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The "Essentially Local" Doctrine and Section 1 of the Sherman Act

Myron N. Krotinger

A symposium devoted to state antitrust law would be incomplete without consideration of the local activities which may remain unaffected by the sweep of federal antitrust laws operating under the broad aegis of the commerce clause of the federal constitution.¹

THE PROBLEM

Section 1 of the Sherman Act encompasses "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states..."²

In 1947, the Supreme Court declared in the first United States v. Yellow Cab Co.³ case that a "restraint on or monopoly" of a "general local [taxicab] service" was outside the scope of the Sherman Act.⁴

The case concerned an alleged conspiracy to limit entry into Chicago's taxicab business by "freezing" and limiting taxicab licenses.


This "local service" concept was articulated by the Court in the setting of a large metropolitan business, where cab operations require the use of vehicles, fuels, lubricants, and components continuously drawn from all parts of the United States. "Commerce" in its broadest sense appears to have been involved in the alleged restraint. The Court, nevertheless, held that the taxicab business in Chicago was "too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act." The efficacy of competition, the right of free entry into business, and the benevolent fostering of "small business" continue to be stated as social, political, and economic ends of the Sherman Act. The ruling by the Supreme Court, therefore, seems to be at variance with the expressed though often uncertain and self-contradictory goals of federal antitrust law.

It must follow from the Supreme Court's ruling in the Yellow Cab case that some sort of "target area" of federal antitrust laws is contemplated. Otherwise, the impact of the federal laws might well bring before the federal courts every neighborhood business squabble. Hardware Merchant A's rumor about his neighbor, Merchant B, may well effect the sale of garden equipment in B's warehouse. Because the equipment originated in an iron ore bed in Minnesota or Canada, Merchant B ordinarily should not be permitted to invoke the federal jurisdiction. Should the result be different where Merchant A induces interstate suppliers of


4. Id. at 233. The "interstate commerce" toward which this aspect of the complaint was directed involved the embarkation upon and completion of interstate travel between homes, offices, hotels, and railroad terminals. Such transportation is intermingled with the admittedly local operations of the Chicago taxicabs.

5. Id. at 230.

6. In Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958), Justice Black stated: "[The Sherman Act] rests on the premise that the unrestrained action of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

7. See, e.g., Dirlam & Kahn, Fair Competition: The Law and Economics of Antitrust Policy 15-17 (1954); Kaysen & Turner, Antitrust Policy 11-18 (1959); Masse!, Competition and Monopoly ch. 2 (1962).

garden equipment to refuse to sell to Merchant B?9 Should it matter that as a result of either competitive tort — the malicious rumor or the boycott — a substantial amount of merchandise actually or potentially flowing in commerce may have been affected?10 Should the result still be different where the impact of either tort is alleged to have been the actual or attempted conspiratorial destruction of a competitor “in commerce?”11

The Court in Yellow Cab was careful to point out that its ruling upon the particular restraint — the conspiracy to limit entry — would not be determinative in a different restraint aimed at a “closer” connection with the interstate phase of the transportation business in Chicago, e.g., a “conspiracy to burden or eliminate transportation of passengers to and from a railroad station where interstate journeys begin and end. . . .”12 Was the Court then suggesting that the aim and thrust of the particular restraint was the determinative factor in obtaining federal jurisdiction?13

THE RESTRICTED AREA OF SEARCH FOR A HAVEN FROM ANTITRUST

The Supreme Court has refused to define clearly the outline of the “target area.”14 Where the per se restraints of price fixing, group boycotts, division of markets, and tying agreements appear before the Court in a setting “closely related” to interstate transportation,15 commodity

9. E.g., Klor’s, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (holding such a boycott to be illegal per se).
14. In United States v. Employing Plasterers Ass’n, 347 U.S. 186, 189 (1954), the Court said: “Where interstate commerce ends and local commerce begins is not always easy to decide and is not decisive in Sherman Act cases.” In Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 234 (1948), the Court emphasized the lack of significance of the determination: “[T]he inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented.” (Emphasis added.)
pricing, interstate market allocation, and product "flow," the jurisdictional issue has received little extensive consideration. The Court has emphasized a "practical" and case-by-case approach.

The federal courts have not hesitated to apply the Sherman Act to restraints "in the stream" of interstate commerce: the interstate movement of goods and persons, local exchanges, terminals, and other "necks of the bottle" of interstate commerce. The Supreme Court has decreed any suggestion that the prohibited restraints are only those which are applied "all along the line of movement of interstate commerce." The Court has stated the "affectation doctrine" bluntly and all-encompassingly:


19. Swift & Co. v. United States, 196 U.S. 375, 398 (1905) ("[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."); Apex Hosiery v. Leader, 310 U.S. 469, 509 (1940). In United States v. Yellow Cab Co., 332 U.S. 218, 231 (1947), the court stated: "[I]nterstate commerce is an intensely practical concept drawn from the normal and accepted course of business. . . . We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical considerations." The "practicalities" also have provoked dissents in the Court. See, e.g., United States v. Employing Plasterers Ass'n, 347 U.S. 186, 200 (1954), where Justices Douglas and Minton dissented.


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

The classic formulation of the applicability of the Sherman Act in terms of the volume of commerce also leaves little room for exemption. The volume of commerce involved in the restraint has been held to be irrelevant to the applicability of the statute. It would seem clear that the search for a haven from antitrust laws in either a restricted concep-

23. United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464 (1949). (Emphasis added.) In Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 234 (1948), the full sweep of the Commerce Clause was invoked: "[G]iven a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall, and the injuries it inflicts upon others become remediable under the Act's prescribed methods, including the treble damage provision." The Court then states that "the statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 [1940]; American Tobacco Co. v. United States, 328 U.S. 781 [1946]. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. Cf. United States v. South-Eastern Underwriters Ass'n, [322 U.S. 533 (1944)]."

"Nor is the amount of the nation's sugar industry which the California refiners control relevant, so long as control is exercised effectively in the area concerned, Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co., 293 U.S. 268, 279 [1934]; United States v. Yellow Cab Co., 332 U.S. 218, 225 [1947], the conspiracy being shown to affect interstate commerce adversely to Congress' policy. Congress' power to keep the interstate market free of goods produced under conditions inimical to the general welfare, United States v. Darby, 312 U.S. 100, 115 [1940], may be exercised in individual cases without showing any specific effect upon interstate commerce, United States v. Walsh, 331 U.S. 432, 437, 438 [1946], it is enough that the individual activity when multiplied into a general practice is subject to federal control, Wickard v. Filburn, [317 U.S. 111 (1942)] ... or that it contains a threat to the interstate economy that requires preventive regulation. Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 221, 222 [1938]." Id. at 236.

24. "[The boycott] is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy." Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959). "It is difficult to perceive how or at what point the lower court would determine that the elimination of individual enterpreneurs had passed permissible bounds. The [lower] court has failed to recognize that the sum-total effect of the elimination of a number of individual traders as a result of many diverse restraints is not negligible from the standpoint of public injury, even if in each case the public may patronize numerous other traders. In our view, the result of such eliminations would be a most serious encroachment on that optimum economic environment at which the Sherman Act aims. See Northern Pac. Ry. v. United States, 356 U.S. 1, 4-5." Brief for the United States as Amicus Curiae on petition for certiorari, p. 5, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). In United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940), Justice Douglas emphasized: "[T]he amount of interstate or foreign trade involved is not material (Montague & Co. v. Lowrey, 193 U.S. 38, [1903]), since § 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected. Steers v. United States, [192 Fed. 1, 5 (6th Cir. 1915)] ... Patterson v. United States, [222 Fed. 599, 618-19 (6th Cir. 1915)]. ..." See also the dissent by Justice Douglas in United States v. Columbia Steel Co., 334 U.S. 495, 537 (1948).
tion of "commerce" or a restricted dollar volume of commerce is heavily-weighted against the searcher.

It also is clear that the "commerce" conception has developed without hindrance from or relationship to a conscious allocation of functions within the federal political framework. Neither the availability of state regulation, nor considerations of whether state or local government "ought" to regulate the particular commercial activity have generally served to limit either the depth or scope of federal jurisdiction. If the approach has been functional and practical, it is derived from the common sense of experienced jurists rather than from economics or political science.25 Hence, most discussion of a proper role for state antitrust enforcement has not been in terms of a claim to exclusivity in any significant competitive sphere,26 but rather in terms of the feasibility of cooperative enforcement, despite possible "pre-emption" by federal regulation.

THE AFFECTATION DOCTRINE AND ITS RELATION TO LOCAL ACTIVITIES

It nevertheless is significant to the practicing lawyer that the federal courts continue to exempt various local restraints from the Sherman Act. The verbalization of such decisions describes the impact of the restraint upon commerce as "remote and incidental"27 rather than "substantial and direct."28 Interstate commerce is deemed unaffected by a merely "incidental" flow of supplies in interstate commerce to the local enterprise, or by "travel in interstate commerce of customers of the local enterprise."29 In such cases, the impact upon commerce of boycotting or price-fixing is then described as "inconsequential," "remote," or "fortuitous."30


27. E.g., Page v. Work, 290 F.2d 323 (9th Cir.), cert. denied, 368 U.S. 875 (1961); Albrecht v. Kinsella, 119 F.2d 1003 (7th Cir. 1941). In Lieberthal v. North Country Lanes, Inc., TRADE REG. REP. (1963 Trade Cas.) ¶ 70894, at 78586 (S.D.N.Y. Sept. 12 1963), the court stated the issue: "Does the amended complaint now show a conspiracy 'to restrain interstate trade and commerce as one thus affecting only purely local trade and commerce?'

28. United States v. Starlite Drive-In, Inc., 204 F.2d 422 (7th Cir. 1953).

29. See notes 27 & 28 supra.

30. E.g., Page v. Work, 290 F.2d 323 (9th Cir.), cert. denied, 368 U.S. 875 (1961); Lawson v. Woodmere, Inc., 217 F.2d 148 (4th Cir. 1954); United States v. Starlite Drive-In,
Such conclusory phrases obviously offer little guidance. The Supreme Court has offered few definitive guides in the determination of when interstate commerce will be deemed to be "affected." Decision of the issue in various factual settings has involved difficulty, confusion, and some inconsistency.\textsuperscript{31}

Despite the general language of the Supreme Court giving broad scope to the commerce clause, the opinions of the Court have failed to answer many vital questions. For example: Where does interstate commerce begin and end? Is this inquiry one of fact or law? What, if any, presumptions are used? How are the facts to be determined? The


32. See note 14 supra.

33. Las Vegas Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir.), \textit{cert. denied}, 347 U.S. 817 (1954) distinguished between the "in commerce" import of the restraint as an issue for the court and the "affectation doctrine" as an issue of fact for the jury. \textit{Cf.} United States v. General Motors Corp., 121 F.2d 376, 398, 402 (7th Cir. 1941) (G.M.A.C. litigation where the impact of the conspiracy on commerce was left to the jury). The instruction of the trial judge is reproduced in Ford Motor Co. v. United States, 335 U.S. 303, 316 n.3 (1948). In Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 249 (1948), however, Justice Jackson dissented from the Courts determination of the "affectation" issue on the basis of the pleadings without evidence. The better rule was established in Marks Food Corp v. Barbara Ann Banking Co., 274 F.2d 934, 936 (9th Cir. 1960), where the court heard the separate issue of jurisdiction in a case where a jury was demanded. In reversing, the reviewing court stated: "In the consideration of these points, we must first note that the trial court in proper circumstances, has the right to order separate trials for separate issues in the same case, F. R. Civ. P. 42 (b), 28 U.S.C.A. We also assume that when this is done in a non-jury case or one in which a jury has been waived, the judge has the power and the duty to receive all proper evidence offered and determine the questions of law and fact which are involved in the separated issue or issues. The rule however, as it seems to us does not sanction the switching of the separated issue in a jury case from the jury to the judge. It may be that this can be done in cases where the very stating of the separated issue shows it to be so frivolous that but the one view is entertainable by reasonable minded persons. The issue in this case is not of that quality. It seems to us that a safe practice would be never to separate the subject matter jurisdiction issue for separate trial in cases where the factual merits of the case must be considered in deciding the separated issue."
Court’s verbalizations vary from case to case and are at times self-contradictory. There is no procedural uniformity in the lower courts in passing upon the jurisdictional plea of “local commerce.” Some courts decide the issue upon motion to dismiss or summary judgment. Others feel constrained to defer decision on the ground that antitrust cases should not be decided by summary procedures. The uncertainty of the decisional process is illustrated by the diverse paths by which the Supreme Court has arrived at conclusions of “no federal jurisdiction” in two landmark opinions. One decision was arrived at after a searching trial. The other illustrates an a priori approach. Both approaches indicate the types of facts which courts may utilize.

**The Factual Approach**

The fields of physician affiliation, local medical society activity, and hospital operation and qualification are outside the scope of section 1 of the Sherman Act. United States v. Oregon State Medical Soc’y was commenced under the Sherman Act against the organized medical pro-


37. Donlan v. Carvel, 209 F. Supp. 829, 831 (D. Md. 1962), where the court said: “It should be noted . . . that summary dismissal in private antitrust litigation should be sparingly granted, because of the nature of the issues and the availability of proof . . . . (Citations omitted.)”

38. Elizabeth Hosp., Inc. v. Richardson, 269 F.2d 167 (8th Cir. 1957); Riggall v. Washington County Medical Soc’y, 249 F.2d 266 (8th Cir.), cert. denied, 355 U.S. 954 (1957); Spears Free Clinic & Hosp. for Poor Children v. Cleere, 197 F.2d 125 (10th Cir. 1952). Section 3 of the Sherman Act applies unqualifiedly to contracts, combinations, and conspiracies in restraint of trade or commerce in the District of Columbia. Interstate commerce is not necessary to the operation of the statute there. A conspiracy was formed between medical corporations and members designed to eliminate a group health association which provided for medical care on a cash-sharing prepayment basis. Members were expelled from their association when they participated in group practice. Moreover, they were denied the use of hospitals and facilities. The court stated that this was an unlawful restraint in violation of § 3. United States v. American Medical Ass’n, 110 F.2d 703 (D.C. Cir. 1940), convictions upheld, 130 F.2d 233 (D.C. Cir. 1942), aff’d, 317 U.S. 519 (1943). State antitrust laws have been held to apply to boycotting practices by medical societies. Willis v.
profession of Oregon. The defendants in the action were the state and county medical societies and their prepaid medical-care company. The Government's complaint charged the defendants with monopolization of prepaid medical care and boycotting of private medical-care associations. Furthermore, the defendants were accused of conspiring to restrain competition between the state society's prepaid medical-care company and plans sponsored by county medical societies. The evidence failed to show monopolization, since the private health associations' prepaid care plans were not adversely affected.

In affirming the trial court's decision, the Supreme Court also held that since the doctor's sponsored plans did not constitute an unlawful restraint, such plans were outside the scope of "commerce." The Court referred to a "number of payments" to out-of-state doctors and hospitals, "presumably for the treatment of policy-holders who happen to remove or temporarily be away" from Oregon when the need for care arose. These payments were dismissed as "few, sporadic and incidental." 40

The court contrasted the noncompetitive restraints between state and county medical care societies with commercial noncompetitive agreements:

This is not a situation where suppliers of commercial commodities divide territories and make reciprocal agreements to exploit only the allotted market, thereby depriving allocated communities of competition. This prepaid plan does not supply to, and its allocation does not withhold from, any community medical service or facilities of any description. No matter what organization issues the certificate, it will be performed, in the main, by the local doctors. The certificate serves only to prepay their fees. The result, if the state association should enter into local competition with the county association, would be that the inhabitants could prepay medical services through either one or two medical society channels. There is not the least proof that duplicating sources of the prepaid certificates would make them cheaper, more available or would result in an improved service or have any beneficial effect on anybody. Through these nonprofit organizations the doctors of each locality, in practical effect, offer their services and hospitalization on a prepaid basis instead of on the usual cash fee or credit basis. To hold it illegal because they do not offer their services simultaneously and in the same locality through both a state and a county organization would be to require them to compete with themselves in sale of certificates. Under the circumstances proved here, we cannot regard the agreement by these nonprofit organizations not to compete as an unreasonable restraint of trade in violation of the Sherman Act. 41

The comments of the Court appear to make a clear distinction between the local practice of a profession and an interference with "com-


40. Id. at 339.
41. Id. at 337-38.
merce" in prepaid medical care plans. Had the evidence shown that the physicians, by boycott in support of their own plans, did, in fact, adversely affect private prepaid care plans, a different result might well have been forthcoming, for interstate competition in prepaid medical insurance plans is wide-spread.42

*The A Priori Approach*

In contrast to the intensely factual examination on appeal in the *Oregon State Medical Soc'y* case, the Court, in the first *Yellow Cab* case, by way of judicial notice, made a sweeping finding as to the normal operating course of local taxicab companies licensed for operation by a municipality. The Court based its decision principally on the following facts: taxicab businesses do not cross state lines; are legally obligated to operate only within the city; are paid fares by the passenger and not by carriers in interstate commerce; are but one means of conveyance to arteries of interstate commerce; and intermingle local passengers with interstate travelers.

The Court appears to have been impressed principally by the proposition that a taxicab trip is not "commonly understood" to be part of interstate travel.44 The Court arrived at its conclusion without any evidentiary bases and despite its frequently reiterated pronouncements that, given the violation of law, interference with *any amount* of commerce is prohibited.

Favorably contrasting with the ruling in *Yellow Cab*, the Court of Appeals for the Second Circuit held that a conspiracy in the linen supply business in the New York and northern New Jersey metropolitan areas sufficiently affected interstate commerce, although only one per cent of all linen service in the market area was affected by the conspiracy. The court noted that even though the one per cent amounted to sales of only $523,168 in 1954, such a volume of business was not "insignificant or insubstantial."45 It is suggested that most people would consider the linen supply business as "essentially local."

The "essentially local" approach of the *Yellow Cab* case continues to appear in recent cases sustaining the "no jurisdiction" defense. It has been held that local activities such as bowling,46 ice and cold storage facil-
barbering, exclusive leasing arrangements in a local shopping center, restrictive installation practices by cemeteries, undertaking, and employment agencies are outside the scope of federal antitrust. Most of the foregoing cases were decided upon motions to dismiss. In these cases of "essentially local" activities, the courts have regarded as immaterial the fact that the local activity may attract interstate customers or involve the use of components which have come from outside the state.

The a priori approach often is combined with the doctrine that the goods in question have "come to rest" before the restraint was applied locally. It should be noted, however, that the a priori approach is a blunt weapon. It also is used by the courts in finding an adverse effect upon commerce, especially in the per se cases.

After the recent caveat against summary adjudications of antitrust cases by the Supreme Court in Poller v. Columbia Broadcasting Sys., and White Motor Co. v. United States, it would seem that the jurisdictional issue of "commerce" should be decided only after a factual hearing on the issue or by summary judgment where uncontroverted facts appear.

54. Interstate commerce was deemed adversely affected in United States v. Employing Plasters Ass'n, 347 U.S. 186 (1954); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948); United States v. Northeast Tex. Chapter, Nat'l Elec. Contractors Ass'n, 181 F.2d 30 (5th Cir. 1950); United States v. Detroit Sheet & Metal Roofing Contractors Ass'n, 116 F. Supp. 81 (E.D. Mich. 1953); United States v. Universal Milk Bottle Serv., 83 F. Supp. 622 (S.D. Ohio 1949). The tendency of the federal courts to take jurisdiction in cases involving per se restraints is augmented by the ruling of the Supreme Court in Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958): "This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable — an inquiry so often wholly fruitless when undertaken."
Factual Determination of the Impact of the Restraint — Page v. Work

The approach in recent cases wherein the defense of "nonaffectation" has been established appears to lie in an intensely factual analysis of the business generally and, particularly, in an analysis of the phase of the business which is alleged to have been unlawfully restrained. This technique, if more widely accepted, may serve to expand the scope of federal antitrust immunity.

In Page v. Work, decided by the Court of Appeals for the Ninth Circuit, an action was brought on behalf of a dissolved newspaper corporation which had engaged primarily in the publication of legal news and advertising in the Los Angeles County area. Plaintiff alleged that 105 community newspapers and their coordinating bureau had injured the corporation by price-fixing, collusive bidding, and by a variety of anticompetitive practices aimed at destroying and excluding non-bureau members. The efforts of the bureau in localizing the publication of legal notices in each community of the county were successful, causing the assets of plaintiff corporation to be sold to a wholly owned subsidiary of the bureau.

The dissolved corporation and the 105 community newspapers were engaged in interstate commerce by reason of their practice of purchasing newsprint and supplies from sources located outside of California, the dissemination of national news and national advertising, and by sales to a few out-of-state subscribers. The only field of effective competition between plaintiff and defendants, however, was in the legal advertising business.

In affirming summary judgments in favor of defendants, the court of appeals concluded:

1. The test of federal jurisdiction is not whether the acts complained of affect a business engaged in interstate commerce, but whether the conduct complained of affects the interstate commerce of such business.

2. The relevant market is not the newspaper business as a whole, but the legal advertising in newspapers printed, published, and circulated in Los Angeles County.

3. Since the frame of relevancy for federal jurisdiction is the local legal advertising market, the complainants' contention that the legal advertising market was an "integral part" of the "flow of commerce" was not justified.

4. The charges of price-fixing, market division, and other practices, although constituting per se violations of section 1 of the Sherman

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57. 290 F.2d 323 (9th Cir.), cert. denied, 368 U.S. 875 (1961).
Act, confer federal jurisdiction only when the intrastate activity of publishing legal notices affects interstate commerce.

(5) No "direct and substantial" effect upon commerce was present since there was no showing that the interstate market for newsprint was appreciably affected. Moreover, the corporations’ out-of-state circulation was de minimis.

(6) The local legal advertising business was insufficient in scope to allow defendants to "gain control" of interstate markets in national display advertisements, news dissemination, or newsprint.

The court, therefore, concluded that the effects on interstate markets were "indirect and nonexistent" and "of no substantial effect."

The result of Page v. Work appears to be at variance with the cases which have found a sufficient basis for jurisdiction under the antitrust laws in a change of direction of interstate commerce. The court did not concern itself with the realignment of a substantial volume of newsprint, national advertising, and national news. Moreover, the court’s ruling appears to ignore the fact that the aim of many combinations and conspiracies is to obtain a greater share of the interstate commerce market.

Page v. Work suggests that anticompetitive practices may achieve immunity from antitrust laws by concentrating only upon the local activities of a business which has significant interstate as well as local facets. Whether a business is vulnerable to competitors in its local or its interstate commerce aspects may often be wholly fortuitous.

The reasoning in Page v. Work further suggests that the "affectation" doctrine also may be utilized to accomplish a resurrection of the "public injury" doctrine under the guise of finding a "remote" or "insubstantial" effect on commerce. This doctrine presumably was consigned to oblivion by the ruling of the Supreme Court in Klor’s Inc. v. Broadway-Hale Stores, Inc. In that case, a boycott of goods against a retail outlet was actionable, irrespective of the impact of the boycott on the local retail competitive market. Local restraints applied to the actual move-

58. Id. at 333-34.
59. In United States v. Starlite Drive-In, Inc., 204 F.2d 419, 421 (7th Cir. 1953), affirming the dismissal of an indictment, the court pointed out that "there is no charge... that films were licensed in any manner different from what they would have been if no restraint had been imposed." Factors adduced as proof of a "substantial effect" upon commerce are: "an increase of price to consumer; a reduction of amount of consumption; an impairment of quality; a decrease in interstate movement; a change of direction of interstate movement; a retardation of flow of interstate movement; a narrowing of markets; a burdening of interstate movement; an impairment of benefits of free competition; and an elimination of price competition." Kallis, Local Conduct and the Sherman Act, 1959 DuKE L.J. 236, 248. (Footnotes omitted.) (Appears as list.)
60. 75 HARV. L. REV. 1233, 1235 (1962).
ment of goods in commerce may afford a distinction between *Klor's Inc.*, and *Page v. Work*. The distinction is unconvincing, however, because of the many rulings which have held that wholly local restraints and discriminations applied to many-faceted businesses involving interstate and intrastate activity are subject to the jurisdiction of the Sherman Act.\(^6\)

**Local Segments of National Marketing Organizations**

While the judicial tendency to insulate "essentially local" enterprises from federal jurisdiction has been on the increase, a contrary tendency or trend is perceptible in connection with local segments of multistate marketing organizations. In many cases, the activities of the local automobile, gasoline,\(^6\) or soft drink dealers\(^6\) have been characterized as "essentially local" in character. While the marketing practices of the supplier corporation through retail outlets have been regarded as part of the "stream of commerce" for purposes of federal jurisdiction,\(^6\) the status of the individual dealer or distributor as party plaintiff pursuant to section 4 of the Clayton Act had received quite contrary consideration.

With an increasing articulation by the courts that refusals to deal may not be utilized for the accomplishment of antitrust objectives,\(^6\) and with

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\(^{63}\) Miller Motors, Inc. v. Ford Motor Co., 252 F.2d 441 (4th Cir. 1958); Hudson Sales Corp. v. Waldrip, 211 F.2d 268 (5th Cir. 1954); Fedderson Motors, Inc. v. Ward, 180 F.2d 519 (10th Cir. 1950); Boro Hall Corp. v. General Motors Corp., 124 F.2d 822, *rehearing denied*, 130 F.2d 196 (2d Cir. 1942); Blenke Bros. Motors, Inc. v. Chrysler Corp., 189 F. Supp. 420 (N.D. Ill. 1960); Riedley v. Hudson Motor Car Co., 82 F. Supp. 8 (W.D. Ky. 1949).


the substantial elimination of the "public injury" requirement for a private treble damage action, the local outlet of the national chain has achieved new importance.

TYING AGREEMENTS

The nature and volume of local commercial activity has become important, not only in ascertaining federal jurisdiction, but also in assessing the legality of tying agreements pursuant to section 1 of the Sherman Act.

In Northern Pac. Ry. v. United States,69 the Supreme Court clarified the relationship between section 1 of the Sherman Act and tying agreements. The legality of a tying agreement is determined by the market power of the tying product and the "substantiality" of commerce in the "tied" product. In absorbing the "tying agreement" in the per se category along with price-fixing, group boycotts, and division of markets, the Court stated:

While there is some language in the Times-Picayune [Publishing Co. v. United States, 345 U.S. 594 (1953)] opinion which speaks of "monopoly power" or "dominance" over the tying product as a necessary precondition for application of the rule of per se unreasonableness to tying arrangements, we do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product (assuming all the time, of course, that a "not insubstantial" amount of interstate commerce is affected). To give it any other construction would be wholly out of accord with the opinion's cogent analysis of the nature and baneful effects of tying arrangements and their incompatibility with the policies underlying the Sherman Act. Times-Picayune, of course, must be viewed in context with International Salt [Co. v. United States, 332 U.S. 392 (1947)] and our other decisions concerning tying arrangements. There is no warrant for treating it as a departure from those cases. Nor did it purport to be any such thing; rather it simply made an effort to restate the governing considerations in this area as set forth in the prior cases. And in so doing it makes clear, as do those cases, that the vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another, regardless of the source from which the power is derived and whether the power takes the form of a monopoly or not.70

The Court's extensive reliance upon and discussion of the International Salt, of course, is not to be lightly dismissed.

70. id. at 11. (Emphasis added.)
Salt case clearly emphasizes that as little as $500,000 of commerce in the "tied" production was "not insubstantial." While White Motor Co. v. United States and Brown Shoe Co. v. United States may cast doubt upon an all encompassing inclusion of the tying arrangement in the per se "club," it is clear that the issue of illegality in the individual case cannot arise unless the "substantiality" of the "tied" commerce is apparent.

The prerequisites for pleading an illegal tying agreement recently have been articulated in the District Court for the Southern District of New York. In Albert H. Cayne Equipment Corp. v. Union Asbestos & Rubber Co., the plaintiff, an ousted exclusive distributor of defendant's steel shelving, alleged that the defendant had terminated plaintiff's distributorship in reprisal for plaintiff's refusal to purchase "other products" sold by defendant.

In denying a motion for preliminary injunction and in dismissing the complaint with leave to amend, the court stated:

Both of the foregoing conditions are essential before a tying arrangement offends Section 1 of the Sherman Act. The instant complaint, however, fails to state any facts showing either UNARCO's economic power over Sturdi-Bilt racks — the tying product — or restraint of a substantial volume of commerce in the unidentified tied items. Indeed, there is nothing in the complaint which even suggests any effect whatever of the tying arrangement on commerce, on competition, or its economic impact on the market for the tied items. The complaint, therefore, fails to allege a claim for relief under Section 1 of the Sherman Act.

The court reconciled its holding with the "notice requirements" of pleading under the Federal Rules of Civil Procedure by stating that while the "shallow, shot-gun, conclusionary pleading" gave notice of what the plaintiff claimed, the claim stated failed "to pass muster" under the various specific sections of the antitrust laws invoked.

This ruling does not suggest a return to outmoded requirements of pleadings in antitrust cases, which required more than "fair notice" of the nature of plaintiff's claim. In a tying agreement action, however, it does portend the requirement that the pleader at least relate the tying and tied products to the tests enunciated by the Supreme Court.

Two courts of appeals opinions seem to be in conflict with the required showing of substantiality where the tied product moves through a number of local outlets which individually do not involve a "substan-

75. Id. at 78542.
76. See Walker Distrib. Co. v. Lucky Lager Brewing Co., TRADE REG. REP. (1963 Trade Cas.) § 70886, at 78539 (9th Cir. Sept. 6, 1963), and cases cited therein.
tial" volume of commerce. In *Osborn v. Sinclair Ref. Co.*, the court reversed dismissal of a complaint arising out of the manufacturer's refusal to continue selling to a dealer because of the latter's failure to accede to Sinclair's demands to stock Goodyear tires, batteries, and accessories (TBA).

The opinion of Judge Sobeloff states:

Turning to the instant case, buying substantial quantities of Goodyear TBA clearly appears to have been a condition of the plaintiff's leasing the service station and being a dealer in Sinclair gasoline. The Goodyear TBA was tied to the lease and the sale of the gasoline. It matters not that the plaintiff was not forced to purchase his entire requirements in Goodyear merchandise. Certainly, insofar as he and other dealers were compelled to carry Goodyear, to that extent competition in TBA was curbed.

More recently, in *Bragen v. Hudson County News Co.*, the Court of Appeals for the Third Circuit reversed the trial court's directed verdict at the conclusion of plaintiff's evidence. Defendant had a near monopoly on the wholesale distribution of newspapers and periodicals in Hudson County, New Jersey. Plaintiff operated a small retail store in Jersey City selling newspapers, magazines, paper backs, comic books, soft drinks, ice cream, candy, and school supplies. The plaintiff was obviously a very small businessman.

Plaintiff proved that defendant required him to accept items which he had not ordered. During the month that defendant became the sole wholesale distributor of the most desirable newspaper and magazine publications in Hudson County, it refused to deal further with plaintiff, claiming that plaintiff owed a balance of $126.19. Plaintiff refused to pay because defendant had continuously "short changed" him on credit for returned and unwanted items which totalled between $550 and $600.

After his business had diminished to the point where he was forced to close his store, plaintiff brought suit. He alleged that numerous customers stopped patronizing his store when they were no longer able to purchase the newspapers and magazines distributed by defendant. The evidence established a series of unavailing protests by the plaintiff, including numerous requests that defendant discontinue delivering unwanted items. Plaintiff also had protested against the quality of defendant's service, e.g., delivery of publications into gutters and unprotected locations during rainy weather.

In reversing the directed verdict for defendant, the court of appeals noted that a single exclusive distributorship for a number of publishers was not necessarily illegal under either section 1 or section 2 of the

77. 286 F.2d 832 (4th Cir. 1961).
78. Id. at 838-39. (Emphasis added.)
Sherman Act. The court, however, found a justiciable jury issue under the "tying cases." Said the court:

In our opinion, the plaintiff has made a sufficient showing which could enable a jury to find that Hudson's business with plaintiff was conducted through tying arrangements. Although Hudson agreed to give credit on returned items, the jury might have concluded on all of the evidence that the administration of this scheme was such that in actual practice the credit concession did not relieve the plaintiff of the economic burden of unwanted 'tied' items.80

The opinion of the court is devoid of discussion of the "substantiality" of the commerce affected by the defendant's practices. It would seem that plaintiff should be required to show not only that he was adversely affected, but that a substantial volume of commerce was affected by the defendant's practices.

CONCLUSION

It is clear that the standards of federal jurisdiction under the Sherman Act have substantially ignored the possibility of remedies under state antitrust laws. The conception both of the national market and the broad sweep of the commerce clause of the Constitution have impelled an approach by the federal courts which substantially precludes a "states rights" or other parochial approach to "commerce" under the Sherman Act.

Until recently, the enforcement of state antitrust laws has been all but ignored in the establishment of a competitive economic atmosphere. This failure of enforcement and the plethora of burdensome, special, and conflicting state regulations81 — often at variance with the conception of a national market — appear to have justified the breadth of jurisdiction envisioned by the federal government under the Sherman Act.

The present uncertain and confused regulation and enforcement at the state level indicates the advisability of a continuing broad jurisdiction in the federal courts over problems of competition and antitrust. With the rising tide of consciousness of state antitrust laws, effective argument in the future perhaps may be available for a more restrictive attitude toward federal jurisdiction.

80. Id. at 78533.