University of Dayton Law Review

Volume 11 | Number 1 Article 5

10-1-1985

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Recommended Citation
Utt, Daniel P. (1985) "Group Boycotts by Health Care Professionals: Is the Per Se Rule an Appropriate Standard of Antitrust Analysis under the Sherman Act?," *University of Dayton Law Review*: Vol. 11: No. 1, Article 5.
Available at: https://ecommons.udayton.edu/udlr/vol11/iss1/5

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COMMENT

GROUP BOYCOTTS BY HEALTH CARE PROFESSIONALS: IS THE *PER SE* RULE AN APPROPRIATE STANDARD OF ANTITRUST ANALYSIS UNDER THE SHERMAN ACT?

I. INTRODUCTION

Since the United States Supreme Court decided a decade ago in *Goldfarb v. Virginia State Bar*[1] that the so-called "learned professions" were not exempt but were subject to the constraints imposed by the Sherman Act,[2] controversy has not subsided over the scope of federal antitrust liability for professionals acting in concert. Providing fuel for this controversy are continued Supreme Court indications that the learned professions *may* be treated differently in the antitrust equation than are other traditional business and commercial entities.[3]

The demise of the "implied" exemption for the learned professions has resulted in a significant number of recent antitrust actions against health care practitioners and their professional associations under section 1 of the Sherman Act. Typical among the claims are those of excluded health care professionals who contend that the conduct of their peers in denying them admitting privileges on hospital medical staffs, or membership status in professional associations, constitutes actionable anticompetitive conduct. In response, defendant health care professionals are advancing "innovative" arguments to justify their exclusionary conduct based upon Supreme Court indications that the learned professions *may* receive different antitrust treatment. Common among the defendants' justifications are that professional self-regulation and other ethical "watchdog" activities should receive merited consideration in the antitrust equation.

Notwithstanding the appeal of the justifications offered by defendant health care professionals, experience gained from traditional anti-

1. 421 U.S. 773 (1975). *See infra* text accompanying notes 30–39.

2. Section 1 of the Sherman Act provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1982).

3. For an analysis of the Supreme Court decisions indicating that the learned professions *may* receive different antitrust treatment, see *infra* text accompanying notes 30–64.

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trust analysis of the conduct of business entities and trade associations demonstrates that such self-regulatory activity is not free from anticompetitive abuses. In fact, it is clear that even health care professionals engaging in exclusionary conduct have competitive interests at stake beyond merely ensuring the competency of their fellow practitioners.[4]

This factual scenario gives rise to the fundamental issue to be addressed by this comment: When, if ever, should learned professionals acting in concert receive different antitrust treatment than that accorded other business and commercial entities under section 1 of Sherman Act? Should justifications that health care professionals are merely acting in the general public's interest in enforcing ethical norms designed to ensure the competency of their members be enough to remove a practice from *per se* antitrust illegality to one analyzed under the rule-of-reason?[5] In order to satisfactorily resolve this important contemporary issue, this comment will focus on the group boycott activity of hospital medical staffs and health care professional associations in denying fellow practitioners and potential competitors desired privileges and status. Importantly, plaintiffs challenging such exclusionary conduct under section 1 of the Sherman Act are having success. The lower federal courts have not, however, reached unanimity regarding the appropriate standards for antitrust analysis.[6]

In analyzing the controversial group boycott activity of health care professionals, it will first be useful to gain an understanding of exactly

4. For a discussion of the tactics employed by the American Medical Association in preserving its so-called "monopoly" in medical care against the other school of medical thought, osteopathy, see Blackstone, *The A.M.A. and the Osteopaths: A Study of the Power of Organized Medicine*, 22 ANTITRUST BULL. 405 (1977).

5. When analyzing restraints of trade challenged under § 1 of the Sherman Act, the courts utilize two standards of antitrust review: The rule-of-reason and the *per se* approaches. "[T]he rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 343 (1982). "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (Brandeis, J.). In making this determination under the rule-of-reason, "the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." *Id.*

Certain types of pernicious restraints are automatically condemned under the *per se* rule when "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it . . . ." *Maricopa*, 457 U.S. at 344. Accordingly, "[o]nce established, *per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials . . . ." Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1976). For further discussion on the *per se* and the rule-of-reason methods of antitrust analysis, see *infra* note 42.

6. *See infra* text accompanying notes 129-57.

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what is at stake for the excluded health care practitioner. This comment will then review and analyze relevant Supreme Court precedents that are pertinent to the learned professions, group boycotts, and other issues arising under section 1 of the Sherman Act when the exclusionary and concerted conduct of health care professionals is challenged. Analysis will then focus on three recent decisions by federal courts of appeals involving section 1 Sherman Act challenges to group boycotts by health care professionals. Finally, this comment will propose an appropriate standard of antitrust review for the exclusionary conduct of health care professionals in light of the relevant and contemporary Supreme Court and lower federal court pronouncements on this issue.

The proposed standard of antitrust review will find as its basis the conclusion to be reached by this comment: Group boycotts by health care professionals generally involve different considerations than the similar practices of traditional commercial entities. Consequently, it is urged that group boycotts by medical professionals ought not be uniformly and automatically condemned as *per se* illegal. Instead, it is asserted that the self-regulatory, competency-based justifications offered by health care professionals for their exclusionary conduct raise sufficiently delicate questions to remove the conduct from *per se* condemnation. Accordingly, courts should apply the rule-of-reason balancing approach to determine whether the challenged conduct, considered in light of the proffered self-regulatory justifications, has an overall pro-competitive effect. The position of this comment is that such a rule-of-reason balancing analysis of the conduct of health care professionals is worthy of acceptance, even when the necessary deference to Supreme Court precedent condemning group boycotts as *per se* illegal is considered.

II. The Scope of the Problem: Interests of the Excluded Professional

Anticompetitive behavior aimed at professionals takes a variety of forms, ranging from tying arrangements [7] and price-fixing agreements,[8] to exclusive contracts[9] and group boycotts.[10] Group boycotts or con-

7. *See, e.g.*, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S. Ct. 1551 (1984). A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." Northern Pac. Ry. v. United States, 356 U.S. 1, 5–6 (1958) (footnote omitted).

8. *See, e.g.*, Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982) (maximum fee schedules agreed upon by foundation member physicians were *per se* illegal); Pennsylvania Dental Ass'n v. Medical Serv. Ass'n, 745 F.2d 248 (3d Cir. 1984) (challenge to prepaid dental service program), *cert. denied*, 105 S. Ct. 2021 (1985).

9. *See, e.g.*, Konik v. Champlain Valley Physicians Hosp. Medical Center, 733 F.2d 1007 (2d Cir.) (exclusive contract between hospital and firm of anesthesiologists challenged under numerous antitrust theories), *cert. denied*, 105 S. Ct. 253 (1984).

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10. *See* Weiss v. York Hosp., 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1777

certed refusals to deal with health care professionals are particularly interesting because such conduct can range from the denial of hospital admitting privileges to a physician or other practitioner, to the denial of membership status in a professional association. What is at stake for the excluded practitioner is often his or her livelihood because denials of staff privileges or association membership status place the professional at a competitive disadvantage.

With respect to hospital admitting privileges,[11] a physician or other health care practitioner faces a number of competitive disadvantages when denied the use of a hospital's services and equipment. First, a practitioner without admitting privileges will find the need to refer patients to physicians with admitting privileges in order to adequately meet the needs and demands of his or her patients.[12] Not only does the necessity of making a referral result in a loss of revenue to the practitioner for the current services he cannot supply, but the excluded practitioner also faces the risk of permanently losing a patient to a practitioner with admitting privileges who obtained the referral.[13] Second,

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(1985); Hayden v. Bracy, 744 F.2d 1338 (8th Cir. 1984); Kreuzer v. American Academy of Periodontology, 735 F.2d 1479 (D.C. Cir. 1984); Wilk v. American Medical Ass'n, 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2398 (1984); Mishler v. St. Anthony's Hosp. Sys., 694 F.2d 1225 (10th Cir. 1981); Virginia Academy of Clinical Psychologists v. Blue Shield, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981); McElhinney v. Medical Protective Co., 549 F. Supp. 121 (E.D. Ky. 1982); Pao v. Holy Redeemer Hosp., 547 F. Supp. 484 (E.D. Pa. 1982); McDonald v. Saint Joseph's Hosp. of Atlanta, Inc., 524 F. Supp. 122 (N.D. Ga. 1981); Robinson v. Magovern, 521 F. Supp. 842 (W.D. Pa. 1981), *aff'd mem.*, 688 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 971 (1982); Malini v. Singleton & Assocs., 516 F. Supp. 440 (S.D. Tex. 1981); Feldman v. Jackson Memorial Hosp., 509 F. Supp. 815 (S.D. Fla. 1981), *aff'd*, 752 F.2d 647 (11th Cir.), *cert. denied*, 105 S. Ct. 3504 (1985).

11. Generally, hospital admitting privileges refer to the right of a physician or other practitioner to admit patients and to direct the care given to them at a particular hospital, with such privileges usually limited to matters within the practitioner's medical specialty. Dolan & Ralston, *Hospital Admitting Privileges and the Sherman Act*, 18 HOUS. L. REV. 707, 709–10 (1981). More specifically, the term " 'medical staff privilege' refers to the right of a physician or dentist to participate in a hospital's governing structure as a member of its medical staff, and the term 'clinical privilege' refers to any health care practitioner's right to perform medical procedures within the hospital." Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 CAL. L. REV. 595, 596 n.1 (1982). Unless indicated otherwise in this comment, the terms "admitting privilege" or "staff privilege" are intended to mean the right of a physician to admit patients and to participate in the governing structure of a hospital.

12. Dolan & Ralston, *supra* note 11, at 713–14. Admitting privileges will often be imperative for a practitioner who relies on high technology equipment for diagnostic and recuperative functions in rendering medical services. *Id.* at 713.

13. *Id.* at 714. Additionally, the denial of admitting privileges indirectly affects the consumer-patient's potential medical costs and freedom of choice as to a particular practitioner. *Id.* at 719–21.

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the physician who is denied admitting privileges faces an even greater disadvantage in that the absence of staff privileges often carries the negative connotation that the person is a "second-class practitioner."[14] This stigma of inferiority certainly affects a competent physician's competitive position when it is apparent that a potential patient has numerous practitioners to choose from.[15] Finally, another disadvantage faced by the excluded practitioner is that of foregone business opportunities because professionals with staff privileges often obtain new business while performing services in a hospital through referrals from other physicians, and from patients who enter a hospital with no chosen physician.[16]

A comparable list of competitive disadvantages also faces the practitioner who is denied membership status in a professional association of his or her peers. First, a practitioner who is denied full membership status in a medical, dental, or other professional association will often lose the referral business that members provide one another through devices such as membership listings.[17] Additionally, the professional who is denied membership status obviously faces the "second-class practitioner" stigma that also accompanies the denial of hospital admitting privileges.

In sum, it is clear that competent practitioners who otherwise meet the statutory requirements to practice in a particular profession will, nevertheless, be placed at a competitive disadvantage if denied admitting privileges or associational status that other members of the particular profession have secured. This dilemma raises the paramount issue confronting current antitrust analysis of the activities of health care professionals and suggests the balancing of two competing considerations. Namely, can the federal antitrust laws be utilized to eliminate professional group boycotts motivated by anticompetitive animus, while still preserving legitimate professional self-regulation aimed at maintaining and improving the competency as well as the professional conduct of members of a particular profession?

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14. *Id.* at 714.

15. There are numerous statistics supporting the proposition that if there is not already a large supply of physicians bordering on market saturation, there will be a vast increase in the per capita ratio of physicians to population by 1990. *See* Leibenluft & Pollard, *Antitrust Scrutiny of the Health Professions: Developing a Framework for Assessing Private Restraints*, 34 VAND. L. REV. 927, 931 (1981). *See also* Alpert & McCarthy, *Beyond Goldfarb: Applying Traditional Antitrust Analysis to Changing Health Care Markets*, 29 ANTITRUST BULL. 165, 183 (1984) (estimates are that the physician supply will increase by 44% between 1978 and 1990).

16. Dolan & Ralston, *supra* note 11, at 714.

17. *See, e.g.*, Kreuzer v. American Academy of Periodontology, 735 F.2d 1479, 1484 (D.C. Cir. 1984) (evidence demonstrated that membership listings of professional associations are utilized by members to facilitate patient referrals).

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The scope of the professional group boycott dilemma can best be illustrated by reviewing a contemporary case involving a group boycott by physicians with hospital admitting privileges against a doctor seeking such privileges. In *Wolf v. Jane Phillips Episcopal-Memorial Medical Center*,[18] an osteopathic physician[19] brought an action under section 1 of the Sherman Act alleging that the board of trustees of two hospitals, and their respective medical staffs, had acted in concert in refusing to grant the physician admitting privileges. It was clear that the plaintiff in this action was faced with a distinct competitive disadvantage because the defendant medical center managed and controlled both hospitals in the community where the physician practiced.[20] However, the physician was allegedly denied admitting privileges after repeated applications solely because of his status as an osteopathic physician, more commonly known as a D.O.[21] It is noteworthy that the medical staffs of both hospitals were comprised solely of allopathic physicians, more commonly known as M.D.'s.[22]

More important is the fact that the osteopath in question sought admitting privileges as a general practitioner. Today, it is well established that there is no qualitative difference in the medical skill, expertise, or competence of general practice D.O.'s as compared to that of general practice M.D.'s.[23] Thus, these facts, as well as the fact that the hospitals in question had not granted admitting privileges to any D.O.'s, provided persuasive support for the argument that the practice in question was simply a group boycott by M.D.'s against D.O.'s in general, which was not based on competency considerations, but was instead grounded on the anticompetitive animus of the M.D.'s on the defendant's medical staffs.

18. 513 F.2d 684 (10th Cir. 1975).

19. Osteopathic physicians are members of the school of medical thought known as osteopathy, which is "[a] system of complete medical practice based on the maintenance of proper relationships among the various parts of the body. Osteopathic physicians, licensed in all 50 states, employ manipulative therapy, drugs, surgery, x-ray, and all other accepted therapeutic methods in the treatment of disease and injury." BLACK'S LAW DICTIONARY 992 (5th ed. 1979). Osteopathic physicians signify their degree as D.O. The traditional school of medical thought is that of allopathy. Allopathic physicians signify their degree as M.D. For a more detailed discussion on osteopathic and allopathic physicians, see Blackstone, *supra* note 4, at 406–10.

20. *Wolf*, 513 F.2d at 685.

21. *Id.*

22. *Id.* The bylaws of many medical staffs and hospitals prohibit the granting of admitting privileges to osteopathic physicians. *See, e.g.*, Weiss v. York Hosp., 745 F.2d 786, 794 (3d Cir. 1984) (both York Hospital's corporate charter and the medical staff's bylaws barred D.O.'s from obtaining admitting privileges until 1974), *cert. denied*, 105 S. Ct. 1777 (1985).

23. After reviewing the evidence, Professor Blackstone arrived at the conclusion that the "quality of osteopaths has for a long time been comparable to that of M.D.'s." Blackstone, *supra* note 4, at 425. In fact, all 50 states currently license osteopathic physicians to practice medicine. *See supra* note 19.

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Yet, in affirming the dismissal of the plaintiff's claim—that the questioned denial of admitting privileges was a *per se* illegal group boycott[24]—the opinion of the Court of Appeals for the Tenth Circuit demonstrates the legal uncertainties faced by health care professionals relying on the Sherman Act for a private remedy in response to the exclusionary conduct of their peers. Not only did the physician face the now outdated contention that the learned professions are exempt from the Sherman Act,[25] but the plaintiff also faced the jurisdictional argument that the defendant's provision of hospital services did not substantially affect interstate commerce.[26] In fact, the *Wolf* court avoided analysis of the so-called "learned profession" exemption contention by dismissing the osteopath's complaint for failure to satisfy the interstate commerce requirement.[27]

The *Wolf* case is particularly relevant to the issues that will be addressed by this comment. First, the case illustrates the fact that group boycotts by health care professionals are not always premised on legitimate "public interest" justifications such as the competency of a practitioner; health care professionals often do have competitive interests at stake in denying a beneficial, desired status to fellow practitioners.[28] Second, even when a court reaches and demonstrates a willingness to analyze the justifications offered by health care professionals for their boycott of a practitioner, the excluded professional will, nevertheless, have to first satisfy a number of legal hurdles before the Sherman Act will provide an attractive private remedy.[29] With this background

24. *Wolf*, 513 F.2d at 685.

25. *Id.* at 686. For a discussion on the demise of the "learned profession" exemption, see *infra* text accompanying notes 30–39.

26. *Wolf*, 513 F.2d at 686. For a discussion of the interstate commerce requirement, see *infra* text accompanying notes 115–28.

27. *Wolf*, 513 F.2d at 688.

28. In the hospital admitting privilege context, once physicians with privileges realize the economic advantages of receiving referrals, rather than making them, as well as not being considered "second-class practitioners," such physicians will also recognize that "[t]hese advantages diminish in direct proportion to the number of other physicians who enjoy similar privileges. Therefore, the decision to grant privileges in one's own specialty or subspecialty involves the diminution of one's own competitive advantage." Dolan & Ralston, *supra* note 11, at 715. Moreover, as profit maximizers, health care professionals are presumably aware of the fact that "[c]onventional economic wisdom predicts that as the supply of practitioners in a relevant specialty area increases, the price of services will decrease if demand remains constant." *Id.* at 716. Some commentators assert, however, that the health care industry does not respond to the normal forces of supply and demand. *See* Leibenluft & Pollard, *supra* note 15, at 930. Nevertheless, these commentators do concede that health care professionals will respond to competitive pressures by "circling the wagons" to fend off potential competition. *Id.* at 931. Furthermore, the existence of competing medical ideologies, such as that between osteopaths and allopaths, often complements the economic realities and results in exclusionary tactics by members of the respective professions. *See* Blackstone, *supra* note 4, at 411–17.

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29. These hurdles, which can essentially be inferred from the language of § 1 of the Sher-

in mind, it will be appropriate to analyze these legal obstacles through a review of Supreme Court decisions dealing with the learned professions, and through an analysis of the Court's precedent in the group boycott arena.

III. THE SUPREME COURT PRECEDENTS

A. *The Demise of the So-Called "Learned Profession" Exemption*

Until 1975, the use of the antitrust laws, as a private remedy to challenge the anticompetitive practices of professionals, was not effective. Learned professionals were essentially deemed immune from antitrust liability because the providing of "services" was not considered "trade or commerce" and was, therefore, not within the reach of the Sherman Act.[30] Moreover, another justification often asserted for this "implied" immunity from the Sherman Act was that the learned professions did not have as their objective the enhancement of profits, but instead existed to serve the public by providing important and necessary services.[31] However, in a case where both of the above justifications were utilized in reaching the holding that the practice of law was not trade or commerce within the meaning of the Sherman Act,[32] the Court of Appeals for the Fourth Circuit directly placed before the Supreme Court the "learned profession" exemption issue in *Goldfarb v. Virginia State Bar.*[33]

man Act, require the plaintiff to prove: (1) concerted action, (2) an unreasonable restraint on trade, and (3) a substantial effect on interstate commerce. *See supra* note 2. Private persons now have standing to sue under the Sherman Act for treble damages for injury to their business pursuant to § 4 of the Clayton Act. 15 U.S.C. § 15 (1982).

30. Thus, as stated by the Court of Appeals for the Fourth Circuit: "[I]f a group of doctors conspire to restrain the practice of another doctor there is no Sherman Act violation because that which is restrained (*i.e.*, the practice of a learned profession, medicine) is neither trade nor commerce." Goldfarb v. Virginia State Bar, 497 F.2d 1, 15 (4th Cir. 1974), *rev'd*, 421 U.S. 773 (1975).

31. *Id.* at 14.

32. *Id.* at 15.

33. 421 U.S. 773 (1975). *Goldfarb* involved a challenge to a bar association's minimum fee schedule for real estate services. This case was not, however, the first opportunity presented to the Supreme Court for dealing with the "learned profession" exemption issue. In American Medical Ass'n v. United States, 317 U.S. 519 (1943), the Court faced a group boycott by the AMA and its members against a prepaid medical service corporation that sought to employ physicians on a full-time, risk-sharing basis. However, the Court avoided the "learned profession" exemption question by focusing on the object of the boycott, Group Health, which the Court characterized as "a membership corporation engaged in business or trade." *Id.* at 528. Moreover, nine years later, the Court again faced a group boycott by physicians of prepaid group practices in United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952). Once again, the Court avoided the "learned profession" exemption issue by simply finding that the lower court was correct in not issuing an injunction in 1949 for any behavior of the defendants that may have occurred in 1941. *Id.* at 332–34. Nevertheless, the Court did issue some important dictum that has carried over to its more recent decisions in asserting that the usual forms of business competition could be "demoralizing

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In attacking this issue, the Supreme Court noted that there was a "heavy presumption against implicit exemptions" to the Sherman Act; in fact, this Act contained no legislative history supporting such a broad implied "learned profession" exemption to the extensive, competition-oriented mandate of the statute.[34] Therefore, in rejecting the argument for such an implied exemption to the reach of the Sherman Act, the Court stated, "The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act . . . nor is the public service aspect of professional practice controlling in determining whether [section] 1 includes professions."[35] After rejecting the "public service" justifications upon which the Fourth Circuit relied, the Supreme Court reached the controlling issue of whether legal services could be considered "trade or commerce." The Court, however, had little difficulty in holding that "the exchange of such a service for money is 'commerce' in the most common usage of that word."[36]

In holding that the practice of law was within the reach of the Sherman Act and condemning the price-fixing arrangement at issue,[37] the Supreme Court, nevertheless, introduced uncertainty into its decision through the use of a footnote.[38] Specifically, the Court stated in its now infamous footnote 17:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be *unrealistic* to view the practice of professions as interchangeable with other business activities, *and automatically to apply to the professions antitrust concepts which originated in other areas*. The *public service aspect*, and other features of the professions, *may* require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, *be treated differently*. We intimate no view on any other situation than the one with which we are confronted today.[39]

This strong statement by the Court makes it apparent that in contexts *other* than price-fixing, the Court considered it to be "unrealistic," con-

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to the ethical standards of a profession." *Id.* at 336.

34. *Goldfarb*, 421 U.S. at 787–88.

35. *Id.* at 787.

36. *Id.* at 787–88. It is noteworthy that *Goldfarb* was a unanimous decision by the Court with Justice Powell not participating in the case.

37. *See id.* at 788, 793.

38. In commenting on this uncertainty, one commentator has stated: "I suppose the inclusion of a footnote is understandable. After all, Supreme Court justices are people too, a rather basic point we all sometimes forget, and the death of this traditional concept may not have come easily to them." Sims, *Maricopa: Are the Professions Different?*, 52 ANTITRUST L.J. 177, 179 (1983).

39. *Goldfarb*, 421 U.S. at 788 n.17 (emphasis added).

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sidering the "public service aspect" of a particular profession, to treat the activities of professionals as solely motivated by the objective of traditional business entities—profitability. But, in providing this dictum, the Court did not offer any specific guidance as to when and how the learned professions "may" be treated differently than other business entities in the antitrust equation.

It is common knowledge in legal circles that the interpretation of Supreme Court footnotes is a matter for litigants—the *Goldfarb* footnote certainly has been no exception. The Court was forced to deal with the breadth of its dictum in *National Society of Professional Engineers v. United States*,[40] the Supreme Court's next major case involving a learned profession. In *National Society of Professional Engineers (NSPE)*, the Court was faced with the issue of whether the lower federal courts should have considered the merits behind the professional association's canon of ethics prohibiting competitive bidding by its member engineers.[41] The lower courts had refused to consider the defendant's argument—that its canon prohibiting competitive bidding was necessary to preserve the "quality of engineering"—because of the view that this professional association regulation constituted a "tampering with the price structure" and was, therefore, unlawful on its face; in antitrust terminology, the practice in question constituted *per se* illegal price-fixing.[42] The engineering society, however, argued in substance that under the *Goldfarb* footnote, its ethical canon should be considered reasonable because it protected the public from deceptive engineering practices fostered by competitive bidding.[43] Thus, the pro-

40. 435 U.S. 679 (1978).

41. *Id.* at 681. The Court recognized engineering as an "important and learned profession." *Id.*

42. *Id.* at 685–86. The approach taken by the lower federal courts in *NSPE* exemplifies the essence of the *per se* method of antitrust analysis. Specifically, when the questioned conduct is found to fit within a prohibited category because of its pernicious effect on competition, the court's inquiry ends, and it refuses to consider any defense or justification based on the reasonableness of the defendant's conduct. *See* Leibenluft & Pollard, *supra* note 15, at 937. *See also supra* note 5. To date, the practices falling within the forbidden category and "which the courts have heretofore deemed unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958) (citations omitted). *See also* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S. Ct. 1551, 1556 n.10 (1984).

The other complimentary branch of antitrust analysis is that based on the rule-of-reason which involves an in-depth analysis of the challenged conduct through consideration of such variables as "the facts peculiar to the business, the history of the restraint, *and the reasons why it was imposed*." *NSPE*, 435 U.S. at 692 (emphasis added). The ultimate determination to be made under the rule-of-reason is "whether the challenged agreement is one that promotes competition or one that suppresses competition." *Id.* at 691. Of course, if the overall effect of the challenged restraint is to suppress competition, it falls under § 1 of the Sherman Act.

43. *NSPE*, 435 U.S. at 687. The *Goldfarb* footnote is reproduced in the text. *See supra* text accompanying note 39.

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fessional association contended that its practice should receive rule-of-reason treatment rather than being condemned automatically as *per se* illegal.

Importantly, in addressing these contentions the Supreme Court affirmed the validity of the reasoning underlying the *Goldfarb* footnote. Although the Court asserted that the cautionary footnote 17 did not create a broad exemption for the learned professions under the guise of the rule-of-reason, the Court did indicate that the nature of competition between professionals and other business entities may differ "significantly," and, therefore, "[e]thical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason."[44]

Nevertheless, after considering the justifications offered by the engineers, *ostensibly* under the rule-of-reason,[45] the Court rejected the use of the proffered ethical canon as an affirmative defense to the price-fixing at issue. Specifically, the Court strongly condemned the engineering society's contention that the presence of price competition in engineering services endangered public safety; in the Court's view, such an argument was "nothing less than a frontal assault on the basic policy of the Sherman Act."[46] Moreover, the Court asserted that the society's contention was untenable under the Sherman Act because "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."[47]

44. *NSPE*, 435 U.S. at 696. Importantly, the Court also indicated that to be upheld under the rule-of-reason, such "ethical norms" could not have any "anticompetitive effect." *See id.* at 696 n.22. *But see infra* note 47.

45. There is uncertainty as to whether the Court was condemning the practice at issue as *per se* illegal, or whether the Court was engaging in a rule-of-reason analysis. The distinction between these two methods of antitrust analysis is important to litigants. *See supra* notes 5 & 42. That the Court condemned the ban on competitive bidding as *per se* illegal is evidenced by the following statement, "*On its face*, this agreement restrains trade within the meaning of § 1 of the Sherman Act." *NSPE*, 435 U.S. at 693 (emphasis added). That the Court gave rule-of-reason treatment to the ethical canon at issue is evidenced by the Court's extensive pronouncement on this method of antitrust analysis. *See id.* at 687–96. Commentators have differing opinions on this issue. *See* Hauvighurst, *Professional Restraints on Innovation in Health Care Financing*, 1978 Duke L.J. 303, 348 n.194; Leibenluft & Pollard, *supra* note 15, at 938; Sims, *supra* note 38, at 179–80; Sullivan & Wiley, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason*, 27 U.C.L.A. L. Rev. 265, 323 (1979). It is apparent that at least three members of the Supreme Court believe that the price-fixing in *NSPE* was condemned as *pe se* illegal. *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 362 (1982) (Powell, J., dissenting, joined by Burger, C.J. & Rehnquist, J.). For further analysis of *NSPE* and *Maricopa*, see *infra* text accompanying notes 50–53.

46. *NSPE*, 435 U.S. at 695. In the Court's view, Congress made the decision that competition was the mandate of the Sherman Act because the philosophy that "competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." *Id.*

47. *Id.* at 696. Although the decision in *NSPE* was not a plurality decision—Justices Stew-

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After the Supreme Court's decision in *NSPE*, it is clear that the *Goldfarb* footnote, offering a basis for different antitrust treatment of the learned professions in at least some situations, *has* continued vitality.[48] Furthermore, the Court did provide some specific guidance for interpreting footnote 17 in that a professional norm cannot be justified through a contention that competition itself is bad for a particular profession; the Court also arguably decided that no differential treatment is forthcoming to professionals engaged in price-fixing.[49] Nevertheless, it is also plausible that the Court in *NSPE* permitted a professional association's ethical canon to be analyzed under the rule-of-reason even though the practice at issue, price-fixing, would normally be considered, automatically, *per se* illegal. Thus, an optimistic argument for the learned professions is that the thrust of *NSPE* is as follows: If a professional association justifies its challenged conduct based on an ethical norm designed to protect the public, the restraint, such as a group boycott, which would normally be considered *per se* illegal, will instead be analyzed under the rule-of-reason to determine whether the overall effect of the practice is pro-competitive.[50] It is apparent that many lower

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art, White, Marshall, and Powell joined Justice Stevens' majority opinion—the concurring opinion of Justice Blackmun, joined by Justice Rehnquist, is important in providing guidance for analyzing professional group boycotts under the Sherman Act. Justice Blackmun refused to adhere to the Court's reasoning insofar as it inferred that "any ethical rule with an overall anticompetitive effect promulgated by a professional society is forbidden by the Sherman Act." *Id.* at 699 (Blackmun, J., concurring). In his view, the *Goldfarb* decision "properly left to the Court some flexibility in considering how to apply traditional Sherman Act concepts to professions long consigned to self-regulation." *Id.* Moreover, Justice Blackmun asserted that he was "not at all certain that the Court le[ft] enough elbowroom for realistic application of the Sherman Act to professional services," because "there may be ethical rules which have a more than *de minimis* anticompetitive effect and yet are important in a profession's proper ordering." *Id.* at 701, 700. Thus, in essence, Justice Blackmun objected to the Court's detailed shaping of the rule-of-reason "to such a narrow last . . . ." *Id.* at 700.

48. As one commentator stated: "[T]he Court kept the coals burning, and invited the continuing efforts to find the free fire zone for the professions that the Supreme Court keeps hinting really does exist somewhere out there." Sims, *supra* note 38, at 180.

49. This statement is, of course, premised on a conclusion that the Supreme Court applied the *per se* branch of antitrust analysis in *NSPE* rather than the rule-of-reason. *See supra* note 45 and accompanying text.

50. In fact, Justice Blackmun provided support for such an argument in his concurring opinion in *NSPE* where, in discussing the *de minimis* anticompetitive effect that may accompany a learned profession's ethical standards, he stated: "A medical association's prescription of standards of minimum competence for licensing or certification may lessen the number of entrants." *NSPE*, 435 U.S. at 700–01 (Blackmun, J. concurring). The fact that the number of entrants in a particular profession is decreased by an ethical norm does not necessarily mean that the overall effect of the ethical standard is to decrease competition; to the contrary, ensuring that medical practitioners, for example, are competent before being granted desired status can serve an overall pro-competitive function by increasing the efficiency and quality of medical care rendered to the ultimate benefit of consumer-patients. *See infra* text accompanying notes 155–56.

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courts have taken the invitation offered by *NSPE*.[51]

That *NSPE* kept the "coals burning" is certain when the arguments raised by the defendants in the Supreme Court's recent decision in *Arizona v. Maricopa County Medical Society*[52] are considered. In *Maricopa*, the specific holding of the Court was that agreements among competing physicians setting the maximum fees they would claim in payment for health services to policy holders of specified insurance plans were *per se* illegal price-fixing contracts.[53] *Maricopa* is important to the instant analysis because of a statement made by the Court in the context of rejecting the physicians' arguments for relief from the *per se* rule condemning maximum, as well as minimum, price-fixing. Specifically, in asserting that the medical profession *could not* be distinguished from any other provider of services simply because the defendants' plan sought to make it easier for patients to pay for services rendered, the Court commented that the price-fixing agreements in question were *not* "premised on public service or ethical norms."[54] Thus, the fact that the Court recited the *Goldfarb* footnote, and noted the *NSPE* "public service or ethical norms" justification as a potential defense in the process of rejecting the defendants' argument for relief from the *per se* rule, leads reasonably to the inference that had the physicians made such an argument, their conduct would have been analyzed under the rule-of-reason.[55]

Although the Supreme Court in *Maricopa* did not add anything substantively to the *Goldfarb* footnote as interpreted in *NSPE*, the Court did keep alive the debate on whether the learned professions may receive different antitrust treatment. The fact that these decisions provide a basis for presenting a tenable argument for different treatment of professionals is further "fueled" by some very recent footnote comments by the Supreme Court in *Jefferson Parish Hospital District No.*

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51. *See infra* text accompanying notes 129–97.

52. 457 U.S. 332 (1982) (Stevens, J.).

53. *Id.* at 335–36. In so holding, the Court reversed the decision of the Court of Appeals for the Ninth Circuit which had utilized the rule-of-reason in analyzing the conduct at issue. *Id.*

54. *Id.* at 349. Also rejected was an argument that the Court should not apply the *per se* rule to the price-fixing at issue because the "judiciary has little antitrust experience in the health care industry." *Id.* As the Court noted, the defendants' "argument should not be confused with the established position that a *new per se* rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged." *Id.* at 349 n.19.

55. One commentator asserts that "the statement in *Maricopa* is just silly . . . ." Sims, *supra* note 38, at 181. However, Mr. Sims does concede that the interpretation of *Maricopa* argued for in the text is plausible because, as he states, "maybe the Court means that the argument that a restraint is justified by an increase in the quality of professional service is a legitimate one which . . . may be successful." *Id.* In sum, even with the differing interpretations of the Court's dictum, one interpretation is unambiguous—the Court kept the "coals burning."

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2 v. Hyde.[56]

In *Jefferson Parish*, the Court held that an exclusive contract between a hospital and a firm of anesthesiologists was not a *per se* illegal tying arrangement and that the contract in question, although it resulted in the denial of admitting privileges to an otherwise qualified anesthesiologist, passed muster under the rule-of-reason.[57] The Court was, however, also cognizant of the fact that the district court "intimated that the principle of per se liability might not apply to cases involving the medical profession."[58] Unfortunately, the Court was not forced to directly decide the correctness of such a blanket rule-of-reason approach, because on appeal, the petitioning hospital and firm of anesthesiologists assumed that "the same principles apply to the provision of professional services as apply to other trades or businesses."[59]

Nevertheless, the Court did provide some important insight regarding the availability of differential treatment for the learned professions by stating that "we have refused to tolerate manifestly anticompetitive conduct simply because the health care industry is involved."[60] In fact, the Court gave a strong indication that it would not offer different treatment to professionals when the challenged restraint was a tying arrangement. Specifically, the Court rejected the view that the legality of a tying arrangement involving medical services turns on "whether it was adopted for the purpose of improving patient care."[61] Thus, in essence, the Court rejected any analysis of tying arrangements in the health care industry based upon an inquiry into whether the arrangement was adopted for a "public service or ethical norms" purpose.

At first glance, these comments by the Supreme Court in *Jefferson Parish* appear to work against the argument that health care profes-

56. 104 S. Ct. 1551 (1984).

57. At issue in *Jefferson Parish* was a challenge to an exclusive contract between the hospital and a firm of anesthesiologists which required that all anesthesiological services for patients of the hospital be performed by this firm. The challenger of this contract was an anesthesiologist who was denied admission to the hospital's medical staff. He alleged that the hospital conditioned its surgical services to those patients who agreed to use only the anesthesiological services provided by the firm and that this practice constituted a *per se* illegal tying arrangement. *Id.* at 1554. The Court refused to classify this particular tying arrangement as *per se* illegal because the hospital did not have sufficient market power to "force" patients to use the services of the contracted anesthesiological firm. *Id.* at 1566. Instead, the Court applied the rule-of-reason to the exclusive contract in question and found that there was no evidence demonstrating that the arrangement had an adverse effect on competition. *Id.* at 1568.

58. *Id.* at 1556 n.12. In fact, the district court had applied rule-of-reason analysis to this apparent *per se* illegal trade restraint, and found the anticompetitive consequences of the contract to be "minimal and outweighed by benefits in the form of improved patient care." *Id.* at 1554.

59. *Id.* at 1556 n.12. In recognizing the petitioners' posture on appeal, however, the Court did cite generally to *NSPE*. *Id.*

60. *Id.* at 1565 n.42.

61. *Id.* at 1565 n.41.

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sionals are entitled to different treatment under section 1 of the Sherman Act than that afforded commercial entities. However, it is necessary to analyze the context in which the Court's statements were made. Specifically, the Court was analyzing an innovative type of tying arrangement, the anticompetitive effects of which occur when the market power of the defendant hospital in the tying product (surgical services and equipment) is used to "force" consumer-patients to purchase the unwanted product (anesthesiological services from the particular firm of anesthesiologists).[62] If anticompetitive "forcing" occurred, consumer-patients would be denied the opportunity to choose a particular anesthesiologist because of their need for this particular hospital's surgical services. Thus, the focus of antitrust analysis was on whether the defendant hospital had sufficient market power to "force" consumer-patients to forego their free choice. Therefore, the presence of any patient care motive underlying the exclusive contract, attacked as a tying arrangement, was irrelevant for analysis of this *particular* trade restraint.

After the *Jefferson Parish* decision, some conclusions can reasonably be made regarding whether the Supreme Court will offer different antitrust treatment to professionals engaged in certain trade practices. First, the Court will not tolerate "manifestly anticompetitive conduct" simply because a learned profession is involved. However, to date, the Court has only condemned price-fixing agreements and certain tying arrangements as manifestly anticompetitive in cases involving a learned profession.[63] Second, the Court has been very cautious in not totally eliminating the propriety of an argument based on the *Goldfarb* footnote as interpreted in *NSPE* and *Maricopa*—that is, in certain situations, because of the "public service aspect" of a particular learned profession, the concerted conduct of its members requires different antitrust analysis than that traditionally accorded other business entities.[64]

62. *See id.* at 1559.

63. *See, e.g.*, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S. Ct. 1551 (1984) (tying arrangement involving health care professionals where requisite elements for *per se* illegality are present); Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982) (price-fixing); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978) (price-fixing); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (price-fixing).

64. That the Court is careful in not eliminating the thrust of the *Goldfarb* footnote is evidenced by a statement in *Jefferson Parish*: "[W]e reject the view of the District Court that the legality of *an arrangement of this kind* turns on whether it was adopted for the purpose of improving patient care." 104 S. Ct. at 1565 n.41 (emphasis added). Thus, the Court, in *all* the relevant professional cases decided to date, has not categorically rejected the notion that there may be grounds for differential antitrust analysis of certain professional conduct, such as group boycotts by health care professionals premised upon "public service or ethical norms" justifications.

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In summary, the Supreme Court has *not* eliminated the implications behind the reasoning of the infamous *Goldfarb* footnote 17 and has instead kept the "coals burning," even in the Court's most recent case touching upon this issue. Although the Court has uniformly condemned price-fixing and certain tying arrangements by professionals as *per se* illegal, the Court has not yet directly addressed the issue of group boycotts by health care professionals. It is asserted that group boycotts are the type of trade restraint best suited for application of a different standard of antitrust analysis, at least in the health care profession, because such exclusionary conduct can result in legitimate and beneficial self-regulation of a professional by his or her professional peers. If such "watchdog" activity is motivated by competency-based considerations designed to safeguard the well-being of patients, this would certainly be a "public service aspect" of the particular health care profession that should be considered by courts in rule-of-reason analyses. Thus, in considering the analysis to follow of the Supreme Court's decisions condemning group boycotts as *per se* illegal, it will be useful to consider whether the Court would, if faced with this issue today, condemn legitimate self-regulation by health care professionals based on competency considerations as a *per se* illegal group boycott, especially when there is an absence of underlying anticompetitive animus. If faced with this issue today, it is asserted that the Court ought not condemn the practice outright, but rather should analyze the "boycott" under the rule-of-reason.

B. *The* Per Se *Illegality of Group Boycotts*

Group boycotts or concerted refusals to deal involve a broad range of commercial as well as noncommercial activity. In the commercial setting, group boycotts generally refer to "an agreement by two or more persons not to do business with other individuals, or to do business with them only on specified terms."[65] The concern of the Sherman Act in condemning group boycotts which have as their objective the elimination of competitors is that such conduct generally has no purpose but that of stifling existing or potential competition in order to increase the market position of the boycotters. The pernicious effects of concerted refusals to deal are best exemplified by the so-called "classic" boycott where there is a horizontal combination at one trade level which seeks to insulate itself from competition with nongroup members

65. II E. KINTER, FEDERAL ANTITRUST LAW § 10.27, at 155 (1980) (quoting Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 HARV. L. REV. 1531, 1531 (1958)).

or victims who compete, or seek to compete, at the same trade level.[66]

The objective of a "classic" boycott can be effectuated by either of two common methods. First, the group boycott can be carried out solely at one trade level through a simple refusal of the boycotters to deal with nongroup members.[67] Alternatively, the most frequently utilized method is where the boycott spans two trade levels and is accomplished through coercion whereby the participants in the boycott put pressure on their suppliers or customers to stop dealing with nongroup members or else face the risk of losing the boycotters' business or product, respectively.[68]

In the context of the health care profession, group boycott activity does exist and can be effectuated by both of the methods described above. For example, because professionals often find it both prudent and necessary to deal and consult with one another, there can be a one-level boycott where members of a medical association combine together and concertedly refuse to deal with nonmembers by denying such practitioners membership status.[69] Alternatively, there can be a two-level boycott involving health care professionals that is akin to the classic two-level commercial boycott where "independent contractor" physicians of a hospital's medical staff combine to pressure the hospital's board of trustees to deny staff privileges to an otherwise qualified physician.[70] Thus, although so-called "group boycotts" by health care practitioners can often be justified as legitimate self-regulation based on the "public service aspect" of the particular profession, such conduct is deserving of careful antitrust scrutiny because of the anticompetitive effects group boycotts can have on the "victims" and the health care market in general when the challenged conduct has the objective of eliminating competitors, actual or potential.

The Supreme Court has engaged in a careful scrutiny of conduct

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66. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 83, at 230 (1977).

67. *Id.* Professor Sullivan asserts that such a one-level boycott is common where members of the trade find it necessary to deal with one another in their business (i.e., brokers). *Id.*

68. As Professor Sullivan states, "The boycotting group members, in effect, say to their suppliers or to their customers, 'If you don't stop dealing with nongroup members, we will stop dealing with you.'" *Id.*

69. *See, e.g.*, Kreuzer v. American Academy of Periodontology, 735 F.2d 1479 (D.C. Cir. 1984) (dental specialty association denial of full membership status to a periodontologist). For an in-depth analysis of the *Kreuzer* case, see *infra* text accompanying notes 160–80. Professor Sullivan argues that such a "boycott" may not have the pernicious anticompetitive effects of the classic boycott, and that such conduct may serve a self-regulatory purpose as well as have beneficial procompetitive effects. *See* L. SULLIVAN, *supra* note 66, § 88, at 247–53.

70. *See, e.g.*, Weiss v. York Hosp., 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1777 (1985); Wolf v. Jane Phillips Episcopal-Memorial Medical Center, 513 F.2d 684 (10th Cir. 1975). For an in-depth analysis of the recent *Weiss* decision, see *infra* notes 132–59 and accompanying text. For an analysis of the *Wolf* case, see *supra* notes 18–27 and accompanying text.

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resembling group boycotts, and has consistently condemned as *per se* illegal, commercial group boycotts.[71] The Court's first and most extensive antitrust analysis of group boycott activity occurred in *Fashion Originators' Guild of America, Inc. v. FTC.*[72] In *Fashion Originators' Guild of America*, the trade practice at issue was in essence a two-level boycott whereby a number of garment design manufacturers (FOGA) combined to combat manufacturers who were copying their "original" garment designs.[73] In dealing with the so-called "style pirates," FOGA members pressured retailers into not dealing with the "style pirates" by threatening to terminate sales of their products to retailers stocking products with copied designs.[74] Thus, although the targets of the group boycott were the "style pirates," FOGA effectuated its objective by applying pressure on retailers. In condemning this unfair trade practice, the Court asserted that the FTC was correct in refusing to consider or hear the proffered justifications of the defendants regarding the reasonableness of their action.[75] Because the Court refused to consider FOGA's justifications for its "organized boycott," this case signified an early indication by the Court that group boycotts are *per se* illegal.

The Supreme Court next addressed the group boycott issue in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[76] where the practice in question was Broadway-Hale's use of its retail market power to pressure suppliers of brand name appliances to stop dealing with Klor's, a discount appliance store.[77] In condemning this practice based on its "interference with the natural flow of interstate commerce" and its

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71. *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127 (1966) (group boycotts are *per se* illegal). *See also supra* note 42. Judge Bork, however, asserts that "[t]he belief that all boycotts are illegal *per se* rests upon an uncritical acceptance of repeated Supreme Court pronouncements to that effect." R. BORK, THE ANTITRUST PARADOX 330 (1978). It must be noted, however, that litigators are left with unambiguous Supreme Court pronouncements to this effect, which are, currently, "the law."

72. 312 U.S. 457 (1941). An earlier case that was important in the development of antitrust analysis of group boycotts was Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).

73. *Fashion Originators' Guild of Am.*, 312 U.S. at 461.

74. *Id. See supra* text accompanying note 68.

75. *Fashion Originators' Guild of Am.*, 312 U.S. at 467–68. The Court affirmed the FTC's condemnation of the challenged practice under § 5 of the Federal Trade Commission Act but also noted that the boycott was prohibited conduct under the Sherman and Clayton Acts. *Id.* at 466–68. The justifications offered by the defendants were that " 'the practices of FOGA were reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against the devastating evils growing from the pirating of original designs . . . .' " *Id.* at 467. Note, however, that FOGA's original fabric designs were neither copyrighted nor patented. *Id.* at 461.

76. 359 U.S. 207 (1959).

77. *Id.* at 209. In Judge Bork's opinion, Klor's was simply a "free rider," and thus, the powerful Broadway-Hale sought to eliminate the discounter. *See* R. BORK, THE ANTITRUST PARADOX 330 (1978).

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"monopolistic tendency,"[78] the Court commented that this boycott was a member of the class of restraints, that by its nature and character, is "unduly restrictive" and thus in the "forbidden category."[79] The Supreme Court's strong condemnation of this concerted refusal to deal with Klor's, as well as the Court's refusal to consider justifications offered by the defendants for their conduct, leads reasonably to the inference that group boycotts are *per se* illegal.

Finally, in 1966, the Supreme Court directly and explicitly held that a group boycott was a *per se* violation of section 1 of the Sherman Act in *United States v. General Motors Corp.*[80] The practice at issue in *General Motors* was a two-level boycott whereby GM conspired with its franchised dealers and their dealer associations to pressure a small number of dealers to stop selling Chevrolets to discount houses in order to eliminate the price-cutters from competition.[81] In terming this practice a "classic conspiracy in restraint of trade," the Court held that the group boycott was *per se* illegal.[82]

The *General Motors* decision conclusively established the Supreme Court's position, which remains unchanged today, that group boycotts are *per se* violations of section 1 of the Sherman Act.[83] With this principle in hand, it will be useful to analyze two other Supreme Court decisions involving the group boycott activity of "trade" associations.

In *Associated Press v. United States*,[84] the Court was faced with a group boycott effectuated by members of the Associated Press, who had as their objective the prevention of nonmembers from obtaining

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78. *Klor's*, 359 U.S. at 213.

79. *Id.* at 211–12.

80. 384 U.S. 127 (1966). The first case to expressly hold that group boycotts are a *per se* violation of § 1 of the Sherman Act was probably Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961). *See also* Silver v. New York Stock Exch., 373 U.S. 341 (1963). It is noteworthy, however, that earlier Supreme Court decisions held that group boycotts were, in substance, *per se* illegal. *See, e.g.*, Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941).

81. *See General Motors*, 384 U.S. at 129–38.

82. *Id.* at 140, 145. Specifically, the Court stated: "There can be no doubt that the effect of the combination or conspiracy here was to restrain trade and commerce within the meaning of the Sherman Act. Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act." *Id.* at 145. Importantly, in rejecting an argument that the motivation underlying the conduct in question should be considered, the Court asserted that its decision in *Klor's* established that a "group boycott of even a *single* trader violated the statute without regard to the reasonableness of the conduct in the circumstances." *Id.* at 145–46 (emphasis added) (footnote omitted).

83. Although the Supreme Court precedent is unambiguous to this effect, commentators and the lower federal courts are not so convinced. Indeed, as Professor Sullivan has stated, "[T]here is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine." L. SULLIVAN, *supra* note 66, § 83, at 229–30.

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84. 326 U.S. 1 (1945).

news reports compiled by the association. Although the Associated Press' practice of limiting the dissemination of news reports to only association members was not at issue,[85] the practice challenged under the Sherman Act was the requirements for gaining membership in this association. Specifically, the United States argued that the Associated Press unlawfully restricted its membership pursuant to bylaws which gave a member veto power over a new applicant's membership request when the applicant would be in competition with the member.[86] Thus, an Associated Press member had the power, through the association's bylaws, to prevent a new applicant from gaining valuable Associated Press membership, and consequently, timely news reports.[87]

In condemning this practice as one obviously designed to stifle competition, the Court strongly rejected the association's tenuous argument that no Sherman Act violation could be found because Associated Press news reports were not "indispensable" as "adequate access" to the reports was provided to the reading public.[88] Arguably, then, the *Associated Press* decision stands for the proposition that "trade" associations cannot utilize unduly restrictive membership requirements that, in effect, operate as a group boycott and serve as a mechanism for eliminating competition.[89]

Another important Supreme Court decision delineating the permissible bounds of a trade association's self-regulatory activities is *Silver v. New York Stock Exchange*.[90] In *Silver*, the Court was faced with the question of how far the Exchange could go in promulgating membership rules pursuant to the Securities Exchange Act of 1934 without frustrating the antitrust policy of the Sherman Act.[91] The practices at issue in *Silver* were the Exchange rule requiring members to disconnect direct telephone wire connections with nonmembers, and the Exchange's policy of not informing nonmembers of the reasons for

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85. *See id.* at 4.

86. *Id.* at 4, 8–10.

87. As the Court observed, "Inability to buy news from the largest news agency, or any one of its multitude of members, can have the most serious effects on the publication of competitive newspapers . . . ." *Id.* at 13.

88. *Id.* at 18. In the Court's opinion, "The proposed 'indispensability' test would fly in the face of the language of the Sherman Act and our previous interpretations of it." *Id.*

89. The exact meaning of *Associated Press* is not altogether clear. Some argue that, in essence, the AP is a joint venture, rather than a trade association, and that the asset held by the AP was so valuable that it vested the AP with a duty to provide access to that asset as if the association were a public utility. *See, e.g.*, L. SULLIVAN, *supra* note 66, § 89, at 253–56. Notwithstanding the disagreement, one principle is clear: "[A]rrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose." *Associated Press*, 326 U.S. at 19.

90. 373 U.S. 341 (1963).

91. *Id.* at 343.

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disconnection.[92]

While the Court noted that the collective action of the Exchange and its members in depriving nonmembers of wire services would have been a *per se* illegal group boycott in the absence of federal securities regulations,[93] it was forced to decide whether the Securities Exchange Act of 1934 provided an exemption from section 1 Sherman Act liability because of the duty of self-regulation imposed on the Exchange by the securities statute. In this reconciliation process, the Court balanced the purposes behind both federal statutes and arrived at the principle that "exchange self-regulation is to be regarded as justified in response to antitrust charges only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act . . . ."[94] In holding that this threshold of justification had not been met, and that the Exchange exceeded its statutorily-provided authority of self-regulation by terminating nonmembers' wire services without any procedural safeguards,[95] the Court found that the Exchange violated section 1 of the Sherman Act.[96]

An immediate question that arises after a reading of the *Silver* decision is the breadth of its holding. Does the requirement of fair procedures imposed by the Court in terminating services to nonmembers extend beyond the facts of that case? This question can probably be answered in the negative, because in *Silver*, the Court was faced with balancing two federal laws and it had to make room for the self-regulation mandated by the Securities Exchange Act of 1934. Therefore, it is doubtful that *Silver* mandates a due process hearing under the guise of the Sherman Act for any person who is denied membership status in a trade association, nor does the case hold that procedural fairness will rectify an otherwise *per se* illegal group boycott.[97] Nevertheless, consid-

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92. *Id.* at 344.

93. *Id.* at 347. As the Court noted, "A valuable service germane to petitioners' business and important to their effective competition with others was withheld from them by collective action. That is enough to create a violation of the Sherman Act." *Id.* at 349 n.5.

94. *Id.* at 361.

95. *Id.* at 361–63.

96. *Id.* at 365.

97. Moreover, as argued by Professor Sullivan, "*Silver* surely does not imply that in situations where Congress has not authorized self-regulation, all that is needed to validate a program having boycott effects is procedural fairness." L. SULLIVAN, *supra* note 66, § 88, at 251. Furthermore, Judge Bork argues that "the courts certainly ought not to make a due process hearing with all joint ventures the sine qua non of all lawful refusals to deal." R. BORK, THE ANTITRUST PARADOX 344 (1978). In *Silver*, the Court specifically held:

> Our decision today recognizes that the action here taken by the Exchange would clearly be in violation of the Sherman Act unless justified by reference to the purposes of the Securities Exchange Act, and holds that [the securities] statute affords no justification for anticompetitive collective action taken without according fair procedures.

Silver, 373 U.S. at 364 (footnote omitted).

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ering the scope of this comment, the importance of *Silver* is that the Court affirmed the continued vitality of the *per se* rule condemning group boycotts.

In summary, the Supreme Court decisions in *Associated Press* and *Silver*, as well as in *Fashion Originators' Guild of America*, establish that the Court's uniform condemnation of group boycotts as *per se* illegal is no different when trade association members are the boycotters. Moreover, as demonstrated in *General Motors*, the Court has not diminished its adherence to the *per se* rule by considering justifications offered by defendants regarding the reasonableness of their anticompetitive conduct.[98]

The staunch position of the Supreme Court in uniformly condemning group boycotts presents the conflict which is the focus of this comment. By what method of antitrust analysis should group boycotts by health care professionals be evaluated in light of the *Goldfarb* footnote? Should the *per se* rule be carried over to group boycotts, even when such conduct is premised on bona fide "public service and ethical norms" rationales, or alternatively, should such justifications remove the questioned practice from immediate condemnation and instead require that the professional boycott be analyzed under the rule-of-reason? The position taken by this comment is that the *Goldfarb* footnote, as developed in *NSPE*, *Maricopa* and *Jefferson Parish*,[99] provides a principled basis for analyzing the conduct of health care professionals differently than that of other commercial entities when such conduct is premised on genuine "public service or ethical norms" justifications. Thus, when legitimate, competency-based justifications are presented, the courts should not immediately condemn the group boycott by health care professionals as *per se* illegal. Instead, courts should analyze the proffered justifications for refusing to deal with other health care practitioners under the rule-of-reason to determine whether the questioned conduct is pro-competitive in effect. This is the approach ultimately taken by many lower federal courts. These courts have not, however, reached unanimity in the reasoning utilized to reach rule-of-reason analysis, nor have these courts applied a uniform rule-of-reason test.[100]

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98. That the Court has not changed its position regarding the *per se* illegality of group boycotts is evidenced by a reference to the categories of *per se* offenses, group boycotts included, in its recent opinion in Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S. Ct. 1551, 1556 n.10 (1984).

99. *See supra* notes 30–64 and accompanying text.

100. For a discussion of three pivotal decisions by federal courts of appeals involving group boycotts effectuated by health care professionals, see *infra* notes 129–97 and accompanying text. For an analysis of how lower federal courts have justifiably reached the rule-of-reason, but by defective reasoning, see *infra* notes 198–241 and accompanying text. For a proposed correct rule-

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C. Supreme Court Analysis of Two Other Requirements Necessary for a Section 1 Violation of the Sherman Act: The "Concert of Action" and "Effect on Interstate Commerce" Elements

1. Concerted Action

Without question, section 1 of the Sherman Act does not apply to unilateral actions in restraint of trade, but instead only reaches conduct involving a plurality of actors.[101] Thus, in order to maintain a section 1 Sherman action, there must be concerted action in that two or more legal persons have contracted, combined, or conspired to unreasonably restrain trade.[102]

In the context of group boycotts by health care professionals, there are a number of methods for proving concerted action. For example, in cases involving denials of hospital admitting privileges, concerted action could be shown by proof of a combination or conspiracy between the hospital's board of trustees and its medical staff.[103] Alternatively, concerted action can plausibly be shown by proving that a combination or conspiracy existed among the independent physicians comprising the

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of-reason approach for analyzing concerted refusals to deal by health care professionals and a discussion on why such an approach should be utilized by the courts, see *infra* notes 242–63 and accompanying text.

101. Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2740 (1984) (Sherman Act contains a "basic distinction between concerted and independent action").

102. *See* 15 U.S.C. § 1 (1982). Section 1 of the Sherman Act is reproduced in relevant part in the footnotes. *See supra* note 2.

103. Commentators argue that the physicians comprising a medical staff are more akin to independent contractors than to employees of the hospital. *See* Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 CAL. L. REV. 595, 638–39 (1982). The problem with the approach of treating the medical staff and the hospital board of trustees as distinct entities is that courts may now reject such a characterization, and instead simply treat this relationship as analogous to that of a corporation and its unincorporated division. *See infra* text accompanying notes 137–38. In *Copperweld Corp.*, the Supreme Court held that there could not be a Sherman Act conspiracy between a parent corporation and its wholly-owned subsidiary. 104 S. Ct. at 2745. Moreover, the Court also reconfirmed that there could not be concerted action between a corporation and one of its unincorporated divisions. *Id.* at 2741–42. Nonetheless, in commenting that officers of a single firm are not independent economic actors, the Court left open the possibility of showing concerted action between a hospital's board of trustees and its medical staff by noting that "many courts have created an exception for corporate officers acting on their own behalf." *Id.* at 2741 n.15. *See, e.g.*, Tunis Bros. Co. v. Ford Motor Co., 763 F.2d 1482, 1496 (3d Cir. 1985) ("If corporate officers or employees act for their own interests, and outside the interests of the corporation, they are legally capable of conspiring with their employees for purposes of section 1.") (citing Weiss v. York Hosp., 745 F.2d 786, 813 n.43 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1777 (1985); H & B Equipment Co. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978); Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391, 399 (4th Cir. 1974)). Since the Court did not expressly reject such an approach, and because physicians are no doubt acting in their own economic interests even when serving as medical staff members, the probability of proving concerted action by this method should be high.

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hospital's medical staff and who are principally involved in the admitting privilege decision.[104] In fact, recent cases have utilized this latter approach in holding that the members of a medical staff or a professional association can provide the requisite plurality of actors necessary for a showing of concerted action.[105] This trend of treating members of medical staffs and professional associations as independent, competing economic entities presents an attractive option for plaintiffs in proving concert of action.[106]

More importantly, Supreme Court precedent justifies treating such medical staffs and professional associations as, in economic reality, consisting of independent medical practitioners who are in competition with each other. For example, in *Arizona v. Maricopa County Medical Society*,[107] the question before the Court was the legality of maximum price-fixing agreements utilized by two independent medical foundations. There was no allegation that the foundations acted together in restraint of trade; rather, the antitrust attack was directed individually against each combination of physicians.[108] Of importance is the fact that the Court did not even address the concerted action issue in *Maricopa*,[109] which indicates that the Court confirmed, albeit *sub silentio*, that the doctors participating in each foundation had agreed among themselves to fix prices. Moreover, in *National Society of Professional Engineers v. United States*,[110] the Court again failed to address the concerted action issue, and simply "assumed" that the ethical canon of the professional association satisfied the "contract, combination, or conspiracy" requirement because the engineers had agreed among themselves on the rule prohibiting competitive bidding.[111]

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104. *See infra* notes 139–43 & 167–69 and accompanying text.

105. *See, e.g.*, Weiss v. York Hosp., 745 F.2d 786, 813 (3d Cir. 1984) (medical staff), *cert. denied*, 105 S. Ct. 1777 (1985); Kreuzer v. American Academy of Periodontology, 735 F.2d 1479, 1490 (D.C. Cir. 1984) (professional association).

106. The attractiveness of this option is that the plaintiff will not have to show a conspiracy, and will simply have to demonstrate that members of the medical staff or professional association *combined* together to reject the plaintiff's request for privileges or membership. Thus, this approach of proving concerted action overcomes the difficulties of showing the same through a conspiracy or agreement between the hospital's board of trustees and the medical staff in, for example, the hospital admitting privilege context. See *supra* note 103 and accompanying text.

107. 457 U.S. 332 (1982).

108. *Id.* at 335–36. The Court phrased the issue as "whether the Sherman Act prohibits the competing doctors from adopting, revising, and agreeing to use a maximum-fee schedule in implementation of the insurance plans." *Id.* at 342.

109. *See id.* at 339–42.

110. 435 U.S. 679 (1978).

111. *See id.* at 682–83. In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), it can also be argued that the Court found concerted action solely through the agreement between members of the county bar association regarding a minimum-fee schedule. This is plausible because the Court did not find that a conspiracy existed between the county and state bars as there was no

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The precedential weight of *Maricopa* and *NSPE* is persuasive because the Court apparently did not even deem the concerted action question to be at issue in condemning the price-fixing agreements of both professional combinations. In fact, statements by the Court in its decision in *Associated Press v. United States*[112] are particularly enlightening in revealing the Supreme Court's position on this issue:

> The Sherman Act was specifically intended to prohibit independent businesses from becoming "associates" in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete. Victory of a member of such a combination over its business rivals achieved by such collective means cannot consistently with the Sherman Act or with practical, everyday knowledge be attributed to *individual* "enterprise and sagacity"; such hampering of business rivals can only be attributed to that which really makes it possible—the collective power of an unlawful combination.[113]

The reasoning embodied in the above quotation definitely justifies the Supreme Court's silence on the concerted action issue in such cases as *Maricopa* and *NSPE*.[114] Clearly the Court's position is that such combinations of competitors must be viewed realistically, with "practical, everyday knowledge," to reach the undisputed conclusion that such associations are, in fact, unlawful combinations of otherwise independent competitors. Thus, the economic reality is that members of medical staffs as well as professional associations can be considered " 'associates' in a common plan" who are otherwise independent economic actors. Therefore, when such associates act together to further the objectives of their combination, this conduct is concerted and deserving of careful antitrust scrutiny.

2. The Interstate Commerce Test

It is well established that the Sherman Act does not apply to all restraints of trade, and this is especially true when the challenged activity has no appreciable effect on interstate commerce and can be considered "purely" intrastate. In fact, that the interstate commerce test is an obstacle to the plaintiff[115] is solidly entrenched in Supreme Court

evidence that the state bar association took formal disciplinary action to enforce adherence to the minimum-fee schedule. *Id.* at 777–78.

112. 326 U.S. 1 (1945).

113. *Id.* at 15.

114. *See also* Silver v. New York Stock Exch., 373 U.S. 341 (1963) (concerted action through collective action of Exchange and its members); American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982) (applying agency principles to hold 90,000-member engineering society liable for Sherman Act violation based on action of committee with delegated authority).

115. Some courts view the interstate commerce requirement as both a procedural prerequi-

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precedent mandating that the challenged restraint "substantially and adversely affects interstate commerce."[116] Moreover, in the context of antitrust claims brought against health care professionals, the commerce requirement has long been an obstacle to plaintiffs as courts have viewed the distribution of medical services or matters affecting those services as purely intrastate in character.[117]

In attempting to overcome the commerce barrier, plaintiffs essentially have two methods of satisfying the jurisdictional prong of the Sherman Act. One method of meeting the interstate commerce test is by showing that the activity in question is *in* interstate commerce.[118] However, even if the activity is not "in commerce" in that it is an *intra*state activity, the jurisdictional requirement can still be satisfied if the challenged conduct substantially affects *inter*state commerce.[119] Because courts have traditionally viewed the activities of the medical profession as being intrastate in character, plaintiffs challenging the conduct of health care professionals have generally had to rely on the second, more burdensome, method of demonstrating the requisite interstate commerce connection. Recently, however, the Supreme Court decided two cases that cast significant light onto this often nebulous requirement and seemingly make the plaintiff's burden much easier.

In *Hospital Building Co. v. Trustees of Rex Hospital*,[120] the Supreme Court issued a major decision affecting subsequent antitrust claims against health care professionals in holding that the provision of hospital services, although a local or intrastate activity, can substantially affect interstate commerce.[121] Importantly, the Court asserted that in satisfying the interstate commerce test, the activity at issue did not have to be "purposefully directed" at interstate commerce, and that an indirect effect on interstate commerce is enough if it is a "substan-

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site and part of the substantive offense under the Sherman Act. *See, e.g.*, Weiss v. York Hosp., 745 F.2d 786, 824 n.63 (3d Cir. 1984) (noting that both requirements are met by same test), *cert. denied*, 105 S. Ct. 1777 (1985).

116. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195 (1974).

117. *See, e.g.*, Wolf v. Jane Phillips Episcopal-Memorial Medical Center, 513 F.2d 684 (10th Cir. 1975). *But see, e.g.*, Crane v. Intermountain Health Care, 637 F.2d 715 (10th Cir. 1981). *See also supra* text accompanying notes 26-27.

118. L. SULLIVAN, *supra* note 66, § 233, at 709.

119. *Id.* § 233, at 710. Professor Sullivan notes that there must be a causal connection between the challenged activity and the flow of commerce. However, he also contends that it is not the "quantitative substantiality" of the impact, but rather, "if a local activity has in a practical sense a significant impact on competition in commerce, the Act applies to the local activity even though the activity does not reduce the quantity of interstate commerce . . . ." *Id.* Professor Sullivan cites as an example of such activity the legal services involved in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

120. 425 U.S. 738 (1976).

121. *Id.* at 739-40.

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tial effect."[122] Thus, this Supreme Court decision is important because it reversed the trend of lower courts in viewing the provision of hospital and medical services as purely intrastate in character.

Subsequent to *Hospital Building Co.*, the Court issued another pivotal decision further refining the interstate commerce test in *McLain v. Real Estate Board of New Orleans, Inc.*[123] In *McLain*, the Court effected a significant reformation of the interstate commerce test as a threshold inquiry by shifting the focus to whether the defendant's questioned conduct *could have* a substantial effect on interstate commerce, instead of focusing on whether the challenged conduct did in fact have a substantial effect on commerce.[124] This is a significant change in the commerce inquiry because it now offers a plaintiff the opportunity to argue *potential* effects on interstate commerce rather than the actual effects at the date of suit.[125]

Additionally, there is some broad language in *McLain* that will be even more troublesome to potential antitrust defendants. Specifically, language in the opinion indicates that the appropriate inquiry may be the effect of the defendants' *total activities* on interstate commerce rather than simply the commerce effect of the challenged conduct.[126] It is clear that this interpretation of the Court's opinion would significantly diminish the burden of the interstate commerce test.[127] In fact,

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122. *Id.* at 744. In fact, the Court asserted that the "substantial effect" test would be met even if the conspiracy in restraint of trade did *not* "threaten the demise of out-of-state businesses or . . . affect market prices." *Id.* at 746.

123. 444 U.S. 232 (1980).

124. *Id.* at 242–43.

125. In the Court's view, requiring a showing of an actual effect on interstate commerce caused by the defendant's challenged conduct would diminish the breadth of the Sherman Act because in a civil Sherman action, "liability may be established by proof of *either* an unlawful purpose or an anticompetitive effect." *Id.* at 243. *See also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940). Thus, requiring a showing of actual effect would defeat an otherwise properly merited Sherman action where "the alleged restraint failed to have its intended anticompetitive effect." *McLain*, 444 U.S. at 243. However, as a practical matter, it is highly improbable that a private plaintiff would maintain a Sherman civil action unless the defendant's practice had an actual *effect* on the challenger's business, because otherwise, the plaintiff would have a difficult time attempting to prove damages.

126. This conclusion is tenable because the Court stated that it would only be necessary for the plaintiff to show a substantial effect on commerce "generated by respondents' brokerage activity," and that the plaintiff need not make a "more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful." *McLain*, 444 U.S. at 242–43. *See also id.* at 246. *See, e.g.*, Western Waste Serv. Sys. v. Universal Waste Control, 616 F.2d 1094, 1097 (9th Cir.) (Interpreted *McLain* to mean "that it was not necessary for the alleged antitrust violation complained of to have affected interstate commerce so long as defendants' business activities, independent of the violations, affected interstate commerce."), *cert. denied*, 449 U.S. 869 (1980).

127. Some commentators argue that such a reading of *McLain* would in essence eliminate the interstate commerce test. They contend, however, that this "suggestive language" is simply casual dicta or worse. Kissam, Webber, Bigus & Holzgraefe, *supra* note 103, at 632–33. *But see*

some lower federal courts have taken the *McLain* invitation and have analyzed the defendant's total activities in determining whether they substantially affect interstate commerce.[128]

IV. LOWER FEDERAL COURT DECISIONS ANALYZING GROUP BOYCOTTS BY HEALTH CARE PROFESSIONALS

During 1983 and 1984, three significant decisions were rendered by federal courts of appeals involving group boycotts by health care professionals that are significant in defining the future direction of this area of antitrust law. In each case, the courts were forced to resolve difficult issues stemming from the Supreme Court precedents discussed above. For instance, the courts dealt with issues involving concerted action, the appropriate standard for analyzing the group boycott in light of *Goldfarb*, *NSPE* and *Maricopa*, as well as the interstate commerce test. Furthermore, each case presents a different professional practice that essentially covers the spectrum of trade restraints effectuated through group boycotts aimed at other health care practitioners. The cases to be analyzed herein include the denial of hospital admitting privileges to qualified osteopathic physicians,[129] the denial of professional association membership status to evidently qualified dentists,[130] and group boycotts against chiropractors by professional health care associations.[131]

In *Weiss v. York Hospital*,[132] the Court of Appeals for the Third Circuit was faced with a class action brought by an osteopathic physician against York Hospital and its medical staff alleging that the defendants' refusal to grant him hospital admitting privileges constituted a *per se* illegal group boycott under section 1 of the Sherman Act.[133]

Marrese v. Interqual, Inc., 748 F.2d 373, 382 (7th Cir. 1984) ("Federal courts have relied upon the treatment of out-of-state patients, the receipt of Medicare, Medicaid, and out-of-state insurance funds, and the purchase of medicine, equipment, and medical supplies from out-of-state purveyors by the plaintiff doctor and/or the defendant hospital, to rule that the doctor's complaint satisfies the jurisdictional requirement of interstate commerce under the Sherman Act.") (citing cases), *cert. denied*, 105 S. Ct. 3501 (1985).

128. *See, e.g.*, Weiss v. York Hosp., 745 F.2d 786, 824–25, 825 n.66 (3d Cir. 1984) (citing Cardio-Medical Assocs., Ltd. v. Crozer-Chester Medical Center, 721 F.2d 68, 74–75 (3d. Cir. 1983)), *cert. denied*, 105 S. Ct. 1777 (1985).

129. Weiss v. York Hosp., 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1777 (1985). *See infra* notes 132–59 and accompanying text.

130. Kreuzer v. American Academy of Periodontology, 735 F.2d 1479 (D.C. Cir. 1984). *See infra* notes 160–80 and accompanying text.

131. Wilk v. American Medical Ass'n., 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2398 (1984). *See infra* notes 181–97 and accompanying text.

132. 745 F.2d 786 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1777 (1985).

133. *Id.* at 792, 818. The defendants in this action consisted of York Hospital, the York Medical and Dental Staff, and 10 individual physicians who served on medical staff review committees. *Id.* at 791. Besides the § 1 claim, the plaintiff also brought a claim under § 2 of the

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The gist of the physician's complaint was that the defendants applied "strict scrutiny" to applications by osteopaths (D.O.'s) for admitting privileges as compared to the review given applications by allopaths (M.D.'s).[134] Furthermore, the plaintiff asserted that even when the defendants granted admitting privileges to D.O.'s, these physicians were given "assistant staff" privileges, the lowest possible classification.[135] Finally, the plaintiff alleged that the defendants' action in applying "strict scrutiny" to applications by D.O.'s for admitting privileges affected class members who had not applied for privileges by "sending a message" to osteopaths in the York Hospital area that the defendants discriminated against D.O.'s.[136]

In reviewing this case, the *Weiss* court initially had difficulty resolving the concerted action issue because the plaintiff contended that the medical staff and York Hospital were distinct entities capable of reaching an agreement or conspiracy.[137] The court finally rejected the plaintiff's contention, simply relying on the district court holding that the medical staff was an "unincorporated division" of the hospital and, therefore, each was considered a single entity incapable of acting in concert under the Sherman Act.[138] Dr. Weiss, however, also alleged that the "doctors who joined together to form the medical staff were separate economic entities who competed against each other so . . . the

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Sherman Act alleging that the hospital had engaged in monopolization. The ultimate holdings of the court were that only the medical staff had violated § 1 of the Sherman Act, and that the hospital did not violate § 2 because of the lack of any monopolizing conduct. *See id.* at 831. On ultimate remand, the case was favorably settled for the plaintiff, Dr. Weiss, who, according to the terms of the settlement, was finally granted admitting privileges. *See* Weiss v. York Hosp., 590 F. Supp. 283 (M.D. Pa. 1984).

134. *Weiss*, 745 F.2d at 794–95. The plaintiff alleged that the medical staff effectuated its policy of discrimination against D.O.'s by essentially granting admitting privileges to any M.D. who applied, but in the case of D.O.'s, the medical staff analyzed, in a very detailed manner, the applications submitted by D.O.'s. In fact, one of the criteria considered was the applicant's "social acceptability." *Id.* at 795. Thus, "strict scrutiny" was applied to the applications of osteopathic physicians. *See id.* The plaintiff had applied for admitting privileges on three occasions but each of his applications was denied, allegedly because of his personality. During the pendency of the litigation, the defendants ironically granted admitting privileges to five D.O.'s. *See id.* at 797–99. For a discussion of the process by which admitting privileges are granted, and the control exerted over this process by the medical staff, see Dolan & Ralston, *supra* note 11, at 709–12.

135. *Weiss*, 745 F.2d at 796. Granting a physician the lowest possible classification of admitting privileges is a classic example of conferring "second-class practitioner" status. *See supra* text accompanying note 14. It is noteworthy that until 1974, the hospital's corporate charter banned D.O.'s from obtaining admitting privileges. *Weiss*, 745 F.2d at 794. Apparently under threat of legal action by Weiss, the medical staff amended its bylaws in 1976 to permit osteopaths to become members of the medical staff. *See id.* at 795.

136. *Weiss*, 745 F.2d at 792.

137. *Id.* at 813.

138. *Id.* at 814–15. *But see supra* note 103 and accompanying text.

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medical staff was a 'combination' within the meaning of section 1."[139] In resolving this contention, the court relied upon the principle that antitrust policy requires courts to focus on the "economic substance of the arrangement, not merely its form."[140] The court then decided that the "economic substance" of this arrangement was that each member of the medical staff was, in essence, a separate economic entity because the doctors were actually in competition with each other in the York medical community.[141] The court therefore held, *as a matter of law*, that the medical staff was a combination of individual doctors whose conduct satisfied the concerted action requirement of section 1 of the Sherman Act.[142] Thus, the plaintiff's case was saved by the court's economically prudent realization that a hospital's medical staff cannot realistically be considered a single entity for purposes of antitrust scrutiny.[143]

The next pertinent issue addressed by the *Weiss* court was the plaintiff's allegation that the medical staff's use of "strict scrutiny" in reviewing applications by D.O.'s for admitting privileges constituted a *per se* illegal group boycott.[144] In analyzing this contention the court considered the challenged conduct to be akin to a "classic," two-level boycott.[145] Thus, in the court's view, even though the boycott was not entirely effective in excluding all osteopathic physicians from York Hospital's medical staff, the discriminatory treatment was sufficient

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139. *Weiss*, 745 F.2d at 813.

140. *Id.* at 815.

141. *Id.* at 816.

142. *Id.* at 814. There is no doubt, considering previous Supreme Court decisions, that the court reached the correct conclusion on the concerted action issue. *See supra* notes 107–14 and accompanying text.

143. The court did, however, reach a questionable conclusion in holding that the hospital could not conspire with its medical staff. *See supra* note 103. Nevertheless, because the court considered that the medical staff was composed of independent doctors, but yet was classified as an unincorporated division of the hospital, it is apparent that the court must have, in actuality, considered the medical staff as existing *apart* from the hospital. Thus, in essence, the conclusion reached by the court is that which it initially denied—the hospital and medical staff were separate economic entities, even if not recognized as such under the Sherman Act. *See Weiss*, 745 F.2d at 813–15.

144. *Weiss*, 745 F.2d at 818.

145. *Id.* at 819. In analogizing the practice in question to that of a "classic" boycott the court stated:

> In this case York is a provider of hospital services; for the purpose of our analysis, the equivalent of the manufacturer in the example of a classical boycott. Similarly, the M.D.s are the equivalent of the retailers in the example, in the sense that physicians [ie., D.O.s] require access to a hospital in order to effectively treat patients.

Id. See supra text accompanying notes 66–70. The *Weiss* court did note that in the traditional "classic" boycott, the retailers pressure or coerce the manufacturer not to deal with the boycotted retailers; however, the court asserted that in this case no coercion was necessary because of the control exerted by M.D.'s over the admitting privilege decision. 745 F.2d at 819.

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enough for the court to consider the medical staff's practice as analogous to the traditionally-condemned group boycott.[146] Furthermore, the Third Circuit was cognizant of Supreme Court precedents condemning such group boycotts as *per se* illegal.[147]

Nevertheless, the *Weiss* court was compelled to consider the ramifications of the *Goldfarb* footnote, as developed in *NSPE* and *Maricopa*.[148] According to the Third Circuit, the thrust of these Supreme Court cases, which indicate that the learned professions may receive different antitrust treatment than that accorded other business entities,[149] is that professional conduct normally considered *per se* illegal will instead be analyzed under the rule-of-reason when the alleged restraint of trade is premised upon an "ethical norm" of a profession.[150] Thus, as the court conceded, in most cases involving denials of hospital admitting privileges, the "courts will, more or less openly, have to utilize a rule of reason balancing approach."[151]

In this particular case, however, the *Weiss* court held that the defendants' conduct was a *per se* illegal group boycott because no justification was offered by the defendants to the effect that their discriminatory treatment of osteopaths was premised on "public service or ethical norms."[152] In fact, as the court noted, it would have been difficult if not impossible for the defendants to have contended that D.O.'s, as compared to M.D.'s, lacked the necessary professional competence to be granted admitting privileges.[153]

After defining the breadth of differential antitrust treatment to be afforded defendants in denial of admitting privilege cases, the *Weiss* court then proceeded to provide guidance to the district court in applying the rule-of-reason in the context of the instant case. According to the Third Circuit, a medical staff could legitimately engage in self-reg-

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146. *Weiss*, 745 F.2d at 820.

147. *Id.* at 818. For an analysis of the Supreme Court's group boycott precedents, see *supra* notes 71–98 and accompanying text.

148. *Weiss*, 745 F.2d at 820.

149. For analysis of the *Goldfarb* differential treatment dichotomy, see *supra* notes 30–64 and accompanying text.

150. *Weiss*, 745 F.2d at 820, 820 n.60. The court concluded that the medical staff had the right to exclude any doctor based on his or her lack of "professional competence or unprofessional conduct" because this could be viewed as a legitimate form of "industry" self-regulation. *Id.* at 820.

151. *Id.* at 820.

152. *Id.* at 820–21.

153. *Id.* at 820, 792 n.4. *See supra* notes 19 & 23 and accompanying text. It is noteworthy that the *Weiss* court directed the district court, on remand for the damage phase of the trial, to allow the defendants to raise the "defense" that any application for privileges by an osteopath, including Weiss', was "properly refused because of the doctor's lack of professional competence or character." 745 F.2d at 831.

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ulation and thus deny admitting privileges to applicants if the denial was grounded on competency or professional conduct considerations.[154] The *Weiss* court asserted that a denial of admitting privileges based on such considerations was justifiable as a component of the medical staff's and hospital's "public service" function; moreover, in antitrust terminology, the court was of the opinion that an exclusion of a physician based on a lack of competence or professional ability would be pro-competitive.[155] Thus, increasing the reputation and quality of medical services at the hospital would enhance efficiency and further, rather than diminish, competition.[156]

As a final issue, the *Weiss* court had to resolve the defendants' argument that the plaintiff failed to satisfy the interstate commerce test. In this regard, the defendants presented an innovative argument advocating an unjustifiably restrictive view of the commerce test in that the court should focus on how the defendants' challenged conduct affected the *plaintiff's* activities in interstate commerce.[157] The court rejected this contention, however, asserting that the proper focus is on how the defendants' conduct affects interstate commerce.[158] Furthermore, the *Weiss* court went a step further, stating that it would examine the defendants' entire activities in interstate commerce and not just the conduct at issue.[159]

In a case presenting similar issues to those decided by the Third Circuit in *Weiss*, the Court of Appeals for the District of Columbia recently faced a distinct type of trade restraint effectuated by a professional association in *Kreuzer v. American Academy of Periodontology*.[160] At issue in *Kreuzer* was the requirement of the American Academy of Periodontology (AAP)[161] that a practitioner limit his

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154. *See Weiss*, 745 F.2d at 820 n.60.

155. *Id.* Of course, such exclusions would be pro-competitive only if the same standards were applied to all privilege applicants. *Id.* The court also asserted that excluding a physician because of unprofessional conduct, such as a "history of trouble in interpersonal relations," would also be legitimate and pro-competitive. *Id.*

156. *Id.*

157. *Id.* at 824.

158. *Id.* at 824–25.

159. *See id.* at 824–25, 825 n.66. For an analysis of the Supreme Court's most recent case specifically analyzing the interstate commerce requirement, see *supra* notes 123–28 and accompanying text.

160. 735 F.2d 1479 (D.C. Cir. 1984).

161. The AAP is a nonprofit corporation organized to advance the science of periodontology, which entails the "formation of standards for advancing training and formulation of procedures to facilitate reimbursement of practitioners by third-party payment plans." *Id.* at 1483. "Periodontics" is one of the eight dental specialties and is concerned with "the treatment of diseases of the tissues surrounding the teeth." *Id.* at 1482. To practice periodontics, the practitioner need only be a graduate of an approved dental school and a licensed dentist. *Id.* The American Dental Association (ADA) engages in numerous self-regulatory activities including the recog-

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or her dental practice to periodontics in order to be eligible for "active membership" in the professional association. The plaintiff, a licensed dentist who practiced periodontics, asserted that the AAP's "limited practice requirement" was the means for effectuating a group boycott by AAP members against others in this dental specialty who did not specifically limit their practice to periodontics.[162] Specifically, Dr. Kreuzer alleged that denying him active membership in the AAP simply because he practiced "periodontal prosthesis"[163] along with periodontics constituted a *per se* illegal group boycott.[164]

In attempting to show concerted action, the plaintiff contended that the AAP conspired with the American Dental Association (ADA) to effectuate a group boycott against periodontists who also practiced periodontal prosthesis by not including the latter practice within the recognized dental specialty of periodontics.[165] The *Kreuzer* court, however, failed to find such a conspiracy between the AAP and the ADA.[166] Nevertheless, the plaintiff was able to establish concerted action under a different and now-familiar method.[167] Specifically, Dr. Kreuzer argued that the individual members of the AAP conspired to enforce the limited practice requirement and to deny his membership application.[168] The court overwhelmingly accepted this theory of con-

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nition of specialty organizations such as the AAP. *Id.* at 1483.

162. *Id.* at 1482. The AAP's "limited practice requirement" provides that a "dentist must be educationally qualified in the specialty of periodontics according to the ADA, and '*must limit . . . his practice exclusively to the special areas approved by the American Dental Association.*' " *Id.* at 1483 (quoting ADA PRINCIPLE OF ETHICS § 18, RE 155) (emphasis by court). When a periodontist fails to meet the AAP's "limited practice requirement," he or she is ineligible for "active membership" in the AAP and can only be granted "associate membership." *Id* at 1483. Associate members do not have the right to vote, make nominations, or hold office in the AAP. *Id.* at 1483 n.7. Moreover, associate members are listed in a different manner in the AAP's membership directory than are active members. *Id.* Thus, in essence, the grant of associate membership is an example of conferring "second-class practitioner" status. *See supra* text accompanying note 14.

163. "Periodontal prosthesis" is a subfield of periodontology that is concerned with "saving teeth that might otherwise be extracted due to advanced periodontal disease." *Kreuzer*, 735 F.2d at 1483. The ADA does not recognize periodontal prosthesis as a dental specialty; therefore, if a dentist practices periodontal prosthesis along with periodontology, he or she does not meet the AAP's "limited practice requirement." *See supra* note 162.

164. *Kreuzer*, 735 F.2d at 1491.

165. *Id.* at 1485.

166. *Id.* at 1488. The court, demonstrating the difficulty of proving a Sherman Act conspiracy, stated that a "showing of regular contact between two independent professional associations on general matters of mutual interest and concern" is insufficient to provide an inference of conspiracy, and that such an inference can only be drawn when there is a showing that the "alleged conspirator has acted contrary to his own independent interest." *Id.* Because the plaintiff failed to satisfy this burden, the court affirmed the district court's grant of summary judgment in favor of the ADA. *Id.* at 1490.

167. *See supra* notes 103–14 and accompanying text.

168. *Kreuzer*, 735 F.2d at 1490.

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certed action, asserting that there could "be no doubt that a conspiracy existed within the AAP to deny Dr. Kreuzer's application for active membership."[169] Thus, as demonstrated in the instant case as well as in the Third Circuit's decision in *Weiss*, antitrust plaintiffs are readily satisfying the concerted action requirement of section 1 of the Sherman Act by simply focusing on the economic reality that professional associations and medical staffs consist of individual, competing economic entities.

The important part of the *Kreuzer* court's opinion is its analysis of whether the alleged *per se* illegal group boycott effectuated by the AAP should be viewed differently under the Sherman Act because health care professionals were involved. Interestingly, the court decided to apply the rule-of-reason to the AAP's actions in enforcing the limited practice requirement because of the "public service" concerns allegedly underlying the professional association's admission requirements.[170] In reaching this conclusion, however, the court attempted to reconcile the conflict between Supreme Court precedents holding group boycotts *per se* illegal and the *Goldfarb* footnote dichotomy offering a basis for different antitrust treatment of the learned professions.[171] Ultimately, the court ostensibly decided that Supreme Court precedents condemning all group boycotts were not conclusive, and that in the context of antitrust challenges to the conduct of the learned professions, there were too many uncertainties regarding the competitive effects of the practices involved to condemn them automatically under traditional *per se* rules.[172]

In holding that the district court was correct in utilizing the rule-of-reason to analyze the professional group boycott at issue, the *Kreuzer* court then proceeded to provide the lower court with guidance in making this analysis. Specifically, the court of appeals rejected the district court's reliance on the lack of any anticompetitive *intent* as its sole basis for finding that the AAP's limited practice requirement passed

169. *Id.*

170. *Id.* at 1492. No doubt the court was influenced by the United States' *amicus curiae* brief urging rule-of-reason analysis because a "professional organization is the group best suited to judge the competence of its members to hold themselves out to the public as specialists." *Id.* at 1491 (citing *Amicus Curiae* Brief for the United States at 5–6). Moreover, the United States urged that membership rules "inform the public and serve a pro-competitive function." *Id.*

171. *See id.* at 1490–92.

172. *Id.* at 1491–92. The *Kreuzer* court interpreted Supreme Court precedents condemning group boycotts as *per se* illegal as only applicable when there was a "purpose to exclude competitors." *Id.* at 1492. Moreover, the court asserted that there was no such purpose in the instant case because the "AAP is a membership organization enforcing its membership rules," and such "membership organizations do not actually compete with the individual member who is affected by a questioned practice . . . ." *Id.* For an analysis of the logical correctness of the *Kreuzer* court's approach, see *infra* text accompanying notes 205–07.

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muster under the rule-of-reason.[173] The *Kreuzer* court explained that under long-standing precedent, such as the Supreme Court's decision in *Chicago Board of Trade v. United States*,[174] the " 'inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition.' "[175] In this regard, the court noted that the conduct under question had a number of possible anticompetitive effects,[176] but conversely, the AAP's limited practice requirement could have pro-competitive effects by improving "the quality of care of periodontal patients."[177]

In prescribing the appropriate balancing approach to be utilized under the rule-of-reason, the *Kreuzer* court articulated a standard which inquired into the nexus between the questioned membership rule and its public service or patient care rationale.[178] This standard focused on whether the economic self-interest of the health care practitioners predominated the membership practice in question, or whether there was a completely separate patient care justification promoted by the rule. Thus, implicit in the court's standard is a requirement that a court inquire into the intent, purpose, or motivation behind an asserted "public service or ethical norm" rationale to determine whether it genuinely promotes the quality of patient care or is simply a pretextual justification that, in actuality, promotes the economic interests of the members of the professional association. Of course, if the justification offered by the professional association was simply the economic self-interest of its members, the challenged conduct would fail to pass muster under the rule-of-reason.

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173. *Kreuzer*, 735 F.2d at 1492–93, 1493 n.20.

174. 246 U.S. 231 (1918).

175. *Kreuzer*, 735 F.2d at 1492 (quoting National Soc'y Professional Eng'rs v. United States, 435 U.S. 679, 691 (1978)).

176. *Kreuzer*, 735 F.2d at 1493–94. The court noted that the limited practice requirement could prevent periodontists from competing with general dentists; that it could prevent periodontists from actively competing with others in this specialty area if a periodontist decided to forego active membership; and finally, that consumers could be injured because periodontists without active membership would not receive referrals and thus the supply of such practitioners would be artificially limited, thereby increasing prices. *Id.*

177. *Id.* at 1494. Specifically, the AAP contended that by requiring periodontists to fully devote their practice to this specialty, their expertise would be enhanced, thereby increasing the quality of patient care. *Id.*

178. *Id.* at 1494. The court's standard for applying a rule-of-reason analysis in the context of a professional group boycott was as follows: "When the economic self-interest of the boycotting group and its proffered justifications merge the rule of reason will seldom be satisfied. When, however, the justification for the boycott is closely related to a lawful purpose the rule of reason will generally be satisfied." *Id.* Note, however, that the court did not define what was a "lawful purpose." It is asserted that *bona fide* "public service and ethical norms" justifications proffered by boycotting professionals constitute a lawful purpose and are pro-competitive in effect. *See infra* text accompanying notes 242–57.

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Nevertheless, in articulating a seemingly workable standard for analyzing group boycotts by professional associations, the *Kreuzer* court introduced uncertainty into its test by including one final element. Specifically, the court asserted that even if the professional association establishes that its practice is pro-competitive in that it improves the quality of patient care, the defendant must still demonstrate that "the means chosen to achieve that end are the least restrictive available."[179] Thus, in relieving the professional association and its "limited practice requirement" from immediate condemnation under the *per se* rule against group boycotts, the Court of Appeals for the District of Columbia clearly decided not to analyze the defendant's conduct under the traditional rule-of-reason and instead adopted an intermediate standard employing a least restrictive means analysis.[180]

On the basis of the *Weiss* and *Kreuzer* decisions, it is apparent that at least two federal courts of appeals have held that rule-of-reason analysis, at least in some form, is the appropriate standard of antitrust review for evaluating the difficult area of group boycotts by health care professionals when the conduct is premised on "public service or ethical norms" justifications. Additionally, it is clear that the Court of Appeals for the Seventh Circuit will also analyze professional group boycotts under the rule-of-reason after the Seventh Circuit's decision in *Wilk v. American Medical Association.*[181]

In *Wilk*, the court was faced with an interesting factual situation where the plaintiffs, five licensed chiropractors,[182] alleged that the defendants had engaged in a conspiracy to eliminate the chiropractic profession through the use of a group boycott.[183] Principal among the plaintiffs' contentions was that the defendant American Medical Association (AMA), through its self-regulatory ethical principles and vari-

179. *Kreuzer*, 735 F.2d at 1495.

180. For an analysis of the correctness of the *Kreuzer* court's approach, see *infra* text accompanying notes 228–41. For a discussion of a proposed rule-of-reason test for analyzing group boycotts by health care professionals, see *infra* text accompanying notes 242–56.

181. 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2398 (1984).

182. "Chiropractic" is a health care service which has, as its primary therapeutic tool, spinal manipulation. *Id.* at 213. Such therapy is also practiced by osteopathic physicians, physical therapists, and some allopathic physicians. *Id.* at 213 n.4. Thus, chiropractors are state-licensed practitioners who compete with physicians in a narrow area of health care services. *Id.* at 216, 218.

183. *Id.* at 211. The defendants who allegedly participated in the conspiracy against chiropractors included, *inter alia*, the American Medical Association (AMA), the American Hospital Association (AHA), the American College of Surgeons (ACS), the American College of Physicians (ACP), the Joint Committee on Accreditation of Hospitals (JCAH), the American College of Radiology, the American Academy of Orthopaedic Surgeons, and the Illinois State Medical Society (ISMS). *See id.* at 211–13. The court ultimately held, as the jury found, that the AMA, AHA, ACS, ACP, JCAH, and the ISMS did in fact participate in a conspiracy against the chiro-

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ous related resolutions, had condemned chiropractors as "quacks" and an "unscientific cult" that did not practice a method of healing with a scientific basis.[184] Furthermore, the plaintiffs asserted that in carrying out this campaign against the chiropractic profession, the AMA communicated to numerous medical associations, medical schools, and hospitals that associations between physicians and chiropractors were "unethical."[185] The plaintiffs asserted that as a result of this conspiracy physicians refused to deal with them, that chiropractors were denied clinical admitting privileges at numerous hospitals, that their referral business declined, and ultimately that public demand for chiropractic services was negatively affected.[186] Therefore, the chiropractors argued that the conduct of the defendants constituted a *per se* illegal group boycott, and as such, it was irrelevant whether the defendants' conduct was motivated by a belief in the dangers of chiropractic.[187]

In considering this group boycott contention, the *Wilk* court engaged in the now-familiar task of attempting to balance Supreme Court precedents condemning group boycotts as *per se* illegal against the differential treatment footnote dichotomy of *Goldfarb* as "interpreted" in *NSPE* and *Maricopa.* While the *Wilk* court was cognizant of the fact that the Supreme Court was persistent in its support of the *per se* antitrust doctrine, the Seventh Circuit asserted, nevertheless, that "boycotts are illegal *per se* only if used to enforce agreements that are themselves illegal *per se*—for example price-fixing agreements."[188] Moreover, after quickly addressing the group boycott precedent issue, the *Wilk* court was easily convinced that this case was inappropriate

184. *Id.* at 213. For evidence that this conduct is not innovative on the AMA's part, and that this organization had similarly condemned osteopathic physicians before "deciding to join them," see Blackstone, *supra* note 4, at 405, 412, 417.

185. *Wilk*, 719 F.2d at 213–14.

186. *Id.* at 214.

187. *Id.* at 216. Nonetheless, the district court ultimately admitted the defendants' public interest evidence, and as the appellate court described, "virtually all of the parties' arguments to the jury were a free-for-all between chiropractors and medical doctors, in which the scientific legitimacy of chiropractic was hotly debated and the comparative intensity of the avarice of the adversaries was explored." *Id.* at 216.

188. *Wilk*, 719 F.2d at 221 (quoting Marrese v. American Academy of Orthopaedic Surgeons, 706 F.2d 1488, 1495 (7th Cir. 1983), *vacated*, 726 F.2d 1150 (7th Cir. 1984), *rev'd on other grounds*, 105 S. Ct. 1327 (1985)). What is interesting in the Seventh Circuit's group boycott analysis is that the court failed to analyze or even cite specific Supreme Court cases condemning group boycotts as *per se* illegal. *See id.* at 221. For a discussion of the Court's group boycott precedent, see *supra* notes 71–98 and accompanying text. The Seventh Circuit has consistently overlooked the weight of Supreme Court authority in its group boycott analysis. *See, e.g.*, Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n, Inc., 672 F.2d 1280, 1281 (7th Cir. 1982) (group boycotts must affect consumers rather than just competitors to be *per se* illegal). For an analysis of the correctness of the Seventh Circuit's group boycott "plus" approach, see *infra* text & accompanying notes 200–04.

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for *per se* treatment because of the uncertainties in evaluating practices of professionals, and because there was substantial evidence of a "patient care" motive as asserted by the defendants.[189] In sum, the Seventh Circuit viewed cases such as *Maricopa* and *NSPE* as preserving the opportunity for different antitrust treatment of the conduct of professionals, and believed that the instant case was an appropriate one for exercising that "discretion" because the ethical justifications proffered by the defendants gave rise "to questions of sufficient delicacy and novelty at least to escape *per se* treatment."[190]

The *Wilk* court then proceeded to provide the district court with guidance for applying the rule-of-reason in this difficult case because it found that defective jury instructions were given.[191] In providing this guidance, however, the *Wilk* court decided that the rule-of-reason could be "modified" in the instant case because the defendants presented "public service and ethical norms" justifications for their conduct.[192] Thus, because of the "patient care" rationales presented by the defendants for the group boycott in question, the court asserted that "[a] value independent of the values attributed to unrestrained competition must enter the equation."[193]

In deciding to allow a value independent of unrestrained competition to enter its "modified" rule-of-reason analysis, the *Wilk* court was seemingly mindful of the fact that the Supreme Court had consistently excluded from the rule-of-reason equation variables unrelated to competition.[194] Nevertheless, the "modified" rule-of-reason analysis articulated by the *Wilk* court, while requiring the defendant to justify its anticompetitive conduct when premised on "public service and ethical norms" rationales, fails to require the defendant to prove that its conduct is pro-competitive in effect.[195] This is because the *Wilk* court's

189. *Wilk*, 719 F.2d at 221.

190. *Id.* at 222.

191. *Id.* at 223. The court found the jury instructions invalid because of the district court's failure to convey the single rule-of-reason inquiry of whether the questioned practice promotes or suppresses competition. *Id.*

192. *See id.* at 225–26. In striking such a path, the court placed reliance on Justice Blackmun's concurrence in *NSPE*. *See supra* note 47. In fact, the Seventh Circuit made its position very clear in stating:

> It seems reasonable that two or three medical doctors, sharing [the] view [that associating with chiropractors is unethical] and working as a team in the care of a particular patient, would be free to agree, and to act on the agreement, to decline to associate with a particular chiropractor in the care of that patient.

Wilk, 719 F.2d at 226.

193. *Wilk*, 719 F.2d at 227.

194. *See id.* at 227–28.

195. *Id.* at 227. The court's standard is as follows:

> The burden of persuasion is on the plaintiffs to show that the effect of Principle 3 [the AMA's anti-chiropractic provision] and the implementing conduct has been to restrict

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standard allows the defendant to escape Sherman Act liability by showing that it had a specific, genuine, and reasonable patient care motive that was the "dominant" reason for the defendant's challenged activity. Thus, under this standard, if the defendant's patient care motive is the dominating justification for the conduct at issue, the group boycott is *presumed* pro-competitive so long as the measure utilized by the defendant is less restrictive of competition than are other available methods.[196]

The standard employed by the *Wilk* court does not place enough emphasis on the competitive considerations mandated by the Supreme Court in rule-of-reason inquiries and will ultimately, therefore, prove to be unworkable.[197] In deciding to remove the conduct of the AMA from immediate condemnation under the *per se* rule against group boycotts, it is clear that the *Wilk* court utilized a standard that lies somewhere between rule-of-reason and *per se* methods of antitrust analysis. Although it is argued in this comment that a rule-of-reason analysis is the correct approach for evaluating group boycotts by health care professionals, the questions presented when analyzing the rule-of-reason standards employed by the *Wilk* and *Kreuzer* courts are whether enough emphasis is being placed on the competitive considerations mandated by Supreme Court precedents, and whether the Seventh and District of Columbia Circuits are justified in imposing a least restrictive means burden on defendant health care professionals.

V. Analysis

A. *The Lower Federal Court Shift to Rule-of-Reason Analysis: Does the End Justify the Means?*

In each of the decisions analyzed in part IV, the federal courts of

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> competition rather than to promote it. If the plaintiffs have met this burden, the burden of persuasion is on the defendants to show: (1) that they genuinely entertained a concern for what they perceive as scientific method in the care of each person with whom they have entered into a doctor-patient relationship; (2) that this concern is objectively reasonable; (3) that this concern has been the dominant motivating factor in the defendants' promulgation of Principle 3 and in the conduct intended to implement it; and (4) that this concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition.

Id. Even though the court was placing evidentiary burdens on the respective parties, it held that the defendants' burden did not constitute an affirmative defense which had to be plead; nevertheless, if the defendants met this burden, they would escape § 1 Sherman Act liability as their conduct would be deemed reasonable. *Id.* The court also asserted that the defendants had to have a specific patient care motive—that is, the concern had to be for a specific patient and not simply for the health, safety, and welfare of the general public. *Id.* at 228. *See supra* note 192.

196. *See Wilk*, 719 F.2d at 227. *See also supra* note 195.

197. For a discussion of these competitive considerations and the shortcomings of the *Wilk* standard, *see infra* text accompanying notes 222–28.

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appeals all reached the conclusion that a rule-of-reason balancing approach should govern resolution of the difficult antitrust issue of group boycotts by health care professionals when the conduct is premised on "public service or ethical norms" justifications.[198] In avoiding the *per se* rule which automatically condemns group boycotts, it is asserted that the courts reached the correct result, considering the necessity of allowing the health care profession to regulate the competence and professional conduct of its members.[199] In deciding to give defendant health care professionals the benefit of the rule-of-reason in certain circumstances, however, it is apparent that the Courts of Appeals for the Third, Seventh, and District of Columbia Circuits have attempted to diminish Supreme Court precedents condemning group boycotts as *per se* illegal.

For instance, the Court of Appeals for the Seventh Circuit in *Wilk* clearly subordinated Supreme Court group boycott precedent in deciding to apply some form of the rule-of-reason to evaluate the boycott against chiropractors. The Seventh Circuit's position, that group boycotts are only *per se* illegal when combined with another practice that is in itself illegal under the antitrust laws,[200] is simply untenable if that court is proceeding under the premise that deference to Supreme Court precedent construing the Sherman Act is necessary—a premise upon which this comment proceeds. In its very recent decision in *Jefferson Parish*,[201] the Court confirmed that group boycotts, including those effectuated by an association of competitors, are *independent per se* violations under section 1 of the Sherman Act.[202] Moreover, the Seventh Circuit's stance that group boycotts must injure consumers and not just competitors in order to be *per se* illegal[203] is, again, not supported by

198. The D.C. Circuit in *Kreuzer* and the Seventh Circuit in *Wilk* applied some form of the rule-of-reason. *See* Kreuzer v. American Academy of Periodontology, 735 F.2d 1479, 1492 (D.C. Cir. 1984); Wilk v. American Medical Ass'n, 719 F.2d 217, 221–22 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2398 (1984). The Third Circuit in *Weiss* indicated it would have applied the rule-of-reason had the defendants presented "public service or ethical norms" justifications for their conduct. *See* Weiss v. York Hosp., 745 F.2d 786, 820–22 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1777 (1985).

199. For a discussion of why rule-of-reason analysis should govern antitrust review of group boycotts by health care professionals, see *infra* text accompanying notes 257–63.

200. *Wilk*, 719 F.2d at 221. *See supra* text accompanying note 188.

201. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S. Ct. 1551 (1984).

202. Specifically, in asserting that certain types of commercial practices are deemed unreasonable as a matter of law, the Court noted: "'[W]here a complaint charges that the defendants have engaged in price fixing, or have *concertedly refused to deal with non-members of an association*, . . . the amount of commerce involved is *immaterial* because such restraints are illegal per se.'" *Id.* at 1556 n.10 (quoting United States v. Columbia Steel Co., 334 U.S. 495, 522–23 (1948)) (emphasis added).

203. *See e.g.*, Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n, Inc., 672 F.2d 1280, 1281 (7th Cir. 1982). *See also supra* note 188 and accompanying text.

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the Supreme Court's decisions. In its *General Motors* decision, the Court confirmed, that under prior precedent, a group boycott is *per se* illegal if it results in the elimination of only a *single* competitor.[204] Thus, the Court's position demonstrates a realization that a boycott of even one competitor will ultimately affect some consumers; however, the Court has never articulated a requirement that the boycott actually injure consumers before it can be condemned as *per se* illegal. It is apparent that the Seventh Circuit in *Wilk* avoided analysis of Supreme Court precedent condemning group boycotts as *per se* illegal because such an analysis would have been fruitless as it would not have been supportive of the *Wilk* court's position. The Seventh Circuit has simply made a convincing case that it is articulating and applying its own form of group boycott analysis—not that of the Supreme Court.

Similarly, the reasoning of the Court of Appeals for the District of Columbia in *Kreuzer* is also flawed in attempting to distinguish Supreme Court precedents. The *Kreuzer* court's position is that group boycotts are only *per se* illegal when they are designed to drive competitors out of the market.[205] It is conceded that the Supreme Court cases condemning group boycotts as *per se* illegal involved restraints of trade that likely had as their goal the elimination of competitors. Nevertheless, the *Kreuzer* court's logic in concluding that the AAP's "limited practice requirement" could have no such purpose or effect is clearly defective. This is because the court concluded that concerted action was proven in the case based on a conspiracy among the members of the AAP to deny the plaintiff's application for full membership in this professional association. However, in holding that the AAP's membership requirement could not have been designed to eliminate competitors, the court stated: "Because sanctioning or membership organizations do not actually compete with the individual member who is affected by a questioned practice, *per se* treatment is inadvisable."[206]

The inconsistency of the *Kreuzer* court in avoiding the *per se* rule against group boycotts is readily apparent: The individuals who make up the professional association do, in fact, compete with the professional who seeks membership status. Why else would the court hold that an agreement among members of the AAP satisfied the concerted

204. United States v. General Motors Corp., 384 U.S. 127, 145–46 (1966). *See supra* note 82.

205. *Kreuzer*, 735 F.2d 1491–92. *See supra* note 172 and accompanying text.

206. *Kreuzer*, 735 F.2d at 1492. *But see* Marrese v. Interqual, Inc., 748 F.2d 373, 394 (7th Cir. 1984) ("[T]he members of a peer review committee, as trained experts in highly specialized fields of medicine, are often in direct competition with the practitioner whom they are reviewing, and the committee's decision to revoke hospital staff privileges may conceivably have a 'substantial and adverse effect' upon interstate commerce."), *cert. denied*, 105 S. Ct. 3501 (1985).

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action requirement? The economic reality is that the professionals who were members of the AAP did have competitive interests at stake and could very well have adopted a membership requirement designed to hamper or eliminate competitors. Moreover, later in its opinion, the *Kreuzer* court even recognized a number of anticompetitive effects that members of the AAP could accomplish through utilization of their "limited practice requirement,"[207] thus adding to the hypocrisy of the District of Columbia Circuit's position.

The Court of Appeals for the Third Circuit in *Weiss* also demonstrated an inclination to diminish Supreme Court precedents condemning group boycotts as *per se* illegal. Although the court paid deference to Supreme Court precedents in holding that the conduct of York Hospital's medical staff in applying "strict scrutiny" to applications by osteopaths for admitting privileges constituted a *per se* illegal group boycott,[208] the *Weiss* court also indicated that it would avoid the *per se* rule in certain circumstances. An instance where the court stated it would "have" to apply the rule-of-reason was where the conduct of the health care professionals resembled industry self-regulation—that is, where a health care professional was denied admitting privileges because of a "lack of professional competence or unprofessional conduct."[209] This approach is justifiable and does have public policy appeal. However, the Third Circuit's position finds no support whatsoever in Supreme Court group boycott precedent. The Court has simply never made an exception to the *per se* rule condemning commercial group boycotts; furthermore, the Court has shown no inclination to apply a different rule simply because the conduct was justified as self-regulatory.[210] Rather, in both its *Silver* and *Associated Press* decisions, the Supreme Court indicated its unwillingness to allow relief from the

207. *Kreuzer*, 735 F.2d at 1493. In general, the potential anticompetitive effects with which the court was concerned were based on the economic reality that AAP members have a competitive interest at stake in preventing potential members from having a broader dental practice than those members who limited their practices solely to periodontics. *Id. See supra* notes 28 & 176.

208. *Weiss*, 745 F.2d at 820–21.

209. *Id.* at 820.

210. *See, e.g.*, Silver v. New York Stock Exch., 373 U.S. 341 (1963) (group boycott by Exchange and its members would have been *per se* illegal but for duty of self-regulation imposed on Exchange by Securities Exchange Act of 1934); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (Court rejected as *per se* illegal a group boycott by gas companies and their regulatory association); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941) (action of trade association in boycotting retailers who stocked "pirated" designs *per se* illegal). After reviewing the Court's decisions in *Radiant Burners*, *Fashion Originators' Guild of America* and *Silver*, Professor Sullivan asserted that "absent a congressional enactment giving antitrust exemption, no self-regulatory reason, however much it might be in the public interest, would warrant a specific boycott." L. SULLIVAN, *supra* note 66, § 87, at 247. *See also supra* notes 71-98 and accompanying text.

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per se rule condemning group boycotts simply because the challenged conduct was justified as self-regulatory.[211] Thus, it is clear that the approach of the Third Circuit in *Weiss* is also at variance with the paramount interpreter of the Sherman Act—the United States Supreme Court.

In summary, the approaches taken by the Seventh, Third and District of Columbia Courts of Appeals in diminishing the scope of the *per se* rule condemning group boycotts, as a means for reaching rule-of-reason analysis, cannot find persuasive support in the relevant Supreme Court precedents. However, these courts are justified in reasoning that group boycotts by health care professionals often result in pro-competitive effects; namely, self-regulation by members of a profession to ensure that minimal levels of competence and professionalism are present before granting a fellow practitioner a desired status or entitlement. Nevertheless, the approach of these courts in adamantly attempting to diminish the Supreme Court's group boycott precedent is not sound, because in general, concerted refusals to deal have as their purpose the elimination of legitimate competitors and are, therefore, anticompetitive and unworthy of prolonged judicial analysis.[212] Moreover, lower federal courts should follow, rather than distinguish on tenuous grounds, the Supreme Court's decisions construing the Sherman Act, especially when faced with the well-entrenched and time-tested rule condemning group boycotts. Instead of "fighting" the Supreme Court on its group boycott position, lower federal courts should reach the rule-of-reason for evaluating group boycotts by health care professionals through a different and distinct method of analysis that finds stronger precedential support in the Court's decisions.

Specifically, the approach that should be utilized by the courts is based solely on the *Goldfarb* footnote dichotomy, which remains undiminished as a source for providing differential antitrust treatment of group boycotts by health care professionals.[213] For instance, in both the *National Society of Professional Engineers (NSPE)* and *Maricopa* decisions, the Supreme Court indicated a continued willingness to treat professionals differently when the alleged restraint of trade was premised on "public service or ethical norms" justifications. The thrust of the Court's infamous *Goldfarb* footnote 17 is best exemplified by the Court's decision in *NSPE*.[214] According to the language in the *NSPE* decision, when members of a learned profession justify their challenged

211. *See supra* notes 84–96 and accompanying text.

212. *See supra* text accompanying notes 65–71.

213. For an analysis of the *Goldfarb* differential treatment dichotomy, see *supra* notes 30–64 and accompanying text.

214. National Soc'y Professional Eng'rs v. United States, 435 U.S. 679 (1978).

conduct on competency considerations or other ethical norms peculiar to the particular profession, the challenged restraint will be relieved from immediate condemnation under the *per se* rule. Instead, the conduct at issue will be analyzed under the rule-of-reason for a determination of whether the practice promotes or suppresses competition.[215]

The Supreme Court has placed certain limits on the breadth of differential treatment offered by the *Goldfarb* footnote. Specifically, the Court will not tolerate "manifestly anticompetitive conduct simply because the health care industry is involved."[216] However, to date, the Court has established only two categories of trade restraints that are so anticompetitive that the Court has been unwilling to offer professionals different antitrust treatment: price-fixing and certain tying arrangements.[217] The Court has *not* condemned group boycotts by health care professionals as so "manifestly anticompetitive" that different antitrust treatment is not available for such practitioners under the *Goldfarb* footnote as developed in *NSPE*. Therefore, where the conduct in question is a group boycott by health care professionals, Supreme Court decisions support an antitrust analysis based on the rule-of-reason when the defendants premise their conduct on legitimate "public service or ethical norms" justifications.

Lower federal courts have placed some reliance on the *Goldfarb* footnote dichotomy. For example, the Third Circuit in *Weiss* recognized that this Supreme Court precedent, albeit dictum, can serve as an " 'escape hatch' . . . [which] can extricate the defendants from the 'cut' of the *per se* rule."[218] Moreover, the Seventh Circuit in *Wilk*, after reviewing the *Goldfarb* footnote as developed in *NSPE* and *Maricopa*, noted that the Court had "taken pains" to preserve the possibility of different antitrust treatment for the learned professions.[219] Accordingly, the *Wilk* court asserted that a justification for a group boycott of chiropractors based on the medical profession's concern for the scientific method presented "questions of sufficient delicacy and novelty at least to escape *per se* treatment."[220]

Although the lower federal courts have looked to the *Goldfarb* footnote as a basis for reaching rule-of-reason analysis, these courts have not placed primary reliance on the differential treatment dichotomy. Instead, the Third, Seventh, and District of Columbia Circuits have primarily relied on diminishing the scope of the Supreme Court's

215. *See id.* at 696.
216. *Jefferson Parish*, 104 S. Ct. at 1565 n.42. *See supra* text accompanying note 60.
217. *See supra* note 63 and accompanying text.
218. *Weiss*, 745 F.2d at 820.
219. *Wilk*, 719 F.2d at 222.
220. *Id.*

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group boycott precedents as a means for reaching the rule-of-reason for evaluating group boycotts by health care professionals.[221] This diminution approach constitutes an avoidance and civil disobedience of the Supreme Court's authority in defining the parameters of antitrust analysis under the Sherman Act. Moreover, because the Court has not disavowed its differential treatment dichotomy in the context of group boycotts by health care professionals, this comment contends that the lower federal courts should place *sole* reliance on the *Goldfarb* footnote dichotomy as authority for reaching the rule-of-reason in analyzing this type of professional conduct challenged under section 1 of the Sherman Act.

The benefits of such a straightforward approach are twofold. First, if lower courts consistently rely on the Supreme Court's indications that different treatment of the learned professions is merited in certain situations, it could force the Supreme Court to accept certiorari on this issue to specifically delineate the permissible bounds of different treatment of professionals under section 1 of the Sherman Act. Such direct clarification is needed from the Court because it has consistently let this issue "burn" for ten years through various footnote pronouncements on its inclination to treat professionals differently. Certainty in this area of contemporary antitrust law is imperative in order to provide the learned professions with the discretion and incentive to engage in effective self-regulation. The second benefit of placing sole reliance on the *Goldfarb* footnote dichotomy as a means for reaching the rule-of-reason is that it could very well encourage the Supreme Court to clarify the proper variables that courts are to consider in a rule-of-reason analysis of professional group boycotts. Currently, the approaches taken by the Seventh and District of Columbia Circuits are at variance with a traditional rule-of-reason analysis. In sum, the application of the Sherman Act to group boycotts by health care professionals is an area of antitrust law that is ripe for current Supreme Court attention.

B. *The Correctness of the Rule-of-Reason Standards Utilized by the Federal Courts of Appeals*

In reaching the rule-of-reason to analyze the conduct of health care professionals in boycotting members of their profession or other health care practitioners, it it clear that the Seventh and District of Columbia Circuits in *Wilk* and *Kreuzer*, respectively, did not utilize the traditional rule-of-reason balancing approach. Instead, while relieving the defendants from the *per se* rule condemning group boycotts,

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221. For a discussion of the diminution approaches taken by the federal courts of appeals, *see supra* text accompanying notes 198–213.

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these courts still employed a heightened, intermediate standard of review which placed a heavy burden on the defendants, through use of a least restrictive means requirement, to justify their exclusionary conduct. Thus, although the *Wilk* and *Kreuzer* courts intimated that they were applying the rule-of-reason, the reality of their analyses demonstrates that they were not.

For example, the Seventh Circuit in *Wilk* articulated a rule-of-reason standard that initially placed the burden on the plaintiff to show that the challenged conduct had an anticompetitive effect. However, even after this burden was satisfied, the court then permitted the defendants to escape Sherman Act liability without a showing that the AMA's group boycott of chiropractors had an overall pro-competitive effect, because the defendants' initial burden only required a showing of a dominant and specific patient care motive.[222] In allowing "[a] value independent of the values attributed to unrestrained competition" to enter the rule-of-reason equation,[223] the *Wilk* court departed from the traditional and proper method of antitrust analysis. This is because the Supreme Court has mandated that a rule-of-reason analysis must focus "directly on the challenged restraint's impact on competitive conditions."[224] By allowing defendants to escape antitrust liability by simply showing that the health care professionals' conduct was premised on a genuine, reasonable, and dominant patient care motive,[225] the Seventh Circuit's "rule-of-reason" approach does not place the requisite emphasis on competitive *effects*. Under a proper rule-of-reason analysis, defendant health care professionals should be required to *prove* that their conduct has an overall pro-competitive effect—such an effect cannot be presumed. For this reason, the Seventh Circuit's standard is defective because it does not have as its sole inquiry an analysis of "whether the challenged agreement is one that promotes competition or one that suppresses competition."[226]

Additionally, it is clear that the *Wilk* court, while unjustifiably relieving the defendants of the burden of specifically showing that their conduct was pro-competitive, also imposed a troublesome requirement on the defendants to prove that their "concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition."[227] This "least restrictive" requirement is

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222. *See Wilk*, 719 F.2d at 227. The Seventh Circuit's standard is reproduced in the footnotes. *See supra* note 195.

223. *Wilk*, 719 F.2d at 227.

224. *NSPE*, 435 U.S. at 688.

225. *See supra* note 195.

226. *NSPE*, 435 U.S. at 691.

227. *Wilk*, 719 F.2d at 227.

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simply divorced from a proper rule-of-reason inquiry of whether the challenged conduct promotes or suppresses competition. If the defendants can establish that their conduct has an overall pro-competitive effect in improving the quality and efficiency of patient care, the health care professionals should not be required to go a step further and demonstrate that the practice at issue is the least restrictive available. It is asserted that if a court relieves the health care group boycott from *per se* condemnation, the defendants should receive the full benefit of a straightforward, traditional rule-of-reason analysis.

Nevertheless, the Court of Appeals for the District of Columbia also employed a least restrictive requirement in its "rule-of-reason" approach in *Kreuzer*.[228] In arriving at this heightened rule-of-reason inquiry, both the *Wilk* and *Kreuzer* courts utilized Supreme Court statements that, in actuality, do not support such an approach.[229] Specifically, the courts relied upon the Supreme Court's decision in *Silver v. New York Stock Exchange*,[230] and also placed weight on Justice Blackmun's concurring opinion in *NSPE*.[231] In *Silver*, while the Court did assert that the Exchange could engage in self-regulation to the "extent necessary" in achieving the objectives of the Securities Exchange Act, the Court did not mandate a least restrictive means analysis in every rule-of-reason inquiry involving trade or professional associations.[232] The Court's decision in *Silver* cannot be extended this far; *Silver* is a distinguishable case where the Court was faced with the narrow issue of reconciling the competing policies behind two federal statutes.[233] Moreover, the reliance of the *Wilk* and *Kreuzer* courts on Justice Blackmun's concurrence in *NSPE* as a basis for requiring a least restrictive means analysis is also misplaced. Notwithstanding the fact that Justice Blackmun's concurrence was not necessary for the result in *NSPE*,[234] his statement that the "Society's rule [was] . . . grossly overbroad"[235] does not even approach a Supreme Court mandate that a traditional rule-of-reason analysis must include consideration of whether the means used were the least restrictive of competition. To the contrary, as Justice Stevens' majority opinion in *NSPE* reconfirmed, the *only* inquiry mandated under the rule-of-reason is one of whether the challenged practice promotes or suppresses

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228. *Kreuzer*, 735 F.2d at 1495. *See supra* text accompanying notes 179–80.
229. *See Wilk*, 719 F.2d at 227; *Kreuzer*, 735 F.2d at 1495.
230. 373 U.S. 341 (1963). *See supra* text accompanying notes 90–97.
231. 435 U.S. 679, 699 (1978) (Blackmun, J., concurring). *See supra* note 47.
232. *Silver*, 373 U.S. at 361.
233. *See id.* at 347.
234. *See supra* note 47.
235. *NSPE*, 435 U.S. at 699 (Blackmun, J., concurring).

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competition.[236]

Upon initial analysis, it is hard not to concede that the least restrictive means requirement utilized by the *Wilk* and *Kreuzer* courts does have initial emotional appeal—it also likely served as a court rationalization for relieving the defendants from the steadfast rule condemning group boycotts as *per se* illegal. Such a requirement may result in competition among medical practitioners that is less restrained when requirements for membership in desired associations are made as unrestrictive as possible to achieve their intended purpose. Nevertheless, such a standard also imposes a nebulous and burdensome requirement on the defendant professional association. Less restrictive means can generally always be found to defeat an otherwise pro-competitive membership requirement.[237]

More importantly, the least restrictive means analysis is simply not mandated by the traditional rule-of-reason. If courts are going to relieve defendant health care professionals from the *per se* rule against group boycotts, they ought not employ a heightened standard that finds no direct support in Supreme Court precedents. Defendants will already have an incentive to make membership requirements less restrictive in order to enhance the likelihood that their practice will be found pro-competitive. When the *Goldfarb* footnote dichotomy is utilized to relieve health care professionals from the *per se* rule against group boycotts, courts should not complicate analysis by articulating a specialized "rule-of-reason" standard just for professionals; rather, defendants should be given the full benefit of a traditional rule-of-reason analysis. Accordingly, if the conduct in question has an overall pro-competitive effect, the defendant health care professionals should escape Sherman Act liability.

The approach of the Court of Appeals for the Third Circuit provides support for such a method of analysis. In *Weiss*, while the court did condemn the defendant medical staff's conduct as *per se* illegal, it also provided important guidance for a rule-of-reason analysis of the group boycott activity of health care professionals. Specifically, the court's guidance offers a method for analyzing the defendant's "public

236. *Id.* at 691 (Stevens, J.). In performing the rule-of-reason analysis, a court could, of course, consider how restrictive a particular practice was in arriving at the ultimate conclusion of whether the restraint has an overall anticompetitive or pro-competitive effect. The problem with the *Wilk* and *Kreuzer* approaches, however, is that these courts make the nebulous least restrictive means analysis a separate inquiry apart from the rule-of-reason analysis. Thus, even if the professional concerted refusal to deal was found to have an overall pro-competitive effect, the practice could still, unjustifiably, be declared illegal if the restraint was not the least restrictive available to meet the particular health care professionals' "public service or ethical norms" objective.

237. *See, e.g., Kreuzer*, 735 F.2d at 1495 (court observed that a number of plausible least restrictive alternatives existed to achieve the professional association's objectives).

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service and ethical norms" justifications under the traditional rule-of-reason inquiry of whether the challenged restraint promotes or suppresses competition.[238] In the court's view, a medical staff's denial of hospital admitting privileges to a physician based on competency considerations is pro-competitive and permissible under the rule-of-reason because it enhances the quality of medical care.[239] Likewise, the denial of admitting privileges because of a physician's unprofessional conduct is also pro-competitive and passes muster under the rule-of-reason because it increases the efficiency of a hospital's provision of medical services.[240] In sum, the Third Circuit's method of analysis demonstrates that group boycotts by health care professionals can be analyzed under a traditional rule-of-reason equation to determine whether the questioned conduct promotes or suppresses competition.

In order to utilize such a straightforward rule-of-reason approach, courts will simply have to engage in traditional economic analysis to determine whether the health care professionals' proffered ethical norm justifications serve competition-enhancing functions. Courts must be willing to analyze whether health care professionals' utilization of competency and professional conduct standards in policing members of their profession have overall pro-competitive effects; at the same time, courts should avoid use of a nebulous least restrictive means requirement. It is recognized, however, that such "public service or ethical norms" justifications can serve as pretextual shields for anticompetitive conduct.[241] Therefore, in order for a traditional rule-of-reason inquiry to be a workable one, it will be necessary to develop a framework for assessing legitimate "public service or ethical norms" justifications from those which are merely pretextual rationales designed to further the self-interests of the particular health care professionals.

C. A Proposed Rule-of-Reason Standard for Evaluating Group Boycotts by Health Care Professionals

In order for the courts to effectively utilize the rule-of-reason balancing approach in analyzing group boycotts by health care professionals, criteria must be formulated to provide courts with a legitimate basis, consistent with the *Goldfarb* differential treatment dichotomy, for avoiding the *per se* rule condemning concerted refusals to deal. This comment therefore proposes a step-by-step analysis aimed at distinguishing legitimate professional self-regulation based upon "public ser-

238. *See Weiss*, 745 F.2d at 820 n.60.

239. *Id.* at 821 n.60.

240. *Id.*

241. *See generally supra* note 28.

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vice or ethical norms" rationales from concerted professional conduct that is predominantly economically self-interested. This "characterization" process will require the court to determine whether the health care professionals have advanced a bona fide "public service or ethical norms" rationale for the challenged group boycott. If this first step of the analysis is established, the court will then proceed to the second step of the analysis which consists of a traditional rule-of-reason inquiry. In analyzing the challenged conduct under this second step, the court should only be concerned with whether the overall effect of the questioned restraint is to promote or suppress competition.

The first step of the proposed analysis of group boycotts by health care professionals consists of a two-prong approach. The court must first determine whether the defendants' challenged conduct deserves to be relieved from the *per se* rule condemning group boycotts. Conduct deserving of such relief is that premised on "public service or ethical norms" justifications which are shown to be the *motivating factor* for the concerted refusal to deal; thus, the court will be required to determine whether the defendants' concern for the competency and professional conduct of a fellow professional or other practitioner is bona fide. In this "characterization" process, the court should analyze the events leading up to the particular practice in question. Specifically, the court should inquire into whether, for example, the particular health care professionals have demonstrated a need for a membership requirement focusing on the competency of a fellow practitioner, and the court should analyze the procedures utilized in enforcing the membership restriction. The touchstone conclusion to be reached by the court is whether the challenged restraint is predominantly in the economic self-interest of the members of a professional association, or whether there is stronger evidence of a need for a membership rule designed to ensure professional competence and to improve the quality of patient care.[242]

If the court is satisfied that the defendants have shown that their conduct was premised on a bona fide "public service or ethical norms" justification, the court should proceed to the second prong of the first

242. In determining whether the adoption of membership restrictions is predominantly in the self-interest of the professionals, the D.C. Circuit in *Kreuzer* provided a helpful standard. *See supra* note 178. A court should determine whether more evidence exists showing a profit motive underlying the group boycott or whether there is more persuasive evidence demonstrating that the practice in question was truly designed and implemented to achieve the "public service or ethical norms" objective of the health care professionals. *See generally supra* note 28. In making this determination, evidence that the health care professionals utilized impartial review procedures and other due process type mechanisms before excluding a practitioner should be persuasive. *See Weiss*, 745 F.2d at 796–97 (applications for hospital admitting privileges passed through four committees before final resolution and "judicial review" was available for negative determinations).

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step of analysis. Under the second prong, the defendants should be required to make a preliminary showing that the membership restriction in question *could* have pro-competitive effects. This showing is necessary because the court should not allow relief from the *per se* rule if the practice in question is "manifestly anticompetitive." Once the court is satisfied that the "boycott" was premised on a bona fide "public service or ethical norms" justification, and that the membership restriction could have pro-competitive effects, the court should, utilizing the *Goldfarb* footnote dichotomy as its precedential basis,[243] allow the defendants relief from the *per se* rule condemning group boycotts. Upon allowing the defendants' practice relief from immediate condemnation, the court should then proceed to the second step of analysis which consists of a full rule-of-reason inquiry.

Simply because the court reaches rule-of-reason analysis should not guarantee that the questioned conduct of the health care professionals will automatically pass muster under section 1 of the Sherman Act. Rather, once the excluded plaintiff practitioner has demonstrated the anticompetitive effect of the membership restriction, the defendants will carry the heavy burden of establishing that the challenged group boycott has an overall pro-competitive effect—that is, the practice promotes rather than suppresses competition. Specifically, the defendants will have to prove, for example, that the denial of hospital admitting privileges based on the lack of a minimum level of professional competence is pro-competitive in effect because it increases the quality of medical care to the ultimate benefit of consumer-patients. Likewise, a health care professional association that utilizes a "limited practice requirement" will have to prove that the effect of such a membership restriction is pro-competitive in that it increases the expertise of the particular professionals, thereby improving the quality of patient care rather than increasing the pecuniary gains of member professionals. In summary, in applying the second step of analysis, the court should utilize the traditional rule-of-reason balancing approach. The evidence presented by the respective parties will enable the court, along with its own economic analysis of the practice in question, to make a determination of whether the group boycott by health care professionals has an overall pro-competitive effect.

In making this determination, the court should *not* employ a least restrictive means analysis in addition to the balancing approach under the rule-of-reason. The need for such a court inquiry will be eliminated if the focus of analysis is solely on competitive considerations. This is because, under the standard proposed by this comment, defendant

243. *See supra* notes 30–64 & 213–17 and accompanying text.

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health care professionals will have the incentive to adopt narrow membership or admitting privilege requirements that focus solely on competency, professionalism, and quality of patient care considerations. Specifically, if unduly broad and burdensome membership requirements are employed by the defendants, it will become apparent that the economic self-interest of the health care professionals predominates the questioned practice, and even if the practice passes the first step of the analysis, the court will likely find under the second step that the concerted refusal to deal has an overall anticompetitive effect.

Court utilization of a least restrictive means analysis demonstrates reluctance on the court's part to fully relieve the defendants from the onerous *per se* rule. Such a heightened, intermediate standard unduly complicates antitrust analysis because health care professionals will always be faced, in retrospect, with innovative arguments that less restrictive membership requirements are available. If courts focus solely on the suppress-promote competition equation, defendant health care professionals will be encouraged to adopt narrow competency and professionalism criteria focusing on the quality and enhancement of patient care, as these are the only membership or admitting privilege restrictions that will have an overall pro-competitive effect.

Other commentators have also supported the adoption of standards for analysis of the challenged conduct of health care professionals by methods other than immediate condemnation under the *per se* rule against group boycotts.[244] One commentator, for example, proposes a two-step analysis which has as its initial focus a determination of whether the challenged professional conduct has a commercial versus noncommercial self-regulatory purpose.[245] Under this approach, if the challenged restraint is found not to have a predominant profit-oriented or commercial purpose, the court should proceed to rule-of-reason analysis. This approach is similar to that proposed by this comment but with one very important qualification. Specifically, the second prong of the first step of analysis proposed by this comment contains the requirement that the defendant make a preliminary showing that the questioned practice *could* have pro-competitive effects. The court must

244. *See, e.g.*, Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 Cal. L. Rev. 595 (1982) [hereinafter cited as Kissam & Holzgraefe]; Leibenluft & Pollard, *Antitrust Scrutiny of the Health Professions: Developing a Framework for Assessing Private Restraints*, 34 Vand. L. Rev. 927 (1981); Note, *The Professions and Noncommercial Purposes: Applicability of Per Se Rules Under the Sherman Act*, 11 U. Mich. J.L. Ref. 387 (1978). *See generally* Brunet, *Streamlining Antitrust Litigation by "Facial Examination" of Restraints: The Burger Court and the Per Se - Rule of Reason Distinction*, 60 Wash. L. Rev. 1 (1984) (advocating a "quick look" at restraints of trade before either the *per se* or the rule-of-reason methods of analysis are applied).

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245. Note, *supra* note 244, at 399–400.

not focus solely on whether the conduct in question has a predominant noncommercial *purpose*, but must also consider likely competitive *effects*, because the Supreme Court has consistently mandated an inquiry "confined to a consideration of impact on competitive conditions."[246] The defendant, therefore, must be required to advance a credible argument that the questioned practice likely has a pro-competitive effect before the court can relieve the challenged restraint from *per se* condemnation and proceed to a full rule-of-reason analysis.

Other commentators argue, in the context of the denial of hospital admitting privileges, that the courts should simply rely in totality, "for proof of an antitrust violation, that there be convincing evidence that the privilege decision has been motivated by a dominant anticompetitive purpose."[247] Although these commentators concede that "antitrust in general does not require proof of an evil purpose, but [employs] such evidence to help interpret and predict effects,"[248] the reliance of this approach solely on a "dominant anticompetitive purpose" for proof of a Sherman Act violation is directly at odds with Supreme Court precedent. It cannot be denied that any inquiry under the rule-of-reason must focus on anticompetitive *effects*. The Supreme Court has simply not shown any inclination to shift rule-of-reason analysis, or for that matter, *per se* analysis, to an inquiry solely focusing on the *purpose* of the restraint. To the contrary, even if the challenged restraint is shown to have a pro-competitive purpose, to escape Sherman Act liability, it must also be demonstrated that the restraint has an overall pro-competitive effect.[249]

Finally, the approach taken by two other commentators deserves careful attention because it focuses on the touchstone Supreme Court mandate under a rule-of-reason inquiry—the effect on competition.[250] These commentators advance a rebuttable presumption approach when the conduct of health care professionals, which would in other contexts be considered *per se* illegal, is challenged under the Sherman Act.[251] This approach begins with the presumption that the challenged conduct of health care professionals is unlawful; however, this presumption can be rebutted through the defendants' showing of a "plausible procompetitive rationale as well as evidence of good faith, the absence of less

246. *NSPE*, 435 U.S. at 690. *See also* Association for Intercollegiate Athletics for Women v. NCAA, 735 F.2d 577, 583 (D.C. Cir. 1984) ("A party's intent is relevant only insofar as it helps predict the probable competitive impact of a disputed practice.") (citing Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)).

247. Kissam & Holzgraefe, *supra* note 244, at 670.

248. *Id.*

249. *See NSPE*, 435 U.S. at 696 n.22.

250. Leibenluft & Pollard, *supra* note 244, at 951.

251. *Id.* at 951-52.

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restrictive alternatives, and perhaps insubstantial market power."[252] The criticism of this approach is that it would allow the defendants to utilize this rebuttable presumption even with classic *per se* violations such as price-fixing.[253] Today, however, there is no question but that the Supreme Court will not tolerate price-fixing by any learned profession.[254] Additionally, the Court has foreclosed the possibility of different antitrust treatment for health care professionals when the conduct at issue is "manifestly anticompetitive."[255]

The rebuttable presumption approach, although enlightening, can also be critized for failing to give proper deference to the differential treatment dichotomy offered by the *Goldfarb* footnote as interpreted in *NSPE*, *Maricopa*, and *Jefferson Parish*.[256] Specifically, this approach imposes a very heavy burden on defendant health care professionals before a court can even reach a full rule-of-reason analysis. The requirement that defendants show that the means chosen are the least restrictive available is a burden that may be impossible for health care professionals to ever overcome. Moreover, the *Goldfarb* footnote, as interpreted, offers the court a method for reaching a full rule-of-reason inquiry without a preliminary, intermediate analysis of the defendants' conduct when the health care professionals present bona fide "public service or ethical norms" justifications.

In summary, the approach proposed by this comment for analyzing group boycotts by health care professionals consists of a two-step process that finds as its basis the *Goldfarb* differential treatment dichotomy and a rule-of-reason analysis consistent with Supreme Court precedents. The first step of proposed analysis requires the court to determine whether the defendants have shown that the challenged conduct was premised on bona fide "public service or ethical norms" justifications, and requires a court determination of whether the defendants have advanced a credible preliminary argument that the challenged conduct could have pro-competitive effects. If the court is satisfied that the health care professionals have met their burden under both prongs of the first step of analysis, the defendants should be relieved from the *per se* rule condemning group boycotts. Under the second step of this proposed approach, the court should utilize a full rule-of-reason analysis to determine whether the defendants have violated section 1 of the

252. *Id.* at 955.

253. *See id.*

254. *See Jefferson Parish*, 104 S. Ct. at 1565 n.42. *See also supra* note 63.

255. As Justice Stevens noted, "we have refused to tolerate manifestly anticompetitive conduct simply because the health care industry is involved." *Jefferson Parish*, 104 S. Ct. at 1565 n.42.

256. *See supra* notes 30-64 & 113-17 and accompanying text.

Sherman Act. The court's focus under the rule-of-reason will, of course, be directed toward determining the competitive impact of the challenged group boycott; the practice should escape Sherman Act liability if it has an overall pro-competitive effect. This two-step method of analysis is a workable one for courts faced with the difficult question of group boycotts by health care professionals. This standard is not only consistent with traditional "competitive effects" antitrust analysis, but it also allows a court to consider legitimate, bona fide "public service or ethical norms" justifications in this contemporary and controversial area of antitrust law.

D. The Rule-of-Reason Is the Appropriate Standard for Analyzing Group Boycotts by Health Care Professionals.

Currently there is a substantial need for allowing health care professionals to engage in self-regulation to ensure that fellow practitioners have, at least, minimal levels of competence and professionalism. Exemplifying this need for self-regulation is a recent statistical estimation that five to fifteen percent of the physicians practicing medicine in the United States are incompetent.[257] This report concludes that the cause of such a high number of incompetent physicians is the failure of the medical profession to crack down on itself by actively policing its members.[258] Moreover, considering the growing medical malpractice crisis in the United States, the failure of medical societies to actively police their members undoubtedly contributes to the problem of incompetency and resulting medical errors.[259] The logical economic effect of an increasing number of malpractice cases is that practitioners' insurance premiums rise, thereby increasing entry barriers in the particular health care field, which will ultimately lead to higher health care costs.[260] Thus, it is reasonable to conclude that the failure of the medi-

257. *See* Feinstein, *The Ethics of Professional Regulation*, NEW ENG. J. MED., Mar. 21, 1985, at 802.

258. *See id.* at 802–04. *See generally* Dolan, *The Law and the Maverick Health Practitioner*, 26 ST. LOUIS U.L.J. 627 (1982) (analysis of the shortcomings of the current system of self-regulation).

259. *See* Relman, *Professional Regulation and the State Medical Boards*, NEW ENG. J. MED., Mar. 21, 1985, at 784–85. In commenting on the shortcomings of the state medical regulatory boards, Dr. Relman asserts: "All the evidence suggests, therefore, that most if not all the states have been too lax—not too strict—in their enforcement of medical professional standards." *Id.* at 785. Nevertheless, it must be conceded that the growing number of malpractice cases cannot be totally attributable to the lack of effective self-regulation in the medical profession. Indeed, certain members of the legal profession are seen as adamantly fostering "frivilous" litigation in numerous malpractice cases, perhaps encouraged by the unrealistic expectations of disgruntled consumer-patients.

260. The rise in medical malpractice insurance premiums and thus health care costs is also a function of the decrease in competition among underwriters. *See* Londrigan, *The Medical Mal-*

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cal profession to actively engage in self-regulation results in anticompetitive consequences.

In the face of such problems in the health care profession, it is unwise socially, as well as economically, to frustrate the efforts of hospital medical staffs and professional associations in policing their fellow practitioners to ensure that standards of minimal competence are met before granting an individual desired professional status. However, an antitrust approach that condemns such professional "watchdog" activities as *per se* illegal group boycotts has such a frustrating effect. When faced with treble damage liability for Sherman Act violations, health care professionals are simply going to avoid such socially beneficial self-regulation and engage in a conspiracy of silence.

Because a health care professional association is probably the "group best suited to judge the competence of its members to hold themselves out to the public as specialists,"[261] the courts ought to cautiously defer to the decision of a professional association, or a medical staff, to exclude a practitioner. The position of this comment is that the courts can provide such deference while concurrently ensuring that the policy of competition mandated by the Sherman Act is preserved. By utilizing a rule-of-reason approach in accordance with the proposal outlined in division C above, courts will not provide a disincentive for professional self-regulation. Moreover, courts will still have ample opportunity to distinguish "manifestly anticompetitive" group boycotts from those concerted refusals to deal by health care professionals that are based on bona fide competency considerations designed to improve the quality of patient care. Although such a rule-of-reason inquiry may entail "significant costs" in terms of "litigation efficiency,"[262] the social costs of frustrating legitimate self-regulation by health care professionals outweigh the potential loss in judicial economy. Today, it *is* "unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas."[263]

VI. Conclusion

The *Goldfarb* differential treatment dichotomy has finally found its place in contemporary antitrust analysis. In the context of group boycotts by health care professionals, different antitrust treatment is advisable because of the legitimate "public service or ethical norms"

practice "Crisis", Trial, May, 1985, at 24.

261. *Kreuzer*, 735 F.2d at 1491 (citing *Amicus Curiae* Brief for the United States at 5–6).

262. *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 343–44 (1982).

263. Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 n.17 (1975).

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justifications upon which this brand of exclusionary conduct is often premised. However, in concluding that the *per se* rule condemning group boycotts should not be religiously applied to this type of professional activity, this comment does not advocate wholesale abandonment of traditional antitrust analysis. Rather, this comment asserts that there is a principled basis under Supreme Court precedent to analyze concerted refusals to deal by health care professionals under the rule-of-reason. In three recent decisions, federal courts of appeals appear to have taken such an approach. Nevertheless, upon closer scrutiny, it is clear that these courts have in reality utilized an intermediate standard of antitrust review lying somewhere between the *per se* and the rule-of-reason approaches.

The utilization of such an intermediate standard of analysis does not give proper deference to the interests of health care professionals in regulating the competency of their fellow practitioners. The approach that should be taken by courts is an initial inquiry to determine the genuineness and potential competitive effects of the defendants' challenged conduct premised on "public service or ethical norms" justifications, followed by a full-scale rule-of-reason analysis to determine whether the questioned restraint has an overall pro-competitive effect. This approach will encourage rather than stifle legitimate self-regulation by health care professionals while still promoting the aims of the Sherman Act in preserving unrestrained competition on the merits.

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