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Ii. Antitrust

attempted if a reasonable possibility of success exists.[89] Such a possibility existed in *Gardner*, since the deceased could have fallen overboard only five minutes before the ship discovered his absence, rather than five hours before, as defendants suggested. Thus, only after the ship had searched the waters it had traversed since the deceased was last seen could it be determined that no reasonable possibility of rescue existed. If the duty to pursue any reasonable possibility of rescue is important in fulfilling the obligation of the ship to care for the seaman and preserve his safety, any reasonable action which would increase the chance of successful rescue should be undertaken. Thus, the duty developed in *Abbott*,[90] to use reasonable care to discover when a seaman is missing, is designed to increase the chance of successful rescue, and is a reasonable extension of the duty espoused by *Gardner*.[91]

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II. ANTITRUST

Interstate Activities of a Hospital Do Not Satisfy Jurisdictional Requirements of the Sherman Act.

In *Hospital Building Co. v. Trustees of Rex Hospital*,[1] the Fourth Circuit held that the interstate activities of a small, local hospital did not satisfy the jurisdictional requirements of the Sherman Act.[2] In reaching that conclusion, the court acknowledged two tests for the determination of Sherman Act jurisdiction: the "directly in commerce" test, and the "affecting commerce" test.[3] The directly in commerce theory requires that the proscribed trade restraint act directly

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[89] 310 F.2d at 287.

[90] Abbott v. United States Lines, Inc., 512 F.2d 118 (4th Cir. 1975).

[91] *See* Anderson v. Atchison, T. & S.F. Ry., 333 U.S. 821 (1948).

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[1] 511 F.2d 678 (4th Cir. 1975), *petition for cert. granted*, 44 U.S.L.W. 3200 (U.S. October 7, 1975) (No. 74-1452).

[2] 15 U.S.C. §§ 1-7 (1970). Section 1 provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, *in restraint of trade or commerce* among the several States, or with foreign nations, is declared to be illegal . . ." (Emphasis added).

Section 2 provides in relevant part: "Every person who shall monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several States, . . . shall be deemed guilty of a misdemeanor. . . ." *Id.* at § 2.

[3] 511 F.2d at 681. *See also*, Mims v. Kemp, 516 F.2d 21 (4th Cir. 1975).

upon only the interstate aspect of commerce.[4] Under the affecting commerce test, the relevant question is whether a local activity substantially influences interstate commerce.[5] In *Rex Hospital,* the Fourth Circuit held that the plaintiff had not satisfied either test and hence did not meet the jurisdictional requirements to maintain an action under the Sherman Act.[6]

The plaintiff in *Rex Hospital,* Hospital Building Company (HBC), sought treble damages and injunctive relief for purported violations of §§ 1 and 2 of the Sherman Act.[7] The district court dismissed HBC's complaint on the ground that the alleged trade restraints lacked "sufficient connection" with interstate commerce to bring the provisions of the Sherman Act into play.[8] The Fourth Circuit affirmed the district court's decision.

HBC alleged that its competitors, the trustees of Rex Hospital, attempted to monopolize the hospital services market in the Raleigh, North Carolina, area.[9] The corporation asserted that the defendants delayed the expansion of HBC's hospital facilities through adverse publicity campaigns and other tactics designed to impede state authorization[10] of the increase in the hospital unit's bed capacity. Finally, the corporation implied that the actions of the defendants were part of a scheme to monopolize hospital services in the Raleigh area. In affirming the district court's decision, the Fourth Circuit did not

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[4] *Cf.* 43 FORDHAM L. REV. 1036 (1975). Because many business activities are multidimensional and have separate interstate aspects to their operations, the courts have found it necsssary in some instances to isolate the anticompetitive activity and determine if it is interstate-related in order to apply the directly in commerce theory. *See, e.g.,* United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952); United States v. Yellow Cab Co., 332 U.S. 218 (1947).

[5] The affecting commerce test is also subject to the terms of the Sherman Act and constitutional restrictions. *Cf.* Note, *Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case,* 73 COLUM. L. REV. 1451 (1973). *See also* Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940). As the Fourth Circuit pointed out in United States v. LeFaivre, 507 F.2d 1288 (4th Cir. 1974), *cert. denied,* 420 U.S. 1004 (1975), the courts must relate the alleged anti-competitive activity to the constitutional limits of the commerce clause power. *See* text accompanying note 16 *infra. See, e.g.,* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).

[6] 511 F.2d at 680.

[7] The action was under 15 U.S.C. §§ 1 & 2 (1970), pursuant to §§ 4 & 16 of the Clayton Act, 15 U.S.C. §§ 15 & 26 (1970).

[8] Hospital Building Co. v. Trustees of Rex Hospital, 1973-1 Trade Cas. ¶ 74,428 (E.D.N.C. 1973).

[9] 511 F.2d at 681.

[10] In North Carolina new construction or expansion of hospital facilities requires an authorization certificate from the state. *Id.*

reach the merits of the corporation's Sherman Act charges. Instead, the Fourth Circuit disposed of the case by finding an insufficient connection with interstate commerce to invoke the Sherman Act.[11]

In order to meet the interstate jurisdictional requirements of the Sherman Act, HBC alleged that its hospital expansion was to be financed with an out-of-state loan,[12] that the flow of insurance fees and federal medicare and medicaid payments came from out-of-state, and that the hospital regularly used interstate modes of communication such as teletype and long distance telephone services. More specifically, HBC alleged that the annual fee paid to its out-of-state parent corporation[13] and the percentage of hospital supplies purchased from sources outside of North Carolina[14] established the requisite ties with interstate commerce to invoke the Sherman Act. Other cases have held that jurisdiction was present in situations where the amount of commerce involved was less than that in *Rex Hospital.*[15] Seemingly, therefore, the Fourth Circuit could have found the jurisdictional requirements to be satisfied without setting a new precedent, and without transcending the bounds of the original constitutional grant of regulatory commerce power.[16]

The court in *Rex Hospital* first dismissed HBC's claim that the

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[11] *Id.*

[12] A loan of over $4,000,000 was to be procured from a lending institution outside of North Carolina to which repayment was to be made in regular installments over a substantial period of years. *Id.* at 688.

[13] The fee was $36,000 in 1972. Because the fee is based on gross receipts, HBC's frustrated plans to expand from 49 to 149 beds would mean substantially less revenue for the parent corporation. HBC advanced the argument that an inhibition of this growth was a restraint of trade among the states, specifically between HBC's North Carolina operation and its out-of-state parent corporation. *Id.*

[14] The record showed that HBC's purchase of supplies from out-of-state in 1972 amounted to 80% of its total acquisitions during that year. These purchases, not including the hospital's food service operation, amounted to $112,846 which included supplies for its pharmacy, radiology department, electrocardiology operations, and medical laboratory. *Id.*

[15] *See, e.g.,* United States v. Finis P. Ernest, Inc., 509 F.2d 1256 (7th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3229 (U.S. Oct. 14, 1975), where the court found that $9,307 worth of material obtained in interstate commerce was not beyond the jurisdictional reach of the Sherman Act, 509 F.2d at 1261; Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir.), *cert. denied,* 348 U.S. 817 (1954), where the court held that total sales of $437,000 was not in itself insubstantial. 210 F.2d at 743. The amount of out-of-state purchases and loans in *Rex Hospital* exceeded these cases in dollar amount. *See* notes 12 and 14 *supra.*

[16] U.S. CONST. art. I, § 8, cl. 3. Chief Justice Marshall in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) rejected the notion that the word "commerce" was primarily concerned with the traffic of goods transported across state lines; instead, Marshall stressed that commerce should be viewed broadly. *Id.* at 4-5.

alleged conspiracy acted directly in interstate commerce.[17] The Fourth Circuit based its reasoning primarily on a determination that hospital services have been historically considered local activities.[18] Consequently, the court held that the conduct of the defendant in *Rex Hospital* could not have acted directly upon the interstate aspects of the hospital business.[19] The Fourth Circuit also concluded that there was an insufficient impact on interstate commerce to satisfy the affecting commerce test.[20] At least arguably there is some

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[17] 511 F.2d at 682.

[18] *Id.* The Fourth Circuit relied on United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952); Elizabeth Hosp., Inc. v. Richardson, 269 F.2d 167 (8th Cir.), *cert. denied,* 361 U.S. 884 (1959); and Spears Free Clinic v. Cleere, 197 F.2d 125 (10th Cir. 1952), to show that hospital services have been considered local activities. There are, however, important distinctions in these cases that set them apart from the situation in *Rex Hospital.*

In *Elizabeth Hospital,* the alleged trade restraint involved interference in the referral of patients from out-of-state. The plaintiff in *Elizabeth Hospital* attempted to establish the requisite tie with interstate commerce by showing that its purchases of medical supplies from sources outside the state were substantial. However, the court in *Elizabeth Hospital* held that the material issues need not be considered as the plaintiff failed to assert that the alleged conspiracy interfered with the purchases. 269 F.2d at 170. In *Rex Hospital,* the alleged Sherman Act violations interfered not only with the number of patients admitted from out-of-state, but with the entire scope of a hospital delivery system. 511 F.2d at 688 (Winter, J., dissenting).

Oregon State Medical Soc'y, 343 U.S. 326 (1952) involved a charge of conspiracy to monopolize directed toward a doctor-sponsored corporation engaged in the sale of prepaid medical care. The Court decided the jurisdictional question by holding that the number of payments to out-of-state hospitals were too sporadic. 343 U.S. at 334. Conversely, in *Rex Hospital,* out-of-state payments by a complete hospital operation would most certainly occur on a regular, on-going basis.

The rejection of the Sherman Act charge in *Spears Free Clinic v. Cleere, supra,* centered on a holding that there was a lack of proof showing an intent to injure, obstruct or restrain trade, compared to the alleged attempts in *Rex Hospital* to delay hospital construction which were never reached on the merits. Still, in *Spears Free Clinic,* the court did not hold that hospital services were a purely local activity as a matter of law. Rather, the court declined to pass upon the question of whether the practice of the healing arts, including chiropractic, was trade or commerce within the meaning of the Sherman Act. 197 F.2d at 128.

[19] 511 F.2d at 680.

[20] The court labeled the effect in *Rex Hospital* "de minimis" under the affecting commerce test. *Id.* at 685. Interestingly, in Goldfarb v. Virginia State Bar, 497 F.2d 1 (4th Cir. 1974), *rev'd,* 421 U.S. 773 (1975), the Fourth Circuit refused to use the de minimis term and instead utilized a "direct and substantial" test, mixing the elements of "in commerce" and "affecting commerce" analysis. *See* text accompanying notes 1-6, *supra.* In *Rex Hospital,* however, the Fourth Circuit appeared to follow the guidelines established in Wickard v. Filburn, 317 U.S. 111 (1942):

> But even if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress

authority that the activities in *Rex Hospital* would satisfy the jurisdictional requirements of either test.

Although the directly in commerce argument on the facts in *Rex Hospital* is not as persuasive as the affecting commerce theory, the directly in commerce argument appears sound in light of the Ninth Circuit opinion in *Rasmussen v. American Dairy Association.*[21] In that case, an attempt was made to force an artificial milk product from the market. Although the main ingredient by volume in the product was local water, the Ninth Circuit reasoned that a restraint of the sale of the other components of the product which originated out-of-state acted directly upon the flow of commerce.[22] The Fourth Circuit rejected the *Rasmussen* analysis because of the decision to regard hospital services as local activity.[23] Arguably, however, there is an analogy between *Rasmussen* and *Rex Hospital.*[24] Hospital services are made up of components such as medical payments, building funds, and surgical supplies, some of which may originate in diverse states. Without the out-of-state financing, insurance payments, drugs, equipment, and government programs, the corporation could not have functioned as a hospital, just as the artificial milk product in *Rasmussen* would have been merely water without its out-of-state ingredients.

The Supreme Court's recent decision in *Goldfarb v. Virginia State Bar*[25] suggests that the narrow view of Sherman Act jurisdictional questions used by the *Rex Hospital* court is becoming outmoded. However, the Fourth Circuit did not have the benefit of the Court's holding in *Goldfarb* when *Rex Hospital* was decided.[26] On the issue of jurisdiction in *Goldfarb,* the Court held that a bar association minimum fee schedule for a title examination and the association's accompanying enforcement mechanisms sufficiently affected inter-

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> if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

Id. at 125.

[21] 472 F.2d 517 (9th Cir.), *cert. denied,* 412 U.S. 950 (1973).

[22] The *Rasmussen* court stated that "for all practical purposes, the out-of-state ingredients *are* [the filled milk product]." *Id.* at 525 (emphasis in original).

[23] The Fourth Circuit dismissed the reasoning of *Rasmussen* by distinguishing the product involved. "[T]he provision of [hospital] services remains what it always has been: a local, intrastate activity, not interstate commerce." 511 F.2d at 682.

[24] *Id.* at 683.

[25] 421 U.S. 773 (1975), *rev'g* 497 F.2d 1 (4th Cir. 1974).

[26] The decision in *Rex Hospital* was handed down on February 18, 1975; *Goldfarb* on June 16, 1975.

state commerce for Sherman Act purposes.[27] The Court reasoned that although a title search was essentially a local, county-based activity, it was nonetheless an integral part of a larger network of interstate purchase financing. Similarly, the individual county-based hospital in *Rex Hospital* could be viewed as part of a larger system of complete hospital services which have ever-increasing ties with nationwide finance plans, insurance payments, and government programs.

In addition to holding that the jurisdictional tests of the Sherman Act were not met in *Rex Hospital,* the Fourth Circuit indicated doubt about the seriousness of the corporation's complaint.[28] The court reasoned that the construction delay of an addition to a small hospital such as that in *Rex Hospital* was not comparable to situations where Sherman Act jurisdiction had been found when a significant number of hospitals in a large city were threatened with a shut-down.[29] This analysis, however, does not consider the collective effect that the type of alleged activities in *Rex Hospital* would have an interstate commerce if all small hospitals were prevented from expanding by means

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[27] 421 U.S. at 779. For a discussion of the jurisdictional aspects of *Goldfarb, see The Shifting Jurisdiction of the Antitrust Laws,* 33 WASH. & LEE L. REV. ____ (1976).

[28] The Fourth Circuit found that: "[T]here is no allegation that the Raleigh Group has the power to put HBC out of business, or indeed, upon a fair reading of the whole amended complaint, that it can do any more than delay, at most, whatever expansion seems economically wise to the plaintiff." 511 F.2d at 685-686.

This appears to reflect a philosophy of Sherman Act policy considerations that differs from that of Travelers Ins. Co. v. Blue Cross of Western Pennsylvania, 361 F. Supp. 774 (W.D. Pa. 1972), *aff'd,* 481 F.2d 80 (3d Cir.), *cert. denied,* 414 U.S. 1093 (1973). There the court indicated by way of dictum that anti-competitive activity need not be blatant to contravene the public policy behind the Sherman Act:

> The thrust of the Sherman Antitrust Act is the prevention of restraint-of-trade and monopolistic practices which, by unwarranted interference with free competition among the suppliers of products or services, *have a tendency* to deprive the public of the benefits ordinarily derived from the rivalry of a number of sellers.

481 F.2d at 780 (Emphasis added).

The theme of a vested public interest in curtailing monopoly power is evidenced in Burke v. Ford, 389 U.S. 320 (1967), and United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954). Both cases stressed the practical ill-effects of local business restraints on the economic well-being of the public, effects which can be quite substantial without placing the alleged victim of monopolistic practices out of business. *See generally* Cox, *Antitrust Policy Planning and Industry Performance Evaluation,* 19 ANTITRUST BULL. 531 (1974).

[29] *See, e.g.,* Doctors, Inc. v. Blue Cross of Greater Philadelphia, 490 F.2d 48 (3d Cir. 1973), which involved a charge by a hospital that an attempt to corner the hospitalization insurance market would effectively close down the hospital, and would place limits on other area facilities.