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Antitrust: Application of the Sherman Act to Local Real Estate Brokerage Activities - McLain v. Real Estate Board of New Orleans, Inc.

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NOTES

ANTITRUST: APPLICATION OF THE SHERMAN ACT TO LOCAL REAL ESTATE BROKERAGE ACTIVITIES— *McLAIN V. REAL ESTATE BOARD OF NEW ORLEANS, INC.*

Before a court is deemed qualified to render a judgment in a particular case, it must first obtain jurisdiction[1] over the subject-matter of the controversy.[2] Cases arising under the Sherman Act[3] present a particular difficulty because the same phrase that defines the prohibited activity also delimits the statute's jurisdictional reach.[4] In a recent decision, *McLain v. Real Estate Board of New Orleans, Inc.*,[5] the United States Supreme Court attempted to clarify the jurisdictional requirement of the Sherman Act.

In a unanimous[6] opinion written by Chief Justice Burger, the Supreme Court brought the activities of local real estate brokers within the scope of the Sherman Act. In its decision, the Court analyzed the jurisdictional requirement of the Sherman Act and sought to clarify its prior decision in *Goldfarb v. Virginia State Bar*,[7] a decision upon which both the district court[8] and the court of appeals[9] in *McLain* had relied.

This Note examines the state of the law of jurisdiction under the Sherman Act prior to *McLain*. It also examines the *McLain* Court's analysis of Sherman Act jurisdiction in the light of prior case law, criticizing the Court's application of that law to the particular facts in *McLain*. Finally, this Note appraises the impact that the decision in *McLain* will have on the jurisdictional requirement of the Sherman Act.

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1. "Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact." Binderup v. Pathe Exch., Inc., 263 U.S. 291, 305 (1923).

2. Subject-matter jurisdiction involves the competency of the court to hear and decide the case presented. It should not be confused with jurisdiction over the person, which involves the power of the court to adjudicate an individual's rights in regard to a particular transaction or event. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350, at 543 (1969).

3. 15 U.S.C. §§ 1-7 (1976).

4. The statute provides in relevant part: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . ." *Id.* § 1. The Supreme Court has offered the following explanation of this section:

> [T]he phrase 'restraint of trade' which . . . had a well-understood meaning at common law, was made the means of defining the activities prohibited. The addition of the words 'or commerce among the several states' was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 494-95 (1940).

5. 444 U.S. 232 (1980).

6. Justice Marshall did not participate in the decision. *Id.* at 247.

7. 421 U.S. 773 (1975).

8. McLain v. Real Estate Bd. of New Orleans, Inc., 432 F. Supp. 982 (E.D. La. 1977).

9. McLain v. Real Estate Bd. of New Orleans, Inc., 583 F.2d 1315 (5th Cir. 1978).

HISTORICAL BACKGROUND

The extent of Congress' power to regulate interstate commerce is very broad and can be limited only by the Constitution itself.[10] This power is not limited merely to the regulation of trade among the states, but includes power over *intra*state commerce when such regulation is necessary to achieve the legitimate end of regulating *inter*state commerce.[11] Commerce includes not only trade among the states, but may extend to production and manufacturing processes,[12] as well as to the provision of services.[13]

By enacting the Sherman Act,[14] Congress sought to deal effectively with all contracts, combinations, and conspiracies in restraint of trade among the states.[15] To that end, Congress intended to exercise all of its power to regulate interstate commerce.[16] It is now accepted that the reach of the Sherman Act is coextensive with the utmost reach of Congress' power under the commerce clause.[17] This has further led the courts to conclude that both the substantive and jurisdictional definitions of interstate commerce under the Sherman Act are coterminous with and equal to the full power of Congress to regulate under the commerce clause.[18]

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10. The Constitution provides: "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." U.S. CONST. art. I, § 8, cls. 1, 3. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).

11. Wickard v. Filburn, 317 U.S. 111, 124 (1942).

12. United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 461 (1949) (manufacture of women's garments); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 222 (1948) (refining of sugar from sugar beets).

13. Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 745 (1976) (hospital services); Goldfarb v. Virginia State Bar, 421 U.S. 773, 785 (1975) (legal services); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 543 (1944) (fire insurance); Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626, 630 (9th Cir.) (dental services), *cert. denied*, 434 U.S. 825 (1977).

14. For an account of the legislative history of the Sherman Act see Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

15. Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 435 (1932).

16. "That Congress [in enacting the Sherman Act] wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . . admits of little, if any, doubt. The purpose was to use that power to make ours, so far as Congress could under our dual system, a competitive business economy." United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558-59 (1944) (footnotes omitted). *See* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 201 (1974); United States v. Frankfort Distillers, Inc., 324 U.S. 293, 298 (1945). *See generally* Note, *Portrait of the Sherman Act as a Commerce Clause Statute*, 49 N.Y.U. L. REV. 323 (1974).

17. In the early case of United States v. E.C. Knight Co., 156 U.S. 1 (1895), the Court nearly consigned the Sherman Act to oblivion by narrowly defining "commerce" to mean merely "trade," thus preventing its application to restraints in manufacturing or processing. Since that time, the courts have gradually expanded the scope of Congress' power under the commerce clause, and with it the reach of the Sherman Act. Cantor v. Detroit Edison Co., 428 U.S. 579, 605-06 (1976) (Blackmun, J., concurring); Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 521 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973). For a history of the evolution of the growth of application of the Sherman Act after its near death-blow in *Knight*, see Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 229-35 (1948).

18. As one court phrased it: "If the Act constituted an exercise of 'all the power' Congress constitutionally possessed to regulate interstate commerce, the jurisdictional definition of in-

Before inquiry into the specific facts of a case arising under the Sherman Act can proceed, a preliminary determination that interstate commerce is involved must be made.[19] The courts must decide, on a case by case basis, whether the conduct involved has a sufficient nexus to interstate commerce to invoke jurisdiction under the Sherman Act.[20] There is, unfortunately, no bright line test.[21] As noted above, however, cases arising under the Sherman Act present a special problem because the jurisdictional requirement as well as the definition of the substantive violation are contained in a single provision of the Act.[22]

The Supreme Court has developed two tests by which jurisdiction may be obtained under the Sherman Act.[23] In order to secure jurisdiction under

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terstate commerce cannot be more restrictive than the substantive one, for then an area of interstate commerce would be jurisdictionally unreachable under the Act." Taxi Weekly, Inc. v. Metropolitan Taxicab Bd. of Trade, Inc., 539 F.2d 907, 910 (2d Cir. 1976). *Accord*, Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 521 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973).

19. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 197 n.12 (1974); United States v. Wrightwood Dairy Co., 315 U.S. 110, 121 (1942); Lehrman v. Gulf Oil Corp., 464 F.2d 26, 36 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1977); United States v. Finis P. Ernest, Inc., 509 F.2d 1256, 1258 (7th Cir. 1975).

20. *E.g.*, Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 742 n.1 (1976) (sufficient nexus shown where local hospital purchased supplies from out of state, substantial revenue was derived from out-of-state insurers, and management services were contracted for with a foreign corporation); Burke v. Ford, 389 U.S. 320, 320-21 (1967) (intrastate liquor wholesalers who purchased all liquor for resale from out-of-state distillers); United States v. Bensinger Co., 430 F.2d 584, 586 (8th Cir. 1970) (retailer convicted of violating § 1 of the Sherman Act in conspiring to fix the price of a single dishwasher). *Contra*, Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341, 343 (9th Cir. 1969) (purchase of supplies from out of state incidental to conduct of a purely local garbage collection service); Lieberthal v. North County Lanes, Inc., 332 F.2d, 269, 271 (2d Cir. 1964) (operation of a bowling alley a purely intrastate activity); Page v. Work, 290 F.2d 323, 330 (9th Cir. 1961) (acquisition of newsprint and ink from out of state does not convert business of publishing a newspaper into interstate activity).

21. In Rasmussen v. American Dairy Ass'n, 472 F.2d 517 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973), the court stated: "We recognize, however, that there must be some limit on the intrusiveness of Sherman Act regulation. Since every enterprise, however localized, inevitably has some effect, however remote, on the flow of commerce among the states, some 'localness,' 'remoteness,' or 'de minimus' factor must intervene or federal regulation is boundless." *Id.* at 526.

22. The problem with trying to divorce substantive from jurisdictional issues in cases arising under the Sherman Act is that the existence of the one is predicated upon the other. That is, it is the determination of whether the alleged anticompetitive conduct states a cause of action under the Act that determines whether the court has jurisdiction. Because the federal courts have exclusive jurisdiction under the Act, once a valid cause of action has been established jurisdiction must follow as a matter of course. The question in such a case is whether the activity complained of states a cause of action under the Sherman Act, both as to the specific allegations of anticompetitive conduct and its effect on or occurrence in interstate commerce. The Act only prohibits anticompetitive activity occurring in or affecting interstate commerce. Neither factor alone is sufficient to sustain an alleged violation.

23. After its near demise in *Knight*, the Court gradually began to expand the jurisdictional reach of the Sherman Act as Congress' power over interstate commerce grew. *See* note 17 *supra*. In Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899), the Court invali-

the Act,[24] allegations of the complaint must show either that the activities complained of are within the flow of interstate commerce, the *in commerce* test, or, although purely intrastate in character, that they have a substantial effect on interstate commerce, the *effect on commerce* test.

The *in commerce* test is easier to apply because it requires only that the alleged illegal activity occur within the flow of interstate commerce,[25] such as fixing prices on goods manufactured in one state for resale in another.

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dated a price fixing and division of markets agreement among manufacturers of cast iron pipe. *Id.* at 240-44. In Swift & Co. v. United States, 196 U.S. 375 (1905), the Court continued to expand the scope of Sherman Act jurisdiction by holding it available to meat dealers who sold their product in interstate commerce. *Id.* at 396. Finally, in United States v. American Tobacco Co., 221 U.S. 106 (1911), the Court held the Act applicable to a tobacco trust whose operation was similar in kind to the type excluded from operation of the Act in *Knight*. *Id.* at 175-76. The rationale of *Knight* was repudiated by the Court in Standard Oil Co. v. United States, 283 U.S. 163 (1931), where the Court held that while manufacturing was not commerce, any agreement "to limit the supply or to fix the price of goods entering into interstate commerce" falls within the prohibitions of the Sherman Act. *Id.* at 169. In *Wickard*, the Court stated that Congress' power over interstate commerce extended not only to those activities within the flow of interstate commerce but also to those which, although purely local, have a substantial economic effect on it. 317 U.S. at 125. The Court adapted this expanded view of interstate commerce to situations arising under the Sherman Act in Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 231-32 (1948). In Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir. 1954), the court stated this dual test of jurisdiction: "The Sherman Act . . . extends not only to transactions in the stream of interstate commerce, but also to intrastate transactions which substantially *affect* interstate commerce." *Id.* at 739 (footnote omitted) (emphasis in original). For a list of cases decided under these two tests, see 1 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 5.01 (1979) [hereinafter cited as VON KALINOWSKI]. *See generally* Note, *Conflicting Interpretations of the Sherman Act's Jurisdictional Requirement*, 32 VAND. L. REV. 1215, 1219-21 (1979) [hereinafter cited as *Conflicting Interpretations*].

24. The jurisdictional requirement of the Sherman Act should be distinguished from the requirement under other federal antitrust statutes. Under the Clayton Act, 15 U.S.C. §§ 12-27 (1976), jurisdiction is limited to persons or activities in commerce. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195 (1974). Further, § 1 of the Clayton Act specifically defines commerce as "trade or commerce among the several States and with foreign nations . . . ." 15 U.S.C. § 12 (1976). The Federal Trade Commission Act, 15 U.S.C. §§ 41-58, was also limited to persons or activities in commerce, until amended by the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, § 201, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. § 45 (1976)). The Federal Trade Commission Act now applies to activities or persons "in or affecting commerce." 15 U.S.C. § 45 (1976).

25. The rationale behind the *in commerce* test is that an effect on commerce is "presumed in a case of a restraint upon goods and services while they are in the flow of commerce." 1 VON KALINOWSKI, *supra* note 23, § 5.01[2] [a]. To obtain jurisdiction under the *in commerce* test, it is relevant to determine the point at which interstate commerce begins and ends; if the restraint occurs before or after, jurisdiction would not be satisfied. *Id.* § 5.01[1] [b]; United States v. Yellow Cab Co., 332 U.S. 218, 233 (1947) (portion of complaint based on transportation of passengers before and after the interstate portions of their journeys failed to state a cause of action under the Sherman Act). This is known as the doctrine of "coming to rest." Whether or not a particular activity occurred in commerce is a question of fact. United States v. Bensinger Co., 430 F.2d 584, 590 (8th Cir. 1970); Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732, 735 (9th Cir. 1954).

Under this test, once it is determined that the alleged unlawful activity occurred within the flow of interstate commerce, no particular impact need be shown.[26] That is, the test is qualitative, not quantitative.[27]

The *effect on commerce* test involves a more detailed analysis of the facts in a particular case.[28] Traditionally, it requires a showing that, first, the alleged illegal activity had an effect on interstate commerce, even though the activity occurred entirely intrastate,[29] and, second, that the effect on interstate commerce was substantial.[30]

While at first glance these two tests appear similar, it is important that their fundamental distinction be maintained.[31] Under the *in commerce* test, the anticompetitive activity must have been imposed directly on the goods or services while in the flow of interstate commerce. Once that is demonstrated, no particular impact on interstate commerce need be shown. In contrast, under the *effect on commerce* test, if the restraint is imposed upon the goods or services before or after their interstate passage, then a substantial effect on interstate commerce must be demonstrated.[32] It was in

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26. As long as the allegations are sufficient to show a conspiracy in restraint of trade of the type prohibited by the Sherman Act, it does not matter that the party seeking redress is only one manufacturer "whose business is so small that his destruction makes little difference to the economy." Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 656-57 (1961) (quoting Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959)).

27. United States v. Yellow Cab Co., 332 U.S. 218, 226 (1947) (failure to allege that defendant had a monopoly with respect to the total number of taxicabs in the United States not sufficient to defeat complaint); United States v. Bensinger Co., 430 F.2d 584, 586 (8th Cir. 1970) (conspiracy to fix the price of a single dishwasher sufficient to sustain conviction under § 1 of the Sherman Act).

28. *See* Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732, 739-40 n.3 (9th Cir. 1954). *See also* VON KALINOWSKI, *supra* note 23, §§ 5.01[3], [4].

29. As the Court held, in an oft-quoted passage:

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

United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464 (1949).

30. The question of the substantiality of the effect on interstate commerce of the alleged unlawful restraint is qualitative, not quantitative. Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732, 748 (9th Cir. 1954). Substantiality is a matter of degree and involves "a practical, case by case economic judgment, not a conclusion derived from application of abstract or mechanistic formulae." Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 523 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973). *Accord*, Doctors, Inc. v. Blue Cross, 490 F.2d 48, 51 (3d Cir. 1973). *See* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 232-33 (1948). The effect may be "substantial" for purposes of the Sherman Act while stopping short of causing an enterprise to go out of business or even having an effect on market price. Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 745 (1976).

31. The courts often have failed to recognize the distinction between the two tests. *See Conflicting Interpretations*, *supra* note 23, at 1225-26.

32. 1 VON KALINOWSKI, *supra* note 23, § 5.01[1] [b]. *See also Conflicting Interpretations*, *supra* note 23, at 1222.

this often confused area of Sherman Act jurisdiction that the Supreme Court handed down its landmark decision in *Goldfarb v. Virginia State Bar*.[33]

Goldfarb involved alleged price fixing by attorneys who performed title examinations in connection with the purchase and sale of residential real estate.[34] The Court there was presented with an opportunity to clarify the jurisdictional requirement of the Sherman Act. The decision, however, has caused considerably more confusion than clarification.[35] Although the Court did not classify the activities in *Goldfarb* either as in interstate commerce or as having had a substantial effect on interstate commerce, the language of the opinion suggests an application of the *in commerce* test. Finding a practical connection between the alleged restraint and the interstate transactions involved,[36] the Court noted that because a substantial volume of commerce was involved and given the inseparability of the title examination from the interstate aspects of real estate transactions, interstate commerce had been sufficiently affected.[37] A further indication that the Court applied the *in commerce* test in *Goldfarb* was its statement that no substantial effect on commerce from the alleged unlawful activities needed to be shown.[38]

In the next case in which the Supreme Court considered the jurisdictional requirement of the Sherman Act, *Hospital Building Co. v. Trustees of Rex*

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33. 421 U.S. 773 (1975).

34. In *Goldfarb*, petitioners, prospective home buyers, were informed that a title examination was required before they could obtain title insurance required by the mortgagee. A title examination could be performed only by a licensed attorney. *Id.* at 775. Petitioners discovered that all of the attorneys they contacted charged the same fee for this service, a fee which conformed to a minimum fee schedule published by the county bar association. Although adherence to the schedule was not mandatory because the county bar association had no enforcement power, the Virginia State Bar endorsed such schedules and could discipline attorneys. *Id.* at 776. Petitioners alleged that the minimum fee schedule constituted price fixing within the meaning of § 1 of the Sherman Act. *Id.* at 778.

35. *See, e.g.*, Comment, *The Confusing World of Interstate Commerce and Jurisdiction Under the Sherman Act—A Look at the Development and Future of the Currently Employed Jurisdictional Tests*, 21 VILL. L. REV. 721, 740-44 (1976) [hereinafter cited as *Confusing World*]. *But see* Comment, *The Shifting Jurisdiction of the Antitrust Laws*, 33 WASH. & LEE L. REV. 181, 186-92 (1976).

36. The interstate aspects of the transactions found by the district court, and accepted by the Supreme Court, were that a substantial amount of loan funds used in the purchase of residential real estate was derived from outside Virginia and that significant portions of the loans were guaranteed by federal agencies headquartered in Washington, D.C. 421 U.S. at 783.

37. *Id.* at 785. The Court focused on the integral relationship of the legal services involved to the interstate transactions, stating that a restraint on those services could affect interstate commerce for purposes of the Sherman Act. *Id.* The Court compared the relationship between the required legal services and the interstate transaction of purchasing a home to that of the taxi trips between railroad stations to change trains during an interstate journey, at issue in United States v. Yellow Cab Co., 332 U.S. 218, 228 (1947). 421 U.S. at 784 n.13.

38. The fact that there was no showing that home buyers were discouraged by the challenged activities does not mean that interstate commerce was not affected. Otherwise, the magnitude of the effect would control, and our cases have shown that, once an effect is shown, no specific magnitude need be proved.

421 U.S. at 784 n.13. *See* note 26 and accompanying text *supra*.

Hospital,[39] the Court first enunciated a nexus approach to Sherman Act jurisdiction.[40] It was unclear whether the district court had dismissed for lack of subject-matter jurisdiction or for failure to state a claim upon which relief might be granted. The court of appeals styled it as the latter and affirmed dismissal. The Supreme Court accepted the court of appeals' characterization, but went on to state:

> However, our analysis of this case would be no different if we were to regard the District Court's action as having been a dismissal for want of subject-matter jurisdiction under Rule 12(b)(1). *In either event, the critical inquiry is into the adequacy of the nexus between respondents' conduct and interstate commerce that is alleged in the complaint.*[41]

THE DECISION IN *MCLAIN*

Facts and Procedure

Petitioners in *McLain*[42] filed a class action suit on behalf of themselves and all similarly situated real estate purchasers and sellers against re-

39. 425 U.S. 738 (1976). In *Hospital Building*, petitioners, owners of a small proprietary hospital in Raleigh, North Carolina, alleged that respondents, a private hospital in Raleigh, two of its officers, and a health planning officer, had conspired to block the planned relocation and expansion of petitioners' hospital and had further attempted to monopolize the hospital services industry in Raleigh. *Id.* at 739-40. Petitioners predicated Sherman Act jurisdiction on the following alleged interstate transactions: (1) that petitioners purchased a substantial amount of medical supplies in interstate commerce; (2) that a substantial number of petitioners' patients were from out of state; (3) that a large portion of petitioners' revenue was derived from out of state, including funds from Medicare and Medicaid; (4) that petitioners contracted for management services with a foreign corporation; and (5) that the planned relocation and expansion were to be funded in large part by loans from out-of-state lenders. *Id.* at 741.

40. The question of jurisdiction in cases arising under the Sherman Act may be contrasted with the jurisdictional question posed in other contexts, such as those involving amount in controversy or diversity of citizenship, where a threshold determination on the issue of jurisdiction is truly separate from the question posed by the merits of the case. In Land v. Dollar, 330 U.S. 731 (1947), the Court stated that where resolution of the question of whether the federal court has proper jurisdiction over a case can be determined only by an inquiry into the merits, as in Sherman Act cases, the jurisdictional question should await a disposition on the merits. *Id.* at 735. Therefore, in a case involving a Sherman Act violation, the jurisdictional/substantive inquiry is reversed. The Ninth Circuit has stated:

> Whether a defendant's conduct constitutes a substantive Sherman Act violation is entirely a matter of congressional definition: Is the defendant's conduct the type of conduct Congress intended to prohibit? Is that conduct a "restraint of trade . . . ?" The jurisdictional question, on the other hand, concerns Congress' power to reach the defendant's conduct. . . .

Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 522 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973). *See Confusing World*, *supra* note 35, at 724-25. *See also* Note, *Antitrust Law—Jurisdictional Scope of the Sherman Act—State Action Exception—Learned Profession Exception—Boddicker v. Arizona State Dental Association*, 11 LOY. L.A. L. REV. 183, 186-90 (1977).

41. 425 U.S. 738, 742 n.1 (1976) (emphasis added). For a discussion of the jurisdictional/substantive dichotomy in the Sherman Act context, see Mortensen v. First Fed. Sav. & Loan, 549 F.2d 884, 891 (3d Cir. 1977). *See also* Note, *Antitrust Law—Jurisdictional Scope of the Sherman Act—State Action Exception—Learned Profession Exception—Boddicker v. Arizona State Dental Association*, 11 LOY. L.A. L. REV. 183, 186-90 (1977).

42. 444 U.S. 232 (1980).

spondent real estate brokers, firms, and trade associations, alleging that respondents violated section 1 of the Sherman Act[43] by conspiring to fix and control residential real estate prices through the systematic use of fixed commission rates, fee splitting, and the suppression of market information useful to buyers and sellers.[44] Petitioners alleged that respondents' activities were both within the flow of interstate commerce and had a substantial effect on interstate commerce.[45] In order to satisfy the interstate requirement of the Sherman Act, petitioners alleged that respondents' services were employed by persons moving into and out of the Greater New Orleans area, that respondents assisted their clients in obtaining financing and insurance of which substantial amounts were obtained from out of state, and that many of the companies providing mandatory title examinations were headquartered in other states.[46] Respondents maintained that their activity was entirely intrastate in character, because they did not participate directly in either the lending or title examination activities, but merely brought prospective buyers and sellers together with others who performed those services.[47]

The district court,[48] relying on the Supreme Court decision in *Goldfarb v. Virginia State Bar*,[49] stated that petitioners could only establish jurisdiction for purposes of the Sherman Act if they could show that there was a substantial volume of interstate commerce involved in the overall real estate transaction, and that the challenged activity was an essential and integral part of the transaction, inseparable from its interstate aspects.[50] Finding the former, but not the latter, criterion established, the district court dismissed

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43. *See* note 4 *supra*.

44. 444 U.S. at 235.

45. *Id.*

46. *Id.* After briefing on the jurisdictional question, the district court heard oral argument. At conference, the court informed petitioners that in order to satisfy the jurisdictional requirement of the Sherman Act, they would have to bring the facts of the case within the framework of *Goldfarb*. Petitioners then deposed nine witnesses, including real estate brokers, title examiners, mortgage lenders, and government officials, in order to establish the requisite interstate nexus. Their testimony demonstrated, *inter alia*, that Security Homestead Association, one of nearly forty savings and loan associations in the Greater New Orleans area, lent in excess of $100 million for the purchase of residential real estate during the period covered in the complaint. Substantial funds for these loans were obtained from out of state. Another deponent, president of Carruth Mortgage Corporation, testified that during the period covered Carruth made over $100 million in mortgage loans and then sold the financial paper in the interstate secondary mortgage market. A substantial portion of these funds was guaranteed by the Federal Housing Administration or the Veterans Administration, both of which are located in Washington, D.C., and to which periodic premium payments were remitted. *Id.* at 238-39.

47. *Id.* at 236. To support this contention, respondents submitted affidavits stating that they were licensed to conduct business only within the State of Louisiana, that there was no legal or other requirement that real estate brokers be employed in the purchase and sale of residential real estate and that, in fact, respondents knew of many such transactions that occurred without the aid or service of a licensed broker. *Id.*

48. McLain v. Real Estate Bd. of New Orleans, Inc., 432 F. Supp. 982 (E.D. La. 1977).

49. 421 U.S. 773 (1975).

50. 432 F. Supp. at 984.

for failure to state a claim upon which relief might be granted.[51] The court of appeals upheld dismissal, but on the ground that petitioners had failed to satisfy the jurisdictional requirement of the Sherman Act.[52] The Supreme Court found that the jurisdictional requirement of section 1 of the Sherman Act was established by petitioners' complaint and remanded the case for trial on the merits.[53]

The Supreme Court's Reasoning

The Supreme Court in *McLain* reiterated that jurisdiction under the Sherman Act may be established either by the *in commerce* or the *effect on commerce* test.[54] The Court found that while petitioners could not meet the requirement of the *in commerce* test,[55] there were sufficient allegations to establish jurisdiction under the *effect on commerce* test.[56] Under the latter test, the Court stated that petitioners need only demonstrate that respondents' activity had a substantial effect on interstate commerce.[57] The Court went on to state that petitioners need not show that the particular alleged

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51. *Id.* at 985.

52. McLain v. Real Estate Bd. of New Orleans, Inc., 583 F.2d 1315, 1324-25 (5th Cir. 1978). The Supreme Court granted certiorari, 441 U.S. 942 (1979).

53. 444 U.S. at 247.

54. "To establish jurisdiction a plaintiff must . . . demonstrate . . . either that the defendants' activity is itself in interstate commerce, or if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce." *Id.* at 242. Prior to *McLain*, there was a question whether both jurisdictional tests remained viable. The basis upon which the Court found jurisdiction in *Goldfarb* has been the subject of some controversy. One commentator has suggested that *Goldfarb* is susceptible to any one of three conflicting interpretations, including that the Court had rejected the two traditional jurisdictional tests as too restrictive. *Confusing World*, *supra* note 35, at 743-44.

55. *See* notes 25-27 and accompanying text *supra*.

56. 444 U.S. at 245. *See* notes 28-30 and accompanying text *supra*. Reading the pleadings in the light most favorable to petitioners, the Court found the following interstate characteristics of respondents' real estate activities: (1) mortgage funds were obtained from out-of-state investors as well as from interstate bank loans; (2) mortgages were obtained under federally insured programs; (3) mortgage obligations were traded in the interstate secondary mortgage market; and (4) in most cases, prior to obtaining a mortgage, a title examination was required, which was provided by interstate corporations. 444 U.S. at 245.

57. *Id.* at 242. *See* note 30 and accompanying text *supra*. The unlawful activity alleged in *McLain*, price fixing, is a per se violation of the Sherman Act. A per se violation is one that the Court has determined is so detrimental to the competitive economy the Sherman Act was designed to foster that no effect need be shown. That is, once the existence of the per se violation is found to exist, the anticompetitive effect is presumed. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). Price fixing is only one of a number of per se violations under the Act. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210-18 (1940). *See* United States v. Topco Assoc., Inc., 405 U.S. 596, 609 (1972) (horizontal restraints); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959) (group boycotts); International Salt Co., Inc. v. United States, 332 U.S. 392, 396 (1947) (tying arrangements). For a history of the per se rule and its diminished role under the Burger Court, see generally Redlich, *The Burger Court and the Per Se Rule*, 44 ALB. L. REV. 1 (1979).

anticompetitive activity had an effect on interstate commerce, but merely that respondents' overall activity had such an effect.[58]

The Court held that the two-step analysis set forth in *Goldfarb*,[59] and outlined by the district court in *McLain*, was applicable only in cases where the *in commerce* test is employed.[60] The district court found, and the Supreme Court accepted, that a large volume of respondents' real estate brokerage activity occurred in interstate commerce.[61] Therefore, the Court stated, in order to establish jurisdiction under the Sherman Act, petitioners need only show that respondents' activities, allegedly infected with anticompetitive aspects, "have a not insubstantial effect on the interstate commerce involved."[62]

CRITIQUE OF THE DECISION IN *MCLAIN*

Viewed as an application of the *effect on commerce* test,[63] the decision in *McLain* is consistent with prior case law insofar as the Court indicated that there existed a sufficient nexus between the real estate transactions involved and interstate commerce to bring the activity within the scope of the Sherman Act. As noted,[64] that test requires that the alleged unlawful activity have an effect on the interstate commerce aspect of the transaction involved. In addition, it requires that the effect on interstate commerce be substantial.[65] It is with respect to this latter requirement that the Court's opinion is open to criticism. The alleged illegal activity involved in *McLain* was price fixing, traditionally a per se[66] violation of the Sherman Act. Yet the Court in *McLain*, having determined that the requisite nexus existed between respondents' activity and interstate commerce, went further and stated that in order to prevail at trial, petitioners would be required "to show that respondents' activities have a not insubstantial effect on interstate

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58. 444 U.S. at 242-43. As the Court pointed out, it is not necessary to demonstrate that the particular alleged anticompetitive activity itself had a substantial effect on interstate commerce, because that would enable those whose restraining activities were unsuccessful to escape liability. The Court stated: "If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect." *Id.*

59. *See* notes 48-50 and accompanying text *supra*.

60. 444 U.S. at 244. The Court stated: "To adopt the restrictive interpretation urged upon us by respondents would return to jurisdictional analysis under the Sherman Act of an era long past." *Id. See* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 235 (1948).

61. *See* note 46 *supra*.

62. 444 U.S. at 246. The Court stated that because petitioners alleged and supported a sufficient basis for satisfying the Sherman Act's jurisdictional requirement under the *effect on commerce* test, dismissal was improper. *Id.*

63. *See* notes 28-30 and accompanying text *supra*.

64. *See* note 29 and accompanying text *supra*.

65. *See* note 30 and accompanying text *supra*.

66. *See* note 57 *supra*.

commerce."[67] The Court had already concluded that the jurisdictional requirement had been met. Inasmuch as the effect on commerce is normally presumed where a per se violation is involved, the Court here may be signaling its continued retreat from per se analysis under the Sherman Act.[68]

The Court's decision in *McLain* is also subject to criticism for the way in which it addressed the *in commerce* test.[69] The Court resolved any doubt that may have existed as to which test it had applied in *Goldfarb*.[70] In holding that legal services were an essential and integral part of real estate transactions, that is, transactions occurring in interstate commerce, the Court in *Goldfarb* found that "the necessary connection between the interstate transactions and the restraint of trade provided by the minimum-fee schedule is present because, in a practical sense, title examinations are necessary in real estate transactions to assure a lien on a valid title of the borrowers."[71] Given the similarity of facts in *Goldfarb* and *McLain*, it is difficult to understand how the Court found that petitioners in *McLain* had established jurisdiction under the *effect on commerce* test but not the *in commerce* test as applied in *Goldfarb*. As the Court itself stated in *McLain*, brokerage services necessarily affect real estate transactions.[72] It is difficult to see how the Court could distinguish this activity from that of legal services because, insofar as residential real estate transactions are concerned,

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67. 444 U.S. at 246.

68. Analysis of the contrasting per se and rule of reason approaches to antitrust cases is beyond the scope of this Note. A suggestion that the Court has departed from its traditional per se approach to price fixing was enunciated in Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979). Labelling the price fixing agreement ancillary to the overall activity of licensing copyrighted musical compositions, the Court stated: "Finally, we have some doubt—enough to counsel against application of the *per se* rule—about the extent to which this practice threatens the 'central nervous system of the economy . . . ,' that is, competitive pricing as the free market's means of allocating resources." *Id.* at 23 (citations omitted). *See also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.9 (1940).

69. *See* notes 25-27 and accompanying text *supra*.

70. 421 U.S. 773 (1975). *See* notes 34-38 and accompanying text *supra*.

71. 421 U.S. at 784 (footnote omitted).

72. 444 U.S. at 246. In comparing the activities of lawyers and real estate brokers, one court recently observed:

> While there are of course differences between the lawyers' activities in *Goldfarb* and the brokers' in the instant case, most suggest a more, not less, substantial impact on interstate commerce for the brokers' activities than for the lawyers'. Defendants emphasize that the brokers' services here were not undergirded by legal compulsion as were those of the lawyers in *Goldfarb*. While that is true, the practical necessity for utilizing a local broker's services, particularly for out-of-state purchasers and sellers, was substantially equal on the evidence presented, hence quite as integral and "inseparable" a part of the final analysis. And on the other hand, while the lawyers in *Goldfarb* took no specific part in creating the critical interstate market of specific buyers and sellers necessary to generate their fees, the brokers in the instant case played a dominant part in creating the specific interstate market that ultimately provided their commissons.

United States v. Foley, 598 F.2d 1323, 1330-31 (4th Cir. 1979).

both appear to be "essential, integral part[s] of the transaction and inseparable from its interstate aspects."[73]

IMPACT OF *McLAIN*

It is significant that the Court brought real estate brokerage activities within the scope of the Sherman Act by focusing upon the interstate aspects of real estate transactions rather than by narrowly expanding the Act's jurisdiction to include such transactions on an ad hoc basis.[74] The Court's action is consistent with the expanding jurisdiction of the Sherman Act.[75]

McLain is not the first case in which the Supreme Court found the Sherman Act applicable to the activities of real estate brokers. It is, however, the first in which the Court predicated jurisdiction on the nexus between the activities involved in real estate transactions and interstate commerce.[76] In *United States v. National Association of Real Estate Boards*,[77] the Court upheld the applicability of the Sherman Act to real estate transactions,[78] but in that case all of the transactions involved occurred entirely within the Dis-

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73. 444 U.S. at 244 (quoting McLain v. Real Estate Bd. of New Orleans, Inc., 432 F. Supp. 982, 984 (E.D. La. 1977)).

74. As one court recently stated: "The traditional mode of analysis seeks the requisite nexus along one or both of two general lines of inquiry *unrelated in terms to particular categories of commercial activities*." United States v. Foley, 598 F.2d 1323, 1328 (4th Cir. 1979) (emphasis added).

75. *See Conflicting Interpretations, supra* note 23, at 1223-29; *Confusing World, supra* note 35, at 726-40.

76. The Court in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), implicitly brought real estate brokerage activities within the purview of the Sherman Act. *Goldfarb* focused, however, on the role of legal services within the overall transaction of buying and selling real estate. In answer to the County Bar's argument that the legal services involved were wholly local in character and any effect they might have on interstate commerce was incidental and remote, the Court in *Goldfarb* stated:

> These arguments misconceive the nature of the transactions at issue and the place legal services play in those transactions. As the District Court found, "a significant portion of funds furnished for the purchasing of the homes in Fairfax County comes from without the State of Virginia," and "significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development, both headquartered in the District of Columbia." Thus in this class action the transactions which create the need for the particular legal services in question frequently are interstate transactions.

Id. at 783-84. Earlier, a lower court had held that real estate transactions are both in interstate commerce and have a substantial effect on it. Mazur v. Behrens, [1974-1] TRADE CAS. ¶ 75,070 (N.D. Ill. 1974). For a discussion of the history of the application of the Sherman Act to real estate transactions, see Note, *Jurisdiction Under the Sherman Act: The "Interstate Commerce" Element and the Activities of Local Real Estate Boards and Brokers*, 79 DUKE L.J. 860 (1979).

77. 339 U.S. 485 (1950).

78. The case involved alleged price fixing in the setting of commission rates by the members of the Washington Real Estate Board. An agreement to fix rates of brokerage commissions had been shown in an earlier criminal proceeding. The case on appeal merely challenged the applicability of the Sherman Act because the transactions involved were not interstate in nature. *Id.* at 487-88.

trict of Columbia. Jurisdiction was obtained under section 3 of the Sherman Act, which makes the Act applicable to activities occurring entirely within the District.[79]

The Court in *McLain* made clear that brokerage activities in connection with the purchase and sale of residential real estate in interstate commerce may be brought within the scope of the Sherman Act under the *effect on commerce* theory,[80] as well as under the *in commerce* theory as applied in *Goldfarb*.[81] By doing so, however, the Court retained the requirement of substantial impact on interstate commerce caused by the alleged anti-competitive restraint. This requirement could pose an unnecessary hurdle for plaintiffs where the activity complained of is less egregious than price fixing. Had the Court applied the *in commerce* theory to the facts in *McLain*, plaintiffs would only have had to demonstrate the nexus between the activity and interstate commerce without regard to the substantiality of its effect.[82]

In holding that real estate brokerage services are within the jurisdictional scope of the Sherman Act, the Court has resolved a conflict among the circuits. In *Bryan v. Stillwater Board of Realtors*,[83] a real estate broker brought an action against the local realty board for rejecting his membership application.[84] The court held that the movement of persons into and out of the state, in addition to the interstate nature of the financing and title examination services, was not sufficient to convert a wholly local activity into interstate commerce.[85] *United States v. Foley*[86] was a case where Sherman Act jurisdiction was similarly predicated on the movement of real estate purchasers and sellers into and out of the state and the substantial volume of mortgage funds secured from out of state.[87] The court in *Foley*, however, had no difficulty in finding a sufficient nexus between the real estate brokerage activities involved and interstate commerce.[88]

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79. Section 3 of the Sherman Act provides in relevant part: "Every contract, combination . . . , or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia . . . , is declared illegal." 15 U.S.C. § 3 (1976).

80. *See* note 56 and accompanying text *supra*.

81. *See* notes 36-38 and accompanying text *supra*.

82. *See* note 30 *supra*.

83. 578 F.2d 1319 (10th Cir. 1977).

84. *Id.* at 1321-22.

85. *Id.* at 1322-24. Other cases in which the courts have failed to find a sufficient nexus between the activities of local real estate brokers and interstate commerce include: Income Realty & Mortgage, Inc. v. Denver Bd. of Realtors, 578 F.2d 1326 (10th Cir. 1978); Diversified Brokerage Servs., Inc. v. Greater Des Moines Bd. of Realtors, 521 F.2d 1343 (8th Cir. 1975); Hill v. Art Rice Realty Co., 66 F.R.D. 449 (N.D. Ala. 1974), *aff'd*, 511 F.2d 1400 (5th Cir. 1975); Marston v. Ann Arbor Property Managers Ass'n, 422 F.2d 836 (6th Cir. 1970); Cotillion Club, Inc. v. Detroit Real Estate Bd., 303 F. Supp. 850 (E.D. Mich. 1964).

86. 598 F.2d 1323 (4th Cir. 1979).

87. *Id.* at 1330.

88. *Id.* at 1329-31. Other cases involving real estate brokerage services where the courts have found Sherman Act jurisdiction include: Sapp v. Jacobs, 547 F.2d 1170 (7th Cir. 1977), *rev'g*, 408 F. Supp. 119 (S.D. Ill. 1976); United States v. Greater Syracuse Bd. of Realtors,

The Court in *McLain* also affirmed the viability of the two jurisdictional tests. This affirmation resolved any question raised by *Goldfarb* that the tests had been abandoned and that the Court was proceeding to apply the Sherman Act on an ad hoc basis.[89]

Finally, in *McLain,* the Court seemed to continue its assault on the per se approach to antitrust analysis.[90] Conceivably, by applying a rule of reason analysis instead, the courts may find that the fixing of brokerage commissions is ancillary to or promotive of residential real estate transactions. This could take away from plaintiffs the remedy gained in *McLain*.

CONCLUSION

The decision in *McLain* reflects a trend toward a more expansive approach to Sherman Act jurisdiction, one in which formalistic, quantitative criteria are of diminished importance. By continuing to read broadly the jurisdictional requirement of the Sherman Act, the Supreme Court recognized the modern day reality that real estate brokerage services are truly interstate in character and should not escape the Act's reach merely because of an out-moded notion that such activities are purely local in character.

George M. Hoffman

Inc., 449 F. Supp. 887 (N.D.N.Y. 1978); Oglesby & Barclift, Inc. v. Metro MLS, Inc., [1976-2] TRADE CAS. ¶ 61,064 (E.D. Va. 1976); Gateway Assoc., Inc. v. Essex-Costello, Inc., 380 F. Supp. 1089 (N.D. Ill. 1974); United States v. Long Island Bd. of Realtors, Inc. [1972] TRADE CAS. ¶ 74,068 (E.D.N.Y. 1972); United States v. Atlanta Real Estate Bd., [1972] TRADE CAS. ¶ 73,825 (N.D. Ga. 1971). *See also* Note, *Jurisdiction Under the Sherman Act: The "Interstate Commerce" Element and the Activities of Local Real Estate Boards and Brokers*, 79 DUKE L.J. 860, 875-79 (1979).

89. *See* notes 34-38 and accompanying text *supra*.

90. *See* notes 57 & 68 *supra*.