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NOTES

CLASS-BASED DENIALS OF HOSPITAL STAFF PRIVILEGES AND THE LEARNED PROFESSIONS EXEMPTION

Hospital medical staffs routinely deny hospital staff privileges to classes of nonphysician practitioners.¹ This practice, which limits free competition, may constitute a group boycott in violation of section 1 of the Sherman Act.² Courts, however, have not always welcomed antitrust challenges to activities engaged in by the medical profession. Because of inexperience in evaluating the competitive effects of such activities,³ some courts have invoked the learned professions⁴ exemption in the health care realm to permit less rigorous antitrust scrutiny of the medical profession.

This Note explores various levels of scrutiny that courts might invoke to ascertain the validity of class-based denials of hospital staff privileges. Part I describes how class-based denials of hospital staff privileges limit competition. Part II discusses the antitrust concepts implicated by class-based denials. In Part III, this Note analyzes the learned professions exemption and applies it to the context of class-based denials of hospital staff privileges. Finally, this Note concludes that the learned professions exemption should not preclude application of the per se rule. In addition, courts should not alter the traditional rule of reason inquiry when analyzing class-based denials.

I. CLASS-BASED DENIALS OF HOSPITAL STAFF PRIVILEGES

In the health care context, a hospital medical staff is comprised of individual medical doctors who compete for patients with other doctors and nonphysician practitioners.⁵ The medical staff, however, has almost ex-

1. This Note employs the term "nonphysician" as the equivalent of "nonmedical doctor practitioner." The term includes osteopaths, podiatrists, psychologists, chiropractors, and nurse practitioners.

2. See *infra* notes 30-32 and accompanying text.

3. See *infra* note 51 and accompanying text.

4. See *infra* notes 33-50 and accompanying text.

5. See Dolan & Ralston, *Hospital Admitting Privileges and the Sherman Act*, 18 HOUS. L. REV. 707, 713-17 (1981).

clusive control over the decision to grant or deny hospital staff privileges to nonphysician practitioners.⁶ By denying hospital staff privileges to nonphysician practitioners, the medical staff in several ways limits the ability of nonphysicians to compete in the market.

First, without hospital staff privileges, nonphysicians may not admit patients to the hospital.⁷ Second, if a nonphysician's patient requires hospital treatment, the nonphysicians must refer the patient to a medical doctor even if the nonphysician is licensed to perform the necessary treatment. Such a referral may indicate to health care consumers that nonphysicians are less competent than medical doctors to provide health care services.⁸ Finally, the hospital may be the only setting that houses the sophisticated technology oftentimes necessary for patient care.⁹

II. ANTITRUST ANALYSIS AND THE GROUP BOYCOTT RULES

A challenge to class-based denials of hospital staff privileges under section 1 of the Sherman Act¹⁰ requires a showing that the denials unreasonably restrain the trade of nonphysician practitioners.¹¹ The Supreme Court has articulated two tests to aid in this determination. First, under the rule of reason, a court must weigh the procompetitive and anticompe-

6. Theoretically, the hospital administration decides whether to grant hospital staff privileges to a class of nonphysician practitioners. The medical staff recommends bylaws to the hospital administration detailing which classes of practitioners should be granted hospital staff privileges. The administration then may accept the recommended bylaws or conduct an independent review. In practice, however, the members of the medical staff are the main actors in hospital staff decisions. The administration rarely rejects the medical staff's recommendations. Even if the administration conducts an "independent" review, it does so in conjunction with representatives of the medical staff. See JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, ACCREDITATION MANUAL FOR HOSPITALS: 1985 MANUAL 31-33, 75; see also Dolan & Ralston, *supra* note 5, at 711-12.

7. See Dolan & Ralston, *supra* note 5, at 709; see also Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 CALIF. L. REV. 595, 596 n.1 (1982) [hereinafter cited as Kissam].

8. See, e.g., *Weiss v. York Hosp.*, 745 F.2d 786, 795 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1777 (1985); see also Dolan & Ralston, *supra* note 5, at 714.

9. See Groseclose, *Hospital Privilege Cases: Braving the Dismal Swamp*, 26 S.D.L. REV. 1 (1981); Kessenick, *Physicians' Access to the Hospital: An Overview*, 14 U.S.F.L. REV. 43 (1979).

10. 15 U.S.C. § 1 (1982). Section 1 of the Sherman Act provides in part: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal." *Id.* Section 1 of the Sherman Act is the primary vehicle by which plaintiffs challenge the alleged collective anticompetitive activities of competitors. "[T]he governing law has been that the Sherman Act bans all concerted arrangements which are adopted for the purpose of reducing competition, or which, regardless of purpose, have a significant tendency to reduce competition." L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 166 (1977).

11. See, e.g., *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 687-88 (1978); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60-62 (1911).

titive effects of a restraint to ascertain its validity.¹² If the anticompetitive effects predominate, the restraint is unreasonable and in violation of section 1.¹³ The rule of reason, however, exacts substantial judicial and business costs.¹⁴ As a result, the Supreme Court also developed a second test, the per se rule.¹⁵

The per se rule invalidates whole categories of restraints on trade.¹⁶ Courts justify per se invalidation on the ground that the restraint under consideration has such a “pernicious effect on competition and lack of any redeeming virtue” that the restraint is per se unreasonable.¹⁷ Under the per se rule, the court finds a violation of section 1 of the Sherman Act if the plaintiff proves that the defendants engaged in the proscribed conduct.¹⁸ The court does not evaluate the competitive effects of the restraint.¹⁹

12. See, e.g., *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

13. *Id.* The rule of reason inquiry does not encompass all possible justifications of the particular restraint. “Instead, it focuses directly on the challenged restraint’s effect on competitive conditions.” *Professional Engineers*, 435 U.S. at 688. Justice Brandeis’ often quoted statement in *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918), sets forth the confines of the rule of reason:

The true test of legality is whether the restraint imposed is such as merely regulates and thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question 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. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id.

14. See *Arizona v. Maricopa County Medical Soc’y*, 457 U.S. 332, 343-44 (1982). The rule of reason often requires elaborate factual inquiries into the purpose of a particular restraint and its effects on competition. Such inquiries strain already limited judicial resources. Furthermore, because judges lack experience in determining and predicting competitive effects, the courts do not achieve consistent results. Without consistency, the business community is left with little, if any, guidance as to future application of the rule in similar cases.

15. *Id.*

16. See *Northwestern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). In *Northern Pacific Railway*, the Supreme Court stated: “Among the practices which the courts have . . . deemed to be [per se] unlawful . . . are price fixing[,] division of markets, group boycotts, and tying arrangements.” *Id.* at 5 (citations omitted).

The Court has freely admitted that the per se rule, in some circumstances, may invalidate a restraint otherwise reasonable under the rule of reason test. See, e.g., *Arizona v. Maricopa County Medical Soc’y*, 457 U.S. 332, 344 (1982); *United States v. Container Corp. of Am.*, 393 U.S. 333, 341 (1969) (Marshall, J., dissenting).

17. 365 U.S. at 5.

18. *Arizona v. Maricopa County Medical Soc’y*, 457 U.S. 332, 344 (1982).

19. “Behavior is illegal per se when the plaintiff need prove only that it occurred in order to win

Courts have held that one restraint that warrants application of the per se rule is the group boycott.²⁰ A group boycott is a joint effort by independent economic actors designed to deny potential competitors access to a market or to inhibit the competitor's efforts to compete in the market.²¹ Although the Supreme Court has interpreted group boycott activities as per se violations, that result is not automatic.²² Courts are required to review each alleged group boycott to determine whether the boycott merits per se condemnation.²³

In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,²⁴ the Supreme Court identified two grounds for per se invalidation of group boycotts. First, a court can impose the per se rule if the boycotting activities demonstrate anticompetitive animus.²⁵ The *Northwest Wholesale* Court reasoned that anticompetitive animus necessarily gives

his case, there being no other elements to the offense and no allowable defense." R. BORK, *THE ANTITRUST PARADOX* 18 (1978).

20. See *supra* note 16.

21. See *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2619 (1985).

22. *Id.* See also R. BORK, *supra* note 19, at 330. Judge Bork points out two examples of group boycotts that are not per se violations of § 1 of the Sherman Act: sports leagues and law firms. *Id.* at 332-33.

23. See 105 S. Ct. at 2619-21. Before courts may apply the group boycott analysis, however, the plaintiff must take two preliminary showings. First, the plaintiff must show that the defendants contracted, combined, or conspired to restrain trade. See *supra* note 10. In the class-based denial context, the medical staff's joint activity in denying privileges to nonphysicians should satisfy the contract, combination, or conspiracy requirement. See, e.g., *Weiss v. York Hosp.*, 745 F.2d 786, 814 (3d Cir. 1984) ("the medical staff is a combination of individual doctors"). Second, the plaintiff must show that the restraint is "in interstate trade." See *supra* note 10. Whether a particular class-based denial has sufficient impact on interstate commerce to implicate the Sherman Act is necessarily a fact-bound inquiry. See *Kissam, supra* note 7, at 628-37.

24. 105 S. Ct. 2613 (1985). In *Northwest Wholesale*, Pacific alleged that its expulsion from a wholesale cooperative was a group boycott that should be held a per se violation of § 1. The district court refused to apply the per se rule and applied the rule of reason. Noting that the record exhibited no anticompetitive effects, the court granted defendant's motion for summary judgment. The court of appeals reversed, holding that the expulsion from the cooperative without procedural safeguards was a per se violation of § 1 of the Sherman Act. *Id.* at 2616.

25. *Id.* at 2620. Pacific argued that expulsion from a wholesale cooperative necessarily implied anticompetitive intention on the part of the cooperative and its members. The Court stated, however, that "purchasing cooperatives must establish and enforce reasonable rules in order to function effectively." *Id.* Because the cooperative alleged that it had expelled Pacific for violating a rule requiring disclosure of a change in ownership, the expulsion did not necessarily imply anticompetitive animus. *Id.* Pacific also argued that the cooperative intended to competitively disadvantage Pacific. *Id.* at 2620 n.7. The Court stated that under some circumstances the anticompetitive motivation of a defendant might give rise to the requisite inference of anticompetitive animus. "[B]ut such an argument is appropriately evaluated under the rule of reason analysis." *Id.*

rise to the inference that the group boycott likely has predominantly anticompetitive effects, thereby justifying per se invalidation.²⁶

Second, a court can apply the per se rule if the defendants possess market power in the relevant geographic market.²⁷ Possession of market power substantially increases the likelihood that the group boycott has predominantly anticompetitive effects.²⁸ The market power rationale also allows a court to invoke the per se rule if the defendants possess exclusive access to a facility that is necessary for effective competition. Such a denial also raises the inference of predominantly anticompetitive effects, thereby justifying application of the per se rule.²⁹

Class-based denials arguably are voidable as per se invalid group boycotts. Class-based denials satisfy the definition of a group boycott. By refusing hospital staff privileges to a class of nonphysician practitioners, the members of the medical staff and the hospital administration are engaging in joint activity that inhibits the efforts of the nonphysicians to compete in the health care market.³⁰ In addition, a particular class-based denial could satisfy the requirements of *Northwest Wholesale*. The denial could demonstrate anticompetitive animus or occur in a context in which the defendants possess market power. Either situation would raise the inference that anticompetitive effects predominate, thereby justifying application of the per se rule.³¹

Courts, however, may decline to apply the per se rule to group boycotts and apply the rule of reason instead, if the nature of the industry

26. *Id.* (citing *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979)).

27. *Id.* at 2619, 2621. The facts of *Northwest Wholesale* did not support a finding that the defendants possessed market power. *Id.* The Court, however, did not define the contours of market power in terms of group boycotts. *Cf.* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551, 1559 (1984) (defining market power in a tying arrangement case as the power “to force a purchaser to do something that he would not do in a competitive market”).

28. 105 S. Ct. at 2621.

29. *Id.* at 2619, 2621. Unfortunately, the Court did not clearly articulate the relationship between market power and exclusive access to a necessary facility. The Court suggested that a finding of either exclusive access or market power would support invocation of the per se rule. *Id.* at 2621. In the class-based denial of hospital staff privileges context, the defendants are unlikely to possess exclusive access to the hospital facility unless they also possess market power. Although a hospital staff will have exclusive access to one hospital, *see supra* notes 5-9 and accompanying text, it will not possess exclusive access to a facility necessary for effective competition unless it also possesses market power within the relevant market. Therefore, in this context, the defendants’ exclusive access to one hospital facility should not be an independent rationale for invoking the per se rule.

30. For the definition of group boycott, see text accompanying *supra* note 21.

31. *See supra* notes 25-29 and accompanying text.

under consideration requires individual inquiry into restraints on competition.³² The determination of whether the nature of the health care industry compels scrutiny under the rule of reason requires an examination of the learned professions exemption.

III. THE LEARNED PROFESSIONS EXEMPTION

The learned professions exemption purports to excuse the learned professions,³³ including the medical profession, from application of the anti-trust laws.³⁴ The exemption is premised on the belief that the professions exist to provide community service, unlike other businesses that exist to maximize profits.³⁵ Lower courts and commentators have adopted this rationale to support a more lenient review of anticompetitive professional activities.³⁶ While the Supreme Court has recognized the validity of the learned professions exemption, it has never applied the exemption to excuse anticompetitive behavior.

In *Goldfarb v. Virginia State Bar*,³⁷ the Supreme Court rejected a county bar association's attempt to invoke the learned professions exemption to protect absolutely the bar's price-fixing scheme.³⁸ The Court

32. 105 S. Ct. at 2620 (citing *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 104 S. Ct. 2948, 2961 (1984)).

33. The learned professions include: attorneys, *see Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); engineers, *see National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); medical doctors, *see Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982); and dentists, *see Boddicker v. Arizona State Dental Ass'n*, 549 F.2d 626 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977).

34. For a detailed discussion of the learned professions exemption, *see Sims, Maricopa: Are the Professions Different?*, 52 ANTITRUST L.J. 177 (1983).

35. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 786-87 (1975); *see also Dolan & Ralston, supra* note 5, at 735-36 (the Supreme Court allowed for the learned professions exemption because of the anticompetitive nature of the professions and to prevent the rejection of all quality-of-care rationales for professional restraints). *But see Goldfarb*, 421 U.S. at 788 ("It is no disparagement of the practice of law as a profession to acknowledge that it has [a] business aspect.").

36. *See infra* notes 42 & 43 and accompanying text. *But see Sims, supra* note 34, at 178 ("But for the misguided self-interest of lawyers and perhaps the subconscious reluctance of the professionals on the Supreme Court to finally and completely bite the bullet, this issue would be thrown in the intellectual wastebasket where it belongs.").

37. 421 U.S. 773 (1975).

38. *Id.* at 786-88. In *Goldfarb*, the plaintiffs attempted to find an attorney who would perform a title search for them for less than the 1% fee "recommended" by the county bar association. *Id.* at 775-76. Of the twenty attorneys who responded to the plaintiffs' request, not one would deviate from the recommended fee. *Id.* at 776. The State Bar Association enforced the fee schedule. Although the state bar had never formally disciplined an attorney for not complying with the fee schedule, the bar had published an ethical opinion containing veiled threats of disciplinary action that would be taken against noncompliers. *Id.* at 776-78.

found that the language of section 1 of the Sherman Act did not provide for a learned professions exemption.³⁹ The Court added that the exemption urged by the bar contradicted the broad reading of the Sherman Act as contemplated by Congress.⁴⁰ In dictum, however, the Court conceded that the “public service aspect” and other features unique to the professions were relevant to antitrust analysis, but did not apply in this case.⁴¹

The *Goldfarb* dictum spurred many lower courts to recognize a limited learned professions exemption.⁴² Several lower courts invoked the exemption to apply the rule of reason to cases in which other precedent indicated that the per se rule should apply.⁴³ The Supreme Court, however, has never endorsed such an application of the learned professions exemption and has specifically rejected it in the area of price fixing.⁴⁴

In *Arizona v. Maricopa County Medical Society*,⁴⁵ two groups of medical doctors attempted to invoke the learned professions exemption to escape per se invalidation of a price-fixing scheme.⁴⁶ In *Maricopa*, the doctors established maximum prices to charge patients who were policyholders of participating insurance plans.⁴⁷ In a four to three decision,⁴⁸

39. *Id.* at 787.

40. *Id.*

41. The Court left open the possibility of a limited learned professions exemption in the following footnote:

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.

Id. at 788 n.17.

42. *See, e.g.,* *Smith v. Northern Mich. Hosps., Inc.*, 703 F.2d 942, 949 n.12 (6th Cir. 1983) (recognizing in dictum that restraints imposed in a professional context might survive antitrust scrutiny although they would be a violation in other contexts); *Arizona v. Maricopa County Medical Soc’y*, 643 F.2d 553 (9th Cir. 1980) (refusing to apply the per se rule to a maximum price-fixing scheme by medical doctors), *rev’d*, 457 U.S. 332 (1982); *Bogus v. American Speech & Hearings Ass’n*, 582 F.2d 277, 291 (3d Cir. 1978) (stating that on remand the defendants might be able to establish a factual basis for application of the learned professions exemption).

43. *See, e.g.,* *Weiss v. York Hosp.* 745 F.2d 786, 821 n.61 (3d Cir. 1984); *Wilk v. American Medical Ass’n*, 719 F.2d 207, 221-22 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2398-99 (1984).

44. *See* *Arizona v. Maricopa County Medical Soc’y*, 457 U.S. 332 (1982); *see also* *National Soc’y of Professional Eng’rs v. United States*, 435 U.S. 679 (1978) (refusing to apply the learned professions exemption to engineers’ refusal to engage in competitive bidding).

45. 457 U.S. 332 (1982).

46. *Id.*

47. *Id.* at 335-36.

48. *Id.* at 342-57. Justices Blackmun and O’Connor did not take part in the decision. Justice

the Supreme Court held that the learned professions exemption did not justify supplanting the per se rule, the test usually applied to price-fixing schemes, with the rule of reason.⁴⁹ The Court, however, again left open the possibility that professional actions could receive relaxed antitrust scrutiny if “premised on public service or ethical norms.”⁵⁰

The Supreme Court cases leave the scope of the learned professions exemption uncertain. Although the Court has recognized the possibility of such an exemption in dictum, the Court has held that the exemption did not apply to the cases under consideration. In the class-based denial context, lower courts might conceivably invoke the learned professions exemption to lessen antitrust scrutiny in two ways. First, courts might employ the underlying rationale of the exemption to justify applying the rule of reason to a case that would otherwise merit per se invalidation. Second, and more controversial, courts might alter the traditional rule of reason inquiry on the theory that the learned professions exemption justifies a more lenient review of the anticompetitive conduct of professionals.

A. *Avoiding the Per Se Rule*

Courts that have refused to apply the per se rule to the health care industry have often justified that result because of judicial inexperience in evaluating the competitive effects of the health care industry and on the anticompetitive nature of that industry.⁵¹ Neither rationale, however, justifies avoiding the per se rule in the class-based denial context.

Judicial inexperience with the health care industry does not justify a refusal to apply the per se rule. *Northwest Wholesale* mandates per se condemnation of two well-defined categories of group boycotts.⁵² These two categories exhibit effects that judicial experience has shown to be predominantly anticompetitive. Furthermore, the two categories can be identified with traditional antitrust analysis, such as the motivation of the participants and the degree of market power they possess.⁵³ Because judicial experience with the antitrust analysis to be employed compensates

Powell filed a dissenting opinion and was joined by the Chief Justice and Justice Rehnquist. *Id.* at 357.

49. *Id.* at 349.

50. *Id.*

51. *See, e.g., Arizona v. Maricopa County Medical Soc'y*, 643 F.2d 553, 556 (9th Cir. 1980), *rev'd*, 457 U.S. 332 (1982).

52. *See supra* notes 24-29 and accompanying text.

53. *See supra* notes 25-29 and accompanying text.

for judicial inexperience with the health care industry, such inexperience does not justify avoiding the per se rule.

The anticompetitive nature of the health care industry also does not justify avoiding the per se rule in the class-based denial context. Although the health care industry possesses many anticompetitive characteristics,⁵⁴ its anticompetitive nature should justify a refusal to apply the per se rule only if a strong relationship exists between the restraint under consideration and the anticompetitive aspects of the industry.⁵⁵ Such a relationship, however, does not exist in the class-based denial context.

The anticompetitive characteristics of the industry, including substantial entry barriers, the existence of third party insurers, and the inability of consumers to compare individualized services,⁵⁶ are only tangentially related to class-based denials of hospital staff privileges. Therefore, because the restraint does not implicate the anticompetitive aspects of the health care industry, courts should apply the per se rule when appropriate in the class-based denial context.

Every denial of medical staff privileges, however, should not result in per se liability for the hospital and its medical staff. *Northwest Wholesale* sanctions per se liability in only two situations. First, courts can apply the per se rule if the defendants' behavior necessarily implies anticompetitive animus.⁵⁷ Because any class-based denial could arguably be moti-

54. The health care industry is inherently anticompetitive in nature. State licensing laws insulate physicians from competition and innovation. See Dolan & Ralston, *supra* note 5, at 735-36. The medical profession is further insulated from competition because of the high costs of medical training. See *Arizona v. Maricopa County Medical Soc'y*, 643 F.2d 553, 556 (9th Cir. 1980), *rev'd*, 457 U.S. 332 (1982).

In addition, the existence of third party insurers further skews the normal competitive model. For example, in 1979, insurance carriers paid for approximately two-thirds of health care bills. Dolan & Ralston, *supra* note 5, at 722. In this situation, the health care consumers have little incentive to be cost-conscious. Furthermore, even assuming that some patients would be willing to investigate costs, the nature of individualized care is not readily susceptible to price or quality comparisons. See *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 366 n.12 (1982) (Powell, J., dissenting).

55. *Maricopa* may indicate that the anticompetitive nature of an industry will rarely, if ever, justify removing a case from the per se rule. In *Maricopa*, a strong correlation existed between the restraint, price fixing, and several anticompetitive aspects of the health industry. The Court nonetheless applied the per se rule against the restraint. 457 U.S. at 342-55. The Court's application of the per se rule in *Maricopa* counsels against nonapplication of the per se rule in the class-based denial context, when the restraint and the anticompetitive aspects of the industry are only tangentially related. See also *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551 (1984) (the Court sanctioned use of the per se rule against tying arrangements in the health care industry).

56. See *supra* note 54.

57. See *supra* notes 24-26 and accompanying text.

vated by the medical staff's ethical duty to protect the public from inferior medical treatment, courts may rarely apply the per se rule.⁵⁸

Second, courts can apply the per se rule if the defendants possess market power in the relevant market.⁵⁹ A finding of market power should be reserved for exceptional cases. For example, a hospital that is isolated geographically or that possesses a substantial share of the market would likely possess market power.⁶⁰ On the other hand, a hospital in an urban area with other hospitals located nearby would probably not have market power.⁶¹ Thus, imposition of per se liability should be the exception rather than the rule in class-based denial cases.

B. *Altering the Rule of Reason Analysis*

Courts must employ the rule of reason to evaluate the antitrust implications of class-based denials of hospital staff privileges if the per se rule is inapplicable. The courts, however, should not invoke the learned professions exemption to alter the traditional rule of reason inquiry.

The Supreme Court has repeatedly stated that the rule of reason inquiry is confined to evaluating the competitive effects of the restraint.⁶² For example, in *National Society of Professional Engineers v. United*

58. *See* *Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983) (defendant medical doctors assert a patient care motive as the basis for the ethical rule prohibiting professional contract with chiropractors), *cert. denied*, 104 S. Ct. 2398 (1984).

In addition, *Northwest Wholesale* suggests that even in the absence of alleged patient care motivation, class-based denials of hospital staff privileges would not require per se invalidation. According to *Northwest Wholesale*, an allegation of an efficiency-enhancing or procompetitive justification would require the case to be evaluated under the rule of reason. 105 S. Ct. at 2620 n.7. The defendants in the class-based denial context could arguably justify the denial on the ground that the denied class, as a whole, is so substandard that a review of individual qualifications would be unnecessary and inefficient. *See* *Dolan & Ralston*, *supra* note 5, at 729. In addition, the hospital could argue that it denies hospital staff privileges to classes of nonphysicians in order to control the cost of malpractice insurance. *See* *Kissam*, *supra* note 7, at 608-09 & 655. The assertion of these and other procompetitive justifications for class-based denials should be sufficient to avoid the per se rule based on an inference of anticompetitive animus.

59. *See supra* notes 27-29 and accompanying text. Antitrust courts have often determined whether a defendant possesses market power in a particular market. *See, e.g.*, *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551 (1984) (requiring market power to invoke per se rule against tying arrangements).

60. *See, e.g.*, *Weiss v. York Hosp.*, 745 F.2d at 825-27 (upholding jury finding that the defendant, which was one of two hospitals in the area and which had over 80% market share, possessed market power).

61. For example, in *Jefferson Parrish*, the defendant was "only one hospital of at least twenty in the area." 104 S. Ct. at 1566 n.44 (quoting court of appeals).

62. *See supra* notes 12 & 13 and accompanying text.

States,⁶³ the Court invalidated an NSPE ethical guideline that prohibited members from engaging in competitive bidding.⁶⁴ The NSPE had attempted to justify the restraint, claiming that the potential benefit to the public interest should affect the antitrust analysis.⁶⁵ The Court, however, employed the traditional rule of reason analysis, noting that from its common-law roots to the present day, the rule of reason inquiry has focused on whether or not the challenged restraint promotes competition.⁶⁶ The Court ultimately concluded that only Congress could alter the focus of the rule of reason.⁶⁷

Courts should heed *Professional Engineers* and limit their rule of reason inquiry to the competitive effects of class-based denials of hospital staff privileges. Introducing into the analysis the question whether a class-based denial is in the public interest would cause unnecessary confusion.⁶⁸ Underlying the Sherman Act is the congressional judgment

63. 435 U.S. 679 (1978).

64. *Id.* at 692-93.

65. *Id.* at 693-94. Specifically, the NSPE argued that competition in the form of competitive bidding would jeopardize the public health and safety by inducing engineers to engage in unethical behavior. *Id.* at 693-96.

66. *Id.* at 688. The Court did not clearly indicate whether it was applying the per se rule or the rule of reason analysis. Because the Court found that the NSPE's guideline constituted a violation on its face, the decision should be interpreted as an application of the per se rule. *Id.* at 679.

67. *Id.* at 689. However, one court has altered the rule of reason inquiry on the basis of the learned professions exemption. In *Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2398-99 (1984), the court announces a two-pronged test for challenges to professional activities that are premised on ethical duties. *Id.* at 227. First, the plaintiff must establish a violation under the rule of reason. *See supra* notes 12 & 13 and accompanying text. Second, if the plaintiff establishes such a violation, the defendant may establish: (1) that they "genuinely entertained a concern" for the putative evil (2) that their concern was objectively reasonable (3) that their concern was the "dominant motivating factor" in establishing the challenged norm, and (4) that no less restrictive alternative existed. *Id.* If the defendant makes this showing, the challenged activity survives invalidation.

The *Wilk* test, if interpreted literally, apparently would enable the antitrust court to validate professional restraints because of the professionals' view of the public interest. The court, however, specifically rejected the public interest rationale as a justification for anticompetitive activity. *Id.* at 228-29. The court stated that it intended the test to determine whether the physicians' "patient care motive" justified the restraint. *Id.* Unlike the public interest rationale, patient care analysis implicates a physician's relationship with his individual patients. *Id.*

Strict application of the *Wilk* test may be an acceptable invocation of the learned professions exemption. The defendants in the class-based denial context, however, would probably not satisfy the *Wilk* test because a class-based denial would probably not be the least restrictive alternative available on the defendants.

68. *See L. SULLIVAN, supra* note 10, at 175. The medical professions' public interests arguments should be directed at the state legislatures rather than the antitrust courts. *See, e.g., Smith & Oneck, Hospitals Facing Greater Liability for Exclusion of the Nonphysicians*, Nat'l L.J., Dec. 10,

that *competition* is in the public interest.⁶⁹ Courts should not take it upon themselves to determine whether competition or class-based denials better serve the public interest.⁷⁰ Legislatures are better suited to resolve such broad policy questions.

IV. CONCLUSION

This Note has analyzed antitrust challenges to class-based denials of hospital staff privileges. Class-based denials will, at least in some circumstances, be susceptible to per se condemnation as illegal group boycotts. When appropriate, courts should not refuse to apply the per se rule. Courts, however, should not alter the traditional rule of reason inquiry. The Supreme Court has repeatedly stated that the rule of reason inquiry is limited to evaluating the competitive effects of the restraint. Deviation from the traditional inquiry without congressional authorization would be an impermissible intrusion by the judiciary into the legislative realm. Until Congress changes the scope of the antitrust laws, courts must enforce them as enacted.

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1985, at 20, cols. 3, 4 (describing Ohio legislation requiring that medical doctors admit and supervise all hospital patients). Such state-minded class-based denials are insulated from antitrust scrutiny by the state action doctrine. See Kissam, *supra* note 7, at 619-28.

69. See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

70. *Id.* The conclusion that the courts should limit their inquiry to the competitive effects of the class-based denial does not render the defendants' purposes totally irrelevant to the rule of reason inquiry. The defendants' rationale for imposing the restraint is relevant to the rule of reason insofar as it aids the court in determining the competitive consequences. As Justice Brandeis stated:

The history of the restraint, the evil believed to exist, the reason for adopting a particular remedy, the purpose or end sought to be obtained are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of the intent may help the court interpret the facts and to predict the consequences.

Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). See also *Chiropractic Cooperative Ass'n of Mich. v. American Medical Ass'n.*, 1985-2 Trade Cas. (CCH) ¶ 66,700, at 63,333 (E.D. Mich. June 24, 1985) (refusing to strike patient care and public interest defenses, but acknowledging that the defenses would not justify an anticompetitive restraint).