our interrelated national economy and broadly apply the Sherman Act whenever an alleged restraint has an effect on the flow of interstate commerce.

Based on this analysis, the recent lower court decisions that have restrictively applied the jurisdictional provisions of the Sherman Act[138] can be criticized on several grounds. In all of these cases, the courts have apparently ignored the significance of the long line of Supreme Court decisions, beginning with *Mandeville Farms* and culminating in the recent *Goldfarb* and *Rex Hospital* opinions, that have expansively interpreted the jurisdictional reach of the Sherman Act. These lower court decisions fail to provide support from the legislative history of the Sherman Act or from other Supreme Court decisions that would rebut the impact of the *Mandeville Farms-Rex Hospital* line of cases. Moreover, in those cases in which the courts have used the jurisdictional requirement as a tool to dismiss complaints that are trivial or lack substantive merit,[139] the courts should be criticized for misusing the jurisdictional dismissal. Courts should deal with the substantive merits of a case directly rather than under the pretense of a jurisdictional determination. Finally, the *McLain*[140] court should be criticized for ignoring the

antitrust budgets were estimated at not more than $7,000,000. The state employed, in the aggregate, fewer than 100 full-time antitrust attorneys. This compares with a legal staff of 442 and an annual budget of over $22,000,000 for the federal Justice Department's Antitrust Division and more than 200 attorneys and a yearly budget of $20,000,000 for the FTC's antitrust bureau. Fellmoth & Papageorge, *supra* note 134 at 42-43.

136. FED. R. CIV. P. 26-37.

137. FED. R. CIV. P. 23(b)(3).

138. *See* notes 113-25 *supra* and accompanying text.

139. *See* note 113 *supra* and accompanying text.

140. *See* notes 120-25 *supra* and accompanying text.

economic realities of the real estate business by suggesting that the securing of home financing and title insurance from out of state sources would not sufficiently affect interstate commerce. The court's use of such terms as "incidental" and "integral" is comparable to the "indirect" or "remote" language of previous lower court decisions and serves only to confuse the issue at hand by cloaking the matter in vague language.[141]

Although the Supreme Court's opinion in *Rex Hospital* provides the impetus for an expansive application of the Sherman Act's jurisdictional requirement, it left unanswered one final question concerning the ultimate reach of the Act into local activities. In describing the breadth of the Sherman Act, the Court in one instance borrowed language from the earlier *Mandeville Farms* decision and stated that the alleged restraint must have a "substantial" effect upon interstate commerce.[142] Unfortunately, the term "substantial" is quite vague and has been interpreted to mean "real, true, not imaginary," or "belonging to or having substance," and even "of considerable size, large."[143] Several lower courts that have restrictively applied the jurisdictional requirement of the Sherman Act have construed this language from the *Rex Hospital* case to require a direct and large impact on interstate commerce.[144] The *Rex Hospital* decision, on the other hand, broadly defined the term "substantial," noting that the effect of the alleged restraint may be indirect and need not cause business failure or alter market price.[145] The Court did not specifically state, however, how minimal the effect can be or whether it must be of a quantifiable nature.

In view of the expansive tone of the Supreme Court's recent decisions, future courts should broadly apply the jurisdictional language of the Sherman Act to all economic activities. Once the plaintiff has alleged that the restraint in question will have a real effect upon interstate commerce, the court should presume that the restraint will have a sufficient impact upon interstate commerce to satisfy the jurisdictional requirement of the Act. Only if the defendant can show that the effect is truely de minimus should the court dismiss the action on jurisdictional grounds.[146] Although the use of

141. The "incidental" and "integral" terms originated in United States v. Yellow Cab Co., 332 U.S. 218 (1947). *See* notes 34-36 *supra* and accompanying text. This case was the last decision by the Supreme Court to dismiss a Sherman Act complaint on jurisdictional grounds and was decided before the Court developed the broad "affecting commerce" test in *Mandeville Farms.*

142. *See* note 99 *supra* and accompanying text.

143. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1817 (1964).

144. *See* notes 113-19 *supra* and accompanying text.

145. *See* note 104 *supra* and accompanying text.

146. Unlike the *Universal Services* decision that dismissed a Sherman Act complaint

a "presumptive effects" test may be arbitrary and lack specific guidelines, it is preferable over a standard based on a fixed dollar amount of interstate commerce that must be reinterpreted or discarded in light of changing economic realities. Moreover, a "presumptive effects" test is in line with Congress' desire to prohibit anticompetitive conduct through full use of its constitutional power.

VII. CONCLUSION

Over the past fifty years, plaintiffs have called upon the federal judiciary to deal with antitrust disputes of an increasingly local nature. Although the courts have responded by generally broadening the range of activities which satisfy the substantive elements of the Sherman Act, their approach to the jurisdictional requirement of the statute has been far from consistent. As a matter of statutory construction, this inconsistency, when compared to the expansive jurisdictional approach applied to other statutes based on the commerce clause, is not justified, at least in the absence of a congressional intention to limit the reach of the Sherman Act.

The Supreme Court has recently attempted to reduce some of the confusion in this area by rendering a series of decisions that broadly construe the jurisdictional scope of the Sherman Act. Despite these decisions, several lower courts have continued to narrowly interpret the jurisdictional requirement of the Act. In view of the economic realities of our interrelated economy, future courts should broadly apply the Sherman Act to local activities in order to effectively implement the Act's provisions.

ROBERT D. ECKINGER

on the grounds that the alleged effect on interstate commerce was de minimus despite the fact that over $18,000 worth of interstate business was affected, this suggested approach would require that only a truly insignificant amount of interstate commerce could be affected if the complaint was to be dismissed on jurisdictional grounds.