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## The Antitrust Implications of the Denial of Hospital Staff Privileges

William R. Drexel

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# The Antitrust Implications of the Denial of Hospital Staff Privileges

WILLIAM R. DREXEL\*

*Hospitals monitor the quality of patient care by controlling physician access to hospitals and their facilities. Physicians denied staff privileges may claim that the hospital's limitation on access represents a concerted refusal to deal—a violation of the Sherman Act. In this article, the author examines the allegedly anticompetitive practices of hospitals and concludes that the hospitals' concerted refusal to deal may be permitted as a legitimate means of self-regulation by professionals.*

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## I. INTRODUCTION

The medical profession has become increasingly sophisticated. Technological advances have spawned an impressive array of new diagnostic and therapeutic devices. Because of its high cost, such equipment is not, however, economically feasible for office use. Access to hospital facilities has thus become essential to the practicing physician.<sup>1</sup>

Concomitantly, hospitals have become more restrictive in granting staff privileges to physicians. Rather than being considered as mere providers of health care facilities, hospitals have become viewed as actual providers of health care. This changing im-

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1. See Cray, *Due Process Considerations in Hospital Staff Privilege Cases*, 7 HASTINGS CONST. L.Q. 217, 217 (1979).

age has led to the imposition of legal liability upon hospitals for the actions of their medical staffs.<sup>2</sup> Hospitals accordingly scrutinize more closely the qualifications of new applicants for staff positions and the competence of existing staff members as a means of avoiding future legal liability. This selectivity often leads to legal conflicts between physicians and hospitals.<sup>3</sup>

Traditionally, physicians who felt that they were wrongfully denied staff privileges brought suits against the offending hospitals, alleging that they had been denied procedural due process. Recently, however, physicians have turned increasingly to the antitrust laws to redress their grievances. This trend is due largely to substantive developments in antitrust law and procedural due process.<sup>4</sup>

Early decisions of the Supreme Court of the United States<sup>5</sup> exempted "learned professions", such as medicine, from antitrust laws because they were not a "trade" as defined in section 1 of the Sherman Antitrust Act.<sup>6</sup> Any such learned profession exemption clearly has been rejected by recent Supreme Court decisions.<sup>7</sup> The

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2. See *Darling v. Charleston Community Memorial Hosp.*, 33 Ill. 2d 326, 333, 211 N.E.2d 253, 258 (1965), *cert. denied*, 383 U.S. 946 (1966) (jury may find that hospital's failure to review staff competence constitutes negligence). For an explanation of the development of hospital liability, see Hanson & Stromberg, *Hospital Liability for Negligence*, 21 HASTINGS L.J. 1, 6-14 (1969); Walkup & Kelly, *Hospital Liability: Changing Patterns of Responsibility*, 8 U.S.F. L. REV. 247, 254-57 (1973).

3. A recent decision succinctly stated the tension between the interests of the hospital and the physician:

On the one hand, the public must be assured that each member of the medical staff of a hospital is fully competent to practice his profession at such facility; on the other hand, every effort must be made to insure that no physician will be denied staff-privileges on the basis of incorrect information or without having been afforded a meaningful opportunity to refute the charges against him. Each decision must be made with the best interest of the hospital in mind but with a full recognition of the rights of the individual physician. The termination of a physician's staff-privileges is serious business; a single precipitous decision of a medical committee could ruin a budding career.

*Early v. Bristol Memorial Hosp.*, 508 F. Supp. 35, 38 (E.D. Tenn. 1980); see also Cray, *supra* note 1, at 217-18.

4. For a general discussion of the procedural due process remedies of a physician denied staff privileges by a hospital, see Cray, *supra* note 1, at 217-18.

5. See, e.g., *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 436 (1932) (quoting *The Nymph*, 18 F. Cas. 506, 507 (C.C.D. Me. 1834) (No. 10,388)). For a general discussion of the learned profession exemption, see Goldfarb v. Virginia State Bar, 497 F.2d 1, 13 (4th Cir. 1974), *rev'd*, 421 U.S. 773 (1975).

6. Sherman Act, 15 U.S.C. § 1 (Supp. IV 1980).

7. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 696 (1978) (canon of ethics prohibiting members from submitting competitive bids for engineering services suppresses competition and violates Sherman Act); Goldfarb v. Virginia State Bar, 421 U.S. 773, 786-88 (1975) (minimum-fee schedule enforced by a state bar association violated

elimination of this barrier to suits within the medical profession has fostered the increased reliance on the antitrust laws by physicians denied staff privileges.

At the same time that the professional exemption was crumbling, Supreme Court decisions markedly circumscribed procedural due process.<sup>8</sup> Recent decisions have narrowed the scope of procedural due process protection by limiting the activities that may be classified as state action.<sup>9</sup> The interests protected by procedural due process—liberty and property—have also been limited.<sup>10</sup> Finally, the Court has narrowed the procedural protections afforded when there is state action and a protected property or liberty interest.<sup>11</sup> These developments have left physicians without much procedural due process protection in most staff privilege situations.<sup>12</sup>

This article will discuss the extent to which the antitrust laws provide a remedy for the denial or revocation of staff privileges.<sup>13</sup> The jurisdictional requirements for the Sherman Act will be discussed first. Since the denial of staff privileges may constitute a concerted refusal to deal,<sup>14</sup> the development of this area of antitrust law must also be examined. This examination is critical because there has been much dispute over Supreme Court statements that concerted refusals to deal are per se illegal.<sup>15</sup> But even assum-

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Sherman Act). There is some uncertainty, however, as to whether professionals are subject to the same standards of liability as nonprofessionals, particularly with regard to trade practices that traditionally have been deemed to be per se illegal. See *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466, 2475-76 (1982) (plurality opinion).

8. Cray, *supra* note 1, at 217-18.

9. See, e.g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge v. Irisv*, 407 U.S. 163 (1972).

10. See, e.g., *Bishop v. Wood*, 426 U.S. 341 (1976); *Paul v. Davis*, 424 U.S. 693 (1976).

11. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976).

12. Cray, *supra* note 1, at 219.

13. This article will deal solely with the denial of staff privileges to individual physicians. These denials may be classified as concerted refusals to deal. See *Robinson v. Magovern*, 456 F. Supp. 1000, 1005 (W.D. Pa. 1978). In contrast, hospitals might enter into exclusive dealing arrangements with particular physicians, thereby foreclosing entry by any other physicians. Such arrangements are subject to different considerations than concerted refusals to deal and are not discussed here. For a discussion of the validity of exclusionary contracts between hospitals and physicians, see Kessenick & Peer, *Physicians' Access to the Hospital: An Overview*, 14 U.S.F. L. Rev. 43 (1979).

14. See *Robinson v. Magovern*, 456 F. Supp. 1000, 1005 (W.D. Pa. 1978).

15. See *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958).

Some lower courts have held that concerted refusals to deal are per se illegal if they involve a conspiracy among competitors to exclude others. See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1178-79 (D.C. Cir. 1978); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 131 (2d Cir. 1978); *North Am. Soccer League v. National Football League*, 465 F. Supp. 665, 672-73 (S.D.N.Y. 1979). Other lower courts have held that concerted refusals are per se

ing that all concerted refusals to deal are per se illegal, and that per se rules apply to professions, denials of staff privileges may nevertheless fall within a well-recognized exception to the per se rule. After explaining why a per se rule may not be appropriate for denials of staff privileges, the article will conclude with an examination of the considerations involved in applying a rule of reason to concerted refusals to deal.

## II. THE JURISDICTIONAL PREREQUISITES OF THE SHERMAN ACT

Restraints of trade are proscribed by the Sherman Act only if they restrain "trade or commerce among the several States."<sup>16</sup> Jurisdiction exists only if the restraint involves transactions in the flow of interstate commerce or transactions affecting interstate commerce.<sup>17</sup> This jurisdictional limitation poses special problems for suits based on the denial or revocation of staff privileges because such action is usually local and apparently does not immediately affect interstate commerce. The jurisdictional barrier, however, is not insurmountable.

The Supreme Court has construed the jurisdiction of the Sherman Act to reach the full extent of congressional power under the commerce clause of the United States Constitution.<sup>18</sup> The scope of the Sherman Act has thus expanded with the expansion of the commerce power. Some of the significant commerce power cases illustrate the potential reach of the Sherman Act.

In *Wickard v. Filburn*,<sup>19</sup> for example, the Supreme Court held that the federal government has the power, under the commerce clause, to regulate the amount of wheat grown by a farmer for personal consumption. Although the impact upon interstate commerce resulting from one farmer's consumption of wheat might be consid-

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illegal only if there is an initial showing of an anticompetitive effect. See, e.g., *Neeld v. National Hockey League*, 594 F.2d 1297, 1298-99 nn.3-4 (9th Cir. 1979). Although evidence of anticompetitive purpose or effect is necessary to establish a violation under the per se rule, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940), *Neeld* requires evidence of anticompetitive effect as a prerequisite to invoking the per se rule. *Neeld*, 594 F.2d at 1300.

16. Sherman Act, 15 U.S.C. §§ 1-2 (Supp. IV 1980). Section 1 provides: "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 . . . ." *Id.* § 1 (emphasis added).

17. See 1 P. AREEDA & D. TURNER, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 232 (1978).

18. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944); see U.S. CONST. art. I, § 8.

19. 317 U.S. 111 (1942).

ered trivial, the Court justified the regulation because the aggregate effect of all farmers' personal consumption was not trivial.<sup>20</sup> A broad construction of the commerce power was also rendered in *Katzenbach v. McClung*.<sup>21</sup> In *McClung* federal regulations prohibiting discrimination were held applicable to a restaurant merely because the restaurant received a substantial portion of its food through interstate commerce.<sup>22</sup> The Court also justified this regulation under the commerce power on the ground that the aggregate effect of all such discrimination would substantially affect interstate commerce.<sup>23</sup>

*Wickard* and *McClung* indicate that the broad grant of congressional power under the commerce clause can be utilized to regulate individual activity which by itself hardly seems to have a substantial effect on interstate commerce. If the jurisdiction of the Sherman Act does in fact reach to the full extent of congressional power, almost all economic activity would be subject to the Sherman Act.<sup>24</sup> Congressional commerce power can thus be construed to extend to a hospital's denial of staff privileges.

The Supreme Court had occasion to adjudicate Sherman Act jurisdictional issues in the health care field in *Hospital Building Co. v. Trustees of Rex Hospital Co.*<sup>25</sup> *Hospital Building* involved a suit by a small hospital against another, larger hospital under sections 1 and 2 of the Sherman Act. The plaintiff, Rex Hospital, alleged that the defendant hospital, its administrator, its trustee, and a local health planning agency conspired to restrain trade and monopolize the market for hospital services by preventing the expansion of Rex Hospital. The Court cited the following interstate contacts in upholding Sherman Act jurisdiction: the plaintiff purchased medical supplies from out-of-state; the plaintiff received payments for services from out-of-state insurers; the plaintiff paid management fees to its out-of-state parent corporation; and the plaintiff was to receive some of the financing for the expanded facilities from out-of-state lenders.<sup>26</sup> These allegations alone were deemed sufficient to establish jurisdiction; the plaintiff was not forced to prove that the adverse consequences of the restraint

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20. *Id.* at 124-29. The Court concluded that such a local activity could "be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ." *Id.* at 125.

21. 379 U.S. 294 (1964).

22. *Id.* at 298-99.

23. *Id.* at 301.

24. 1 P. AREEDA & D. TURNER, *supra* note 17, ¶ 232.

25. 425 U.S. 738 (1976).

26. *Id.* at 739.

would substantially affect commerce.<sup>27</sup> The court was satisfied that the plaintiff had substantial interstate contacts that might be unreasonably burdened by the restraint.<sup>28</sup>

Physicians whose staff privileges have been denied or revoked often have had a more difficult time proving the requisite interstate contacts.<sup>29</sup> For example, in *Wolf v. Jane Phillips Episcopal Memorial Medical Center*,<sup>30</sup> the United States Court of Appeals for the Tenth Circuit denied jurisdiction under the Sherman Act to an osteopath who had been refused staff privileges at two hospitals. Although the court found an illegal restraint of trade, it dismissed the case because the plaintiff's "business of practicing medicine and furnishing medical services was wholly intrastate in character."<sup>31</sup> The defendant's purchases of medical supplies and other interstate actions were declared irrelevant; only the plaintiff's interstate contacts were relevant for the purpose of obtaining jurisdiction under the Sherman Act.<sup>32</sup>

In contrast to *Wolf*, the district court in *Zamiri v. William Beaumont Hospital*<sup>33</sup> refused to dismiss for lack of jurisdiction an antitrust suit brought by a doctor who had been denied staff privileges. The physician's allegation that a significant portion of his potential plaintiffs received medicare or medicaid benefits was suf-

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27. *Id.* at 744.

28. *See id.* at 745-46. Courts focus on the potential for a substantial effect on commerce resulting from the restraint. In determining such a potential effect, courts must examine the plaintiff's interstate contacts that might be affected by the restraint. If those contacts are substantial, there is jurisdiction under the Act. *See, e.g., St. Bernard Gen. Hosp. v. Hospital Serv. Ass'n*, 510 F.2d 1121, 1124 (5th Cir. 1975); *Doctors, Inc. v. Blue Cross*, 490 F.2d 48, 51-53 (3d Cir. 1973).

29. *See Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1980); *Wolf v. Jane Phillips Episcopal-Memorial Medical Center*, 513 F.2d 684, 687 (10th Cir. 1975); *Riggall v. Washington County Medical Soc'y*, 249 F.2d 266, 268 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958) (no allegations suggesting burden upon interstate commerce); *Daley v. St. Agnes Hosp.*, 490 F. Supp. 1309, 1317 (E.D. Pa. 1980). *But see* *Mishler v. St. Anthony's Hosp. Sys.*, 1981-2 Trade Cas. (CCH) ¶ 64,342, at 74,586 (10th Cir. 1981) (concurring opinion); *Everhart v. Jane C. Stormont Hosp.*, 1982-1 Trade Cas. (CCH) ¶ 64,703 (D. Kan. 1982); *Malini v. Singleton & Assocs.*, 516 F. Supp. 440, 442-43 (S.D. Tex. 1981); *Zamiri v. William Beaumont Hosp.*, 430 F. Supp. 875, 876-77 (E.D. Mich. 1977).

30. 513 F.2d 684 (10th Cir. 1975).

31. *Id.* at 688.

32. *Id.* at 687-88. The court noted that the restraint alleged by the plaintiff did not have a substantial effect upon interstate commerce. *Id.*; *see Borsody, The Antitrust Laws and the Health Industry*, 12 AKRON L. REV. 417, 427 (1979); *see also United States v. Oregon State Medical Soc'y*, 343 U.S. 326 (1952); *Spears Free Clinic & Hosp. v. Cleere*, 197 F.2d 125 (10th Cir. 1952). Both cases hold that the business of practicing medicine is wholly intrastate in character.

33. 430 F. Supp. 875 (E.D. Mich. 1977).

ficient to avoid summary dismissal for lack of jurisdiction.<sup>34</sup> The court held that the eventual proof of those interstate contacts would satisfy the jurisdictional requirement of the Sherman Act.

*Zamiri* demonstrates the potential ease of satisfying the "affecting commerce" aspect of the Sherman Act's jurisdictional requirement.<sup>35</sup> In analyzing whether there are sufficient interstate contacts that might be affected by a denial of staff privileges, the following contacts may be relevant: the potential number of out-of-state patients;<sup>36</sup> the amount of reimbursements from out-of-state insurance companies;<sup>37</sup> the plaintiff's purchases of medical supplies through interstate commerce;<sup>38</sup> and the receipt of medicare and medicaid reimbursement from the plaintiff's potential patients.<sup>39</sup> Most physicians who have been denied staff privileges probably will have a sufficient number of these interstate contacts that the aggregate long-term impact of the denial will substantially affect interstate commerce and thus satisfy the jurisdictional requirement of the Sherman Act.<sup>40</sup>

### III. BACKGROUND: THE ANTITRUST LAWS

#### A. General Considerations

Section 1 of the Sherman Act proscribes "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in

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34. *Id.* at 877; see also *Feminist Women's Health Center, Inc. v. Mohammad*, 415 F. Supp. 1258, 1264 (N.D. Fla. 1976), *aff'd in part*, 586 F.2d 530 (5th Cir. 1978).

35. See also, e.g., *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 35 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972) (Sherman Act jurisdiction established by proof that service station operator would purchase a significant amount of tires, batteries, and accessories through interstate commerce over the entire period of his operation).

36. See *Feminist Women's Health Center v. Mohammad*, 586 F.2d 530, 540 (5th Cir. 1978); *McLain v. Real Estate Bd.*, 583 F.2d 1315, 1320 (5th Cir. 1978) (customers moving across state lines); *St. Bernard Gen. Hosp. v. Hospital Serv. Ass'n*, 510 F.2d 1121, 1124 (5th Cir. 1975).

37. See *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 744 (1976).

38. See *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 35 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972).

39. *Zamiri v. William Beaumont Hosp.*, 430 F. Supp. 875, 877 (E.D. Mich. 1977). As one commentator suggests, "[I]n an era of rapid communication, mobile population, and pervasive governmental regulation and financing of the health care industry," the defense of an insubstantial effect on interstate commerce is becoming much less certain. Borsody, *supra* note 32, at 428.

40. *Mishler v. St. Anthony's Hosp. Syss.*, 1981-2 Trade Cas. (CCH) ¶ 64,342, at 74,586 (10th Cir. 1981) (concurring opinion); *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1980); *Everhart v. Jane C. Stormont Hosp.*, 1982-1 Trade Cas. (CCH) ¶ 64,703 (D. Kan. 1982); *Malini v. Singleton & Assocs.*, 516 F. Supp. 440, 442-43 (S.D. Tex. 1981); *Zamiri v. William Beaumont Hosp.*, 430 F. Supp. 875, 877 (E.D. Mich. 1977).



restraint of trade or commerce among the several states."<sup>41</sup> Not all restraints of trade have been declared illegal. Section 1 prohibits only restraints that unreasonably suppress competition; it does not ban restraints adopted for valid commercial purposes even though their ancillary effect may be to restrain competition.<sup>42</sup>

Courts have applied two different analyses in determining the validity of restraints. Courts most often determine the validity of a restraint by applying the first analysis: the rule of reason. Under this analysis, courts examine the reasonableness of the restraint in light of the nature and effect of the restraint, the history of the restraint and its purpose, the facts peculiar to the business or industry, and the condition of the business or industry before and after the restraint.<sup>43</sup> In contrast to the rule of reason analysis, courts have sometimes applied a summary, per se rule to invalidate a restraint of trade, irrespective of any professed legitimate purpose.<sup>44</sup> The per se rule is typically applied in cases in which there has been "price fixing" or the restraint is "'plainly anticompetitive' and very likely without 'redeeming virtue.'"<sup>45</sup>

### B. *The Rule of Reason, the Per Se Rule, and Concerted Refusals to Deal*

The application of the rule of reason and the per se rule to concerted refusals to deal has had a turbulent history. Although Supreme Court decisions have often been viewed as mandating the application of a per se rule to concerted refusals to deal,<sup>46</sup> this application has been severely criticized.<sup>47</sup> Moreover, lower courts have not consistently applied the per se rule.<sup>48</sup> And the scope of the activities that constitute concerted refusals, which thus fall

41. 15 U.S.C. § 1 (Supp. IV 1980); *see supra* note 16.

42. *See Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588, 603-04 (1925).

43. *See Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *Standard Oil Co. v. United States*, 221 U.S. 1, 65-67 (1911).

44. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

45. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 9 (1979).

46. *See, e.g., Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958); *see also* Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685, 687-92 (1979); Handler, *Recent Developments in Antitrust Law: 1948-1959*, 59 COLUM. L. REV. 843, 863-64 (1959); Comment, *Political Blacklisting by the Motion Picture Industry: A Sherman Act Violation*, 74 YALE L.J. 567, 569-77 (1965).

47. *See* L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 240-41 (1977) (per se rule should be applied only to explicit boycotts and boycotts lacking any alternative purpose or effect benefiting competition); Bauer, *supra* note 46, at 686.

48. *See* Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486, 1487 (1966).

within the per se rule, has been subject to considerable confusion.<sup>49</sup> This confusion is compounded by the absence of a uniform definition of what constitutes a concerted refusal to deal.<sup>50</sup> Two types of cases, however, often have been distinguished. Some concerted refusals to deal involve parties conspiring to make it difficult or impossible for others to compete in the same market at the same level; other concerted refusals are attempts by conspirators to achieve goals other than the exclusion of competitors.<sup>51</sup> Because the first type of concerted refusal is more likely to possess anticompetitive effects, this distinction is important in analyzing the validity of the restraint.<sup>52</sup>

One of the earliest Supreme Court adjudications of concerted refusals to deal was *Eastern States Retail Lumber Dealers' Ass'n v. United States*.<sup>53</sup> In *Eastern States*, the retail lumber dealers were found to be guilty of implicitly agreeing not to deal with wholesalers who sold directly to the public. Although an individual dealer could unilaterally refuse to deal with a wholesaler for any reason, the dealers could not legally conspire to cease trade with a wholesaler.<sup>54</sup> In summarily invalidating the retail dealers' scheme, the Court emphasized the anticompetitive purpose and effect of this coercive conduct.<sup>55</sup>

In *Paramount Famous Lasky Corp. v. United States*,<sup>56</sup> the Supreme Court applied the rule of reason to a concerted refusal to deal in spite of the fact that only three years earlier it had applied the per se rule to price fixing.<sup>57</sup> The *Paramount* Court invalidated an agreement among film producers and distributors to refuse to deal with any exhibitor who failed to contractually assent to arbi-

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49. See *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 543 (1978).

50. *Id.* The Supreme Court noted that "the decisions reflect a marked lack of uniformity in defining the term." *Id.*

51. *Id.*; L. SULLIVAN, *supra* note 47, at 232.

52. See *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 9 (1979); cf. Bauer, *supra* note 46, at 700 n.73 (all concerted refusals to deal are per se illegal under *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959)).

53. 234 U.S. 600 (1914). The Supreme Court decided *Eastern States*, like the first concerted refusal case, *Montague & Co. v. Lowry*, 193 U.S. 38 (1903), before the rule of reason/per se rule distinction had been developed.

54. 234 U.S. at 614.

55. *Id.*

56. 282 U.S. 30 (1930).

57. The per se test first appeared in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). The Court noted that "[t]he power to fix prices . . . involves power to control the market and to fix arbitrary and unreasonable prices. . . . Agreements which create such potential power may well be held to be in themselves immeasurable or unlawful restraints . . ." *Id.* at 397.

tration.<sup>58</sup> The Supreme Court affirmed the lower court's holding that the agreement requiring arbitration was unreasonable.<sup>59</sup>

In contrast to the rule of reason analysis applied in *Paramount*, the Supreme Court appeared to apply a per se rule in *Fashion Originators' Guild of America v. FTC*.<sup>60</sup> The Fashion Originators' Guild of America ("FOGA") was an association of garment manufacturers formed as an instrument to stop "style pirates"—manufacturers who copied guild members' originals. FOGA established an elaborate system for the detection of copied garments. When such a garment was found in a retail store, the members of FOGA, who comprised sixty percent of the manufacturers of high priced women's clothes, would refuse to deal with the retailer.<sup>61</sup> In holding that this agreement violated section 1 of the Sherman Act, the Court refused to hear evidence relating to the reasonableness of FOGA's efforts to protect members from style pirates.<sup>62</sup> Although *Fashion Originators'* thus appears to mandate the application of the per se rule to concerted refusals to deal implemented by competitors possessing market power,<sup>63</sup> there are reasons to remain skeptical of this conclusion. The case also involved agreements among guild members prohibiting retail advertising and regulating discounts.<sup>64</sup> These agreements would clearly have been characterized as price fixing and subject to per se invalidation irrespective of the concerted refusal to deal.<sup>65</sup>

Although *Fashion Originators'* may have left some doubt about whether concerted refusals to deal are per se illegal, the issue was largely resolved in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*<sup>66</sup> *Klor's* involved a suit by a retail store against one of its competitors and a group of appliance manufacturers and their distributors. The retail store alleged that the competitor had induced the manufacturers either to refuse to deal with the retail store or to sell appliances to the retail store at higher prices.<sup>67</sup> In declaring this restraint illegal, the Supreme Court noted that "[g]roup boy-

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58. 282 U.S. at 41-42.

59. *Id.*

60. 312 U.S. 457 (1941).

61. *Id.* at 461-63.

62. *Id.* at 468.

63. See L. SULLIVAN, *supra* note 47, at 235; Bauer, *supra* note 46, at 688.

64. 312 U.S. at 463.

65. See *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688, 691 (7th Cir. 1961); *United States v. United Liquors Corp.*, 149 F. Supp. 609 (W.D. Tenn. 1956), *aff'd per curiam*, 352 U.S. 991 (1957); see also *supra* note 44 and accompanying text.

66. 359 U.S. 207 (1959).

67. *Id.* at 209.

cotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances . . . ."<sup>68</sup> Although *Klor's* suggests the application of a per se rule to all concerted refusals, some commentators have cautioned against that conclusion.<sup>69</sup>

The need for caution in applying a per se rule is nowhere more evident than in cases in which concerted refusals to deal are adopted as means of industry self-regulation. In *Radiant Burners, Inc. v. Peoples Light & Coke Co.*,<sup>70</sup> a group of public utilities, natural gas suppliers, and manufacturers of gas burners formed an association that operated testing laboratories to determine the safety, utility, and durability of gas burners. It gave its seal of approval to burners that passed its tests. If a burner failed to pass the tests, the utilities participating in the association would refuse to provide gas for use in those burners.<sup>71</sup> Notwithstanding the apparent consumer protection benefits of the self-regulation, the Supreme Court held that the district court erred in dismissing the plaintiff's action for failure to state a claim.<sup>72</sup>

The *Radiant Burners* Court cited *Klor's* to support its conclusion that the refusal to deal fell within the class of restraints proscribed by the Sherman Act.<sup>73</sup> In arriving at that conclusion, the Court emphasized the fact that the association was applying non-objective standards for the seal of approval.<sup>74</sup> The tests were "not based on 'objective standards,' but are influenced by respondents, some of whom are in competition with petitioner, and thus its determinations can be made 'arbitrarily and capriciously.'"<sup>75</sup> The

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68. *Id.* at 212 (footnote omitted).

69. See L. SULLIVAN, *supra* note 47, at 236; Bird, *Sherman Act Limitations on Non-commercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247, 276. Bird argues that since the *Klor's* defendants offered no justification for their conduct, *see* Brief for Respondents at 3, *Klor's*, 359 U.S. at 207, one should not automatically conclude that the Court applied a per se rule. Bird contends that it is possible that the Court applied a rule of reason, but since there was no justification given for the activity in question, the Court concluded that the activity was a violation of the Sherman Act. In contrast, Sullivan argues that the per se rule of *Klor's* applies only to concerted refusals to deal that exclude competitors. L. SULLIVAN, *supra* note 47, at 235-41.

70. 364 U.S. 656 (1961).

71. *Id.* at 657-58.

72. *Id.* at 659-60.

73. *Id.*

74. *Id.* at 658.

75. *Id.*; *cf.* American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 102 S. Ct. 1935 (1982) (use of standards to deprive competitor of market for its device), *aff'g* 635 F.2d 118 (2d Cir. 1980).

Court thus reasoned that anticompetitive purposes rather than legitimate self-regulatory purposes, such as safety, may have been the motive for the denial of the seal of approval. The association ostensibly could have alleviated these concerns in either of two ways. First, it could have adopted objective standards that would have limited its discretion. Implementing objective standards would obviate the possibility that any denial was based on anticompetitive reasons by eliminating the subjectivity through which such motives operate. Second, even if the association could not have devised objective standards, it could have implemented procedural safeguards to ensure that the denial of the seal, and hence the refusal to deal, was based on legitimate self-regulatory reasons. Had the association taken these steps to assure the absence of anticompetitive motives, the Court may not have summarily invalidated the self-regulatory refusal to deal.

Only two years later, in *Silver v. New York Stock Exchange*,<sup>76</sup> the Supreme Court gave some indication of the importance of limiting the ability of self-regulators to pursue anticompetitive practices. In *Silver* the stock exchange requested that all broker-dealers stop providing private wire connections to another broker-dealer. Those connections were necessary for the broker-dealer to compete in the securities market.<sup>77</sup> The Court stated that concerted refusals to deal are per se illegal "absent any justification derived from the policy of another statute or otherwise."<sup>78</sup> Examining the policies of the Securities Exchange Act of 1934, the Court found a justification for general self-regulation in this area.<sup>79</sup> The Court held, however, that the self-regulation in this specific context could not withstand antitrust scrutiny because the boycotted broker-dealer was not afforded notice and an opportunity for a hearing.<sup>80</sup> The Court cited two reasons for this procedural requirement: (1) the need to impede anticompetitive motives from controlling self-regulatory decisions, and (2) the desirability of providing a reviewing court with evidence of the purposes for the self-regulatory decisions.<sup>81</sup>

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76. 373 U.S. 341 (1963).

77. *Id.* at 348.

78. *Id.* at 348-49 (emphasis added).

79. *Id.* at 361.

80. *Id.* at 361-63.

81. The first reason for the procedural requirements in *Silver* is to lessen the impact of anticompetitive motives. *Id.* at 361. By forcing a self-regulating body to declare the legitimate reasons for its actions and to listen to opposing viewpoints from the affected individuals, the procedural requirements of notice and a hearing inhibit the adoption of anticom-

*Silver* is significant for explicitly recognizing the importance of procedural safeguards as a prerequisite to the validity of self-regulatory refusals to deal. Although the *Silver* Court derived the procedural requirement from the Securities Exchange Act, the reasons the Court cited to support the procedural requirement apply to all self-regulatory concerted refusals to deal. Lower courts have thus construed *Silver* as mandating the adoption of procedural safeguards for any valid self-regulatory concerted refusal to deal.<sup>82</sup>

*Silver* is also important because it expands the application of the rule of reason to any concerted refusal to deal adopted pursuant to a regulatory scheme that is based on a "justification derived from the policy of another statute [other than the Sherman Act] or otherwise."<sup>83</sup> The phrase "or otherwise" has been construed to permit the application of the rule of reason to any self-regulatory refusal to deal justified by the peculiar circumstances of the industry.<sup>84</sup> Accordingly, *Silver* has been read as creating an exception to the per se rule—an exception which extends beyond the mere context of securities regulation.<sup>85</sup>

Most courts thus apply a per se rule to concerted refusals to deal, although some limit the scope of the per se rule to those concerted refusals that have the effect of preventing excluded parties from competing in the same market as the conspirators.<sup>86</sup> The courts apply a rule of reason, however, to all self-regulatory con-

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petitive refusals to deal in all regulatory contexts. The second justification for the procedural requirement, like the first, extends beyond the *Silver* context of securities regulation. Providing a reviewing court with evidence of the factors considered in adopting the concerted refusal is valuable because the reviewing court is better able to assess the extent to which the regulatory body is motivated by legitimate, rather than anticompetitive, justifications. *Id.* at 363.

82. See, e.g., *United States Trotting Ass'n v. Chicago Downs Ass'n*, 487 F. Supp. 1008, 1015-16 (N.D. Ill. 1980); *McCreery Angus Farms v. American Angus Ass'n*, 379 F. Supp. 1008, 1018 (S.D. Ill. 1974).

83. 373 U.S. at 348-49 (emphasis added).

84. See *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 651-53 (5th Cir. 1977); *United States Trotting Ass'n v. Chicago Downs Ass'n*, 487 F. Supp. 1008, 1015-16 (N.D. Ill. 1980); *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1321 (D. Conn. 1977); *McCreery Angus Farms v. American Angus Ass'n*, 379 F. Supp. 1008, 1018 (S.D. Ill. 1974); *Denver Rockets v. All-Pro Management*, 325 F. Supp. 1049, 1064-65 (C.D. Cal. 1971).

85. See, e.g., *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 652-53 (5th Cir. 1977); *United States Trotting Ass'n v. Chicago Downs Ass'n*, 487 F. Supp. 1008, 1015-16 (N.D. Ill. 1980); *McCreery Angus Farms v. American Angus Ass'n*, 379 F. Supp. 1008, 1015-16 (S.D. Ill. 1974); *Amway Corp.*, 93 F.T.C. 618, 684-85 (1978).

86. See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1178-79 (D.C. Cir. 1978); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 131 (2d Cir. 1978) (distinction between "horizontal" and "vertical" restraints); *North Am. Soccer League v. National Football League*, 465 F. Supp. 665, 672-74 (S.D.N.Y. 1979).

certed refusals to deal that have satisfied the requirements of *Silver* and its progeny.<sup>87</sup>

Notwithstanding the above limits to the per se rule, the United States Court of Appeals for the Tenth Circuit has gone further, requiring a plaintiff to make an initial showing that the concerted refusal has an "arguable demonstrative" anticompetitive purpose or effect before applying a per se rule.<sup>88</sup> Although this may reflect underlying discontent with applying a per se rule to concerted refusals to deal,<sup>89</sup> the Supreme Court has not challenged the per se rule. Thus, the ensuing discussion of the denial of staff privileges will be based on the analytic framework outlined in *Klor's*, *Radiant Burners*, and *Silver* and developed in the majority of lower court opinions.<sup>90</sup>

#### IV. THE LEGALITY OF DENIALS OF STAFF PRIVILEGES

##### A. Hospital Administration and Staff Privileges

An analysis of the antitrust implications of denials of medical staff privileges requires some knowledge of hospital administration. The antitrust analysis first requires an understanding of the organization of the hospital medical staff and the procedures for selec-

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87. One court formulated the criteria in this manner:

(1) There is a legislative mandate for self-regulation "or otherwise". In discussing the history of the New York Stock Exchange in *Silver*, the Court suggests that self-regulation is inherently required by the market's structure. From this basis, it has been argued that where collective action is required by the industry structure, it falls within the "or otherwise" provision of *Silver*. Note, Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason, 66 Colum. L.Rev. 1486 (1966).

(2) The collective action is intended to (a) accomplish an end consistent with the policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary.

(3) The association provides procedural safeguards which assure that the restraint is not arbitrary and which furnishes a basis for judicial review.

*Denver Rockets v. All-Pro Management*, 325 F. Supp. 1049, 1064-65 (C.D. Cal. 1971); see cases cited *supra* note 82.

88. See, e.g., *Neeld v. National Hockey League*, 594 F.2d 1297, 1298-99 nn.3-4 (9th Cir. 1979).

89. For a critique of the per se rule as applied to concerted refusals to deal, see Bauer, *supra* note 46.

90. Although the Court might possibly directly overrule the per se approach espoused in *Klor's*, cf. *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (invalidating the per se rule as applied to vertical territorial restrictions imposed by nondominant firm), it seems more likely that the Court will limit the per se rule to those concerted refusals to deal directed at precluding competitors from entering the market and will also adopt the lower courts' construction of the *Silver* exception to the per se rule. See cases cited *supra* note 82.

tion of staff members. One must also understand the reasons why hospital administrators are compelled to exercise some discretion over who is allowed on the medical staff.

The governing board of a hospital is ultimately responsible for ensuring that the hospital provides high quality patient care.<sup>91</sup> But the board alone is incapable of fully carrying out those responsibilities; hospital boards must by necessity rely heavily on the advice of medical staff members who possess the technical expertise required to evaluate the competency of new applicants and the adequacy of health care provided by current staff members.<sup>92</sup>

Hospital medical staffs are organized in committees to facilitate the exchange of information with governing boards. The medical staff meets periodically and selects an executive committee, composed of active staff members, to represent the staff.<sup>93</sup> In addition to serving as a liaison between the medical staff and the governing board, the executive committee advises the board on the qualifications of new applicants and current staff members.<sup>94</sup>

Although the governing board possesses ultimate responsibility for staff selection, it usually delegates to the medical staff the authority to assess the qualifications of staff members.<sup>95</sup> The medical staff, through the executive committee, can thus exercise considerable influence over the extension of staff privileges. In fact, if the governing board disagrees with the recommendation of the medical staff, a joint committee composed of members of the medical staff and the governing board generally convenes to resolve the disagreement.<sup>96</sup> This exercise of influence by the medical staff may constitute a concerted refusal to deal and thus violate the antitrust laws.<sup>97</sup>

The need for hospitals to monitor the competence of the medi-

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91. JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, ACCREDITATION MANUAL FOR HOSPITALS 51-52 (1980) [hereinafter cited as JOINT COMMISSION]; Southwick, *The Legal Aspects of Medical Staff Function*, 46 HOSP. PROGRESS 84, 85 (1965), reprinted in AMERICAN MEDICAL ASS'N, READINGS IN HOSPITAL LAW 154 (1965) [hereinafter cited as Southwick, *Legal Aspects*].

92. Southwick, *Legal Aspects*, *supra* note 91, at 85.

93. JOINT COMMISSION, *supra* note 91, at 73-89.

94. Staff appointment is generally granted for a two-year interval after which the staff member's qualifications are reassessed. *Id.* at 78-79.

95. *Id.* at 73-79.

96. *Id.*

97. See *Robinson v. Magovern*, 456 F. Supp. 1000, 1005 (W.D. Pa. 1978) (question of fact whether denial of staff privileges violated antitrust law); cf. *United States v. General Motors Corp.*, 384 U.S. 127 (1966) (automobile dealers joined to induce automobile manufacturer to stop selling to dealers who sold to discounters).



cal staffs has evolved from the changing conception of hospitals. Although hospitals were once viewed as institutions that merely provided the facilities for medical care, they increasingly have become viewed as actual providers of health care.<sup>98</sup> This attitude is reflected in the judicial willingness to impose liability upon hospitals for negligently monitoring the competence of hospital personnel.<sup>99</sup> As a result, hospital boards have an affirmative obligation to ensure that current staff members, as well as applicants for staff membership, possess the requisite qualifications and sufficient competence to discharge their duties as staff physicians. Governing boards cannot relieve themselves of this obligation by delegating the task to the medical staff.<sup>100</sup> Nevertheless the boards need the expert advice of physicians and may be negligent for not soliciting the recommendations of the medical staff.<sup>101</sup> Paradoxically, in soliciting the recommendations of the medical staff and thereby fulfilling its duty to monitor the quality of health care, a hospital board may be participating in a concerted refusal to deal and as a result violating the antitrust laws.

#### B. *Denials of Staff Privileges as Industry Self-Regulation*

Although the denial of staff privileges is a somewhat novel concerted refusal to deal, it has many of the attributes of classic concerted refusals.<sup>102</sup> It is structurally very similar to the concerted refusal to deal in *United States v. General Motors Corp.*<sup>103</sup> In *General Motors* an association of automobile dealers illegally conspired with the General Motors Corporation, which controlled a resource essential to automobile dealers—the automobile—to eliminate automobile sales through “discount houses.”<sup>104</sup> The United States Supreme Court held that the collaborative actions of General Motors and its dealer associations were a “classic conspiracy

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98. Southwick, *The Hospital as an Institution—Expanding Responsibilities Change Its Relationship with the Staff Physician*, 9 CAL. W.L. REV. 429, 429, 432 (1973) [hereinafter cited as Southwick, *Hospital as an Institution*]; see *supra* note 2 and accompanying text.

99. See, e.g., *Purcell & Tuscon Gen. Hosp. v. Zimbelman*, 18 Ariz. App. 75, 500 P.2d 335 (1972); *Mitchell County Hosp. Auth. v. Joiner*, 229 Ga. 140, 189 S.E.2d 412 (1972); *Darling v. Charleston Community Memorial Hosp.*, 33 Ill. 2d 326, 333, 211 N.E.2d 253, 258 (1965), *cert. denied*, 383 U.S. 946 (1966).

100. Southwick, *Hospital as an Institution*, *supra* note 98, at 462-63.

101. Southwick, *Legal Aspects*, *supra* note 91, at 84.

102. Cf. cases cited *supra* notes 53, 56, 60 & 66 (adjudications of concerted refusals to deal).

103. 384 U.S. 127 (1966).

104. *Id.* at 130.

in restraint of trade."<sup>105</sup> Similarly, members of the medical staff can be viewed as conspiring to induce the hospital, which possesses an essential resource—medical facilities—to refuse to deal with other physicians who might compete with members of the medical staff. To the extent that the concerted refusal of the medical staff is aimed at excluding competitors, it can be viewed as more restrictive than the refusal in *General Motors*, which was devised merely to stop the competitors from selling to discounters.

A similar analogy can be made to the concerted refusal to deal in *Radiant Burners v. Peoples Light & Coke Co.*<sup>106</sup> The refusal of the gas association in *Radiant* to give the seal of approval to the plaintiff's gas burner was invalidated because the criteria for issuing a seal were not based on objective considerations, but instead were subject to the influence of the plaintiff's competitors.<sup>107</sup> Similarly, a hospital's refusal to extend staff privileges to a doctor may not be predicated solely on objective criteria. Indeed, the applicant's competitors—members of the medical staff—will be in a strong position to influence the decision whether to grant staff privileges. Thus, the decision to grant staff privileges is just as likely to be based on anticompetitive reasons as the refusal to grant the seal of approval in *Radiant*.

The denial of staff privileges thus closely resembles other restraints that have been classified as concerted refusals to deal. If the requisite conspiracy or concerted action is established, the denial of staff privileges would appear to be an illegal group boycott. But proof of the requisite conspiracy among competitors, which invokes per se analysis in boycott cases, may be difficult to establish in all staff privilege cases. The advisory medical staff committees may not contain specialists in all fields. Thus, the denial of staff privileges to a specialist who has no competitors on the medical staff committee advising the board may not be considered a violation. The denial may not be considered to encompass either a conspiracy among competitors or a conspiracy at all.<sup>108</sup> Conversely, a denial of staff privileges may be considered a concerted refusal to deal if the applicant has competitors on the advisory staff committees.<sup>109</sup> Because the concerted refusal to deal in this context would

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105. *Id.* at 140.

106. 364 U.S. 656 (1961); see *supra* text accompanying notes 70-75.

107. 364 U.S. at 658.

108. See *Robinson v. Magovern*, 521 F. Supp. 842, 892-96, 908 (W.D. Pa. 1981).

109. *Robinson v. Magovern*, 456 F. Supp. 1000, 1005 (W.D. Pa. 1978). Even if a competitor of the applicant is a member of the advisory medical staff committee, a conspiracy

have the effect of precluding the conspirators' competitors from obtaining access to a resource necessary for them to effectively compete with the conspirators, this refusal would be within the class of concerted refusals that has traditionally been subjected to the per se rule under section 1 of the Sherman Act.<sup>110</sup> Inasmuch as hospitals have legitimate reasons for selectively granting staff privileges and for relying on the recommendations of their medical staffs, the application of a per se rule, which would summarily invalidate the denial, seems inappropriate.<sup>111</sup>

Some lower courts have applied a rule of reason to concerted refusals to deal that have no apparent anticompetitive motive.<sup>112</sup> The Supreme Court has not had occasion, however, to draw any such distinction, particularly when, as here, the effect of the refusal is to preclude entry by a competitor.<sup>113</sup> But the Supreme Court has intimated that a rule of reason analysis might apply to some concerted refusals to deal adopted as objective methods of industry self-regulation.<sup>114</sup>

In *Silver v. New York Stock Exchange*,<sup>115</sup> the Court laid the

might not be established. The competing doctor serves as an employee of the hospital in advising the board and thus arguably cannot conspire with his employer because of the intracorporate conspiracy doctrine. See *Moles v. Morton F. Plant Hosp.*, 1980-1981 Trade Cas. (CCH) ¶ 63,600, at 77,188 (M.D. Fla. 1978). The competing doctor, however, "has an independent, personal stake in achieving the object of the conspiracy" because he carries on his own medical business. *Robinson v. Magovern*, 521 F. Supp. 842, 907 (W.D. Pa. 1981). The intracorporate conspiracy doctrine thus would not be available to defeat the inference of a conspiracy. *Id.* See generally *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Morton Bldgs., Inc. v. Morton Bldgs., Inc.*, 531 F.2d 910, 917 (8th Cir. 1976); *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974); *Marrese v. American Academy of Orthopedic Surgeons*, 496 F. Supp. 236, 241 (N.D. Ill. 1980).

110. See *supra* notes 1-2, 50-52 & 89 and accompanying text.

111. Application of a per se rule probably would force hospital boards to stop using the recommendations of their staffs. It would be difficult, however, for the boards to procure other competent advice.

112. See, e.g., *Worthen Bank & Trust Co. v. National BankAmericard, Inc.*, 485 F.2d 119, 124-25 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974); *G.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm.*, 467 F.2d 178, 186-87 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); *cf. Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1177-78 (D.C. Cir. 1978) (football player claimed that the NFL draft constituted a group boycott because professional football clubs refuse to deal with any player before he has been drafted).

113. Recently, however, a plurality of the Supreme Court intimated that the per se rule may not apply to restraints adopted by professionals if the purpose of the restraints is to enhance the quality of the service the profession provides to the public. *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466, 2475 (1982) (plurality opinion). The scope of this possible qualification to the per se rule remains to be explored. See *infra* text accompanying notes 132-58.

114. See *supra* notes 70-85 and accompanying text.

115. 373 U.S. 341 (1963).

foundation for the industry self-regulation exception to per se invalidity for all concerted refusals to deal. Two lower courts have interpreted *Silver* to permit the application of the rule of reason analysis to concerted refusals to deal if:

(1) There is a legislative mandate for self-regulation "or otherwise."

(2) The collective action is intended to (a) accomplish an end consistent with the policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more exclusive than necessary.

(3) The [defendant] provides procedural safeguards which assure that the restraint is not arbitrary and which furnishes a basis for judicial review.<sup>116</sup>

The first prerequisite to the *Silver* exception has been liberally construed.<sup>117</sup> Rather than requiring that there be an actual legislative mandate approving collective action, concerted action may be mandated by the industry structure.<sup>118</sup> When the industry structure is such that concerted action is necessary for the survival of the industry, the first requirement is satisfied.<sup>119</sup> For example, the Supreme Court applied a rule of reason to concerted activities among members of the news media in *Associated Press v. United States*.<sup>120</sup> The Court assessed the validity of agreements among members of the Associated Press information network not to provide wire services to its competitors.<sup>121</sup> Although the Court held that the restraint was unreasonable, it noted that cooperation in news gathering among members of the media is essential to the

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116. *Denver Rockets v. All-Pro Management*, 325 F. Supp. 1049, 1064-65 (C.D. Cal. 1971); see also *McCreery Angus Farms v. American Angus Ass'n*, 379 F. Supp. 1008, 1018 (S.D. Ill. 1974).

117. See *Denver Rockets v. All-Pro Management*, 325 F. Supp. 1049 (C.D. Cal. 1971).

118. *United States Trotting Ass'n v. Chicago Downs Ass'n*, 487 F. Supp. 1008, 1015-16 (N.D. Ill. 1980); *McCreery Angus Farms v. American Angus Ass'n*, 379 F. Supp. 1008, 1018 (S.D. Ill. 1974); Note, *supra* note 48, at 1501; see also Comment, *Antitrust Law: Procedural Safeguard Requirements in Concerted Refusals to Deal: An Application to Professional Sports—Denver Rockets v. All-Pro Management, Inc.* (C.D. Cal. 1971), 10 *SAN DIEGO L. REV.* 413 (1973). But see *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260, 1266-67 (N.D. Ga. 1973) (applying *Silver* exception only when mandated by federal statute). Some policy justification must support the restraints that constitute the industry self-regulation. See *McDonnell v. Michigan Chapter No. 10, Am. Inst. of Real Estate Appraisers*, 587 F.2d 7, 9 (6th Cir. 1978).

119. *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 652 (5th Cir. 1977). But see *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1321 (D. Conn. 1977).

120. 326 U.S. 1 (1945).

121. *Id.* at 13-15.

industry's operation.<sup>122</sup>

Grants of medical staff privileges present considerations similar to those in *Associated Press*. Because hospitals may be liable for the acts of staff physicians, the governing board of a hospital has an obligation to ensure that all staff physicians are competent.<sup>123</sup> The board is not, however, capable of evaluating the credentials and performance of physicians but instead must rely on the recommendations of skilled practitioners.<sup>124</sup> Without such advice, hospital boards would not be able to monitor effectively their staffs, guard against legal liability, and maintain public confidence in the hospital. Thus, the inherent nature of the hospital industry—the potential liability of hospitals for staff physicians and the degree of expertise required to evaluate physicians—appears to be a sufficient mandate for self-regulation by hospitals.

The second prerequisite for the *Silver* exception is also satisfied in the staff privilege context. The concerted action in denials of staff privileges consists of agreements among physicians and the hospital to exclude other physicians. But that agreement, which is inferred from the board's acceptance of the staff physicians' advice, flows directly from the hospital's need to monitor its staff. The concerted action thus is intended to accomplish an objective that underlies the policies justifying self-regulation. Moreover, the concerted refusal appears reasonably related to the need to monitor the staff because the staff physicians are in the best position to evaluate the competence of other physicians. Finally, the concerted action is no more extensive than necessary because the staff members' advice must be based on the applicant's qualifications, which "shall be specifically related to proper licensure, training, experience, and documented current competence."<sup>125</sup>

The third prerequisite for the *Silver* exception requires the adoption of procedural safeguards to ensure that the concerted action is not predicated on anticompetitive motives. *Silver* has been construed as requiring notice and an opportunity for a hearing.<sup>126</sup> For example, in *McCreery Angus Farms v. American Angus Ass'n*,<sup>127</sup> cattle breeders were suspended from a breeding associa-

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122. *Id.* at 13-14.

123. See *supra* notes 98-101 and accompanying text.

124. See *supra* text accompanying note 101.

125. JOINT COMMISSION, *supra* note 91, at 73-75.

126. See, e.g., *Rearick v. Holstein-Friesian Ass'n*, 472 F. Supp. 464, 466 (W.D. Pa. 1979).

127. 379 F. Supp. 1008 (S.D. Ill. 1974).

tion for failing to follow an association rule relating to blood typing. The district court, however, held that the boycott was per se invalid<sup>128</sup> because the excluded breeders were not given advance notice that the association was reviewing their actions, adequate opportunity to respond to the charges against them, or an opportunity to confront their accuser.<sup>129</sup>

For a denial of staff privileges to avoid per se illegality, it thus must be the outcome of fair procedures. The hospital must give the physician notice of a hearing concerning his qualifications and an opportunity to offer evidence of his competence and respond to any alleged deficiencies in his qualifications.<sup>130</sup>

If proper procedural safeguards are provided, a hospital's denial of staff privileges based on staff recommendations apparently falls within the *Silver* exception to per se treatment of concerted refusals to deal. The denial of staff privileges, however, still must be subjected to a rule of reason analysis. The analysis in such cases focuses on the power, purpose, and effects of the restraint. When a court finds that anticompetitive concerns predominate, the refusal to deal is held to be per se illegal.<sup>131</sup>

### C. *The Emerging Professional Qualification to Antitrust Liability*

The application of the rule of reason to staff privilege cases, instead of the more stringent per se rule, may be warranted because the restraints in staff privilege cases are imposed by members of a profession.<sup>132</sup> Although the Supreme Court of the United States has repeatedly disavowed any wholesale professional exemption from antitrust liability,<sup>133</sup> it has nonetheless consistently indicated that the antitrust laws might be applied less rigorously to professions than to trades or industries.<sup>134</sup>

The Supreme Court explicitly rejected an expansive profes-

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128. *Id.* at 1018-19.

129. *Id.* at 1018.

130. See generally JOINT COMMISSION, *supra* note 91, at 78.

131. *Neeld v. National Hockey League*, 594 F.2d 1297, 1299 (9th Cir. 1979).

132. *Everhart v. Jane C. Stormont Hosp.*, 1981-2 Trade Cas. (CCH) ¶ 64,703 (D. Kan. 1982). For a discussion of the application of the rule of reason to hospital staff privilege cases, see *infra* notes 159-66.

133. See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 686-87 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975).

134. See *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466, 2475-76 (1982) (plurality opinion); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 696 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 n.17 (1975).

sional exemption from antitrust liability in *Goldfarb v. Virginia State Bar*.<sup>135</sup> The *Goldfarb* Court invalidated a minimum fee schedule adopted and enforced by a local bar association, despite the schedule's nexus to the legal profession.<sup>136</sup> The Court did not, however, foreclose the possibility that it would impose less stringent antitrust liability on professionals.<sup>137</sup> Certain features of professions might justify validating a restraint on professional activity that would be invalid if applied in other trades.<sup>138</sup> The public service aspect of professions was the only feature identified by the *Goldfarb* Court as perhaps justifying an otherwise impermissible restraint.<sup>139</sup>

In subsequent decisions, the Supreme Court continued to intimate, but has failed to apply, a more lenient antitrust standard for professions. In *National Society of Professional Engineers v. United States*,<sup>140</sup> the Court invalidated a canon of engineering ethics that prohibited competitive bidding. Although the Court did not deem the canon to be price fixing, it nonetheless held it to be per se illegal.<sup>141</sup> The Court found the canon inherently unreasonable because it completely precluded price competition among engineers.<sup>142</sup> The Society argued that the canon should be upheld under *Goldfarb* because competitive bidding would lead to deceptively low bids, and would thereby tempt engineers to do inferior work with consequent risk to public safety and health.<sup>143</sup> The Court rejected this argument, holding that an ethical canon that merely regulates competition might be permissible under *Goldfarb*, but one that completely forecloses competition cannot be

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135. 421 U.S. 773, 787 (1975).

136. *Id.* at 792-93.

137. *Id.* at 788-89 n.17. The Court stated:

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.

*Id.*

138. *Id.*

139. *Id.*

140. 435 U.S. 679 (1978).

141. *Id.* at 692.

142. *Id.* at 696.

143. *Id.* at 693.

justified.<sup>144</sup>

*Arizona v. Maricopa County Medical Society*<sup>145</sup> is the most recent Supreme Court decision involving the application of the antitrust laws to a profession. In *Maricopa* a plurality of the Court refused to withhold the application of the per se rule against a price-fixing agreement merely because the agreement was implemented by doctors, rather than nonprofessionals.<sup>146</sup> The State of Arizona had challenged the agreement among competing physicians that set the maximum fees for medical services provided under certain insurance plans.<sup>147</sup> Participating physicians were free to charge less than the maximum fee for services they provided to policyholders, and were not restricted in the fees they could charge to non-policyholders.<sup>148</sup> Policyholders could retain the services of any physician, but were not reimbursed for fees in excess of the maximum scheduled fee.<sup>149</sup>

In reversing the decision of the United States Court of Appeals for the Ninth Circuit, the Supreme Court held this fee scheme to be a price-fixing agreement and hence per se illegal.<sup>150</sup> The per se rule could not be avoided merely by showing that a profession was involved:

In *Goldfarb v. Virginia State Bar*, we stated that 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." The price fixing agreements in this case, however, are not premised on public service or ethical norms. The respondents do not argue . . . that the quality of the professional service that their members provide is enhanced by the price restraint.<sup>151</sup>

Thus, the Court implied that a different conclusion might result when a restraint imposed by professionals is premised upon public service or ethical norms.<sup>152</sup>

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144. *Id.* at 696.

145. 102 S. Ct. 2466 (1982) (plurality opinion).

146. *Id.* at 2475.

147. *Id.* at 2469-72.

148. *Id.* at 2471.

149. *Id.* at 2471-72.

150. *Id.* at 2472-75.

151. *Id.* at 2475 (citations omitted).

152. In addition to refusing to apply a professional exemption to the per se rule, the Court refused to withhold application of the per se rule merely because the Court has had little antitrust experience in the health care field. *Id.* at 2476. Such an exception, the Court



*Goldfarb*, *Professional Engineers*, and *Maricopa* all indicate that the antitrust laws may be applied less rigorously to professions than to other trades. The rule emerging from these cases may be interpreted in two different ways. One interpretation is that a restraint imposed by a profession cannot obviate the application of the per se rule, but can only serve as one factor to be considered in rule of reason cases. Under this interpretation, a denial of staff privileges that constitutes a group boycott would not be saved by the professional qualification to antitrust liability.<sup>153</sup>

A second interpretation of *Goldfarb* and its progeny is that a restraint imposed by professionals will be saved from the per se rule only if it is solidly grounded on the public service aspects of the profession.<sup>154</sup> Additionally, the restraint must merely regulate, not totally foreclose competition.<sup>155</sup> This alternative interpretation might justify the application of the rule of reason, rather than the per se rule, to staff privilege cases. Some restraints on staff privileges are necessary to ensure that physicians are competent and to enable hospitals to limit their liability for physicians' errors. Staff privileges merely regulate competition by fostering competent medical care by qualified physicians. Unlike the ban on competitive bidding in *Professional Engineers*,<sup>156</sup> professional competency reviews will not entirely foreclose competition among physicians.<sup>157</sup>

It is not yet clear whether the emerging professional qualification to antitrust liability will result in the application of the rule of reason to denials of staff privileges. If the qualification does preclude application of the per se rule, the resulting rule of reason analysis will be identical to the analysis warranted by the *Silver* self-regulation exception.<sup>158</sup>

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noted, would frustrate the rationale of the per se rule, "which in part is to avoid 'the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved . . . in an effort to determine at large whether a particular restraint has been unreasonable . . .'" *Id.* at 2476-77 (quoting *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).

153. The denial, however, would nonetheless be analyzed under the rule of reason if the self-regulatory criteria set forth in *Silver* are satisfied. See *supra* text accompanying notes 115-30.

154. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 n.17 (1976).

155. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 696 (1978).

156. *Id.*

157. Certain denials, however, may effectively foreclose competition and should therefore be subject to the per se rule. For example, when the practice of a hospital is to deny staff privileges to all new doctors or doctors of a particular specialty, existing staff members may be totally shielded from competition.

158. See *supra* text accompanying notes 115-30.

### D. *Denials of Staff Privileges and the Rule of Reason*

In analyzing whether a restraint is legal under the rule of reason, courts examine the market power of the conspirators, and the purpose and effect of the restraint to determine if it substantially impedes competition. Market power plus anticompetitive purpose or effect may be sufficient for the restraint to be held illegal under the rule of reason.<sup>159</sup>

In denial of staff privilege cases, there are two types of market power. First, the competitors of the excluded physician may have sufficient market power to coerce the hospital into excluding the applicant.<sup>160</sup> Second, the hospital may have sufficient market power to effectively deprive the excluded physician from access to a resource essential to the practice of medicine.<sup>161</sup> Although there may be more than one hospital in the relevant geographic market, excluding a physician from one hospital often leads to exclusion from other hospitals.<sup>162</sup> Moreover, exclusion by one hospital may lead to disciplinary investigation by local medical boards and thus further impede an excluded physician's ability to practice medicine.<sup>163</sup> Although many instances of denial or revocation of staff privileges involve the exercise of market power, anticompetitive purpose or effect must also exist before the denial of staff privileges is invalidated under the rule of reason.

The purpose and effect of the revocation or denial of staff privileges may be anticompetitive. For example, an individual may be refused privileges because he did not join a medical society or because the current staff members desire to be insulated from additional competition. But hospitals may also have legitimate purposes for denying or revoking staff privileges. First, hospitals may be liable for the acts of their staff physicians and thus must exercise control over who has staff privileges to limit that liability.<sup>164</sup>

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159. See *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969). In contrast, purpose or effect may be sufficient to find a violation of § 1 of the Sherman Act under a *per se* analysis even in the absence of market power. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940); L. SULLIVAN, *supra* note 47, at 192.

160. See *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 462 (1941).

161. See *United States v. General Motors Corp.*, 384 U.S. 127, 145-46 (1966); *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 210-11 (1959).

162. Grad, *The Antitrust Laws and Professional Discipline in Medicine*, 1978 DUKE L.J. 443. "The non-renewal or revocation of privileges may have far-reaching consequences for a physician, because no other hospital in the area is likely to grant him privileges either, and his record may follow him elsewhere if he tries to relocate." *Id.* at 469-70.

163. F. GRAD & N. MARTI, *A STUDY OF MEDICAL DISCIPLINARY PROCEDURES* 225, 227 n.614 (1978); Grad, *supra* note 162, at 471.

164. See *Darling v. Charleston Community Memorial Hosp.*, 33 Ill. 2d 326, 211 N.E.2d

Without the ability to revoke or deny staff privileges based on qualifications, hospitals would have to continually monitor the competence of their staff physicians. Such review would impose greater costs upon hospitals than periodic review. Second, prohibiting hospitals from exercising discretion over the number of staff members might lead to inefficiencies resulting from an excessively large staff. Finally, a hospital has a legitimate interest in preventing physician incompetence to ensure public confidence in the integrity of the health care provided at that particular hospital.

In analyzing the power, purpose, and effect of any denial of staff privileges, the procedural requirements of *Silver* will be pertinent. The requirements of notice and a hearing will provide some indicia of the possible legitimate motives for a revocation or denial of staff privileges.<sup>165</sup> If it appears that the true motive for the denial of privileges was not anticompetitive, then the denial should be allowed. But the denial of staff privileges should be violative of section 1 of the Sherman Act when the purpose or effect of the denial is anticompetitive and there is some evidence of market power.

The application of the rule of reason in this manner will serve to inhibit many of the restraints confronting physicians attempting to gain access to hospital facilities. The rule of reason is, nevertheless, flexible enough to permit hospitals to exercise their legal obligation to maintain some control over their medical staffs.

## V. CONCLUSION

Hospital governing boards have come under increasing legal pressure to ensure that their staff physicians are competent. To carry out that obligation, governing boards of hospitals have had to rely on the expert advice of their staff physicians. This practice, however, is fraught with antitrust problems because it may constitute a concerted refusal to deal.

Concerted refusals to deal involving conspiracies among competitors to exclude other competitors usually have been held to be per se illegal. Although per se rules in general, and per se rules applied to concerted refusals to deal in particular, have been severely criticized, the Supreme Court has not reviewed recently the per se rule as applied to concerted refusals to deal. The Court has,

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253 (1965), *cert. denied*, 383 U.S. 946 (1966).

165. See *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); *supra* text accompanying notes 115-30.

however, carved out an exception to the rule for concerted refusals to deal adopted as legitimate means of self-regulation.

Concerted refusals to deal arising out of the denial or revocation of staff privileges appear to fall within this exception when the hospital has implemented procedural safeguards, such as giving the applicant notice and an opportunity to be heard. If such safeguards are provided, the antitrust legality of the denial is tested under the rule of reason. Under this flexible test, courts will be able to analyze the coercive power of the conspirators and the anticompetitive purpose and effect of the denial, striking down the denial of staff privileges only if those anticompetitive considerations outweigh the hospital's legitimate interest in maintaining a competent staff. Such an approach should effectively serve to balance the conflicting interests of physicians and hospitals while upholding the purposes of the antitrust laws.