Medical Peer Review, Antitrust, and the Effect of Statutory Reform

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INTRODUCTION

"For too many years when the diagnosis has been professional incompetence, the prescription has been cosmetic surgery."

—Rep. Henry Waxman

While others have blamed the so-called medical malpractice "crisis" on litigious lawyers, greedy patients, overzealous juries, and careless insurers, Congress has focused its attention on another culprit: incompetent physicians. The Health Care Quality Improve-
ment Act of 1986 (HCQIA) is an attempt to improve the quality of medical care in this country by encouraging the medical profession to rid itself of bad doctors. In 1986 Congress diagnosed an "increasing occurrence of medical malpractice" throughout the nation that warranted the intervention of the federal government. Congress prescribed HCQIA in an effort to lower the incidence of professional incompetence, in part by lowering the incidence of peer-review litigation. Congress specifically found that the threat of such lawsuits—particularly those raising federal antitrust claims—inhibited doctors and hospitals from sanctioning incompetent doctors. HCQIA was enacted to minimize that threat and to encourage physicians to police their peers.

HCQIA addresses the problem of medical malpractice by establishing a two-part program to identify incompetent physicians throughout the nation. Designed to encourage physicians to scrutinize the quality of their peers' professional performance, the first part of the Act provides limited "immunity" from legal liability for those who engage in peer-review activity. The second part of the

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4. Congress found that "[t]he increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State." 42 U.S.C. § 11101(1) (1988). See infra notes 30-32 and accompanying text.
5. 42 U.S.C. § 11101(3)-(5) (1988). Peer-review litigation is typically brought by a physician or other medical practitioner who alleges that she has been unlawfully excluded from a hospital or other medical facility in violation of antitrust, civil rights, and various state laws. The defendants, usually the hospital and other physicians on the medical staff (the plaintiff's "peers"), typically counter that the plaintiff was excluded because of her incompetence, professional misconduct, or other incompatibility with their efforts to achieve high-quality health care for their patients. See infra notes 244, 367 and accompanying text. In this Article, peer-review litigation encompasses litigation over the granting, denial, restriction, and revocation of staff privileges and other means of formal access to institutional health-care providers. For a description of the medical credentialing process by which such access is secured, see Dolan & Ralston, Hospital Admitting Privileges and the Sherman Act, 18 Hous. L. REV. 707, 709-12 (1981). For a discussion of the antitrust implications of medical credentialing, see Havighurst & King, Private Credentialing of Health Care Personnel: An Antitrust Perspective (pts. 1 & 2), 9 Am. J.L. & MED. 131, 263 (1983).
Act establishes a nationwide computerized system for reporting instances of physician incompetence or malpractice, which finally became operational on September 1, 1990. The parts of the Act are conceptually related, for the drafters envisioned a program that would encourage the medical profession to bring cases of incompetence to the attention of disciplinary authorities and also would keep track of such cases and other malpractice claims.


9. Congressman Henry Waxman, a principal sponsor of the Act, summarized the dual nature of the Act:

But underlying an essential point in this legislation is, from my point of view, tying together the question of immunity and reporting. I think the two must go together. We ought to give immunity to doctors to participate in peer
Congress found the peer-review process—by which doctors review and recommend sanctions for the professional incompetence or misconduct of fellow doctors—to be critical to solving the malpractice problem. Peer review can indeed protect the public from medical malpractice to the extent that it can successfully curtail or eliminate the professional practice of bad doctors. However, peer review can also be used as a ploy to reduce or eliminate the competition posed by perfectly good doctors. The possibility of such abuse makes peer review vulnerable to the public policy concerns of the antitrust laws.

Peer-review litigation has created a triple bind for policy-makers. Although the goal of peer review to encourage the medical profession to weed out its incompetent members is laudable, it has proven difficult simultaneously to: (1) protect the peer-review participants from the threat of legal liability for their legitimate weeding-out actions, (2) avoid insulating them from liability if their actions were in fact purely self-interested, and (3) decide quickly and cheaply whether any given case involves legitimate review of professional competence or illegitimate economic self-protection. There may be good reasons to suppose that in most cases the physicians who assess the professional conduct of one of their peers are principally concerned with the effect of that physician’s practices on patient welfare rather than on their own economic well-being. However, whenever competitors join together to cooperate in a course of conduct that results in the exclusion of another competitor from the marketplace, antitrust concerns are inevitably implicated.

review in order to encourage that peer review, but we have to protect the public by making the information available from peer review to an institution so that that information will be used in a meaningful way.


11. See Curran, Legal Immunity for Medical Peer-Review Programs, 320 New Eng. J. Med. 233, 233 (1989) (antitrust laws have a “built-in bias against competitors’ having the power and authority to limit or exclude business opportunities for other practitioners in the same field. Yet this is the very purpose of a medical-staff credentials committee.”).

12. See United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1370 (5th Cir. 1980) (where competing realtors joined together to cooperate in their businesses, suspicions of antitrust violations automatically arose).
Whenever antitrust is implicated, the potential exists for time-consuming and expensive litigation.

Thus, the recurrent cry from courts and commentators has been for a method for accurately and expeditiously distinguishing those cases in which legitimate peer-review activity has been undertaken in an honest effort to improve the quality of medical care, from those cases in which the peer-review process has been used illegitimately to shield anticompetitive conduct of medical practitioners. Through HCQIA, Congress has devised one method for making this distinction. Whether the Act actually will assist in this line-drawing process is the subject of this Article.

This Article analyzes whether HCQIA will effect any real change in peer-review litigation under the antitrust laws, or whether it is just another round of "cosmetic surgery." Although HCQIA's protection from legal liability is not limited to antitrust cases, the threat of antitrust liability provided the primary impetus for enacting the immunity provision, and thus this Article focuses on the Act's impact on antitrust litigation only. The Article contends that the statutory reform effected by the Act falls short of that heralded by its supporters, and concludes that because the Act does not change the substantive rules governing antitrust liability in peer-


14. This is the term employed by Congressman Waxman to describe prior efforts to deal with medical malpractice. See supra text accompanying note 1. Thus far, only one case has been decided on the merits of the immunity question under HCQIA, see Austin v. McNamara, 731 F. Supp. 934, 943 (C.D. Cal. 1990) (granting immunity), while a number of cases have mentioned HCQIA either in other contexts or as inapplicable to the litigation. See Homer, supra note 7, at 476-81 (collecting cases); Strama, The Impact of the Health Care Quality Improvement Act on Peer Review, HEALTHSPAN, Oct. 1990, at 14-15 n.19 (collecting cases).

15. See 42 U.S.C. § 11111(a)(1) (1988) (exempting persons undertaking a professional review action in compliance with the Act from liability for damages "under any law of the United States or of any State (or political subdivision thereof)"). Although this Article contends that the immunity provisions should not affect antitrust litigation, they may affect the adjudication of other claims.

review cases, its much-touted "immunity" is more imaginary than real.

Part I introduces the reader to the provisions and legislative history of the Act. Part II examines medical peer-review litigation under the federal antitrust laws to determine what, if any, effect the Act will have on such litigation. Superficially, HCQIA might be seen as providing new sanctions for meritless peer-review litigation; a new presumption of non-liability for peer-review defendants in antitrust cases; and a new recognition that the medical profession's pursuit of quality medical care through its peer-review activities should not be burdened or penalized by the antitrust laws. However, this Article contends that these propositions are not new, for even without HCQIA, groundless peer-review litigation may be sanctioned; peer-review activities may be considered presumptively legal under the antitrust laws; and the good-faith promotion of quality health care through peer review is a legitimate objective and thus a lawful activity under the antitrust laws. Part II will develop these contentions and demonstrate that the so-called immunity granted by the Act from antitrust liability is so limited as to be virtually nonexistent. Part II emphasizes that, as a consequence, the legal approaches to analyzing HCQIA and non-HCQIA antitrust cases will be the same. Thus, although the Act does help to clarify some problems with applying the antitrust laws to peer-review cases, Part II concludes that certain key provisions of the Act that were the focus of reform effect no true substantive or procedural changes in the application of the antitrust laws to such litigation.

Part III analyzes peer-review actions at their most critical juncture—summary judgment—and similarly concludes that procedurally courts should handle cases under HCQIA the same way as they handle cases that are not covered by the Act. In addition, Part III undertakes to untangle the current confusion in summary judgment jurisprudence in antitrust conspiracy cases. By identifying specific problem areas and providing guidelines for the disposition of motions for summary judgments, Part III is intended to be useful in

18. See id. § 11112 (professional review action will be presumed to have met with statutory standards for immunity).
19. See id. §§ 11101(3), (4), (5) (congressional findings prompting legislation).
20. See infra subsection II(B)(1).
21. See infra subsection II(B)(2).
22. See infra subsection II(C)(3).
23. See infra subsection II(B)(3).
analyzing medical peer-review cases whether they fall inside or outside the scope of the Act.

The Article ultimately concludes that, although Congress could have made reforms in the substantive or procedural adjudication of peer-review disputes under the antitrust laws, it has not done so by this Act, and that therefore courts should not interpret HCQIA as if it had enacted true reforms. Moreover, because the immunity granted by HCQIA is limited, a substantial amount of peer-review litigation will continue to arise that is outside the scope of the Act. This Article is therefore intended to guide courts not only in the interpretation of HCQIA, but also in the resolution of medical peer-review litigation under the antitrust laws whether or not the Act applies.

I. WHY HCQIA WAS ENACTED

In enacting HCQIA, Congress recognized that one direct way to improve the quality of medical care in this country was to prevent incompetent or unprofessional physicians from providing such care. The problem in the past has been that groups supposedly responsible for weeding out the bad doctors—state licensing boards, hospitals, and medical societies—often did not do so. One reason for the past failure of peer review has been that such groups simply were not aware that doctors within their jurisdictions had a history of malpractice. To remedy this lack of information, Congress enacted the national reporting provisions of the Act, which require hospitals and other health-care entities to report to state medical boards all disciplinary actions they take against physi-


25. H.R. Rep. No. 903, supra note 24, at 2. The failure of medical peer review in this country was a recurrent theme throughout the congressional hearings, reports, and debates. See Hearings on H.R. 5540, supra note 9, at 48 (Rep. Waxman stated that "the current system does little to eliminate bad doctors. Frankly, I have yet to meet a single health care professional who believes that state licensing boards or hospital peer review committees do an effective job of policing the medical profession.") (emphasis in original); H.R. Rep. No. 903, supra note 24, at 13 ("Unfortunately, to date, neither state disciplinary boards [nor] the peer review system has adequately identified those incompetent or unprofessional practitioners from whom the public must be protected.").

26. See infra notes 33-35 and accompanying text.
cians for incompetence or professional misconduct. The Act further requires anyone who makes a payment pursuant to a medical malpractice claim to report such payment to the Secretary of Health and Human Services.\(^{27}\)

Another reason for the past failure of medical peer review has been the reluctance of physicians to participate actively in the disciplining of their peers for poor professional performance. Whether this reluctance was due primarily to physicians’ fears of being sued for imposing sanctions on their peers, or to physicians’ feelings of sympathy for a fellow professional and a resultant “conspiracy of silence,” the fact of such reluctance has generally been recognized.\(^{28}\) To overcome it, Congress enacted the immunity provisions of the Act.

Congress recognized that the immunity provisions were a necessary quid pro quo to ensure strong support from the medical profession for the establishment of the national data bank of information about physicians and to spur physician cooperation in the reporting system.\(^{29}\) Thus, the two components of the legislation—legal protection to encourage physicians to identify and discipline their incompetent colleagues, and a reporting system to keep track of those physicians with histories of malpractice claims or disciplinary actions—reflect a political compromise.

### A. The Purpose of the Reporting System

The fact of medical malpractice—that some doctors negligently kill or injure patients—provided one impetus for HCQIA’s enactment.\(^{30}\) Although the number of such doctors was assumed to be

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28. See id. § 11101(4) (finding that the threat of treble damage antitrust liability unreasonably discourages physicians from participating in effective professional peer review); Hearings on H.R. 5110, supra note 1, at 237 (“brotherhood of silence” and fear of legal liability have made physicians reluctant to participate in peer review); see also id. at 330, 333 (physicians are “caught between the suspicion of the public that there is a ‘conspiracy of silence’ countenancing inappropriate professional conduct and the very real possibility of lawsuit for libel or on antitrust grounds by an angry colleague”), 430. See also infra note 36.
29. See H.R. Rep. No. 903, supra note 24, at 3 (“Thus, there is a clear need to do something to provide protection for doctors engaging in peer review if this reporting system is to be workable.”); 132 Cong. Rec. H9962 (daily ed. Oct. 14, 1986) (“[I]n order to encourage physicians to act responsibly in reviewing the activities of their fellow physicians, this legislation would provide a very limited immunity from liability for allegations of antitrust violations by disciplined physicians.”) (statement of Rep. Madigan).
30. See H.R. Rep. No. 903, supra note 24, at 2 (bill’s focus is on physicians who injure patients through incompetent or unprofessional service); 132 Cong. Rec. H9957 (daily
small, it was generally agreed that their impact on health care was large. 31 Ridding the profession of bad doctors was repeatedly called for by Congressman Ronald Wyden, a sponsor of the legislation, as the "first step" toward a national malpractice strategy. 32

One of the reasons why incompetent physicians, though arguably few in number, pose such a significant threat to the quality of health care is that they have been able to continue to practice medicine even after determinations were made of their incompetence or unprofessional conduct. Congressional committees received considerable evidence that such doctors have simply moved to other states and reopened their practices. 33 Because no comprehensive national reporting system existed, the state medical boards and the health-care providers in the new locales had no thorough way of uncovering these doctors' past malpractice or disciplinary histories. 34 Moreover, even if those in the new locale did try to investigate the newcomer, the state medical board or medical providers in the old locale frequently were reluctant to provide complete and accurate reports about the doctor because of fear of being sued. 35

31. See Hearings on H.R. 5540, supra note 9, at 47-48 (small but deadly group of incompetent and unprofessional physicians cause serious injury and needless death every day across country); id. at 54, 59 (small fraction of doctors cause a large fraction of malpractice payouts); Hearings on H.R. 5110, supra note 1, at 215 (3%-5% of all physicians have some impairment that detrimentally affects their ability to perform medical care); H.R. REP. No. 903, supra note 24, at 2 ("This legislation would do much to reduce the damage committed by this small, but very destructive, group of doctors.").

32. See, e.g., Hearings on H.R. 5540, supra note 9, at 52 (supporting HCQIA as part of a national strategy to reduce medical malpractice); Hearings on H.R. 5110, supra note 1, at 114 (weeding out incompetent physicians is part of the solution to the current crisis); id. at 192-93 (touting HCQIA as a step toward a national malpractice policy); 132 CONG. REC. H9963 (daily ed. Oct. 14, 1986) (same).


34. Hearings on H.R. 5110, supra note 1, at 223; H.R. REP. No. 903, supra note 24, at 3.

35. Hearings on H.R. 5540, supra note 9, at 41 (failure to report due to fear of being sued); Hearings on H.R. 5110, supra note 1, at 216 ("Fear of legal action often is at the root of a less than truthful complimentary reference."); id. at 307 (physicians "are afraid to risk their own livelihood by reporting a fellow practitioner for fear they might be sued"); H.R. REP. No. 903, supra note 24, at 3 (hospitals remain silent "to avoid lengthy and unpredictable litigation").
Congress focused on the "chilling effect" that the threat of litigation was said to have on peer-review activities in the medical profession. This chilling effect was manifested in the willingness of hospitals or state medical boards to accept the "voluntary" resignation of physicians found to be incompetent or unprofessional in exchange for silence about the reasons for the resignation. Testimony demonstrated that this sort of "plea-bargaining" was practically routine: "When doctors identify another doctor as failing to meet professional standards, the all-too-common solution has been to say, 'Quit practicing here and we won't tell anyone.'"  

36. See Hearings on H.R. 5540, supra note 9, at 27 (Rep. Edwards observed that the "Committee's hearing and report, as well as language of the bill, focus on the chilling effect which treble damages in an anti-trust claim can have on effective peer review"); id. at 44 ("fear of being sued has had a chilling effect on reporting incompetence"); id. at 147-48 (damage claims "have a chilling effect on a physician's willingness to participate in the peer review process."); Hearings on H.R. 5110, supra note 1, at 270 (Jack W. Owen, vice president of the American Hospital Association (AHA), observed that a "proliferation of lawsuits challenging hospital credentialing and peer review actions [has] had a chilling effect on peer review activities"); id. at 298, 323, 327, 357-58 (threat of litigation deters physicians from serving on peer review committees); id. at 338 ("chilling effect on the willingness of members of the profession to challenge the competency of a colleague"); H.R. REP. No. 903, supra note 24, at 3 ("Doctors who are sufficiently fearful of the threat of litigation will simply not do meaningful peer review."); 132 CONG. REC. H11,590 (daily ed. Oct. 17, 1986) (Rep. Waxman observed that "nearly every witness indicated that the threat of litigation under current law is a major barrier to effective peer review"); id. at H9963 (daily ed. Oct. 14, 1986) (Rep. Tauke and Rep. Wyden noted threat of lawsuits was a major deterrent to participation in peer review).  

37. See, e.g., Hearings on H.R. 5540, supra note 9, at 34, where the Office of Inspector General testified:  

For example, many physicians under investigation by state boards would voluntarily surrender their licenses in one state prior to a formal hearing and then would continue practicing medicine by moving to another state where they also maintained a license. In many cases voluntary surrender of a license became part of a "plea bargain" arrangement whereby the boards could avoid costly due process hearings.  

Id. See also Hearings on H.R. 5110, supra note 1, at 311-12 ("standard practice" is for physicians to try to negotiate surrendering of a license to a state medical board in exchange for dropping charges and then to move into another jurisdiction to save their reputation); id. at 317 (Rep. Waxman noted reasons why a hospital might prefer "plea bargaining" by giving a neutral recommendation in exchange for a "voluntary" resignation in order to get rid of incompetent physicians and pass them on to someone else); H.R. REP. No. 903, supra note 24, at 3 ("hospitals too often accept 'voluntary' resignations of incompetent doctors in return for the hospital's silence about the reasons for the resignations").  

38. Hearings on H.R. 5110, supra note 1, at 191 (statement of Rep. Waxman). See also id. at 216 (providers "often force impaired physicians to resign to avoid adverse publicity and fail to report inadequacies known to them"); id. at 222 ("common practice" in the medical profession "to provide neutral or good references to individuals who don't deserve them"); id. at 226 (voluntary surrender of license in one state as part of a "plea bargain" arrangement).
The reporting system in the Act was intended to discourage this kind of agreement and thereby "end the ability of incompetent doctors to skip from one jurisdiction to another without detection." 99

B. The Purpose of Granting Immunity

"Doctors are in the best position to do something about malpractice because they see it happening around them." 40 The problem, continually discussed during congressional consideration of HCQIA, is that competent doctors are disinclined to do anything about malpractice because of fear that they will be sued by the incompetent ones:

Every physician I know in the country who is practicing medicine tells me that there are one or more physicians at his or her hospital who are incompetent and when I say why are they still there, they say we are afraid to bring an action against them because they will retaliate . . . .41

Whether the belief is justified or not, many physicians believe that to serve in any peer-review capacity is necessarily to risk being named in a lawsuit.42 This fear of litigation has led some physicians to refuse to participate on peer-review committees or panels; and even if they do serve, some refuse to discipline a colleague whom they believe deserves to be sanctioned for substandard performance.43 This failure of physicians to participate in peer-review activities has resulted in a widely acknowledged failure of the medical profession to get rid of its incompetent members,44 despite the consensus that the profession itself is the body most qualified to identify


41. Hearings on H.R. 5540, supra note 9, at 66 (statement of Dr. Sidney M. Wolfe, Director, Public Citizen Health Research Group).

42. Although there was considerable testimony about the chilling effect that litigation was thought to have on peer review, see supra notes 35-36 and accompanying text, some vigorously disputed both the fact of and the basis for such deterrence. See Hearings on H.R. 5540, supra note 9, at 96-99, 121-23 (no evidence that legislation is needed); 132 CONG. REC. H9961 (daily ed. Oct. 14, 1986) (Rep. Edwards stated that "peer review participants' fear of damage claims is unfounded . . . . The view of several witnesses was, 'if it ain't broke, don't fix it.' ").

43. See supra notes 35-39 and accompanying text.

44. See Hearings on H.R. 5540, supra note 9, at 106, 127, 144-45; Hearings on H.R. 5110, supra note 1, at 278, 298, 327, 358, 368; supra notes 35-36.
and discipline bad doctors.\textsuperscript{45}

During congressional consideration of HCQIA, the most often invoked example of peer-review litigation run amok—and of the chilling effect such litigation was said to have on legitimate peer-review activities—was the federal district court's damage award in \textit{Patrick v. Burget}.\textsuperscript{46} The district court awarded Dr. Timothy Patrick nearly two million dollars in a successful treble-damage antitrust action against his former physician colleagues based upon peer-review proceedings instituted against him.\textsuperscript{47} The substantial award in this case was frequently cited to demonstrate the need for legal immunity for participants in peer-review activities.\textsuperscript{48}

The invocation of the \textit{Patrick} case as a principal argument for granting immunity is ironic, for as Congressman Henry Waxman, a sponsor of the legislation, made clear at the close of the debates, the peer-review activities in the \textit{Patrick} case would never obtain immunity under HCQIA.\textsuperscript{49} Regardless of the outcome of the \textit{Patrick} case, however, the sponsors of the legislation were prepared to provide some sort of immunity from liability for physicians who participate in good-faith peer review, in the belief that such immunity would encourage doctors to engage in professional self-policing.\textsuperscript{50}

\begin{footnotes}
\item[45] See supra note 40 and accompanying text.
\item[47] See id. at 98.
\item[48] See, e.g., \textit{Hearings on H.R. 5540}, supra note 9, at 27 (Rep. Edwards observed that a "primary impetus for [HCQIA's] immunity [provision] was the substantial damage award, including treble damages, made by an Oregon Federal district court jury in the case of \textit{Patrick v. Astoria Clinic} [sic]"); id. at 66 (discipline of physicians threatened by the "Oregon case" and others like it); \textit{Hearings on H.R. 5110}, supra note 1, at 279 (\textit{Patrick} case was just one of many recent rulings that have "amplified the litigation concerns of those who participate in peer review"); id. at 333, 340-41 (noting the chilling effect that cases like \textit{Patrick} and others have had on the medical profession); id. at 337-38 (\textit{Patrick} helped "to heighten the anxiety experienced by many physicians"); 132 \textit{Cong. Rec.} H9962 (daily ed. Oct. 14, 1986) (as a result of the \textit{Patrick} decision, doctors "began to mute their criticism of fellow physicians or to refuse to participate in peer reviews").
\item[50] See, e.g., \textit{Hearings on H.R. 5110}, supra note 1, at 198 (statement of Rep. Wyden); 132 \textit{Cong. Rec.} H9963 (daily ed. Oct. 14, 1986) (Rep. Wyden testified that the legislation 'encourages physicians' [sic] to blow the whistle on malpracticing colleagues by protecting them from individual damage suits that might result from honest, fair peer review.').
\item[903] See also H.R. \textit{Rep. No. 903}, supra note 24, at 9 ("Because the reporting system required under this legislation will most likely increase the volume of such suits, the Committee feels that some immunity for the peer review process is necessary."); 132 \textit{Cong. Rec.} H11,590 (daily ed. Oct. 17, 1986) (Rep. Waxman explaining the effect on immunity whether \textit{Patrick} is upheld, modified, or overruled); supra note 29. The \textit{Patrick} case is discussed \textit{infra} at notes 194-205 and accompanying text.
\end{footnotes}
C. The Narrow Scope of the Immunity Provisions

During the course of congressional consideration, numerous revisions substantially narrowed the scope of immunity granted by the Act. Congressman Waxman observed that "[t]he immunity left after these modifications is extremely limited, but essential." To qualify for protection under HCQIA, subsection 11112(a) requires the peer reviewers to have acted:

1. in the reasonable belief that the action was in furtherance of quality health care,
2. after a reasonable effort to obtain the facts of the matter,
3. after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
4. in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

References to the limited nature of the immunity were made repeatedly during the hearings and debates, evidently to quell strong criticisms of the grant of immunity in the first place. The principal objection to the immunity was that it could be used to shield not just legitimate peer-review actions against a malpracticing physician, but also illegitimate peer reviews motivated by prejudice, anticompetitive purposes, personal vindictiveness, or by some other concern wholly unrelated to the quality of the physician's medical care.  

54. See Hearings on H.R. 5540, supra note 9, at 95 (it cannot be presumed that peer-review actions are necessarily for the betterment of health care, but to the contrary, in light of increased competition among physicians, it is likely that the process will be abused for anticompetitive or antisocial purposes); 132 Cong. Rec. H9960 (daily ed. Oct. 14, 1986) (Rep. Edwards stated that "the bill fails to adequately protect competent physicians from abusive actions by illegal professional review. . . . [T]he fundamental
Examples of abuse of the peer-review process include adverse peer-review decisions made, not because of any incompetence or misconduct on the physicians' part, but because of their race or origin or the race or origin of their patients; because the physicians served poor, uninsured, or underinsured patients; because they posed an economic threat to other physicians; because of some other "turf battle" among medical specialists; or because they blew the whistle on other colleagues who were incompetent.

Congressman Waxman frequently took the opportunity to assure the critics that HCQIA was not intended to protect such abuses:

I want to make it clear, however, that we fully agree that we cannot tolerate abuses of the peer review system, and that H.R. 5540 was never intended to protect any such abuses.

This is true whether the concern is with anti-competitive activities, with actions based on race, or any other prejudicial or discriminatory factors. We have emphasized this throughout our discussions of this bill within the Energy and Commerce Committee and with the staff of the Judiciary Committee.

To reiterate: nothing in H.R. 5540, as currently drafted, would protect the type of abuse that I have referred to.

flaw of the bill in its present form continues to be that the immunities shield professional actions which are fair as well as actions which are illegal.”).  
55. See Hearings on H.R. 5540, supra note 9, at 68, 71-72, 108-111, 137-38; 132 Cong. Rec. H9961 (daily ed. Oct. 14, 1986) (“The testimony presented to the Judiciary Committee shows that peer review often has the result if not the intent of discriminating against minority and foreign born doctors.”).
56. See Hearings on H.R. 5540, supra note 9, at 74-76.
58. E.g., Patrick v. Burget, 486 U.S. 94 (1988); see supra notes 46-49 and accompanying text. See also infra note 61 and accompanying text.
59. See Hearings on H.R. 5110, supra note 1, at 346, 348-49.
60. See Hearings on H.R. 5540, supra note 9, at 56, 60.
61. Id. at 47 (emphasis in original). See also id. at 49 (legislation “could not possibly bar a doctor victimized because of his or her race, age or sex from pursuing all remedies currently available under our civil rights laws. Nor could it be used to shield actions to harass physicians who are willing to blow the whistle on their incompetent colleagues.”) (emphasis in original); Hearings on H.R. 5110, supra note 1, at 192 (Rep. Wyden stated: “There is one thing this bill will not do. It will not shield doctors from liability for what are truly anticompetitive business practices. The only protected activities are those dealing with the professional behavior and competence of individual practitioners.”); 132 Cong. Rec. H9957 (daily ed. Oct. 14, 1986) (Rep. Waxman stated: “The immunity provisions have been restricted so as not to protect illegitimate actions taken under the guise of furthering the quality of health care. Actions that violate civil rights laws or actions that are really taken for anticompetitive purposes will not be protected under
In order to protect physicians who participate in a good-faith effort to weed out their incompetent colleagues, without shielding abuses of the peer-review process, the immunity provisions were substantially redrafted. In particular, they apply only to actions based on "the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients)." The aim was to protect only peer reviews motivated by concerns about an individual physician's ability to provide quality health care. To emphasize this point, the drafters of the Act specifically defined circumstances that would not be considered to be based on competence or professional conduct. These would include, for example, decisions based on a physician's joining or not joining a professional society, on a physician's fees or advertising, on the economic organization of a medical practice, or on a physician's activities with other non-physician health-care professionals. This list was not meant to be all-inclusive, and in case the drafters overlooked any similar circumstance, they excluded immunity "for any other matter that does not relate to the competence or professional conduct of a physician." Moreover, the Act protects only decisions based on the professional performance of an individual physician; "actions against a class of physicians do not fall

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62. Hearings on H.R. 5540, supra note 9, at 52 (Rep. Wyden stated that "[w]e have taken great care to insure that the protections offered under this legislation cannot be used to shelter anti-competitive or discriminatory behavior."); H.R. REP. No. 903, supra note 24, at 3 ("The bill protects innocent and often helpless consumers from abuses by bad doctors without insulating improper anticompetitive behavior from redress."); id. at 9 ("Initially, the Committee considered establishing a very broad protection from suit for professional review actions. In response to concerns that such protection might be abused and serve as a shield for anti-competitive economic actions under the guise of quality controls, however, the Committee restricted the broad protection.").


64. Hearings on H.R. 5540, supra note 9, at 49 (Rep. Waxman stated: "[W]e have made it perfectly clear that the only matter at issue under our bill is the ability of doctors—one by one—to practice medicine competently and professionally."); Hearings on H.R. 5110, supra note 1, at 192 ("The only protected activities are those dealing with the professional behavior and competence of individual practitioners.").


66. 42 U.S.C. § 11151(9)(E) (1988). See also 132 CONG. REC. H11,591 (daily ed. Oct. 17, 1986) (Rep. Waxman termed the listed exceptions as "illustrative, not exhaustive."); 132 CONG. REC. H9959 (daily ed. Oct. 14, 1986) (Rep. Waxman observed that the "list of exclusions is not exhaustive... The purpose of [§ 11151(9)(E)] is simply to avoid the inference that any matters not listed in this subsection are necessarily ones related to competence or professional conduct.").
within the purview of this legislation." 67

Criticism prompted other limitations on the scope of immunity. 68 The immunity applies only to damage actions, not to suits for declaratory or injunctive relief (for example, suits for reinstatement of privileges). 69 Presumably, a prevailing plaintiff in any such equitable antitrust action would still be entitled both to the requested equitable relief and to costs and attorney's fees. 70 HCQIA's protection also does not extend to civil rights suits 71 or to suits by public enforcement agencies, such as the Department of Justice, the Federal Trade Commission, or state attorneys general. 72 Further, the immunity applies only to peer-review actions involving physicians, not to those involving nurses or other health professionals. 73 In addition, a health-care facility that fails to comply with the reporting requirements of the Act will not be entitled to immunity. 74

II. HCQIA AND PEER-REVIEW LITIGATION

A. Peer-Review Litigation Under the Antitrust Laws Before HCQIA

Of all the possible claims that can be advanced in peer-review litigation, federal antitrust claims seem to have posed the biggest threat to the medical profession and to have been the major factor behind its demand for legal immunity from liability for peer-review activity. 75 Doubtless, the threat of treble-damage liability as well as

67. See H.R. Rep. No. 903, supra note 24, at 21 (for example, a hospital's requirement that physicians have a specific type or level of specialty training to qualify for hospital privileges does not fall within the Act).


69. See 42 U.S.C. § 11111(a)(1) (1988) (limitation on liability for damages); H.R. Rep. No. 903, supra note 24, at 9 ("In addition, the bill does not restrict the rights of physicians who are disciplined to bring private causes of action for injunctive or declaratory relief.").


74. See id. § 11139(c).

75. See supra notes 16 and 46-48 and accompanying text.
the frequent absence of insurance coverage for such claims have diminished many physicians' enthusiasm for participating in professional peer review.

Nonetheless, the notion that antitrust immunity is necessary to encourage active peer review is somewhat belied by the cool reception that the federal judiciary has generally given lawsuits over staff privileges. In fact, the antitrust laws have rarely been used successfully to overturn peer-review decisions. Not only do defendants win most cases, but the federal courts have historically been reluctant to entertain such claims, if not downright antagonistic towards them.

This judicial coolness seems to come from several sources. First, some courts have implicitly analogized medical staff decisions by a hospital to the decisions of a public agency, thus according them considerable deference. Such courts are avowedly reluctant to "second-guess" what they perceive to be expert professional judgment. Second, on the assumption that antitrust lawsuits deter good-faith peer review, some courts are reluctant to contribute to this perceived "chilling effect." Third, some courts are undoubt-
edly daunted by the complex, time-consuming, and costly nature of antitrust litigation in general. Not only are discovery and trial likely to be lengthy and burdensome, but antitrust jurisprudence itself is not a model of clarity or consistency. There is notorious and widespread disagreement among jurists and legal scholars even over the goals that the antitrust laws are designed to achieve.

Finally, and perhaps most importantly, there appears to be an undercurrent of judicial concern that the antitrust laws were never faced with the threat of treble damages for alleged antitrust violations "will either dilute their peer-review reports" or will discontinue their participation in the peer-review process, cert. denied, 472 U.S. 1027 (1985); Pontius, 552 F. Supp. at 1362, 1376 (referring to the chilling effect of potential damages for participation in peer review).

81. See, e.g., Marrese, 748 F.2d at 393-94 (expressing reluctance to allow further burdening of federal courts with antitrust litigation where state law mandates peer review), cert. denied, 472 U.S. 1027 (1985); Pontius, 552 F. Supp. at 1361 (describes "the pressing need to avoid the expense of antitrust litigation in an 'industry' already highly regulated and fraught with serious problems of cost and quality control").


intended to apply to disputes over medical staff privileges.\textsuperscript{84} This sentiment is perhaps founded on a lurking judicial suspicion that many, if not most, such cases are illegitimate: just a sore loser trying to turn his losses into a federal case.\textsuperscript{85} Representative of this judicial attitude is the United States Court of Appeals for the Seventh Circuit's observation that a cause of action under the Sherman Act is not created "every time a lawyer, accountant, or architect is denied partnership status in a national firm, a business executive is fired or denied a promotion by a national corporation, or a physician, surgeon, or specialist has hospital staff privileges denied or revoked."\textsuperscript{86}

A number of courts have charged, or come close to charging, that medical staff privileges cases brought under the antitrust laws are "frivolous."\textsuperscript{87}

On the other hand, the federal courts have not been willing to dismiss such cases out of hand. One of the principal reasons for the judiciary's stopping short of announcing a blanket hands-off policy seems to be its concern that if peer-review actions are to be exempt from antitrust scrutiny, then such an exemption should rightfully

\textsuperscript{84} See, e.g., Jaffee v. Horton Memorial Hosp., 680 F. Supp. 125, 127 (S.D.N.Y. 1988) ("This case presents an almost classic example of use of the antitrust laws to obtain relief of doubtful social or economic value, which was never contemplated by the 19th Century trustbusters who drafted these laws."); Pontius, 552 F. Supp. at 1361 (expressing grave doubts that the Sherman Act was ever intended to provide federal courts with jurisdiction over hospital staff-privileges cases).

\textsuperscript{85} See, e.g., Husain v. Helene Fuld Medical Center, 1990-1 Trade Cas. (CCH) § 68,905, at 62,858 (D.N.J. 1989) ("not every act that causes a person to suffer a personal or professional set-back can be turned into a Sherman Act matter"); Thompson v. Wise Gen. Hosp., 707 F. Supp. 849, 855 (W.D. Va. 1989) ("courts should not allow plaintiffs, by charging conspiracies in restraint of trade, to turn every case into a Sherman Act matter"), aff'd, 896 F.2d 547 (4th Cir.), cert. denied, 111 S. Ct. 132 (1990); Rosenberg v. Healthcorp Affiliates, 663 F. Supp. 222, 224 (N.D. Ill. 1987) (not every hospital staff exclusion case is significant enough to warrant the concern of the federal antitrust laws); Seglin v. Esau, 769 F.2d 1274, 1280 n.6 (7th Cir. 1985) (hard to ignore a suspicion that the facts of the case have been forced into an antitrust mold to achieve federal jurisdiction).

\textsuperscript{86} Marrese v. Interqual, Inc., 748 F.2d 373, 393 (7th Cir. 1984), cert. denied, 472 U.S. 1027 (1985). See also Robinson v. Magovern, 521 F. Supp. 842, 891 (W.D. Pa. 1981) ("Congress did not pass the antitrust laws in order to insure that every young surgeon can perform the type and number of procedures that he considers to be most satisfying."), aff'd, 888 F.2d 824 (3d Cir.), cert. denied, 459 U.S. 971 (1982).

\textsuperscript{87} Ezpeleta v. Sisters of Mercy Corp., 800 F.2d 119, 122 (7th Cir. 1986) (future antitrust challenges regarding staff privileges under Indiana medical peer review process may be deemed "frivolous" because of clear bar of state action doctrine); Harron v. United Hosp. Center, Inc., 522 F.2d 1133, 1134 (4th Cir. 1975) (per curiam) ("frivolous to urge that employment of a single doctor to operate the radiology department of a hospital invokes the Sherman Act"); cert. denied, 424 U.S. 916 (1976).
Another reason the courts have continued, at least nominally, to entertain such cases is that, as discussed earlier, peer-review decisions by their very nature are fraught with the potential for anticompetitive abuse. The peer-review decision is typically made on the recommendation of numerous members and committees of the medical staff of the hospital who individually, while they are peers, are also direct or indirect competitors of the plaintiff physician. The denial or termination of medical staff privileges necessarily has the effect of eliminating a competitor and thus, at least arguably, of reducing competition for the remaining medical staff members. The very act of denying or terminating privileges can thus raise antitrust concerns: superficially, it can be argued to look like a classic group boycott.

As one court has observed of medical staff privileges cases: "The antitrust laws are at least arguably implicated because by preventing a plaintiff physician from furnishing medical services to patients within a specified market, the conspirators insulate themselves to that extent from potential competition and thereby distort the normal market mechanism." Abuse of the peer-review process is not just hypothetically possible but has been found to have occurred in a small but significant number of cases. Because of this potential for abuse, neither the courts, nor Congress, have been

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88. See Pontius, 552 F. Supp. at 1361 ("further jurisdictional limitations ought to come from Congress rather than district courts").

89. See supra notes 54-60 and accompanying text; see also Miles & Philp, supra note 13, at 504 (observing that to some extent, peer review puts the "fox in the chicken coop").

90. See Weiss v. York Hosp., 745 F.2d 786, 819-20 (3d Cir. 1984) (hospital's denial of staff privileges to osteopaths was sufficiently close to traditional boycott that the characterization is appropriate), cert. denied, 470 U.S. 1060 (1985); McElhinney v. Medical Protective Co., 549 F. Supp. 121, 132 (E.D. Ky. 1982) (adopting the position that a classic group boycott is a "concerted attempt by a group of competitors at one level to protect themselves from non-group members who seek to compete at that level"). See also L. Sullivan, HANDBOOK OF THE LAW OF ANTITRUST 229-32 (1977) (describing characteristics of boycotts); supra note 12 and accompanying text.


92. A few plaintiffs have prevailed at trial. See, e.g., Patrick v. Burget, 486 U.S. 94 (1988) (respondents determined to have violated §§ 1 and 2 of the Sherman Act by initiating and participating in peer-review proceedings in order to reduce competition); Oltz v. St. Peter's Community Hosp., 861 F.2d 1440 (9th Cir. 1988) (plaintiff damaged by unlawful conspiracy among anesthesia service providers designed to eliminate competition); Boczar v. Manatee Hosps. & Health Sys., Inc., No. 88-1867-CIV-T-17B (M.D. Fla. Feb. 12, 1991) (unpublished), reported at 60 ANTITRUST & TRADE REG. RPRTR. 277 (1991) (physician suspended by hospital was awarded $450,000 treble damage judgment, having allegedly been "subjected to 'anticompetitive exclusion' through acts of intimidation, coercion, harassment, extortion, and threats"). See also supra notes 55-60 and accompanying text (describing abuses of peer review).
ready to exempt medical peer review completely from antitrust scrutiny.

B. HCQIA's Weak Disincentives to Litigate

As discussed earlier, one of the principal goals of the Act was to encourage active, good-faith peer review by discouraging peer-review litigation.\(^9\) Congress chose several means to create disincentives for potential plaintiff physicians to bring such lawsuits. First, there is a cost-shifting provision, which requires the court to award costs, including reasonable attorney's fees, to the defendants if the plaintiff's claim or conduct during the litigation was unreasonable or groundless.\(^4\) Second, the Act creates a presumption that the defendants acted reasonably and provided fair procedures when they undertook their peer-review activities.\(^5\) Third, the Act grants what has been termed limited "immunity" to peer-review participants.\(^6\)

These provisions were lauded as providing a needed deterrent to peer-review litigation.\(^7\) The following discussion suggests that these highly touted changes effect no real procedural or substantive change in antitrust law, and thus that HCQIA's bark is decidedly fIERcer than its bite.

1. The Cost-Shifting Provision.—The Act requires a court to award prevailing costs, including reasonable attorney's fees, to a substantially prevailing defendant if the plaintiff's claim or conduct during the litigation "was frivolous, unreasonable, without foundation, or in bad faith."\(^8\) While this provision may serve to emphasize Congress's concern over frivolous litigation in the peer-review arena, the sanctions provided by it were already available under either rule

\(^9\) See supra notes 36-38, 40-48, and accompanying text.


\(^5\) See 42 U.S.C. § 11112(a) (1988); infra subsection II(B)(2).


In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section 11112(a) of this title and the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.

\textit{Id.}
11 of the Federal Rules of Civil Procedure\textsuperscript{99} or some other provision governing frivolous litigation and abusive practices in the federal courts.\textsuperscript{100}

The culpability standard in HCQIA that triggers this cost-shifting sanction—that plaintiff’s claim or conduct be “frivolous, unreasonable, without foundation, or in bad faith”—is identical to that in the National Cooperative Research Act of 1984.\textsuperscript{101} That language in turn was directly based on the Supreme Court’s interpretation of the cost-shifting provision of title VII of the Civil Rights Act of 1964.\textsuperscript{102} In \textit{Christianburg Garment Co. v. EEOC},\textsuperscript{103} the Supreme Court

\textsuperscript{99} Rule 11 of the Federal Rules of Civil Procedure requires a court to impose a sanction, which may include an order to pay reasonable expenses including a reasonable attorney’s fee, upon a party or attorney who by signing a document falsely certifies that: to the best of the signer’s knowledge, information, and belief formed after reasonable inquiry [the document] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

\textit{FED. R. CIV. P. 11}.

\textsuperscript{100} \textit{See}, e.g., \textit{FED. R. CIV. P. 16(f)} (governing schedulings and pretrial conferences); \textit{FED. R. CIV. P. 26(g)} (governing discovery abuses); \textit{FED. R. CIV. P. 37} (providing for sanctions for failure to conduct discovery); \textit{APP. R. CIV. P. 38} (allowing damages and costs for frivolous appeals); 28 U.S.C. § 1927 (1988) (sanctions against attorney who “unreasonably and vexatiously” multiplies proceedings in a case).

\textsuperscript{101} 15 U.S.C. §§ 4301-4305 (1988). The cost-shifting section of this statute provides that:

the court shall . . . award to a substantially prevailing party defending against any claim [under the federal antitrust laws or similar state statutes] the cost of suit attributable to such claim, including a reasonable attorney’s fee, if the claim, or the claimant’s conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.

\textit{Id.} § 4304(a)(2). Congressman Waxman stated that HCQIA’s cost-shifting provision was taken from this language. \textit{See} 132 \textit{CONG. REC.} H11,591 (daily ed. Oct. 17, 1986).

\textsuperscript{102} Section 706(k) of title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1988), provides: “In any action or proceeding under this title the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee as part of the costs.” Explaining this provision, a congressional committee on the Cooperative Research Act stated:

The Conferees believe that the Supreme Court’s \textit{Christianburg} standard, [see infra notes 103-105 and accompanying text] as further explicated by the lower courts, is an appropriate one to adopt in the context of suits against joint R&D ventures, and that it will achieve the desired goal of protecting law-abiding defendants from baseless and bad faith attacks while ensuring that private enforcement of the antitrust laws is not deterred. By adopting a well-established and well-understood standard, Congress can provide the greatest certainty to litigants about the standard by which their conduct of litigation will be measured.

\textit{H.R. CONF. REP. NO. 1044}, 98th Cong., 2d Sess. 15 (1984), \textit{reprinted in} 1984 \textit{U.S. CODE CONG. & ADMIN. NEWS} 3131, 3140. While the committee did not expressly discuss the
held that an award of attorney's fees to a prevailing defendant in a title VII case may be made upon a finding that the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."\textsuperscript{104} Although a finding that the plaintiff acted in subjective bad faith is thus not a necessary condition prior to imposing the sanctions on a title VII plaintiff, it is certainly a sufficient one: "needless to say, if a plaintiff is found to have brought or continued such a claim in \textit{bad faith}, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense."\textsuperscript{105}

Thus, HCQIA's culpability standard for shifting the defendant's costs to the plaintiff is ultimately derived from and identical to title VII's culpability standard. The significance of this observation is that title VII's standard has been found as a practical matter to be substantially the same as the culpability standard for imposing costs and attorney's fees under rule 11.\textsuperscript{106} Logically, it follows that, if the standards of title VII and rule 11 for imposing sanctions are effectively the same, and the standards of title VII and HCQIA are largely identical, then the standards of rule 11 and HCQIA must likewise be the same.

This last proposition has more than syllogistic appeal. It has the support of both common sense and the cases. Both provisions are rooted in the goal of deterring groundless litigation.\textsuperscript{107} Neither

\begin{footnotesize}
\textsuperscript{104} See, e.g., Forsberg v. Pacific Northwest Bell Telephone Co., 840 F.2d 1409, 1422 (9th Cir. 1988) (under either rule 11 or title VII, the district court must find that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith); Tall v. Town of Cortlandt, 709 F. Supp. 401, 409 (S.D.N.Y. 1989) ("Second Circuit's objective interpretation of Rule 11 . . . is virtually identical to the standard set forth in \textit{Christianburg}.") While the culpability standards for rule 11 and title VII may be the same, it is not necessarily true that sanctions may be appropriate under both in any given case. For example, sanctions under title VII are appropriate only if the plaintiff's action itself is frivolous or unreasonable; sanctions may be awarded under rule 11 for particular conduct. \textit{See infra} note 110.
\end{footnotesize}
provision makes a finding of plaintiff's subjective bad faith a necessary precondition to defendant's recovery,\textsuperscript{108} and upon a finding of culpability, both make the imposition of sanctions mandatory.\textsuperscript{109} Indeed, it is difficult to imagine a case where a sanction would be appropriate under the Act, but not similarly available under rule 11 or the other provisions permitting sanctions for abusive litigation practices.\textsuperscript{110}

rule 11 are deterrence, punishment, and compensation); \textit{Amendments to the Federal Rules of Civil Procedure}, 97 F.R.D. 165, 198 (1983) (advisory committee notes to rule 11 amendment) ("imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses").

108. HCQIA's use of the disjunctive "or in bad faith" indicates that a finding of subjective bad faith will justify an award of fees, but is not required. This interpretation is bolstered by \textit{Christianburg}, from which HCQIA's standard was ultimately derived. See \textit{supra} notes 102-105 and accompanying text (Supreme Court made clear that subjective bad faith was not required under title VII's fee shifting provision). Similarly, a finding of subjective bad faith is not a necessary condition prior to imposing sanctions under rule 11. \textit{See Eastway Constr. Corp. v. City of New York}, 762 F.2d 243, 253 (2d Cir. 1985) ("Simply put, subjective good faith no longer provides the safe harbor it once did [under rule 11]."), \textit{cert. denied}, 484 U.S. 918 (1987); 2A \textit{MOORE'S FEDERAL PRACTICE} ¶ 11.02[3], at 11-15 (2d ed. 1990) ("The 'objective test' for sanctionable conduct announced in \textit{Eastway} has now been universally adopted."); \textit{Note, The Demise of a Subjective Bad Faith Standard Under Amended Rule 11}, 59 \textit{TEMPLE L.Q.} 107 (1986) (discussing how \textit{Eastway} removed the requirement of subjective bad faith).

109. Like rule 11, HCQIA provides that the court "shall impose" sanctions if the requirements are met. This language has been interpreted as imposing mandatory sanctions under rule 11. \textit{See Thomas}, 836 F.2d at 876 (mandatory sanctions for violation of rule 11); \textit{ABA Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure}, 121 F.R.D. 101, 122 (1988) (mandatory nature of sanctions).

110. In one sense, HCQIA's cost-shifting provision arguably could be "tougher" than rule 11 because a court under rule 11 could impose a lesser sanction than attorney's fees and costs, while HCQIA mandates this sanction. \textit{See, e.g., Thomas}, 836 F.2d at 878 (appropriate sanction for violation of rule 11 may be "a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to circumstances"). However, the lack of discretion in HCQIA could cut the other way if a court declined to characterize arguably inappropriate conduct as "frivolous" or "unreasonable" because of the severity of the single available sanction. On the other hand, it is arguable that rule 11 is broader or "tougher" than HCQIA's cost-shifting sanction. One reason is that while HCQIA (like title VII) seems to allow an award of attorney's fees only against a party, rule 11 allows an award against "counsel, a party, or both." \textit{Eastway Constr.}, 821 F.2d at 124. In title VII cases, some courts have hesitated to assess sanctions solely against a party under title VII's cost-shifting provision (which is analogous to HCQIA's), but have assessed sanctions under rule 11 against the attorney alone or against the attorney and the party. \textit{See, e.g., Johnson v. N.Y.C. Transit Auth.}, 823 F.2d 31, 32 (2d Cir. 1987) (per curiam) (fees awarded against attorney and party); \textit{Witzsche v. Jaeger & Haynes, Inc.}, 707 F. Supp. 407, 412 (W.D. Ark. 1989) (fees assessed against plaintiff and attorney, jointly and severally); \textit{Brownlow v. General Serv. Employees Union}, 35 Empl. Prac. Dec. (CCH) ¶ 34,886 (N.D. Ill. 1984) (fee assessed against attorney alone). Moreover, HCQIA is like the title VII cost-shifting provision in that it is outcome based. This is because awards
Moreover, prior to HCQIA's effective date, the federal courts had not hesitated to impose sanctions under rule 11 or other provisions against peer-review plaintiffs in appropriate cases, or to threaten invoking the rule: "In this very expensive area of litigation, we must require that attorneys think before they file." Thus, any additional deterrence promised by HCQIA's cost-shifting provision is probably more imaginary than real.

2. The Presumption in the Defendants' Favor.—HCQIA limits the liability of peer-review participants who meet the four standards of reasonableness and due process set forth in subsection 11112(a). HCQIA further provides that the peer reviewers' actions shall be presumed to have met these standards "unless the presumption is rebutted by a preponderance of the evidence." HCQIA thus creates a presumption of nonliability for peer reviewers who sanction doctors and specifies the burden of proof required to rebut that presumption.

A comparable rebuttable presumption and allocation of the burden of proof exist without HCQIA. As discussed below, peer
review fits within the category of commercial conduct that the Supreme Court has dealt with as presumptively lawful in the absence of additional, rebuttal evidence from the plaintiff. Moreover, a burden of proof requiring the plaintiff to establish the illegality of the defendant's conduct by a preponderance of the evidence is already well established under antitrust law.

a. Presumption of Nonliability.—To prove a violation of section 1 of the Sherman Act, the plaintiff must prove that the defendants engaged in a "contract, combination . . . or conspiracy" to restrain trade unreasonably. Proving such a conspiratorial agreement can be difficult. Frequently the plaintiff has no direct evidence of it, but must rely on circumstantial evidence of the defendants' conduct, which arguably gives rise to an inference of unlawful agreement. The Supreme Court has not required the plaintiff to produce direct evidence of a formal agreement, but rather has allowed the agreement to be inferred from the surrounding circumstances. However, at what point the factfinder will be permitted to draw that inference from the plaintiff's circumstantial evidence has become a critical and controversial issue in section 1 cases.

With the observation that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case," the Supreme Court appears increasingly ready to prohibit an inference of illegality in the absence of direct or strong circumstantial evidence. This Article contends that a judicial rule that prevents the factfinder from inferring illegality in certain kinds of circumstantial cases is tantamount to a congressional rule, such as HCQIA, which requires the factfinder to presume the nonliability of the defendants in certain kinds of cases. In both cases, comparable burdens are placed on the plaintiff to come forward with affirmative evidence to overcome the operation of the rule.

115. See infra subsection II(B)(2)(a).
116. See infra note 170 and accompanying text.
118. See Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954) (business behavior is admissible circumstantial evidence from which the factfinder may infer agreement); Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1450 (9th Cir. 1988) ("Because direct evidence of concerted action . . . is so rare, the Supreme Court has traditionally granted fact finders some latitude to find collusion or conspiracy from parallel conduct and inferences drawn from the circumstances.").
119. 6 P. AREEDA, ANTITRUST LAW ¶ 1405, at 22 (1986) ("most frequent operational question encountered by antitrust courts is whether a conspiracy claim is sufficiently supported to require a trial").
Courts have not permitted the factfinder to infer illegality in some cases of parallel business conduct among competitors. While evidence that the defendants pursued parallel or identical courses of conduct may be relevant to a finding of illegal conspiracy, the factfinder may not infer illegality from evidence of such "conscious parallelism" alone.\textsuperscript{121} Something more is needed—a so-called "plus factor"—which would make the inference of unlawful conspiracy stronger than the inference of lawful independent action.\textsuperscript{122} The practical effect of this plus-factor approach is to create a judicial presumption of legality for consciously parallel conduct among competitors, a presumption that can be rebutted by additional evidence—something more in the way of motive to conspire or conduct consistent with conspiracy—that supports an inference of illegality.

A similar rebuttable presumption of legality exists for a manufacturer who terminates one of its distributors after receiving complaints about the distributor from its other distributors. In \textit{Monsanto Co. v. Spray-Rite Service Corp.},\textsuperscript{123} several of defendant Monsanto's distributors had complained to it that another distributor, plaintiff Spray-Rite, was "price-cutting" by not adhering to Monsanto's contractual resale prices. Subsequent to receiving these complaints, Monsanto terminated Spray-Rite, which in turn filed an antitrust action alleging that Monsanto and the complaining distributors had engaged in a vertical price-fixing conspiracy.\textsuperscript{124}

The Supreme Court decided that evidence that a manufacturer had terminated a price-cutting distributor following complaints by other competitor distributors was, by itself, not sufficient to support an inference of illegal concerted action.\textsuperscript{125} The Court observed that on such evidence alone a manufacturer could simply be unilaterally exercising either its legal rights under \textit{United States v. Colgate & Co.}\textsuperscript{126} to refuse to deal with those who do not comply with its previously announced resale prices,\textsuperscript{127} or its prerogatives under \textit{Continental Theatre Enters.}, 346 U.S. at 541.

\begin{footnotes}
\item[121] \textit{Theatre Enters.}, 346 U.S. at 541.
\item[122] See 6 P. \textit{AREEDA}, supra note 119, ¶ 1434; L. \textit{SULLIVAN}, supra note 90, at 317-22 (1977). For example, four filling stations may all charge identical prices for gasoline. Because such price parallelism may logically be the result either of intense, lawful price competition or of unlawful collusion to fix prices, a court would be reluctant to allow a factfinder to conclude the latter without some additional evidence beyond the price uniformity that favored that inference.
\item[124] \textit{Id.} at 757.
\item[125] See \textit{id.} at 759, 763-64.
\item[126] 250 U.S. 300 (1919).
\item[127] \textit{Monsanto}, 465 U.S. at 761-63 (under \textit{Colgate}, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply).
\end{footnotes}
T.V., Inc. v. GTE Sylvania, Inc.\textsuperscript{128} to devise an appropriate marketing strategy through reasonable nonprice restrictions on its distributors.\textsuperscript{129} The Court reasoned that "[p]ermitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct"\textsuperscript{130} and "create an irrational dislocation of the market."\textsuperscript{131}

In light of this danger, the Court announced that, as a matter of substantive antitrust law, "something more than evidence of complaints is needed"\textsuperscript{132} to permit an inference that the manufacturer's behavior was unlawful. According to the Court, the "correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor."\textsuperscript{133} The potential for chilling procompetitive conduct justified creating, in effect, a presumption that a post-complaint dealer termination was, by itself, a lawful, independent exercise of business judgment. The plaintiff could rebut this presumption by coming forward with something more that "tends to exclude" the possibility that defendants were engaged in lawful conduct and supports the inference of unlawful conspiracy.\textsuperscript{134}

The Supreme Court similarly found the plaintiffs' evidence in Matsushita Electric Industrial Co. v. Zenith Radio Corp.\textsuperscript{135} to be insufficient to support an inference of a horizontal conspiracy to engage in predatory price-cutting among twenty-one Japanese-affiliated manufacturers of consumer electronic products. The Court rejected as largely irrelevant most of the plaintiffs' evidence that supported the inference of illegal conspiracy,\textsuperscript{136} and further found that the defendants had no rational economic motive to conspire to price predatorily.\textsuperscript{137} The Court observed that the "[l]ack of motive bears on the range of permissible conclusions that might be drawn from ambigu-

\begin{itemize}
\item 129. Monsanto, 465 U.S. at 762-63.
\item 130. Id. at 763.
\item 131. Id. at 764.
\item 132. Id.
\item 133. Id. at 768.
\item 134. See Note, The Evolving Summary Judgment Standard for Antitrust Conspiracy Cases, 12 J. Corp. Law 503, 521 (1987) (termination of a price-cutting distributor in response to other distributor complaints is presumptively legitimate, and only additional evidence can rebut the presumption).
\item 135. 475 U.S. 574 (1986).
\item 136. See id. at 595-97.
\item 137. See id. at 588-93.
\end{itemize}
ous evidence,” and that “if the factual context renders [the plaintiffs'] claim implausible—if the claim is one that simply makes no economic sense—[plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary.” The Court in effect found the alleged conspiracy to be so economically irrational that, presumptively, the defendants did not engage in it.

Even if the defendants' rebates and price-cutting activities had been consistent with a plausible inference of a conspiracy to suppress prices, the activities were also consistent with an inference of independent conduct that was the very essence of competition, namely, cutting prices in order to increase business. Citing Monsanto, the Court required additional evidence to support the inference of illegality in order not to deter lawful procompetitive conduct: "Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect."

While the Supreme Court has spoken in terms of permissible inferences in the foregoing cases, the practical effect of preventing the jury from inferring illegality from circumstantial evidence of certain kinds of commercial conduct is to create a rebuttable presumption of legality for such conduct. What kind of conduct gives rise to this presumption? Broad language in Matsushita might suggest that any conduct consistent with the possibility of legality will be presumed to be legal in the absence of further evidence tending to exclude the possibility of legality. This is premised on the Court's characterization of the Monsanto holding "that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." This language is a misinterpretation of Monsanto, which has unfortunately been uncritically adopted by a number of courts.

Although the post-complaint conduct at issue in Monsanto was

138. Id. at 596.
139. Id. at 587.
140. Note, supra note 134, at 533.
141. Matsushita, 475 U.S. at 594.
142. Id.
143. Note, supra note 134, at 533-34 (Monsanto-Matsushita approach creates presumptions that must be resisted by the parties).
144. Matsushita, 475 U.S. at 588, 597 n.21.
145. See Note, Summary Judgment and Circumstantial Evidence, 40 STAN. L. REV. 491, 500 nn.53-55 (1988) (observing also that Monsanto made no reference to whether competing inferences were "equally plausible" or whether evidence was "as consistent" with one inference as with the other); see also id. at 508-509.
consistent with inferences of both legal business conduct and illegal price-fixing, such consistency by itself was not the basis for presuming the conduct lawful (by preventing the jury from inferring it was unlawful) in the absence of additional contrary evidence.\(^{146}\) The conduct at issue in *Monsanto* (and, indeed, in *Matsushita* and the conscious parallelism cases) failed to give rise to an inference of conspiracy not simply because it was consistent with the possibility that the defendants were engaging in lawful conduct, but rather because such conduct would almost invariably be undertaken by defendants who were behaving lawfully.\(^{147}\) In other words, “any company engaged in the *innocent* conduct could not help but do the very thing which plaintiff suggested should be proof of illegal conduct.”\(^{148}\) Thus, the presumption of legality is created not for conduct that is simply consistent with an explanation of innocence or lawfulness, but rather for conduct that innocent defendants must or are highly likely to engage in if acting lawfully.\(^{149}\) Faced solely with evidence of such conduct, a factfinder could not rationally favor a conclusion that such conduct was unlawful over the conclusion that it was lawful, and to permit a factfinder to draw a conclusion of illegality could potentially “chill the very conduct the antitrust laws are designed to

\(^{146}\) Simple consistency with an inference of innocence is too broad a basis for preventing the jury from inferring guilt. In every circumstantial case where the defendant puts on any defense at all, the defendant’s conduct will always be consistent with the competing inferences of legality and illegality. *See* Note, *supra* note 145, at 494, 500 n.53 (“Because indirect evidence is, by definition, always susceptible to alternative interpretations, the defendant will always be able to [interpret circumstantial evidence in an innocent light], subject to the constraint that his explanation be a ‘plausible’ one.”).

\(^{147}\) For example, a *Monsanto*-type manufacturer who was exercising its right unilaterally to terminate a distributor that did not comply with its previously announced resale price policy, would be likely to terminate a distributor after receiving information about the distributor’s contractual noncompliance. Similarly, *Matsushita*-type manufacturers engaged in lawful competition would very probably cut their prices and provide rebates. Furthermore, competitors are very likely to engage in parallel or uniform business practices when the firms are economically interdependent. *See* 6 P. Areeda, *supra* note 119, ¶¶ 1410, 1423, at 197-98, 237-38 (unfair to impose antitrust liability on oligopolists who can rationally proceed only by taking actions parallel to those of their competitors).

\(^{148}\) Note, *supra* note 145, at 508 (emphasis in original). *See also* Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 488 (1984) (decision to permit an adverse inference may depend on whether the conduct from which it is sought to be drawn is likely to be pursued in the absence of a prohibited purpose or arrangement).

\(^{149}\) Note, *supra* note 145, at 517 (to persuade a court that its conduct merits such a presumption of legality, the defendant must show “not that his version of the facts is the more likely one on the evidence presented, but that anyone engaging in the innocent conduct he asserts actually took place would be highly likely to perform the very behavior that is the basis of the plaintiff’s inference”).
Peer-review litigation is ripe for the application of these principles. A hospital's denial or termination of a doctor's staff privileges is conduct that is consistent both with an inference of good-faith peer review to protect patients from an incompetent doctor, and with an inference of illegal conspiracy to eliminate competition from a competent doctor. (This consistency is, in fact, the very problem posed by peer review.)\(^1\) Moreover, a hospital in all probability would in an appropriate case undertake such an adverse action against the doctor if it was effectively engaging in legitimate peer review. Thus, as in the conscious parallelism cases, *Monsanto* and *Matsushita*,\(^2\) peer review is conduct that is highly likely to be engaged in by innocent parties, and hence it justifies the same presumption of legality, which can be rebutted in appropriate cases by additional evidence that "tends to exclude"\(^3\) the possibility of innocence.

Furthermore, the rationale justifying the presumption of legality in the earlier cases is equally applicable to peer review. Permitting a jury to infer an illegal conspiracy too readily on the basis of peer-review conduct alone could deter the medical profession from engaging in legitimate, procompetitive peer review at all. Indeed, because the threat of antitrust liability through such mistaken inferences already appeared to be deterring the medical profession from engaging in good-faith peer review,\(^4\) Congress expressly created a rebuttable presumption of nonliability for peer review of doctors in HCQIA.

Thus, a rebuttable presumption of legality for peer review, which is comparable to HCQIA's presumption of nonliability, was already justified by existing case law and will obtain in peer-review cases not covered by the Act. Prior to 1986 some lower courts had formally established a presumption in peer-review litigation that the peer-reviewers had acted in good faith.\(^5\) Since *Matsushita*, several

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151. See supra notes 11-13, 89-92, and accompanying text.
152. See supra note 147.
153. *Monsanto*, 465 U.S. at 768; see supra note 133 and accompanying text.
154. See supra notes 35-38, 41-44, and accompanying text.
155. E.g., Williams v. Kleveland, 1983-2 Trade Cas. (CCH) ¶ 65,486, at 68,365, 68,367-368 (D. Mich. 1983) (presumption that peer reviewers acted in good faith). See also Castelli v. Meadville Medical Center, 702 F. Supp. 1201, 1206 (W.D. Pa. 1988) (citing Pontius v. Children's Hosp., 552 F. Supp. 1352, 1372 (W.D. Pa. 1982) for the proposition that a hospital's selections of medical staff are presumed to be based on legitimate medical and business reasons), aff'd, 872 F.2d 411 (1989). These presumptions were frequently erroneously based on the view that peer-review decisions were to be ac-
more courts have used the Supreme Court precedent discussed in this subsection to create such a presumption of legality for peer review of professional competence. Although HCQIA was enacted several months after Matsushita was decided, arguably only a rather confident legislator would conclude, on the basis of Monsanto and the earlier conscious-parallelism cases, that expressly tipping the initial balance legislatively in the peer-review defendants' favor was unnecessary.

b. Burden of Proof—Another way to understand how HCQIA's presumption of nonliability does not change the basic antitrust analysis in peer-review litigation is to recognize that the presumption is not a true presumption at all. A true presumption is a device by which the proof of one fact (the "basic" fact) must be taken for some purposes as proof of another fact (the "presumed" fact). HCQIA's presumed facts (that the defendants were acting reasonably to further quality of health care and with fair procedures) do not depend on the establishment of any basic facts. Instead, the presumption is really just a way of assigning to the plaintiff the burden of disproving the presumed facts (that is, of proving that the defendants were not acting reasonably to further quality of care or were acting without fair procedures).

In this respect, HCQIA's presumption is like the classic "presumption of innocence" in criminal law, which is also not a true presumption because its existence does not arise from the establishment of any basic facts. The presumption of innocence is, instead, a restatement of the criminal law principle that the prosecution bears the burden of proving the defendant guilty. Similarly, HCQIA's presumption that the defendants were acting

corded judicial deference. See supra notes 78-79 and infra notes 438-440 and accompanying text.


157. See 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5122, at 561 (1977) (for example, "evidence that a person has not been heard of for seven years (the basic fact) can be used to show that the person is dead (the presumed fact)").

158. See id. at 557, 589.

159. See id. (distinguishing presumptions from "assumptions," which are rules for allocating the burden of proof); id. § 5126, at 611 n.30 ("In many cases it is unclear
reasonably to further the quality of health care is simply another way of stating that the plaintiff has the burden of proving that they were not acting in such a manner. Because as a practical matter the plaintiff has this burden anyway under section 1 of the Sherman Act, HCQIA's "presumption" has not affected the allocation of the burdens of proof between the parties in the typical peer-review action under the antitrust laws.

A comparison of the allocations of the burdens of proof with and without HCQIA is helpful to demonstrate this last point. With or without HCQIA, the plaintiff initially must make out a prima facie case that the defendants have conspired to restrain trade unreasonably. Under HCQIA, assuming the plaintiff has met this burden, the defendants may respond by raising the immunity defense. Although usually the defendants have the ultimate burden of proof on an affirmative defense, HCQIA's presumption that the four immunity standards have been met automatically shifts back to the plaintiff the burden of rebuttal. The plaintiff then has both the burden of production and the burden of persuasion to prove that the defendants were not acting as presumed, that is, that they did not comply with at least one of the standards of reasonableness or fair procedure.

This shifting of proof burdens closely parallels the shifting of burdens in a typical antitrust action under the rule of reason without HCQIA. First, the plaintiff must make out a prima facie case that trade has been restrained; second, the burden then shifts to the defendants to come forward with evidence of a legitimate objective for their conduct; and third, the burden shifts back to the plaintiff either to disprove the existence or the legitimacy of the claimed ob-

whether the 'presumption' is a true presumption or is simply an alternate way of stating the burden of proof.”

160. See infra notes 166-167 and accompanying text.

161. Because HCQIA's presumption operates against the party with the burden of persuasion, it is superfluous: it "is like a handkerchief thrown over something covered by a blanket." C. WRIGHT & K. GRAHAM, supra note 157, § 5126, at 611.

162. See 7 P. AREEDA, supra note 119, ¶ 1507, at 397.


164. This pattern of shifting burdens is illustrated in the only case thus far decided on the merits under HCQIA. See Austin v. McNamara, 731 F. Supp. 934, 942 (C.D. Cal. 1990) (plaintiff failed to address, much less rebut, the defendants' showing of compliance with HCQIA's requirements). See also Loiterman v. Antani, 1990 U.S. Dist. LEXIS 7955, *23 (N.D. Ill. 1990) (to avoid dismissal, plaintiff must affirmatively plead defendants' noncompliance with the immunity standards).

165. As discussed infra subsection II(C)(2) and subsection II(C)(2)(b), peer-review litigation under § 1 would be accorded rule-of-reason analysis.
jective or to show that the objective could have been achieved by less restrictive means. In a typical peer-review action without HCQIA, the plaintiff first alleges that the defendants’ adverse action against his staff privileges creates a prima facie case of unlawful conspiracy in restraint of trade. The defendants almost invariably counter with the evidence that their actions were motivated by a legitimate business or health-care objective, typically (as in the HCQIA standards) that the peer reviewers were reasonably prompted by concerns for patient welfare or improving the delivery of quality medical care. The burden then shifts back to the plaintiff to show that the peer-review defendants were not acting pursuant to their claimed objective, that is, they were not primarily prompted by concerns over patient welfare or the quality of medical care provided at their facility. This burden in a non-HCQIA case is, for all practical purposes, tantamount to the plaintiff’s burden under HCQIA to rebut the presumption that the defendants complied with the four immunity standards of section 11112(a), specifi-

166. This allocation of proof burdens has been extensively described by Professor Areeda. See 7 P. Areeda, supra note 119, ¶ 1502, at 371-72 (“Virtually all courts applying the rule of reason follow these three steps.”); see also id. ¶ 1507, at 397. It should be noted that plaintiff’s presentation of a prima facie case under § 1 shifts the burden of production, not of persuasion, to the defendant to come forward with evidence of a legitimate objective to rebut the plaintiff’s initial showing of the unreasonableness of the defendant’s challenged restraint. Id. ¶ 1511, at 429; see Areeda, The Rule of Reason—A Catechism on Competition, 55 Antitrust L.J. 571, 581-82 (1986) (although plaintiff bears the burden of showing an unreasonable restraint, the burden of introducing evidence will constantly shift). The burden of persuasion to demonstrate the unreasonableness of the restraint remains on plaintiff as part of her case in chief. Id. This result is similar to that achieved by HCQIA, which places the burden of persuasion on the plaintiff to show that the defendants were not acting for reasonable, health-care quality purposes. See Bhan v. NME Hosp., 929 F.2d 1404, 1991 U.S. App. LEXIS 4685, *11, 21-22 (4th Cir. 1991) (adopting Professor Areeda’s description of the shifting burdens in a non-HCQIA peer-review case).

167. See, e.g., cases cited infra in notes 244 and 367; see also Bolt v. Halifax Hosp. Medical Center, 891 F.2d 810, 819-22 (11th Cir.) (health-care quality raised to defeat inference of conspiracy), cert. denied, 110 S. Ct. 1960 (1990); Shah v. Memorial Hosp. [Shah J], 1988-2 Trade Cas. (CCH) ¶ 68,199, at 59,327-28 (W.D. Va. 1988) (health-care quality objective raised to defeat inference of conspiracy). The defendant’s health-care quality objectives can be raised also to rebut a prima facie showing of an unreasonable restraint of trade, e.g., Miller v. Indiana Hosp., 843 F.2d 139, 143-45 (3d Cir.) (health-care quality objective raised to show reasonableness), cert. denied, 488 U.S. 870 (1988). Once the defendants raise a legitimate medical or business objective for their adverse action against her, the plaintiff must produce direct or circumstantial evidence that “tends to exclude” the possibility that the defendants were engaged in legitimate conduct. See supra notes 133-134 and accompanying text. Thus, in a non-HCQIA case, the plaintiff will have similar burdens of production and persuasion to show that the defendants were not acting to further their asserted legitimate objective, whether such objective is raised to defeat an inference of conspiracy or to rebut a showing of unreasonableness.
cally that they were acting reasonably to further the quality of health care.\footnote{168}

Furthermore, the plaintiff's burden on a motion for summary judgment without HCQIA is discharged with exactly the same kind and amount of evidence necessary under HCQIA: the plaintiff must produce sufficient evidence supporting the claim to allow a rational factfinder to find in her favor.\footnote{169} With or without HCQIA, the standard of proof for the plaintiff to prevail at trial is a preponderance of the evidence.\footnote{170} Hence, in either case the plaintiff will have to produce enough evidence for the factfinder to conclude that, more probably than not, the defendants were not acting as claimed (or as presumed under HCQIA) in the legitimate interests of quality health care, but were engaged in the unlawful elimination of competition. Thus, HCQIA's express presumption of the reasonableness of the defendants' conduct, which can be overcome by a preponderance of the evidence, does not as a practical matter change the usual antitrust presumptions or burdens of proof at all.

\footnote{168. One possible difference HCQIA may make is to lighten, as a theoretical matter, the defendants' initial burden of production on the issue of justification for their peer-review action. Without HCQIA, once the plaintiff makes out a prima facie case of an unreasonable restraint of trade, the defendants have the burden of going forward with evidence of a legitimate objective. \textit{See supra} notes 166-167 and accompanying text. Under HCQIA, arguably the defendants need not introduce any evidence to show proof of compliance with the reasonable-belief immunity standards. \textit{But see infra} note 315 and accompanying text. This theoretical difference may have little practical significance at trial, because assuming the plaintiff has met her burden of production to rebut the presumption (and show an illegitimate purpose behind the defendants' action), the defendants will probably not choose to risk relying on a jury instruction that they have the benefit of the presumption, but rather will put forward evidence to show compliance (and hence a proper purpose for their action). \textit{See infra} note 316 and accompanying text.}


The Limited Immunity Provisions.—The immunity provisions of the Act are very narrow. What is left after all the exclusions and limitations is immunity from antitrust damages in any case where: (1) the defendant peer-review participants acted reasonably to exclude someone from the medical staff on the grounds of professional incompetence or misconduct, where such incompetence or misconduct affects or could affect the health or welfare of patients, (2) prior to excluding a physician, they provided her with due process protections that were fair and appropriate under the circumstances, and (3) the subject of the peer review was an individual physician. The irony is that antitrust liability would not attach in such a case in any event, with or without HCQIA.

No court, commentator, or enforcement agency has ever suggested that, in such a case, peer-review participants potentially face antitrust liability. Courts have consistently held that medical centers may exclude individual doctors on the basis of lack of professional competence or unprofessional conduct. The Sherman Act does not prevent, as one court put it, “a hospital from discharging a physician that it believes is incompetent regardless of any collateral effect on ‘competition.’” On the contrary, the courts and enforcement agencies have emphasized that peer review undertaken to eliminate medical incompetence is procompetitive rather than anticompetitive and is fully consistent with the goals of the antitrust laws. As Charles F. Rule, former acting assistant Attorney General in the Department of Justice, once stated:

Put simply, there is no reason to expect a clash between the antitrust laws and peer review conducted to eliminate incompetence in the delivery of health care service. Quite to the contrary, the greatest potential of peer review is its ability to foster the basic goals of the antitrust laws in the

171. See supra subsection I(C).
173. See id. § 11112(a)(3).
174. See id. § 11151(9), 11115(c).
177. See infra note 272 and accompanying text.
health care industry—the efficient delivery of quality services in a competitive market place.178

Moreover, recent developments in tort law have imposed an affirmative duty on hospitals and other health-care organizations to select physicians and monitor their performance according to criteria of medical competence and quality patient care. It would be highly anomalous for courts to suggest that hospitals which diligently fulfill that tort duty would face potential antitrust charges. The landmark decision of Darling v. Charleston Community Hospital179 established that a hospital may be found independently negligent for failing to monitor the performance of a physician on its staff, even though the physician is an independent contractor and not an employee.180 The court in Johnson v. Misericordia Community Hospital181 recognized a duty for hospitals to exercise reasonable care in the selection of their medical staffs through the granting of staff privileges.182 It is now well established in tort law that hospitals, under the theory of corporate negligence, have a direct duty to pa-

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178. Letter from Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, United States Dept. of Justice, to Kirk B. Johnson, Esq., American Medical Association (Dec. 2, 1986); see also infra note 276 (quoting letter further).


180. See id. at 333, 211 N.E.2d at 258; see also Oehler v. Humana, Inc., 775 P.2d 1271, 1272 (Nev. 1989) (hospital has duty to monitor treatment of patients by nonemployee physicians with staff privileges under corporate negligence theory of liability); Blanton v. Moses H. Cone Memorial Hosp., 319 N.C. 372, 377, 354 S.E.2d 455, 458 (1987) (hospital has a duty to monitor on an on-going basis the performance of physicians on its medical staff); Thompson v. Nason Hosp., 370 Pa. Super. 115, 124, 535 A.2d 1177, 1182 (1988) (hospital may be charged with negligence for failing to supervise the quality of care or competence of its staff if it has actual or constructive knowledge of procedures utilized); Sharsmith v. Hill, 764 P.2d 667, 673 (Wyo. 1988) (hospital has a duty to exercise reasonable care in supervising and reviewing the treatment of patients by members of medical staff, as well as a duty of care in determining whether to extend or continue staff privileges).

181. 99 Wis. 2d 708, 301 N.W.2d 156 (1981).

182. See id. at 728, 301 N.W.2d at 164; see also Insinga v. LaBella, 543 So. 2d 209, 214 (Fla. 1989) (because it is in a superior position to supervise and monitor physician performance, a hospital has an independent duty to a patient to detect and retain competent physicians seeking staff privileges); Bush v. Dolan, 149 A.D.2d 799, 799, 540 N.Y.S.2d 21, 22 (1989) (hospital may be liable for breach of duty to a patient by permitting an unqualified physician to exercise staff privileges); Albain v. Flower Hosp., 50 Ohio St. 3d 251, 257-58, 553 N.E.2d 1038, 1045-46 (1990) (hospital has a duty only to grant and to continue staff privileges of the hospital to competent physicians); Douglas v. Freeman, 57 Wash. App. 183, 188, 787 P.2d 76, 79 (1990) (hospital owes a nondelegable duty to exercise reasonable care to ensure that only competent physicians are selected as members of hospital medical staff and to intervene in patient treatment if there is obvious negligence); Greenwood v. Wierdama, 741 P.2d 1079, 1088 (Wyo. 1987) (hospital has a duty of reasonable care in the extension and continuation of medical staff privileges).
tients to exercise care and independent judgment in evaluating the competence of their medical staff members, both at the time of initial appointment to the medical staff and on a continuing basis. Because under principles of tort law "[h]ospital administrations ignore physician incompetence at their own risk," courts should not interpret the antitrust laws to mean that hospitals also police physician incompetence at their own risk.

State statutes and the national hospital accrediting body also oblige hospitals to engage in peer review. All fifty states have enacted statutes that to some extent provide immunity to those who participate in medical peer review, and that define the statutory responsibilities of the peer reviewers. The Joint Commission on Accreditation of Healthcare Organizations (JCAHO) specifies the peer-review procedures that hospitals in order to be accredited must follow in the granting and renewal of staff privileges.

If the common law, state statutes, and accreditation standards have all created obligations for hospitals to ensure that they grant and renew staff privileges only to competent doctors, it would be unthinkable to interpret the antitrust laws to impose liability on parties who fulfill those obligations. Because HCQIA grants immunity to those who, in effect, are simply fulfilling those duties, it grants immunity for conduct that would not be actionable under the antitrust laws. Thus, insofar as antitrust liability is concerned, HCQIA's grant of immunity is as meaningful as a hypothetical statutory grant of immunity under tort law to anyone who conducts her-

183. Inzinga, 543 So. 2d at 214 (at least 17 other states have accepted the corporate negligence doctrine in the context of a hospital's selection and retention of its medical staff). See generally A. Southwick, The Law of Hospital and Health Care Administration 565-78 (2d ed. 1988); Hardy, When Doctrines Collide: Corporate Negligence and Respondeat Superior when Hospital Employees Fail to Speak Up, 61 Tul. L. Rev. 85, 90-105 (1986) (discussing the doctrine of corporate negligence in cases where a hospital employee fails to report a private physician's negligence).

184. Williams v. Kleevaland, 1983-2 Trade Cas. (CCH) ¶ 65,486, at 68,358 (W.D. Mich. 1983); see also Albain, 50 Ohio St. 3d at 258, 553 N.E.2d at 1045 (where a previously competent physician with staff privileges develops a pattern of incompetence that the hospital should become aware of through its peer-review process, the hospital must answer for its retention of the physician).


186. See id. at 98-100.


188. See supra notes 172-174 and accompanying text.

189. The threat of antitrust liability was a primary impetus for enacting HCQIA. See supra notes 46-48, 75, and accompanying text.
self as a reasonable person under the circumstances.\textsuperscript{190}

An illustration of this contention may be found in antitrust litigation where the peer-review plaintiff has prevailed, if only on a preliminary motion. In those cases the plaintiff was prepared to show an antitrust violation with allegations and supporting evidence that would overcome one or more of the Act's immunity provisions. Such evidence, if proven, would have demonstrated or did demonstrate: (1) that economic considerations rather than considerations of the plaintiff's professional competence or conduct prompted the peer-review action,\textsuperscript{191} (2) that the action lacked fair notice and hearing procedures,\textsuperscript{192} or (3) that the case involved a non-physician plaintiff.\textsuperscript{193} In each of these cases, HCQIA's immunity would have been inapplicable, and hence the Act would have provided no more protection from antitrust liability than was provided without it.

The principal example of this contention is \textit{Patrick v. Burget}. Dr. Timothy Patrick was a surgeon in Astoria, Oregon, which had only one hospital.\textsuperscript{194} A private, group medical practice in town, the Astoria Clinic, whose professional members made up a majority of the medical staff at the hospital, employed him for a year, after which

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Restatement (Second) of Torts} § 283 (1965) (the standard of conduct to which an actor must conform in order to avoid negligence is that of a reasonable man under the circumstances).
\item See, \textit{e.g.}, \textit{Patrick v. Burget}, 486 U.S. 94, 98 (1988) (jury found specific intent to injure or destroy competition); \textit{Bolt v. Halifax Hosp. Medical Center}, 891 F.2d 810, 821 (11th Cir.) (summary judgment denied because a factfinder could infer that the defendants intended to enter into an agreement designed to achieve an end not dictated by legitimate business concerns), \textit{cert. denied}, 110 S. Ct. 1960 (1990); \textit{Miller v. Indiana Hosp.}, 843 F.2d 139, 144-45 (3d Cir.) (summary judgment denied because a genuine issue of material fact existed as to whether the reason for revoking the plaintiff's privileges was his incompetence or an anticompetitive motivation), \textit{cert. denied}, 488 U.S. 870 (1988); \textit{Weiss v. York Hosp.}, 745 F.2d 786, 815, 820 (3d Cir. 1984) (jury found that defendants engaged in policy of discrimination against the plaintiff and the plaintiff's exclusion was not based on competence or qualification), \textit{cert. denied}, 470 U.S. 1060 (1985); \textit{Shah v. Memorial Hosp. [Shah I]}, 1988-2 \textit{Trade Cas. (CCH)} ¶ 68,199, at 59,328 (W.D. Va. 1988) (summary judgment denied where the plaintiff's evidence tended to exclude the possibility that defendants were acting for procompetitive reasons).
\item See, \textit{e.g.}, \textit{Miller v. Indiana Hosp.}, 843 F.2d 139, 144 (3d Cir. 1988) (evidence of irregularities and possible conflicts of interest in the hearing process as well as evidence of motivation to destroy the plaintiff as a competitor), \textit{cert. denied}, 109 S. Ct. 178 (1988); \textit{Jiricko v. Coffeyville Memorial Hosp. Medical Center}, 700 F. Supp. 1559, 1561 (D. Kan. 1988) (formal letter of reprimand placed in plaintiff's file without notice to him or a hearing of any kind).
\item See, \textit{e.g.}, \textit{Oltz v. St. Peter's Community Hosp.}, 861 F.2d 1440 (9th Cir. 1988) (plaintiff was a nurse anesthetist); \textit{Sweeney v. Athens Regional Medical Center}, 709 F. Supp. 1563 (M.D. Ga. 1989) (plaintiff was a nurse midwife); \textit{Nurse Midwifery Assocs. v. Hibbett}, 689 F. Supp. 799 (M.D. Tenn. 1988) (plaintiffs were nurse midwives), \textit{aff'd in part, rev'd in part}, 918 F.2d 605 (6th Cir. 1990), \textit{modified on reh'g}, 927 F.2d 904 (1991).
\item 486 U.S. 94, 96 (1988).
\end{enumerate}
\end{footnotesize}
they invited him to become a partner at the clinic. Dr. Patrick declined, and subsequently set up an independent practice that competed with the clinic.195

Thereafter, the clinic physicians engaged in a series of actions against Dr. Patrick that ultimately led, after peer-review proceedings at the hospital, to his termination from the medical staff at the hospital.196 Dr. Patrick filed an antitrust lawsuit against the clinic partners, contending that they had used the hospital's peer-review proceedings anticompetitively in an unlawful effort to reduce competition from him, rather than out of any legitimate concern for the quality of his patient care. The jury agreed with Dr. Patrick and awarded him $650,000, which the district court then trebled.197

The Court of Appeals for the Ninth Circuit characterized the clinic partners' conduct as "shabby, unprincipled and unprofessional,"198 and found substantial evidence that the clinic doctors had acted in bad faith in the hospital's peer-review process.199 The court nevertheless reversed the district court's judgment and held that the peer reviewers were immune from the antitrust laws under the state-action doctrine.200

The Supreme Court reversed the judgment of the Court of Appeals. Concluding that no state actor in Oregon actively supervised hospital peer-review decisions, the Court held that the state-action doctrine did not protect these peer-review activities from antitrust scrutiny, and reinstated the district court's verdict and treble damage award.201

While the Court found that the peer-review participants in Patrick were subject to antitrust liability before HCQIA was enacted,202 Congressman Waxman asserted during congressional debates that they would not have been immunized from antitrust liability even if

195. Id.
196. Id. at 96-97 (defendant physicians consistently refused to have professional dealings with the plaintiff, complained of the plaintiff's medical practices to the State Board of Medical Examiners, which retracted its letter of reprimand, and despite conflicts of interest, sat on an ad hoc peer-review committee that voted to recommend termination of the plaintiff's privileges).
197. Id. at 98.
199. See id. at 1507.
200. See id. at 1505-1507 (state action doctrine exempts from the antitrust laws actions taken by the state or by private parties pursuant to a clearly articulated and affirmatively expressed state policy and subject to active supervision by the state).
201. See Patrick, 486 U.S. at 105.
202. See id. at 105 n.8.
HCQIA had been in effect. This is so because they would not have been able to meet the reasonable belief and the due process requirements for immunity. There was evidence not only that the defendants' purpose was predominately to exclude competition rather than to promote quality health care, but also that the members of the staff committees reviewing the matter were not sufficiently impartial to qualify for the Act's protection. Ironically, the physicians who participated in Patrick's peer-review proceedings—the very case that helped to spark the medical profession's demands for immunity from antitrust scrutiny for participants in peer review—would themselves not have been immune from such scrutiny under the Act.

Congressman Waxman made it clear during the congressional hearings that "'[t]here is one thing [HCQIA] will not do. It will not shield doctors from liability for what are truly anticompetitive business practices." Truly anticompetitive business practices" would seem by definition to be antitrust violations. The sponsors thus seem to be saying that the Act provides no immunity for peer-review participants who violate the antitrust laws. If so, then the implication is inevitable that "immunity" is granted only to peer-review conduct that would not constitute a violation of the antitrust laws in the first place. Thus, in the context of antitrust litigation, HCQIA's immunity is so "limited" as to be virtually nonexistent.

C. HCQIA's Reinforcement of Traditional Antitrust Principles

As argued to this point, certain key provisions of HCQIA will effect no real substantive change in antitrust peer-review litigation. The Act does, however, implicitly reinforce the application of cer-
tained traditional antitrust concepts to peer-review litigation. The Act provides, either expressly or by implication, that for peer-review litigation involving the professional competence of doctors: (1) the antitrust laws extend to such litigation;\(^{207}\) (2) the rule of reason applies in such litigation under section 1 of the Sherman Act;\(^{208}\) and (3) the defendants' motive or purpose is a primary determinant of antitrust liability in such litigation.\(^{209}\) However, except perhaps for the third proposition, none of these was open to significant scholarly or judicial debate before HCQIA's enactment. Moreover, because these principles may be derived independently of HCQIA, they apply to all peer-review litigation, and are not limited (as is HCQIA) to peer review of physician competence.

1. The Extension of the Antitrust Laws to Medical Peer Review.—Over the past fifteen years, the Supreme Court has affirmed that the antitrust laws apply to the health-care industry in general. The Supreme Court has held that the professions are not exempt from antitrust liability\(^{210}\) and that the activities of health-care providers like hospitals, which had been thought to be purely local activities, may affect interstate commerce sufficiently to come within the antitrust ambit.\(^{211}\) In the face of arguments that the health-care market is sufficiently different from other commercial markets to justify a relaxation of antitrust scrutiny, the Supreme Court has thus far declined to carve out special exceptions or exemptions from the antitrust laws for the health-care profession.\(^{212}\)

HCQIA serves to emphasize that, except for the "extremely limited"\(^{213}\) immunity granted by it, the full reach of the antitrust laws extends to medical peer review. Expressly providing for a narrow construction of the Act, Congress declared that, except as specifically provided by its terms, the Act did not change other liabilities and immunities under law, or preempt or override any state law that gives incentives, immunities, or protections for those engaged in a professional review action.\(^{214}\)

\(^{207}\) See infra subsection II(C)(1).

\(^{208}\) See infra subsection II(C)(2).

\(^{209}\) See infra subsection II(C)(3).


\(^{212}\) See Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 348-50 (1982) (with regard to price-fixing agreements, the Sherman Act establishes one uniform rule applicable to all industries).

\(^{213}\) See supra notes 51, 53, and accompanying text.

2. The Application of the Rule of Reason to Peer-Review Actions.—

While the proposition that the antitrust laws apply to medical peer review is not controversial, a somewhat more debatable proposition is that the so-called rule of reason applies to peer-review litigation under section 1 of the Sherman Act. Despite its literal language declaring "every" collective effort to restrain trade illegal,215 section 1 has been interpreted to prohibit only those practices that unreasonably restrain trade.216 Under the rule of reason, all of the circumstances surrounding a restrictive practice—industry conditions, the actual and potential effects of the restraint, the reasons for its adoption—are considered in determining its reasonableness.217 The central test of the reasonableness of a challenged restraint, and therefore of its legality, is whether it promotes or suppresses competition.218

Occasionally, the courts have condemned under section 1 an entire category of restraints without analyzing on an individual basis their effects on competition as required under the rule of reason. Because they are perceived to be plainly anticompetitive, such restraints are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business reason for adopting them.219 Restraints that have been condemned categorically as per se illegal include price-fixing agreements, group boycotts or concerted refusals to deal, divisions of markets, and tying arrangements.220

Although commentators have argued that the line between per-

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216. See National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 98 (1984); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 63-64 (1911).
217. To determine the legality of a restraint:

the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed;
the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1917).
218. See id.
219. See Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); see also National Collegiate Athletic Ass'n, 468 U.S. at 103-04 ("Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.").
se analysis and rule-of-reason analysis is blurred,\(^{221}\) as a practical matter plaintiffs usually argue strenuously for, and defendants vigorously contest, the application of the per se rule to any challenged restraint in an antitrust lawsuit.\(^{222}\) Peer-review litigation is no exception. As discussed below, defendants have thus far always succeeded in convincing the courts to adopt the rule-of-reason analysis when peer review of an individual physician's professional competence or conduct was at issue.\(^{223}\) HCQIA implicitly also adopts this approach.

\[a. \] \textit{HCQIA's Adoption of the Rule of Reason.}—Under the rule of reason, courts necessarily examine whether the defendants undertook their challenged conduct in order to achieve a legitimate objective.\(^{224}\) Under the traditional per se approach, once a court finds the challenged restraint to fit within a category of restraints previously condemned as per se unreasonable, the court will condemn the particular one at issue without analyzing the defendants' claimed justification for their conduct.\(^{225}\)

HCQIA not only permits an inquiry into the peer-review defendants' purpose behind their action, it also presumes that their objective was legitimate.\(^{226}\) Although scholars have debated whether the pursuit of quality health care should be recognized as a legitimate objective under the antitrust laws,\(^{227}\) Congress impliedly established its legitimacy in the peer review of a doctor's competence or professional conduct by presumptively protecting such activity from antitrust damage liability. Because peer-review litigation

\(^{221}\) Professor Areeda has argued that the distinctions between the per se approach and the rule of reason are not as sharp as litigants and courts frequently treat them, and that they may be collapsed into a single inquiry about a restraint's competitive significance with varying presumptions. See 7 P. Areeda, supra note 119, at ¶ 1511; see also National Collegiate Athletic Ass'n, 468 U.S. at 104 n.26 ("there is often no bright line separating per se from Rule of Reason analysis"). See generally Piraino, Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis, 64 So. Cal. L. Rev. 685, 688 (per se rule and rule of reason should be viewed "not as opposite approaches to antitrust analysis but as related parts of a continuum"), 709-17 (1991).

\(^{222}\) If a per se rule is applied, not only does the plaintiff not have to establish how the restraint harmed the public or adversely affected competition, but the defendants may not introduce evidence justifying their conduct. See Koefoot v. American College of Surgeons, 652 F. Supp. 882, 886 n.3 (N.D. Ill. 1986). See infra note 229 and accompanying text.

\(^{223}\) See infra subsection II(C)(2)(b).

\(^{224}\) See 7 P. Areeda, supra note 119, ¶ 1504.

\(^{225}\) See id., ¶ 1509, at 409 ("In fullest flower, a per se rule condemns conduct without proof of power, effect, or purpose and without hearing claims of legitimate objectives.").


\(^{227}\) See infra notes 250-254 and accompanying text.
under HCQIA will closely parallel peer-review litigation under the rule of reason.\textsuperscript{228} HCQIA can be viewed as an endorsement of the latter approach when peer review of the professional competence of other medical practitioners is scrutinized under section 1.

\textit{b. Judicial Adoption of the Rule of Reason.}—In peer-review litigation to date, courts have almost uniformly found the rule of reason to be the appropriate analytical standard.\textsuperscript{229} Reasons for rejecting the per se rule have varied. Sometimes courts have said that they lack sufficient experience with restraints of trade in the health-care industry to justify per se condemnation of them.\textsuperscript{230} Other courts have found the per se rule inappropriate because the anticompetitive consequences of defendants' peer-review activities were unclear.\textsuperscript{231} Some courts have adopted the rule of reason on the ground that peer-review activities simply do not fit the classic group boycott paradigm.\textsuperscript{232}

A primary reason for choosing the rule of reason in peer-review litigation has been the Supreme Court's dictum in \textit{Goldfarb v. Virginia State Bar},\textsuperscript{233} suggesting that the "public service aspect" of a profes-

\begin{footnotesize}
\textsuperscript{228} See supra notes 162-168 and accompanying text.
\textsuperscript{229} See Loiterman v. Antani, 1990 U.S. Dist. LEXIS 7955, (N.D. Ill. 1990) *18-22 (collecting cases). Two cases are exceptions that tend to prove this general rule. In Weiss v. York Hosp., 745 F.2d 786, 820 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985), the Third Circuit applied the per se rule to a hospital's discriminatory denial of privileges to osteopaths. The court noted that the per se rule was appropriate because the defendants' defense was simply a flat denial that they discriminated against osteopaths. Had their defense been, not a denial of their alleged discriminatory conduct, but a justification for it on the grounds either that they were motivated by concerns of the osteopaths' professional competence or conduct, or that they were acting in accordance with public service or ethical norms of the profession, the court said it would have adopted a rule of reason approach. In Sweeney v. Athens Regional Medical Center, 709 F. Supp. 1563, 1573 n.4 (M.D. Ga. 1989), although the district court tentatively ruled for purposes of summary judgment that the per se test applied, the court said it would reconsider at trial the appropriateness of charging the jury on the rule of reason in light of the Supreme Court's admonition in United States v. Topco Assoc., Inc., 405 U.S. 596, 607-08 (1972), to accord business relationships per se treatment only after considerable judicial experience with them.


\textsuperscript{231} See, e.g., Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1445 n.1 (9th Cir. 1988) (economic impact of arrangement was not obvious); Goss v. Memorial Hosp. Sys., 789 F.2d 353, 355-56 (5th Cir. 1986) (defendants' lack of market power made proof of anticompetitive effects sufficiently uncertain to conclude that the per se rule is not applicable).


\textsuperscript{233} 421 U.S. 773 (1975).
\end{footnotesize}
sion may warrant treating professional conduct differently under the antitrust laws from ordinary commercial or business activities. Relying on Goldfarb, peer-review defendants have typically characterized their purpose in curtailing or eliminating the plaintiff's opportunity for membership on a medical staff as an effort to improve the quality of health-care services at the institution. Where the defendants have justified their actions in these terms, the lower courts have consistently found the rule of reason to be the appropriate standard.

The lower courts' adoption of the rule of reason in staff privileges cases is supported by Supreme Court precedent. Historically reluctant to condemn the standards of a professional group as unreasonable per se, the Court has observed that judicial inexperience with a particular restraint cautions against extending the per se approach. Furthermore, like the lower courts, the Supreme Court has been reluctant to extend per se condemnation to conduct whose economic impact is not immediately obvious. In light of a growing acknowledgement that peer review can be procompetitive, the overall economic effects of a given peer-review action would usually not be immediately apparent.

The Supreme Court has reaffirmed its adherence to the view expressed in Goldfarb that professional services may differ significantly from other business services. It has observed that when professional conduct involves public service or ethical norms of the profession, the conduct may serve to regulate and promote competition and thus should be judged under the rule of reason. The Court has made clear, however, that when the activities of medical professionals are not different from ordinary commercial activities, the usual per se rule should apply.

Peer review is not ordinary commercial activity and has no analog in the daily activities of most commercial enterprises. Although

234. Id. at 788-89 n.17.
237. See National Collegiate Athletic Ass’n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 100 n.21 (1984).
239. See infra notes 272-279 and accompanying text.
peer review can be used to suppress competition,242 its primary purpose—as acknowledged by Congress through HCQIA—is to ensure quality in the provision of medical services. In light of such a purpose, peer review can fairly be characterized as premised on the "public service aspect" of the medical profession and hence entitled to the rule of reason.

Thus, it is likely that the Supreme Court would have judged the rule of reason to be appropriate in peer-review litigation even before HCQIA’s enactment. Certainly, it should also be the standard for analysis in cases not covered by the Act.

3. Quality of Care As a Legitimate Objective.—The Supreme Court has stated that a good intention will not save an otherwise objectionable restraint.243 Nevertheless, some lower courts have expressly accepted defendant medical professionals’ concerns for patient welfare and the quality of medical services as a justification for the application of the rule of reason to their conduct as well as a defense to liability under the antitrust laws.244 Similarly Congress appears to have favored an intent-based test for the disposition of peer-review cases involving a physician’s staff privileges, for HCQIA estab-

242. See supra notes 54-61 and accompanying text.
243. See Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1917) (quoted supra note 217); National Collegiate Athletic Ass’n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 101 n.23 (1984) ("good motives will not validate an otherwise anticompetitive practice").
lishes the peer reviewers’ purpose as the litmus test for protection from antitrust liability.

Under HCQIA, the peer reviewers’ “good intention”—that is, their reasonable belief that they were acting to further quality health care—will “save” the restraint, at least to the extent that it ends the antitrust inquiry in a suit for damages. Because, independently of HCQIA, peer-review litigation that survived dismissal on some other ground frequently focused on whether the defendants were acting out of concerns for quality medical care or out of concerns for economic self-interest, HCQIA’s focus on the defendants’ purpose in acting adversely to the plaintiff will, by itself, make little practical difference in the disposition of this litigation.

Two Supreme Court cases analyzing the antitrust liability of professionals may, however, have called into question whether peer reviewers’ concern with the quality of patient care is a legitimate objective and thus a valid defense under the Sherman Act, arguably making HCQIA’s grant of immunity for such peer review necessary. In National Society of Professional Engineers v. United States and Federal Trade Commission v. Indiana Federation of Dentists, the Supreme Court flatly rejected the arguments of two professional groups that their conduct did not violate the antitrust laws because their purpose was to promote the quality of their respective professional services and thereby to protect public health, safety, and welfare.

Moreover, several commentators have criticized the lower

245. See 42 U.S.C. § 11112(a)(1), (4) (1988); see also supra text accompanying note 52.
246. See, e.g., Bolt, 891 F.2d at 819-22 (evidence of anticompetitive motivation precluded grant of directed verdict); Miller, 843 F.2d at 144-45 (genuine issue was raised by the evidence as to whether defendants revoked plaintiff’s staff privileges because of his incompetence or because of anticompetitive motivation); Sweeney, 709 F. Supp. at 1575 (material factual questions exist over whether defendants were motivated by concern for the patients or by a desire to eliminate the plaintiff as a competitor); Nurse Midwifery Assocs. v. Hibbett, 689 F. Supp. 799, 808-09 (M.D. Tenn. 1988) (material issues of fact exist with regard to the defendants’ motivations for their conduct), aff’d in part, rev’d in part, 918 F.2d 605, 904 (1991); Shah I, 1988-2 Trade Cas. at 59,328-29 (summary judgment denied where disputed evidence existed with regard to the defendants’ motive for excluding the plaintiff from the medical staff).
247. 435 U.S. 679 (1978); see infra notes 261-264 and accompanying text.
248. 476 U.S. 447 (1986); see infra notes 265-267 and accompanying text.
249. In dictum in a third case, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984), the Supreme Court also seemed to dismiss as irrelevant the defendant hospital’s asserted quality of care concerns in analyzing the reasonableness of an exclusive contract between the hospital and a group of anesthesiologists: “Thus, we reject the view of the District Court that the legality of an arrangement of this kind turns on whether it was adopted for the purpose of improving patient care.” Id. at 25, n.41. Contrast id. at 44 (O’Connor, J., concurring) (observing that the exclusive contract, “which has little an-
courts that have focused on the defendants' purpose or motive in order to determine whether they have violated the antitrust laws. Although the Supreme Court has recognized that civil liability under section 1 may be established by proof of either an unlawful purpose or an anticompetitive effect, courts and commentators have suggested that the competitive effects of the challenged activity should be the primary measure of reasonableness, and that an inquiry into the actors' purpose is secondarily important and useful only to assess the likely competitive effects of the activity. Thus, the lower courts' focus on the defendants' state of mind has been challenged as inconsistent with the proper antitrust focus on the effects of their conduct on competition.

Even if some purpose-based inquiry is conceded to be appropriate, some commentators have argued that the defendants' claim to be ensuring or promoting patient welfare and the quality of professional services at their institution could not alone legitimate their conduct under the antitrust laws. Finally, the defendants' motives or intent have been viewed as so difficult to ascertain that antitrust liability should not be made to depend upon it.

251. See, e.g., National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 103-104 (1984); Kreuzer v. American Academy of Periodontology, 735 F.2d 1479, 1493 (D.C. Cir. 1984) (defendant's intent, no matter how genuinely held, is not the determinative factor in an analysis under the rule of reason; the effects of a boycott are not necessarily dependent on the purpose of the boycott); Wilk v. American Medical Ass'n, 719 F.2d 207, 225 (7th Cir. 1983) ("effect or consequence . . . controls, not intent or motive"); see also 7 P. AREEDA, supra note 119, 1506, at 390-92.
252. See Greaney, Quality of Care and Market Failure Defenses in Antitrust Health Care Litigation, 21 CONN. L. REV. 605, 614 (1989) (proper focus of antitrust attention is on effects, not purposes); Havighurst, supra note 78, at 1167 (rule of reason analysis should focus on identifying the net harm to competition and "should reject worthy-purposes defenses when such harm is found"); Miles & Philp, supra note 13, at 521-22 (urging a focus on competitive effects). Other commentators have stressed the importance of a purpose-based inquiry in antitrust analysis. See, e.g., Kissam, supra note 83, at 1187-89; Kissam, Webber, Bigus & Holzgraefe, Antitrust and Hospital Privileges: Testing the Conventional Wisdom, 70 CALIF. L. REV. 595, 660-63 (1982); Wirtz, Purpose and Effect in Sherman Act Conspiracies, 57 WASH. L. REV. 1, 5, 8-16 (1981).
253. See Areeda, supra note 166, at 577-78 (noting that the Supreme Court in Indiana Dentists rejected the purpose of improving patient care as illegitimate); Greaney, supra note 252, at 608-13 (arguing that the Supreme Court has rejected quality-based justifications in antitrust analysis); Kissam, supra note 83, at 1215-16 (patient-care defense is inconsistent with Professional Engineers' mandate to analyze challenged restraints solely by their competitive impact).
254. See Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1338-39 (7th Cir. 1986) (Judge Easterbrook has questioned the utility of trying to determine
This section contends that peer reviewers' reasonable concerns with patient welfare and the quality of medical services provided at their institutions are legitimate objectives under the antitrust laws, and that HCQIA was not necessary to establish them as such. The lower courts' acceptance of these concerns both as a justification for employing the rule of reason and as a defense to liability can be justified on either of two grounds. First, the pursuit of quality medical services through the peer-review process is a legitimate antitrust objective in its own right. Second, the peer reviewers' actions are necessary to make the market for medical services more competitive.

a. Quality of Care as a Legitimate Objective in Its Own Right.—Courts have recognized that ensuring the safety of a product or service can be a legitimate justification for certain restraints, provided that the restraints are reasonably ancillary to a main purpose of protecting the public from harm or avoiding liability. Peer review is this sort of conduct. While the effect of an adverse peer-review action is to eliminate a competitor by preventing that physician from practicing at the institution, it is typically ancillary to the hospital's main purpose of protecting the public from inferior medical care or protecting itself from liability under the corporate negligence doctrine.

These purposes should be viewed as legitimate objectives under the antitrust laws because they are prompted by legal and professional duties imposed on institutional providers. As discussed earlier, a hospital must engage in peer review not only to maintain its accreditation from the JCAHO, but also to discharge its obligations under state statutes and tort law to ensure the professional competence of its medical staff. Hospitals would be put in

anticompetitive intent); Havighurst, supra note 78, at 1155 (anticompetitive intent raises subjective issues incapable of definitive proof).

255. See infra subsection II(C)(3)(a). See generally Ross, The Traditional Rule of Reason Analysis and the Importance of a Quality Defense in Health Care Cases, in ABA, ANTITRUST ISSUES IN HEALTH CARE tab D (Oct. 1990) (reviewing Supreme Court cases and concluding that whether a quality defense exists in health care antitrust cases is unresolved).

256. See infra subsection II(C)(3)(b).

257. See, e.g., National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 696 n.22 (1978); see also 7 P. Areeda, supra note 119, at 369, 383-89.

258. The elimination of a competitor is not necessarily an unreasonable suppression of competition. See Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (antitrust laws were enacted for "the protection of competition, not competitors") (emphasis in original).

259. See supra notes 179-187 and accompanying text.
an untenable position if, on the one hand, state common law or statutes required them to engage in conduct for the purpose of ensuring quality of care and promoting patient welfare on their premises, and yet on the other hand, the antitrust laws were interpreted to make such a purpose not sufficiently legitimate to avoid antitrust liability. Inasmuch as section 1 prohibits only "unreasonable" restraints of trade, an objective that is mandated by law should not be deemed irrelevant to the assessment of reasonableness.260

Nevertheless, language in Supreme Court precedent might seem to imply such an anomalous result. Properly analyzed, however, these cases do not preclude the conclusion that concerns for patient welfare effectuated through peer review are legitimate objectives under antitrust laws.

*National Society of Professional Engineers v. United States* involved a canon of a professional engineering association that prohibited its members from soliciting or submitting engineering proposals on the basis of competitive bidding.261 The Supreme Court upheld the lower courts' invalidation of the canon as unlawful on its face. The Court flatly rejected, as inconsistent with the Sherman Act, the Society's defense that the restraint was justified because competitive bidding "would lead to deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequent risk to public safety and health."262 Characterizing this defense as "nothing less than a frontal assault on the basic policy of the Sherman Act,"263 the Court found the defendants' appeals to promoting the public interest to be irrelevant. It declared that the focus of antitrust analysis was on the challenged restraint's impact on competition, not on its claims to promoting the public interest despite its adverse effects on competition.264

260. Noneconomic justifications for challenged restraints have been urged as legitimate. See, e.g., National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 134-35 (1984) (White, J., dissenting) (legitimate noneconomic goals should not be ignored); *National Soc'y of Professional Eng'rs*, 435 U.S. at 699-701, (Blackmun, J., concurring) ("there may be ethical rules which have a more than de minimus anticompetitive effect and yet are important in a profession's proper ordering"); Wilk v. American Medical Ass'n, 719 F.2d 207, 227 (7th Cir. 1983) (value independent of values attributed to unrestrained competition must enter the rule of reason analysis in the context of patient care). But see 7 P. Areeda, supra note 119, ¶ 1504, at 381 (noting the Supreme Court's hostility to noncompetitive justifications).


262. Id. at 699 (footnote omitted).

263. Id. at 695.

264. See id. ("Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute.").
The Supreme Court was equally unsympathetic to similar quality-protection and public interest arguments made by the dental profession in *Federal Trade Commission v. Indiana Federation of Dentists.* At issue was the lawfulness of a "work rule" promulgated by an association of dentists. The rule prohibited member dentists from submitting x-rays to dental insurance companies along with claim forms. As had the engineers, the dentists defended their rule in terms of ensuring the quality of their professional services: providing x-rays to insurers might lead insurers to determine inaccurately proper levels of dental care, and thus injure the health of patients.

The Supreme Court made short work of this defense. Drawing an analogy between the withholding of x-ray information in this case and the withholding of price information in *Professional Engineers,* the Court rejected as another "frontal assault" on the Sherman Act the argument that giving to consumers (or insurers acting on their behalf) information they deemed relevant would lead consumers to make unwise or dangerous choices. The Court reasoned that because it had found that noncompetitive, quality-of-service arguments did not justify the denial of information in the market for engineering services, it would find equally unavailing similar justifications for the suppression of information in the dental services market.

If the engineers' claim of promoting the public's health and safety by protecting it from deceit and inferior engineering work was an illegitimate defense under antitrust law, why should the Sherman Act countenance the claim of medical professionals that their peer-review actions, which hamper or destroy a doctor's ability to practice her profession, are legitimate because they promote patient welfare or improve the quality of health care? How can the Court's rejection of the dentists' noncompetitive, quality-of-service justifications be reconciled with acceptance of peer reviewers' claim of promoting the quality of medical care? Why is it not equally a "frontal assault" on the basic policy of the Sherman Act to argue that peer review is not an unreasonable restraint because it eliminates inferior medical practice and therefore promotes the public interest?

These two Supreme Court cases can be distinguished from the

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266. See id. at 452, 462-63.
267. See id. at 463.
typical peer-review case on several grounds. First, the engineers' ethical canon and the dentists' "work rule" were not legally mandated, as is peer review. No affirmative public policy or positive law required the engineers or dentists to engage in their respective challenged activities. Unlike peer review, which discharges specific affirmative legal obligations, the dentists' work rule and engineers' canon were promulgated out of more vague, generalized concern for public welfare.\textsuperscript{268} Second, both the engineers and the dentists engaged in withholding information about their services from consumers (or from insurers who were acting on behalf of consumers). As opposed to suppressing information, peer review actively generates information about the service provided by medical practitioners to consumers. Although such information might not be given directly to patients, it is provided to those who purport to act on their behalf, such as institutional providers and state medical review boards. Increasing information in the marketplace is a well-recognized, legitimate objective under the antitrust laws.\textsuperscript{269}

Finally, in \textit{Indiana Dentists} and \textit{Professional Engineers}, there was a weak nexus between the alleged ends sought to be achieved (ensuring quality) and the means chosen (suppression of information) for achieving those ends.\textsuperscript{270} The engineers claimed that suppressing price information was a means to prevent price-cutting in order to promote quality engineering work. The dentists argued that suppressing x-ray information was a means to prevent consumers' misuse of the information in order to promote quality dental services. Not only is the nexus weak between ends and means, but the linking activities in both cases are favored activities under the antitrust laws: both the lowering of prices (as in \textit{Professional Engineers}) and the use of information by consumers as they see fit (as in \textit{Indiana Dentists}) are activities classically viewed as facilitating or promoting competition.\textsuperscript{271} By contrast, peer review directly achieves its goals of pro-

\textsuperscript{268} See Wilk v. American Medical Ass'n, 719 F.2d 207, 228 (7th Cir. 1983) ("generalized concern for public health, safety, and welfare . . . affords no legal justification for economic measures to diminish competition"); Areeda, \textit{supra} note 166, at 579-80 (Supreme Court has rejected generalized claims that a restraint serves the public interest).

\textsuperscript{269} See infra notes 274-275 and accompanying text.

\textsuperscript{270} Indeed, the nexus was so tenuous in each case as possibly to give rise to a suspicion that the claimed justifications were not the true ones.

\textsuperscript{271} See Havighurst, \textit{supra} note 78, at 1157-60. See also Kreuzer v. American Academy of Periodontology, 735 F.2d 1479, 1494 (D.C. Cir. 1984) (where the rational nexus between a professional rule and public protection is close, courts are more willing to uphold the challenged restraint of the profession). Professor Areeda has suggested that the "dentists cloaked their restraint with the garb of improving patient care. The Court
moting quality medical care by reviewing the actual services of medical practitioners so that hospitals and state medical review boards can take steps to prevent incompetent or unprofessional practitioners from providing those services.

b. Ensuring Quality of Care as Improving Competition.—Even if peer review’s claim to promoting patient welfare or the quality of medical care is not viewed as a legitimate objective in its own right under the antitrust laws, on the ground that it is tantamount to the generalized public interest claims that were rejected in Professional Engineers and Indiana Dentists, peer review’s goals may be recognized as legitimate if they are cast, not in terms of promoting the public interest, but rather in terms of promoting competition.

Peer review can be argued to promote competition because by correcting a market failure, peer review improves the efficiency of the health-care marketplace. While competition among sellers of

then rejected that purpose as illegitimate, stripping away the “cloak” and leaving a “naked restraint.” Areeda, supra note 166, at 578. This author believes the Court’s rejection of a patient-care concern in Indiana Dentists is best explained as a skepticism about the sincerity of the concern, that is, a recognition of the weak nexus between the dentists’ claimed goals and their chosen means, rather than as a general condemnation of patient-care concerns for all cases. See Indiana Dentists, 476 U.S. at 464 (“even if concern for the quality of patient care could under some circumstances serve as a justification for the careful use of x rays as a basis for evaluating insurance claims is in fact destructive of proper standards of dental care”). Along this same line, Professor Areeda has argued that despite the Court’s hostility in Professional Engineers to public safety justifications, he doubts that the Court meant to condemn a restraint that actually saves lives. See 7 P. Areeda, supra note 119, ¶ 1504, at 381.

272. See Marin v. Citizens Memorial Hosp., 700 F. Supp. 354, 361 (S.D. Tex. 1988) ("restricting staff privileges to doctors who maintain a basic level of medical competence is ultimately pro-competitive not anti-competitive"); Friedman v. Delaware County Memorial Hosp., 672 F. Supp. 171, 190 (E.D. Pa. 1987) (exclusion of a doctor who refuses to follow established procedures to protect patients from unnecessary surgery is procompetitive); Quinn v. Kent Gen. Hosp., 617 F. Supp. 1226, 1239 (D.C. Del. 1985) ("peer review process is arguably procompetitive, for by monitoring the qualifications and performance of physicians it may compensate for the relative lack of information about these matters by consumers."). Professor Areeda has advanced the argument that “many claims of redeeming virtue expressed by laymen in ‘public interest’ terms can be reformulated in terms of promoting competition,” and that rather than suppressing competition, actions that offset a “market failure” can promote competition. See 7 P. Areeda, supra note 119, at 383. Professor Havighurst has advanced a similar argument in the context of profession-sponsored peer review:

Indeed, it can be argued that if the law does no more than make allowance for the reality that markets are imperfect, it leaves the underlying paradigm of competition unchallenged. Unlike the public-safety claims offered in [Professional Engineers], a narrow market-failure defense for an agreement to adhere to a profession’s official practice standards might escape being characterized as “a frontal assault on the basic policy of the Sherman Act.”
a given service or product is traditionally thought to bring about the
best mix of price, output, and quality for that service or product, several factors prevent the health-care market from achieving this competitive ideal. Among the factors that have been identified as impeding the free operation of market mechanisms in the health-care industry is the consumers' lack of information about the cost and quality of medical services. Peer review serves to correct this market imperfection by generating information about the quality of medical care provided by individual practitioners. In addition, it is procompetitive to the extent that it improves the quality of medical services by preventing incompetent or unprofessional doctors from providing them.

This analysis is bolstered by HCQIA itself, for its legislative history is a lengthy testimony to the overwhelming failure of the health-care marketplace to eliminate bad quality medical care. In its findings, Congress bluntly identified this market failure as the "increasing occurrence of medical malpractice," which "can be remedied through effective professional peer review." Thus, Congress itself has acknowledged the competitive imperfections of the health-care marketplace as well as the procompetitive benefits that good-faith peer review can provide to offset these imperfections. Concerned that the threat of antitrust litigation would chill desirable competitive conduct in the form of good-faith peer review, Congress legislatively declared it to be protected conduct under the antitrust laws. In effect, HCQIA reflects a legislative judgment that

Havighurst, supra note 78, at 1143 (footnotes omitted). Similarly, Professor Greaney has expanded on the view that peer review corrects market failure. See Greaney, supra note 252, at 627-49. While some courts have adopted this approach, e.g., Kreuser, 735 F.2d at 1491-92, other courts have rejected it, e.g., Koefoot v. American College of Surgeons, 1987-1 Trade Cas. (CCH) ¶ 67,509, at 60,151 (N.D. Ill. 1987) ("An argument that improving patient care is patently procompetitive is nothing more than a reformulation of the defendants' argument that their conduct is justified because it is motivated by a general concern for patient welfare.").

273. See Professional Eng'rs, 435 U.S. at 695 ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.").

274. See Greaney, supra note 252, at 633-35.

275. See Havighurst, supra note 78, at 1157-60, 1168.

276. See Letter from Charles F. Rule, supra note 178 (although denial of privileges to an incompetent practitioner may make it difficult or impossible for him to practice his profession, "such a denial does not impair competition. Rather, because the denial will enhance the quality and efficiency of health care and thereby strengthen the hospital's competitive position, peer review serves the underlying goals of the antitrust laws.").

277. See supra notes 24-35, 42-45, and accompanying text.


279. Id. § 11101(3).
effective peer review helps to eliminate medical malpractice and hence to improve the functioning of the health-care marketplace.

By choosing to test the facial legitimacy of a peer-review action in terms of the purposes for which it was undertaken, Congress approved the way most lower courts have approached peer review under the antitrust laws. Even before HCQIA's enactment, in staff privileges cases that survived summary judgment, the reasons why the defendants denied or revoked the plaintiff's privileges were critical to the outcome. This approach was justified either because improving the quality of medical care and promoting patient welfare are legitimate objectives in their own rights under the antitrust laws, or because improving the quality of health-care delivery by preventing incompetent or unprofessional doctors from practicing improves competition in the health-care market.

III. PEER-REVIEW LITIGATION ON SUMMARY JUDGMENT, WITH OR WITHOUT HCQIA

Thus far, this Article has contended that the rules for establishing antitrust liability of defendants in a peer-review lawsuit are virtually unchanged by HCQIA as a matter of substantive law. Although an avowed purpose of the drafters was to provide limited immunity from antitrust liability, the Act appears to immunize only conduct that would not be actionable under the antitrust laws in the first place. Moreover, the cost-shifting and presumption provisions effect no practical difference in the procedural handling of these lawsuits, and therefore provide little of the promised disincentives to initiating suit.

What then, if anything, does HCQIA do? One final goal espoused by the drafters was that the Act would expedite the disposition of peer-review litigation. Even if the Act did not provide any new protection from ultimate liability in otherwise meritorious cases, it would be an affirmative change if it provided new protection from lengthy and costly litigation in nonmeritorious ones. Because defendants won the vast majority of peer-review cases prior to

280. See supra subsection II(B)(3).
281. See supra subsections II(B)(1), (2).
282. See H.R. Rep. No. 903, supra note 24, at 12 (noting Committee's intention to "allow defendants to file motions to resolve the issue of immunity in as expeditious a manner as possible"); 132 Cong. Rec. H9959 (daily ed. Oct. 14, 1986) (emphasizing "the importance of resolving the issue of immunity in as expeditious a manner as possible").
HCQIA, the so-called chilling effect of peer-review litigation may be due less to the perceived risk that defendants will ultimately lose the case and incur treble damages than to the perceived risk that even if they win they will have undergone pointless, expensive, and time-consuming litigation. Indeed, the legislative history reveals that concerns over the threat of protracted litigation were as significant as those over the threat of actual liability.

Had it not been for a recent trilogy of cases from the Supreme Court, HCQIA might have made a difference in the procedural handling of peer-review litigation at the summary judgment stage. Traditionally courts considered the ascertainment of a party's state of mind to be a factual question properly within the province of the jury and hence inappropriate for summary disposition. HCQIA made the defendants' purpose dispositive, and thus arguably, the Act could have been interpreted to give judges new license to assess on a motion for summary judgment evidence of the legitimacy of the peer-review defendants' asserted purpose, thereby avoiding, if the issue were resolved in the defendants' favor, both judicial consideration of a multitude of other issues typically raised for summary disposition as well as a trial.

The trilogy of Supreme Court cases has independently accomplished this same result. Part III discusses how the inquiry into the defendants' purpose should be handled on a motion for summary judgment both under HCQIA and independently of the Act. Because nearly all peer-review litigation has been disposed of at the summary judgment stage in the defendants' favor, a careful analysis of summary judgment principles in the context of this litigation is critical. Part III concludes that inquiry into the defendants' purpose should be handled the same way with HCQIA as without it.

A. A Perspective on Summary Judgment

One approaches the topic of summary judgment with consider-

283. See supra note 77 and infra note 452, and accompanying text.
284. See supra note 36.
286. The leading case is Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 473 (1962) ("summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles"). See also 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2730 (2d ed. 1983) (summary judgment often is inappropriate to resolve the issue of a party's state of mind).
287. See infra note 452 and accompanying text.
able trepidation. The general rule is easy to state. Rule 56 provides that summary judgment shall be granted if there is "no genuine issue as to any material fact." From there, interpretation of the rule is characterized by ambiguous principles and judicial inconsistency, and the field is fraught with criticism, disagreement, and frustration.

Prior to the trilogy, conventional wisdom under Poller v. Columbia Broadcasting System dictated that summary judgment procedures should be used "sparingly" in antitrust litigation, and more generally that summary judgment should not be granted if there was the "slightest doubt" as to the facts. Critics challenged this pre-trilogy conventional wisdom, arguing against the talismanic invocations of caution and pointing out that lower courts did not uniformly practice the judicial hesitancy Poller preached.

289. See, e.g., Calkins, Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System, 74 Geo. L.J. 1065, 1110 (1986) ("Buried within the unpretentious words of [Rule 56] lie some of the most troublesome issues in the law"); Friedenthal, Cases on Summary Judgment: Has There Been a Material Change in Standards?, 65 Notre Dame L. Rev. 770, 781-82 (1988) (courts "have found it awkward to articulate a specific positive standard for sufficiency" of the nonmoving party's showing that the dispute is genuine); Harmon & Fore, Summary Judgment in Complex Antitrust Cases, 31 So. Tex. L. Rev. 381, 392 (1990) ("there are no standards for determining genuineness of issues or materiality of facts"); Risinger, Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment, 54 Brooklyn L. Rev. 35, 38 n.17 (1988) (discussing the indeterminacy of summary judgment tests).
291. Id. at 473; see C. Wright, A. Miller & M. Kane, supra note 286, § 2732.1, at 313 (antitrust cases are "by their very nature poorly suited for disposition by summary judgment").
293. See, e.g., Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L.J. 745, 746 (1974) (most decisions "simply draw from the available cliches, which are selected in classic cut-and-paste style to support whatever result the court feels is proper. In reality most judges are simply muddling through and denying the motion whenever they are in doubt."); Schwarzer, supra note 148, at 466-67 (rule 56 "has become encumbered with an impressionistic and dogmatic overlay that obstructs sound analysis. . . . Discussions of summary judgment generally consist of formalistic rhetoric and often reflect a hostility toward summary procedures. . . ."); Sonenshein, State of Mind and Credibility in the Summary Judgment Context: A Better Approach, 78 Nw. U.L. Rev. 774, 787-88 (1983) (criticizing "talismanic" invocation of Poller).
294. See, e.g., Calkins, supra note 289, at 1067, 1104, 1120 (noting assault on Poller); Louis, Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases,
The trilogy appeared to reject the conventional wisdom. Without reference to Poller, the Supreme Court in Matsushita Electric Industrial Co. v. Zenith Radio Corp. stated that there must be more than "some metaphysical doubt" as to facts to defeat a summary judgment motion. In Anderson v. Liberty Lobby, Inc., the Court found that if the evidence is "merely colorable" or is "not significantly probative," summary judgment may be granted; the "mere existence of a scintilla of evidence" would not defeat the motion. In Celotex Corp. v. Catrett, the Supreme Court declared that summary judgment procedure was not a disfavored procedural shortcut in federal litigation. Given that each case in the trilogy was a 5-4 decision, it should come as no surprise that some of the jurists themselves and numerous commentators have found little improvement since the trilogy in the state of summary judgment jurisprudence. One commentator has lamented that there has been no replacement of the underlying legal doctrines since Poller's restrictive approach to summary judgment; rather, the courts "have simply developed a set of countervailing cliches in support of granting the motion." Even if the trilogy has failed to bring needed clarification to the law itself, most agree that it has created a judicial atmos-


297. Id. at 249-50.
298. Id. at 252.
300. See id. at 327.
301. See id. at 257-58 (Brennan, J., dissenting) (Court's analysis "is deeply flawed, and rests on a shaky foundation of unconnected and unsupported observations, assertions, and conclusions"); id. at 269 (Rehnquist, J., dissenting) (Court "contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before and has no intention of starting now"); Matsushita, 475 U.S. at 599 (White, J., dissenting) (complaining of the Court's "confusing and inconsistent statements about the appropriate standard for granting summary judgment").
302. See, e.g., Mullenix, Summary Judgment: Taming the Beast of Burdens, 37 DEFENSE L.J. 529, 533, 546, 556 (1988) (criticizing the trilogy for making summary judgment procedures less clear and more inefficient). A couple of commentators have felt the need to create charts just to follow the Court's summary judgment pronouncements. See, e.g., id. at 561-62; Nelken, One Step Forward, Two Steps Back: Summary Judgment After Celotex, 40 HASTINGS L.J. 53, 84 (1988).
phere more conducive to the granting of summary judgment.304

B. Guidelines for Summary Judgment in Peer-Review Cases

Each case in the trilogy addressed the general question of how, on a motion for summary judgment, a court determines whether a genuine issue of material fact exists requiring trial. Analysis of this question involves two steps.305 First, the court must determine whether the moving party has satisfied its initial burden of production to show the lack of a genuine dispute. Celotex was primarily concerned with this question.306 Second, assuming the movant meets this burden, the burden now shifts to the nonmoving party, and the court must determine whether the nonmovant has satisfied its burden to come forward with evidence showing the existence of a genuine issue.307 Matsushita and Liberty Lobby were primarily concerned with this question.

While this two-step analysis applies to every issue that can be raised on summary judgment, this section limits its analysis to the peer-review plaintiff’s burden on summary judgment on the issue of whether the defendants conspired or engaged in concerted action (without HCQIA) and the issue of whether the defendants qualify for immunity (with HCQIA). These issues are largely the same because they both raise the problem of ascertaining the defendants’ purpose in acting adversely to the plaintiff. HCQIA makes the peer reviewers’ purpose dispositive for immunity, and cases not under HCQIA have focused on evidence of the defendants’ purpose in determining whether a conspiracy could reasonably be inferred by the factfinder. In cases not under HCQIA, plaintiffs have avoided summary judgment or a directed verdict on the conspiracy issue by showing a genuine dispute as to the peer reviewers’ purpose.308 As

304. See, e.g., Calkins, supra note 289, at 1119; Friedenthal, supra note 289, at 771, 787; Harmon & Fore, supra note 289, at 382, 388-91, 395; Note, Summary Judgment in Federal Court: New Maxims for a Familiar Rule, 34 N.Y.L. SCH. L. REV. 201, 213 n.99, 218 n.125 (1989) (most libel and antitrust cases since the trilogy have resulted in summary judgment for defendants).

305. See Louis, supra note 303, at 1044 n.147.

306. See id.

307. See id.

discussed below, virtually the same showing will have to be made under HCQIA for the plaintiff to avoid summary judgment.\textsuperscript{309}

Stated another way, the same evidence can be used to avoid summary judgment in non-HCQIA cases as in cases under the Act, because evidence that in non-HCQIA cases successfully establishes a genuine issue over the fact of a conspiracy would also successfully create a genuine issue over whether the reasonable-belief immunity standards were met. Understanding how these cases should be handled both under HCQIA and without it remains important, for peer-review cases will continue to arise in which the defendants might not qualify for immunity under HCQIA,\textsuperscript{310} and yet they could still rely on their claim of a legitimate purpose to avoid antitrust liability.

1. \textit{The Moving Party's Burden.}—In a peer-review case not under HCQIA, \textit{Celotex} has made the burden on the parties moving for summary judgment (assumed throughout to be the defendant peer reviewers) relatively light. They may satisfy their initial burden of production to show a genuine issue of material fact in one of two ways: first, by simply pointing out an absence in the discovery record of any evidence that supports one or more of the elements of the plaintiff's prima facie case, or second, by presenting affirmative evidence that disproves or negates one or more of the elements of the plaintiff's claim.\textsuperscript{311} If they choose the second alternative, their burden may be satisfied by offering evidence of a legitimate objec-

\textsuperscript{309} See infra notes 318-322 and accompanying text. To the extent that there is any difference between the two showings, arguably less may be required to demonstrate a genuine issue over whether defendants complied with the immunity standards than to demonstrate a genuine issue over whether the defendants engaged in an unlawful conspiracy. To rebut the immunity claim under HCQIA, the plaintiff should be able simply to offer evidence that negates the defendants' assertion (or presumption) of compliance. Rebuttal evidence that raises defendants' bias, untruthfulness, or lack of credibility ought to suffice to create a genuine issue over whether the immunity standards were met. However, such evidence may not suffice to create a genuine issue over whether the defendants conspired. Plaintiff must offer some evidence, direct or circumstantial, that affirmatively supports a finding of conspiracy, and cannot simply rely on impeaching the defendants' denials of conspiracy. See infra notes 332-333 and accompanying text. What this means is, to the extent HCQIA may permit a different level of proof for plaintiff to avoid summary judgment on the issue of immunity, it arguably provides an evidentiary threshold that is lower than is required of the plaintiff on the issue of conspiracy. Thus, the Act does not increase the potential for expediting review of this litigation.

\textsuperscript{310} For example, the peer reviewers' claim for immunity may fail because the plaintiff is not a physician, because the action does not concern the plaintiff's competence or professional conduct, or because the defendants failed to provide appropriate due process procedures. See supra notes 191-93 and accompanying text.

tive for their action.\textsuperscript{312} If they have met their burden in this second fashion, the burden of production now shifts to the plaintiff to show a genuine dispute over the peer reviewers' true objectives, although the burden of persuasion on whether a genuine dispute exists remains on the moving parties.\textsuperscript{313}

In a case to which HCQIA may apply, the moving parties may satisfy their initial burden of production in similar ways. Under the first alternative described above, the movants may, under \textit{Celotex} and without even raising HCQIA, simply point out an absence of evidence to support one or more of the elements of the plaintiff's prima facie case. Under the second alternative, the movants may raise the immunity provision of HCQIA and obtain the statutory presumption that, in acting adversely to the plaintiff, they were acting reasonably in the pursuit of quality health care, which is tantamount in a non-HCQIA case to offering evidence of a legitimate objective.\textsuperscript{314} Whether the movants must offer affirmative evidence on a motion for summary judgment to support the presumption that they were so acting, or whether they may simply rely on the statute's presumption that they were, is an open question.\textsuperscript{315} If they must come forward with some affirmative supporting evidence of their reasonable health-care quality concerns, their burden would seem to be no heavier than in a non-HCQIA case to establish a legitimate

\begin{footnotes}
\item[312] Typically, this legitimate objective relates to health-care concerns. See \textit{supra} notes 166-167 and accompanying text. The peer reviewers may also choose to negate any one of several elements of the plaintiff's prima facie case. For example, they may satisfy their production burden by offering a sworn affidavit denying the plaintiff's allegation of conspiracy. See Louis, \textit{supra} note 293, at 755.
\item[313] See \textit{Anderson v. Liberty Lobby, Inc.}, 477 U.S. 242, 256 (1986) (movant has burden of showing no genuine issue of fact).
\item[314] See \textit{infra} notes 321-322 and accompanying text.
\item[315] An argument that the defendant peer reviewers need not come forward at the summary judgment stage with any evidence that supports proof of their compliance with the immunity standards is that, as a general proposition, the effect of a rebuttable presumption is to relieve the party with the benefit of the presumption from having to introduce evidence on the presumed facts. See C. \textsc{Wright} & K. \textsc{Graham}, \textit{supra} note 157, § 5122, at 563 (effect of presumption is to satisfy the plaintiff's burden of producing evidence on presumed fact); G. \textsc{Shreve} & P. \textsc{Raven-Hansen}, \textsc{Understanding Civil Procedure} (1989) § 86, at 350 ("rebuttable presumption thus operates to satisfy the proponent's burden of production"). An argument that, despite the statutory presumption of compliance, the peer reviewers must nevertheless offer some evidence of compliance at the summary judgment stage is that, as a general matter, rule 56 imposes the initial and ultimate burden on the moving party to show the absence of a genuine dispute of material fact, even as to those issues on which the nonmoving party will bear the burden of proof at trial. See \textit{supra} note 313 and accompanying text; \textit{Louis, supra} note 303, at 1045 nn.150-151 (proposition that if moving party will not face burden of proof at trial, then moving party should not face any burden of production on summary judgment, "has been uniformly rejected by the federal courts").
\end{footnotes}
objective. If they need not offer such affirmative evidence at the summary judgment stage, then the burden of production will shift automatically to the plaintiff to show a genuine dispute over the peer reviewers' true reasons for acting adversely to the plaintiff.

Thus, HCQIA makes either no difference to the movants' burden of production on a summary judgment motion, or at most it arguably makes a mild difference by relieving the peer reviewers of an obligation to offer some evidence at the summary judgment stage that they were acting in the reasonable belief that they were furthering health-care quality. Because as a practical matter the peer reviewers will want to offer evidence on this issue in any event, this arguable technical difference in procedural burdens will probably make little practical difference in the resolution of summary judgment motions in peer-review disputes under the antitrust laws.

2. The Nonmoving Party's Burden Under HCQIA.—HCQIA does not specify, on a motion for summary judgment, what procedural effect is to be given the statutory presumption that defendants acted in accordance with the four immunity standards of subsection 11112(a). Specifically, the Act does not explicitly state what effect the plaintiff's failure to produce any rebuttal evidence would have. Secondly, if the plaintiff has come forward with some evidence, the Act provides no test for determining whether such evidence is sufficient to rebut the presumption and avoid summary judgment.

If the plaintiff produces no evidence to rebut the defendants' presumptive compliance with the four immunity standards, the court should grant summary judgment in the defendants' favor on the immunity question. Because the Act states that compliance with the standards shall be presumed "unless the presumption is rebutted by a preponderance of the evidence," the implication is

316. See C. Wright & K. Graham, supra note 157, § 5122, at 558-59 ("Hence, from a practical point of view, the weight of these burdens is of little concern; the party must attempt to introduce as much evidence as he can to support his factual contentions."). In Austin v. McNamara, 731 F. Supp. 934, 939-42 (C.D. Cal. 1990), the defendants did introduce evidence supporting their compliance with the immunity standards on a motion for summary judgment.

317. 42 U.S.C. § 11112(a) (1988). In Austin, 731 F. Supp. at 942, where the plaintiff made no attempt to refute or contest the defendants' compliance with the immunity standards, the court found the plaintiff's allegations of conspiracy insufficient to withstand summary judgment. The conclusion that the plaintiff must come forward with some affirmative evidence to rebut the presumption of compliance is supported by Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) (in a case under title VII of the Civil Rights Act of 1964, if the employer is silent in face of a presumption, the court must enter judgment for the party with the benefit of the presumption). In addition, scholars generally agree that an unrebutted presumption would justify a jury
strong that some affirmative rebuttal is required to avoid summary judgment.

Assuming that the plaintiff does come forward with some rebuttal evidence, the tougher question is whether it is enough to defeat a motion for summary judgment on the immunity defense. By providing that compliance with the immunity standards is presumed unless rebutted by a preponderance of the evidence, the Act suggests that, once the litigation has reached the trial phase, the burden rests on the plaintiff to persuade the factfinder that, more probably than not, the defendants did not comply with the four standards. The Act does not suggest that, on a motion for summary judgment, the judge is to assess whether the plaintiff has met this burden of persuasion.\textsuperscript{318} Proof of noncompliance with the immunity standards at

finding on the presumed fact in favor of the proponent of the presumption. See C. Wright & K. Graham, supra note 157, \S 5122, at 563 (unless opponent makes some attack on the presumption, the jury is required to find against him on the issue of presumed fact). See also infra note 326. But see C. Wright & K. Graham, supra note 157, \S 5122, at 571 (contrasting the effect of an unrebutted presumption under rule 301).

318. The Act does not provide that compliance with the immunity standards is a factual issue to be determined any differently from other factual issues in the case. The Committee Report, however, ambiguously states that the Act "would allow a court to make a determination that the defendant has or has not met the [immunity] standards..." H.R. Rep. No. 903, supra note 24, at 12. For several reasons, this ambiguous language in the report should be read, not as permitting the judge to make the factual determination of compliance (that is, whether the plaintiff has met her burden of persuasion on the issue of noncompliance), but rather as permitting the judge on an early motion to decide whether the plaintiff has come forward with sufficient evidence for a jury to find noncompliance by a preponderance of the evidence (that is, whether the plaintiff has satisfied the burden of production on the issue of noncompliance). First, this interpretation is consistent with other legislative history describing the rationale for imposing a preponderance of the evidence standard rather than a clear and convincing standard. The former was favored to determine noncompliance with the immunity provisions because it was the same standard applied to the determination of other factual issues in an antitrust case. See supra note 170 and accompanying text. Second, the Act does not expressly provide for judicial factfinding on compliance with the immunity standards. Third, judicial factfinding on the issue of noncompliance with HCQIA could create a conflict with the jury's factfinding on the underlying antitrust claims at trial. However, there is no indication in the legislative history that, for example, a judge's factual determination of noncompliance (for example, that the defendants' actions were not taken in the reasonable belief that they furthered quality of care) should affect or displace the jury's factual determination of the issues of conspiracy or the reasonableness of the restraint, both of which often depend on a factual determination of the defendants' purposes for their actions. See supra notes 244, 308, and accompanying text. Finally, this interpretation that compliance with HCQIA's immunity standards is a jury question where the evidence shows a genuine dispute of material fact over the defendants' purposes, is consistent with the allocation of decision-making functions between judge and jury on an analogous immunity question that raises factual issues of the defendants' "reasonable beliefs," namely, the issue of qualified immunity for executive officials in a civil rights action. See Note, Qualified Immunity and the Allocation of Decision-
the summary judgment stage should thus be treated as is proof of every other factual issue on which the plaintiff bears the burden of persuasion at trial: to defeat a motion for summary judgment, the plaintiff must provide sufficient evidence for a rational factfinder to return a verdict in her favor. On a motion for summary judgment, the judge must decide, not whether she believes that the defendants more probably than not did not comply with the four immunity standards, but rather whether a rational jury could so find on the evidence presented by the plaintiff. If it could, then summary judgment should be denied.

Because inquiry into compliance with the four standards (particularly inquiry into the reasonableness of the peer reviewers’ actions and their concerns about the quality of health care) closely parallels the inquiry made in cases not under HCQIA into the legitimacy of the defendants’ claimed objectives (usually also related to quality-of-care concerns), it follows that the standards for determining whether a “genuine issue” exists are also parallel, if not identical. At least in the absence of a countervailing standard in the Act, the general standards for assessing the sufficiency of plaintiff’s evidence on a motion for summary judgment should apply to cases both under HCQIA and independent of it, as analyzed below.

319. See Liberty Lobby, 477 U.S. at 248.
320. See id. at 252 (“judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented”). See also Note, supra note 304, at 225 (“critical inquiry is not whether the judge finds one party’s evidence more convincing than another’s, but whether a jury could legally so find”); Note, The Effect of Presumptions on Motions for Summary Judgment in Federal Court, 31 UCLA L. Rev. 1101, 1115 (1984) (“A court should not grant summary judgment simply because it feels that the opposing party is unlikely to prevail at the trial. To make such an assessment is essentially to try the case.”) (citations omitted); infra notes 434-435 and accompanying text.
321. See supra notes 162-170 and accompanying text.
322. This conclusion follows not only in logic but from policy, for the same policy considerations that gave rise to HCQIA’s express presumption of reasonableness and due process by the peer reviewers also have created a practical presumption in their favor of the legitimacy of their actions in non-HCQIA cases. See supra notes 151-156 and accompanying text.
3. The Nonmoving Party's Burden Without HCQIA.—Once the defendants have moved for summary judgment on the issue of conspiracy-in-fact—supporting the motion adequately under Celotex and offering a legitimate objective for undertaking the adverse peer-review action against the plaintiff (such as her incompetence or professional misconduct)—the burden of production now shifts to the plaintiff. At this point, the Monsanto-Matsushita principles apply. Because the defendants' adverse action against the plaintiff is not only consistent with inferences of lawful peer review and illegal conspiracy, but also is conduct that innocent peer reviewers would be likely to engage in if undertaking lawful peer review, the plaintiff must come forward with affirmative evidence that tends to exclude the possibility of lawful conduct. In other words, to avoid summary judgment in a non-HCQIA case, the plaintiff must come forward with affirmative evidence "such that a reasonable jury could return a verdict" in her favor on the existence of an illegal conspiracy.

What evidence will suffice to meet this burden? As with cases under the Act, if the plaintiff comes forward with no evidence, she has obviously not met her burden. If the plaintiff puts forth direct evidence of a conspiracy, then she has met her burden, and the court must deny the motion. The harder, and far more typical, case is the plaintiff who is relying on circumstantial evidence to support an inference of conspiracy.

The courts have been reluctant to articulate precise standards for testing when the plaintiff's circumstantial evidence provides a sufficient basis for a jury verdict in her favor in large part because

323. See supra notes 123-150 and accompanying text.
325. Liberty Lobby, 477 U.S. at 248.
326. See Celotex Corp. v. Catrett, 477 U.S. 317, 324-25 (1986) (nonmoving party cannot resist proper summary judgment motion by relying on allegations in pleadings alone); Popofsky & Goodwin, The "Hard-Boiled" Rule of Reason Revisited, 56 Antitrust L.J. 193, 207-08 (1987) (where the defendant moves for summary judgment on the ground that no conspiracy exists and presents a plausible procompetitive explanation, the plaintiff must present evidence that tends to exclude the possibility that the defendant engaged in the conduct for legitimate reasons); Schwarzer, supra note 148, at 484-85 ("if the movant comes forward with a lawful explanation of its conduct and the opponent offers no opposing evidence, the motion must be granted if entry of judgment is otherwise appropriate.").
327. See Friedenthal, supra note 289, at 781 ("opposing party will always be able to defeat the motion by putting in direct evidentiary material supporting its side of the case"); Note, supra note 145, at 491, 517 ("If all of the elements are supported by direct evidence, summary judgment must be denied").
this determination is at bottom a matter of judgment.\textsuperscript{328} Although there may be no "magic formula"\textsuperscript{329} for testing the sufficiency of the nonmoving party's response, the courts have developed some general guidelines, which at least create an atmosphere in which this judicial judgment is to be exercised.

The remainder of Part III analyzes peer-review litigation in the context of five issues that have traditionally guided the courts in testing the sufficiency of evidence on a motion for summary judgment. Although admittedly some of these issues might be characterized as "maxims" or "rules" or perhaps even "clichés,"\textsuperscript{330} the issues have served to focus the courts' inquiry on motions for summary judgment. Specific peer-review cases will be examined to illustrate the application of these guidelines. If because of their generality the guidelines do not ordain the outcome of every case, they are nonetheless useful in providing a feeling for the judicial role in assessing the sufficiency of the nonmoving party's response to a motion for summary judgment.

\textit{a. Specific Evidence.}—Rule 56(e) provides that the nonmoving party's response must "set forth specific facts showing that there is a genuine issue for trial."\textsuperscript{331} It is usually not sufficient for the plaintiff simply to attack the credibility of the defendants' witnesses; on issues on which the plaintiff bears the burden of proof, the plaintiff must come forward with affirmative facts of her own.\textsuperscript{332} Thus, in a conspiracy case, the plaintiff cannot simply argue that the defendants' denials of conspiracy should not be credited.\textsuperscript{333}

\begin{itemize}
\item \textsuperscript{328} See Friedenthal, supra note 289, at 781-82.
\item \textsuperscript{329} \textit{Id.} at 782.
\item \textsuperscript{330} Professor Louis has consistently characterized the standards for summary judgment as clichés. See Louis, supra note 293, at 746; Louis, supra note 303, at 1042.
\item \textsuperscript{331} \textsuperscript{FED. R. CIV. P. 56(e).}
\item \textsuperscript{332} See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 ("discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion") (quoting Base Corp. v. Consumer Union of United States, Inc., 446 U.S. 485, 572 (1984)); 2 P. AREEDA & D. TURNER, ANTITRUST LAW \textsection 316, at 61 (1978) ("mere disbelief by one party of another's testimony is not usually sufficient ground for rejecting it"); Schwarzer, supra note 148, at 485 (attacking the credibility of the movant's witness is insufficient).
\item \textsuperscript{333} See Liberty Lobby, 477 U.S. at 256 (plaintiff may not defeat a summary judgment motion in a conspiracy case by merely asserting that the jury might disbelieve the defendant's denial of conspiracy); Nurse Midwifery Assocs. v. Hibbett, 689 F. Supp. 799, 808 (M.D. Tenn. 1988) ("While the jury was free to disregard the defendants' testimony that no agreement of any kind was formulated during the course of these contacts, mere disbelief could not rise to the level of positive proof of an agreement to sustain the plaintiffs' burden of proving conspiracy."); aff'd in part, rev'd in part, 918 F.2d 605 (6th Cir. 1990), modified on reh'g, 927 F.2d 904 (1991). See also Sonenshein, supra note 293, at
Cases not under HCQIA have been summarily disposed of on the ground that the plaintiff came forward with no specific, affirmative evidence that could support an inference of conspiracy by showing that the defendants were acting otherwise than as they claimed they were, namely, out of a legitimate concern over the plaintiff's competence or professional conduct. Courts are properly reluctant to entertain allegations they perceive to have been fabricated out of "whole cloth."

These cases would be treated the same way under HCQIA. Under the Act, the plaintiff is required to rebut the presumption of compliance with the immunity standards by a preponderance of the evidence. If the plaintiff offers no evidence at all to show that the defendants were not acting out of a reasonable concern over quality of care in light of the plaintiff's competence or professional conduct, then summary judgment for the defendants would appropriately be granted. Indeed, this result occurred in the only case thus far to be decided on the merits under HCQIA.

On the other hand, in non-HCQIA cases where the plaintiff has come forward with specific evidence that undercuts the defendants' claimed procompetitive or health-care concerns, the plaintiff has successfully avoided summary judgment or a directed verdict. Typically, such evidence consisted of the defendants' overt expressions of concern about the competition posed by the plaintiff's practice. For example, in Miller v. Indiana Hospital, the plaintiff had evidence that members of the hospital's board and administration had

789 ("It is axiomatic that a party is not permitted to prove a positive proposition by first offering a witness who refutes the proposition, and then impeaching that witness.").


336. See supra note 317 and accompanying text.

337. See Austin v. McNamara, 731 F. Supp. 954, 942 (C.D. Ca. 1990) (plaintiff did not attempt to refute or contest any of the defendants' efforts to apply HCQIA immunity provisions to case).

expressed concerns that the plaintiff’s expansion of his medical center posed a competitive threat to the hospital, and that they wanted to gather sufficient support among the medical staff of the hospital to prevent the plaintiff from hiring good doctors to staff his medical center. In *Sweeney v. Athens Regional Medical Center*, the plaintiff produced evidence that, among other things, the chiefs of the obstetrics departments at two hospitals had written a joint letter to the hospitals that the plaintiff nurse-midwife’s home-birth practice “must be eliminated.” In other cases, the defendants had expressed the opinion that there were already enough of a certain class of practitioners in the community without the plaintiff. Although in *Bolt v. Halifax Hospital Medical Center* there was no evidence of an overt expression of anticompetitive purpose, the court would permit an inference of such purpose from evidence that the defendants’ allegations of the plaintiff’s professional incompetence were so baseless as to constitute a pretext for their anticompetitive purpose.

Evidence of these types of conduct (sometimes in conjunction with other evidence) sufficiently undercut the defendants’ claims to be acting for legitimate, medical care reasons to create a genuine issue as to their true purpose and hence to avoid summary judgment or a directed verdict in a non-HCQIA case. By the same token, such evidence would also be sufficient to create a factual dispute for the jury over whether the reasonable-belief immunity standards were met under HCQIA.

339. *Id.* at 141, 144.
341. *Id.* at 1572. While a desire to “eliminate” the plaintiff’s practice could be prompted either by economic self-interest or a genuine concern over the medical care that the plaintiff provided to patients, there was other evidence in this case that tended to exclude the possibility of independent action.
342. See, e.g., *Shah v. Memorial Hosp.* [*Shah I*], 1988-2 Trade Cas. (CCH) ¶ 68,199, at 59,328 (W.D. Va. 1988) (affidavit of a witness stated that he was refused an application for privileges at the defendant hospital “because Danville didn’t need any more urologists”); see also *Oltz v. St. Peter’s Community Hosp.*, 861 F.2d 1440, 1443 (9th Cir. 1988) (defendant anesthesiologists presented a report outlining the impact of nurse anesthetists (of which plaintiff was one) on anesthesiologist incomes); *Medical Staff of Memorial Medical Center*, 110 F.T.C. 541, 544 (1988) (a consent decree was obtained where an FTC complaint alleged that objections to granting nurse midwives privileges were that it would create an “economic problem” for obstetricians and that there was “no need in the community” for the services of nurse midwives).
344. *Id.* at 821-22. See also discussion of case infra at notes 350-355 and accompanying text.
b. Probative Evidence.—To carry her burden of producing evidence that there is a genuine issue of material fact, the nonmoving party’s evidence must be “probative.” Unfortunately, the courts have characterized this burden with vague phrases, and in measuring the sufficiency or probative value of the evidence, have engaged in somewhat circular restatements of the basic issue. Under Liberty Lobby’s formulation, whether the nonmoving party’s evidence is sufficiently probative to demonstrate a genuine factual issue depends on whether the evidence presents a “sufficient disagreement” to require submission to the jury. This otherwise unhelpful formulation at least focuses on the need for conflict or contradiction in the evidence or in the reasonable inferences from the evidence. Indeed, an alternative characterization is whether “reasonable minds could differ as to the import of the evidence.” About the best that can be urged in the application of this sufficiently-probative evidence standard to find a genuine dispute is the court’s impartiality and good faith. In the end, the judge is to decide not whether a verdict ought to be returned in the nonmoving party’s favor, but rather whether a reasonable jury could return one.


347. See Liberty Lobby, 477 U.S. at 251-52.
348. Id. at 250.
349. See id. at 249; see supra note 320 and infra notes 421-435 and accompanying text. This determination takes considerable detachment and objectivity. One wonders whether the five justices in the Matsushita majority—who by remanding in effect found that reasonable minds could not disagree about the import of the evidence thus far in the record—meant to imply that the four dissenting justices, who disagreed heartily about the import of the evidence, did not have reasonable minds. Indeed, the majority’s conclusion that there was insufficient factual evidence to support an inference of conspiracy has been sharply criticized. See, e.g., Stempel, supra note 292, at 108-14 (the Court assessed the probative value of each side’s evidence in a manner inappropriate for deciding summary judgment motions). The 5-4 split in Celotex poses the same irony, leading one commentator to observe that such “hair-splitting” on the issue of the suffi-
Bolt v. Halifax Hospital Medical Center provides a careful analysis of which evidence is, and which evidence is not, probative on the issue of conspiracy in a peer-review case. In that case, the plaintiff alleged that a conspiracy existed among three Florida hospitals to deprive him of medical staff privileges. Of particular interest is the evidence that the district court did not permit the plaintiff to introduce at trial. The plaintiff proposed to show that the proceedings and conclusion of an investigatory committee at one hospital, on which the other two hospitals also relied, were a sham and a pretext for their actions. Excluding this evidence from trial, the district court found it to have no probative value as a matter of law, because the court believed that proof of a jealous intent was not relevant to an evaluation of the reasonableness of the competitive effects of the challenged action.

The circuit court disagreed with the exclusion of the evidence, and found that its probative value on the issue of conspiracy was "extremely high." The circuit court’s position seems eminently correct for the reasons it stated:

If the evidence showed that the [conclusions of the hospital’s investigations] were so baseless that no reasonable medical practitioner ... could have reached those conclu-

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351. The circuit court also described three categories of evidence that were introduced by the plaintiff at trial, and explained why each was not sufficiently probative of a conspiracy among the hospitals to withstand the defendants’ motions for directed verdict. See id. at 826-27. The court found the following evidence insufficiently probative to withstand motions for directed verdict: (1) evidence of consciously parallel actions among the defendants, because the plaintiff provided no evidence that such actions were against the defendants’ individual, economic self-interests in the absence of mutual assurances to undertake the actions; (2) evidence of inter-hospital communications, because "it is well settled that the mere opportunity to conspire among antitrust defendants is insufficient to permit the inference of conspiracy"; and (3) statements by the chief of surgery at one hospital that "because [the] other two hospitals are going to get rid of [the plaintiff], we’ve got to seriously think of getting rid of him at [our hospital]," because such statements show only an awareness of the plaintiff’s difficulties at the other hospitals. Id. The court’s evaluation of this evidence is consistent with traditional antitrust analysis, for the plaintiff had established only that the conduct was consciously parallel, not that it was agreed upon. This evidence, which was admitted at trial, produced no "plus factors" that would have permitted on inference of conspiracy. See supra note 122 and accompanying text.
352. Id. at 821-22, 827-28. The plaintiff was prepared to offer evidence that members of the peer-review committees knowingly suborned false and fabricated evidence against him, and had personal motives for subverting the peer-review proceedings. Id. at 821.
353. See id. at 822.
354. Id.
sions, then a factfinder could easily infer . . . that the hospital and its peer review committees intended to enter into an agreement designed to achieve an end not dictated by legitimate business concerns.\textsuperscript{355}

Had \textit{Bolt} been decided under HCQIA, this same evidence would have been sufficiently probative to avoid summary judgment or a directed verdict on the issue of compliance with the immunity standards of subsection 11112(a). Evidence that the defendants' conclusions about the plaintiff's competence or professional conduct were groundless, pretextual, or based on knowingly false or fabricated evidence, would directly refute the defendants' position (presumed or otherwise) that their actions were taken in the reasonable belief that they were warranted to ensure quality of care, and hence it would create a genuine issue for trial over whether the defendants had met the immunity standards. Although under the Act the plaintiff has the burden to show by a preponderance of the evidence that the standards are not met, evidence that the peer reviewers' findings were a sham would permit a rational jury, viewing the evidence in the light most favorable to the plaintiff,\textsuperscript{356} to conclude that the reasonable-belief immunity standards were not met.

c. \textit{State of Mind Evidence}.—The defendants' state of mind is frequently a central issue in an antitrust conspiracy action for establishing two elements of the plaintiff's prima facie case. First, in a circumstantial case the plaintiff must show that the defendants had a rational motive to conspire in order to raise a plausible inference that in fact they did conspire.\textsuperscript{357} Second, whether the restraint is deemed reasonable under the rule of reason will often depend on the defendants' purpose in undertaking it: for a legitimate objective or an anticompetitive purpose.\textsuperscript{358} In accordance with \textit{Poller}, conventional wisdom dictated that summary judgment be granted "sparingly in complex antitrust litigation where motive and intent play leading roles . . . ."\textsuperscript{359}

\begin{thebibliography}{9}
\bibitem{355} \textit{Id.} at 821.
\bibitem{356} See \textit{Anderson} v. \textit{Liberty Lobby}, Inc., 477 U.S. 242, 255 (1986) (all justifiable inferences from the evidence are to be drawn in the nonmovant's favor).
\bibitem{358} See 7 P. AREEDA, supra note 119, ¶ 1504.
\bibitem{359} \textit{Poller} v. \textit{Columbia Broadcasting Sys.}, 368 U.S. 464, 473 (1962). \textit{See also} Louis, supra note 294, at 720 (summary judgment is traditionally denied almost automatically in cases involving state of mind).
\end{thebibliography}
This traditional approach was effectively discarded by the trilogy. In *Matsushita*, without even passing reference to *Poller*, the Supreme Court majority discussed at length whether the defendants had a rational motive to conspire, and concluding that they did not, declared there was no genuine issue for jury resolution on the state of the record thus far presented.\(^{360}\) In *Liberty Lobby*, a defamation action, the Supreme Court treated the issue of the defendant’s state of mind like any other factual inquiry, with the burden on the plaintiff to produce evidence on that issue that would support a jury verdict.\(^{361}\) There has been general approval for treating state of mind issues no differently on summary judgment from any other factual issues.\(^{362}\)

Thus, the presence of an issue as to the defendants’ motive or intent will not, by itself, be enough to defeat a motion for summary judgment either in a non-HCQIA case or in a case under the Act. Summary judgment analysis in either case must focus on whether the plaintiff can offer probative evidence that contradicts or undercut the defendants’ evidence of innocent motive or lack of improper intent.\(^{363}\) Without HCQIA, the plaintiff’s evidence must tend to exclude the possibility that the defendants were pursuing a legitimate goal;\(^{364}\) under HCQIA, the plaintiff’s evidence must rebut the presumption that the defendants were acting in the reasonable belief that they were furthering quality of care.\(^{365}\) Evidence that satisfies one standard will in all likelihood satisfy the other.\(^{366}\)

Plaintiffs in non-HCQIA cases frequently lost on summary judgment because their evidence did not refute or undermine in any

\(^{360}\) See *Matsushita*, 475 U.S. at 588-97.

\(^{361}\) See *Liberty Lobby*, 477 U.S. at 256-57.

\(^{362}\) See, e.g., *Miller v. Indiana Hosp.*, 843 F.2d 139, 143 (3d Cir.) (summary judgment standard is no different in antitrust litigation than in any other), *cert. denied*, 488 U.S. 870 (1988); *Calkins*, *supra* note 289, at 1118; *Louis*, *supra* note 293, at 766 (intent, motive, and other state of mind issues should be treated like other factual questions); *Sonenshine*, *supra* note 293, at 792-95 (state of mind cases should be treated no differently from other cases on summary judgment); Note, *supra* note 294, at 778-80 (eliminating special treatment of state of mind cases will allow more efficient operation of summary judgment).

\(^{363}\) See *Harmon & Fore*, *supra* note 289, at 398; *Sonenshine*, *supra* note 293, at 795 (summary judgment should be granted when the movant offers evidence demonstrating innocent motive or lack of intent, unless the non-movant offers substantial probative evidence contradicting such evidence).

\(^{364}\) See *Monsanto v. Spray Rite Serv. Corp.*, 465 U.S. 752, 764 (1984); see also *supra* notes 123-134 and accompanying text.

\(^{365}\) See *supra* notes 157-160 and accompanying text.

\(^{366}\) See *supra* notes 161-170 and accompanying text.
way the defendants' innocent explanation for their conduct. On the other hand, successful plaintiffs presented evidence which collectively tended to show that the defendants' purpose was to reduce competition rather than to improve patient care as they claimed. Because plaintiffs will, almost by definition, have only circumstantial evidence to counter the defendants' own testimony as to their purpose or intent, courts should be wary of too easily dismissing the inferential import of the plaintiff's evidence in the face of the defendants' denials of illegitimate motivation. The court should consider whether plaintiff's evidence as a whole would permit a rational jury to infer an unlawful purpose, rather than consider whether each individual piece of evidence, one by one, contradicts the defendants' innocent explanation of their conduct.

For example, the court in *Shah v. Memorial Hospital* may have impermissibly fragmented the plaintiff's circumstantial evidence of the defendants' purpose. The plaintiff was an anesthesiologist of Indian origin who, along with her urologist husband, opened up their respective practices in 1982 in Danville, Virginia. After waiting

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369. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 598 (1986) (White, J., dissenting) (proof of a conspiracy should not be fragmented); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962) (court should consider plaintiff's proof as a whole rather than "tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each").


371. Her husband filed a separate action against the hospital and physicians group for
almost ten months for the defendant hospital to grant her staff privileges, she became employed part-time by defendant Danville Anesthesiologists (DA), performing anesthesiology at the hospital. After only a year, the plaintiff resigned from DA. Upon DA's recommendation, the hospital thereafter restricted her privileges.372

Evaluating whether an inference that the defendants had conspired to drive the plaintiff from practice in the area was permissible, the court expressly considered evidence of: (1) the hospital's delay in granting her privileges; (2) the restriction of her privileges; (3) the presence of DA members on the hospital peer-review committees; and (4) the timing of the restriction of her privileges one week after her resignation from DA.373 For each piece of evidence, the defendants had a plausible innocent explanation, which the court appeared, one by one, to accept.374

While it is correct that the defendants' adverse actions alone cannot give rise to an inference of conspiracy,375 the court did not appear to consider relevant the plaintiff's further evidence that: (1) the chairman of the ad hoc committee to investigate the restrictions on her privileges had expressed a distaste for foreign physicians; (2) there was antagonism between DA and plaintiff; (3) DA had declined to give her full-time employment on the stated ground that a full-time employee was not needed, and yet less than two months later DA employed on a full-time basis an anesthesiologist whose license was under investigation by the State Board of Medical Examiners; and (4) the alleged problems with her medical care were common occurrences in administering various types of anesthesia.376 The first three pieces of evidence would seem to undercut the defendants' explanations only by undermining their credibility (bias in the form of personal animus, and possible untruthfulness in their purported reasons for refusing to hire plaintiff full-time), not by contradicting them. Mere disbelief in the defendants' testimony, however, does not suffice to raise an inference of conspiracy.377

Nonetheless, if plaintiff had evidence to support her contention that her patient cases had been properly managed, then a reasonable factfinder might infer from that evidence, together with the evi-

373. See id.
374. See id.
375. See supra notes 143-156 and accompanying text.
376. See Shah II, 1988-2 Trade Cas. (CCH) at 59,322-323.
377. See supra note 333.
dence of personal animosity, that the defendants' purported reasons were a pretext for anticompetitive exclusion. From the court's statement of the facts it is difficult to know whether the plaintiff had presented evidence to support her contention of proper care, and in any event the court seems to have been reluctant to evaluate such evidence at all. Not only did the court defer inappropriately to the defendants' medical findings, but it seems that the evidence, if taken collectively rather than individually, could tend to exclude the possibility that defendants were acting as they claimed. Although evidence that the defendants did not act for their stated purposes does not necessarily prove that they acted for anticompetitive purposes, such evidence should raise a sufficiently genuine issue about their purposes to avoid summary judgment. Had Shah arisen under HCQIA, summary judgment on the issue of compliance with the immunity standards should almost certainly have been denied. Not only was there a problem with the procedures afforded the plaintiff, but also evidence of the soured employment relationship as well as the appropriateness of her care (assuming plaintiff had such evidence) would seem to create a genuine issue over the reasonableness of the defendants' belief that their action was warranted by patient-care concerns.

379. See Shah II, 1988-2 Trade Cas. (CCH) at 59,322-323 (court is not competent to judge the severity of medical problems or to pass on the plaintiff's overall competency).
380. See id.; infra notes 438-440 and accompanying text (discussing inappropriate judicial deference to peer reviewers' findings).
381. To make out a § 1 violation, plaintiff must prove either an anticompetitive purpose or anticompetitive effect. See Wirtz, supra note 252, at 4-5 (anticompetitive purpose not essential to § 1 violation).
382. DA members in competition with the plaintiff sat on the peer-review committees of the hospital. Shah II, 1988-2 Trade Cas. (CCH) at 59,323. The presence of the DA members on these committees would raise the question of whether the defendants acted "after adequate notice and hearing procedures are afforded to the physician or after such other procedures as are fair to the physician under the circumstances." 42 U.S.C. § 11112(a)(3). The hospital would not be deemed under § 11112(b)(3)(A)(iii) to have met the adequate notice and hearing requirement because the review panel consisted, at least in part, of direct competitors. Whether the procedures were nonetheless "fair under the circumstances" would seem to be a genuine issue. The court pointed out that "[s]ome such overlap is inevitable in a hospital [that size]." 1988-2 Trade Cas. (CCH) at 59,323.
383. Similar impermissible fragmenting of evidence on the issue of conspiracy also may have occurred in Anesthesia Advantage, Inc. v. Metz Group, 759 F. Supp. 638, 1991 U.S. Dist. LEXIS 3106 (D. Colo. 1991). The district court found the plaintiffs' evidence of a conspiracy by defendant physician anesthesiologists to exclude plaintiff nurse anesthesiasts from the hospital insufficient to avoid summary judgment, where such evidence consisted of evidence that the hospital adopted a call schedule that disadvantaged the
d. **Permissible Inferences.**—A frequently recited maxim to guide the court's assessment of the sufficiency of the evidence on a motion plaintiffs and additional evidence of (1) contracts among defendants giving them an opportunity to conspire, (2) expulsion of a Metz Group physician who had assigned cases to plaintiffs, (3) circulation of statements by some of the defendants indicating hostility to nurse anesthetists, and (4) votes by some of the defendants to require supervision of a nurse anesthetist by a physician anesthetist. 1991 U.S. Dist. LEXIS 3106, at *26-32. Looking at each individual piece of evidence for consistency with inferences of permissible conduct, the district court concluded that "the entire course of conduct by the defendants is consistent with the pursuit of permissible independent business purposes." Id. at *32.

The problem with this analysis (and that in *Shah II*, see *supra* notes 370-382 and accompanying text) is that the court appears to have classified too broadly the conduct which is assertedly consistent with conflicting inferences of legality and illegality before it examined whether there was any evidence that tended to exclude the possibility of lawful conduct by the defendants. Recall that in *Monsanto*, the conduct that was consistent with conflicting inferences of legality and illegality was simply a manufacturer's termination of one dealer after receiving complaints about the dealer from other dealers. *See infra* notes 123-134 and accompanying text. The Supreme Court found that such evidence, standing alone, did not support an inference of illegality, but that *additional* (albeit ambiguous) evidence did tend to exclude the possibility of independent action by the manufacturer, or so a jury could reasonably conclude. *See Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 765-68 (1984). The conduct in *Metz* that is analogous to the post-complaint dealer termination (and which, standing alone, is insufficient to support an inference of conspiracy) is the hospital's adoption of the call schedule that disadvantaged the plaintiffs. Like the plaintiff in *Monsanto*, however, the plaintiffs in *Metz* offered the above four *additional* items of (albeit ambiguous) evidence that arguably tended to exclude the possibility of independent business purpose in adopting the call schedule, or so it would seem a jury could reasonably conclude. Yet instead of examining such additional evidence in the light most favorable to the nonmoving plaintiffs, *see supra* note 356, *infra* note 384, and accompanying text, to determine whether a jury could reasonably so conclude, the district court broadly characterized *all* of the evidence of conspiracy as "ambiguous" and therefore consistent with the defendants' explanations of permissible independent business purposes. 1991 U.S. Dist. LEXIS 3106, at *32. Because nearly all circumstantial evidence is consistent with both a plaintiff's inference of illegality and a defendant's inference of legality, *see supra* note 146 and accompanying text, the district court's approach poses a nearly insurmountable burden for plaintiffs who must prove a conspiracy from circumstantial evidence.

The district court in *Shah II* made an analogous error when it analyzed whether each piece of the plaintiff's evidence was consistent with an inference of legality. *See supra* notes 370-382 and accompanying text. The proper analytical framework would have been to recognize that the defendants' adverse action against the plaintiff's staff privilege in *Shah II* was, standing alone, consistent with an inference of legality and of illegality, and hence was insufficient evidence by itself from which to infer a conspiracy. The court should then have gone on, however, to ask whether the plaintiff's *additional* evidence of conspiracy, when viewed in the light most favorable to the plaintiff, tended to exclude the possibility of lawful conduct. *See infra* notes 418-419, 436-437, and accompanying text.

By contrast, summary judgment in the defendants' favor seems to have been properly granted in Todorov v. DCH Healthcare Auth., 921 F.2d 1438 (11th Cir. 1991), where the plaintiff's only evidence of an unlawful conspiracy was evidence of the hospital's denial of his application for medical staff privileges and of a possible anticompetitive motive of other staff members who recommended that the plaintiff's application be
for summary judgment is that the inferences to be drawn from the evidence "must be viewed in the light most favorable" to the non-moving party.  Matsushita appears to contradict this maxim by suggesting that if the plaintiff's evidence of the defendants' conduct is "as consistent" with an inference of innocence as with an inference of illegality under section 1, or if these competing inferences are "equally plausible," then the court must reject the plaintiff's inference.

This apparent contradiction can be reconciled. The traditional rule is only a general rule; three limitations to it have been recognized. First, the traditional rule does not apply when the inferences urged by the plaintiff are unreasonable. Second, even if the plaintiff's inferences are reasonable, the underlying substantive law in the case may, for policy reasons, limit the range of inferences that a jury may be permitted to draw. Third, the court may keep a case that gives rise to conflicting inferences from the jury if there is simply no rational way for the jury to choose between them. As discussed in this section, caution must be exercised in applying both the traditional rule and the limitations on it in the context of peer-review litigation with or without the Act.

The first limitation on the traditional rule is that only reasonable inferences must be drawn in the nonmovant's favor. The Matsushita majority stated that "courts should not permit factfinders to

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denied. See id. at 1456. The hospital's denial of staff privileges to the plaintiff in Todorov after receiving a negative recommendation from other medical staff members is analogous to the manufacturer's termination of the plaintiff in Monsanto after receiving complaints about the plaintiff from its competitors: both adverse actions against the plaintiffs constitute insufficient evidence, standing alone, from which to infer an unlawful conspiracy, and the court may properly require the plaintiffs to come forward with "something more" that tends to exclude the possibility of lawful action. See supra notes 123-134, 151-154, and accompanying text. Because the plaintiff in Todorov offered no such additional evidence that tended to exclude this possibility, summary judgment was properly granted. "To infer a conspiracy solely from the radiologists' anticompetitive conduct and the board's denial of privileges would be, in effect, to criminalize perfectly legitimate conduct." Todorov, 921 F.2d at 1458.

385. 475 U.S. 574, 588 (1986) ("conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy").
386. Id. at 596-97 ("if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy").
387. See infra notes 390-404 and accompanying text.
388. See infra notes 405-417 and accompanying text.
389. See infra notes 418-419 and accompanying text.
infer conspiracies when such inferences are implausible . . . ."\textsuperscript{390} Although there is a danger that the \textit{Matsushita} reference to the relative plausibility of inferences could be interpreted as a license for the court to engage in impermissible weighing of the evidence and evaluation of the strength of the plaintiff's case,\textsuperscript{391} it need not (and should not) be so interpreted. Implausibility in this context ought to border on the frivolous. Perhaps the clearest test of implausibility has been couched in terms of reasonable doubt: "If the plaintiff's burden is a preponderance standard, then summary judgment may be granted to the defendant only if the judge finds beyond a reasonable doubt that the inference does not follow in this case."

In the context of peer-review litigation, the question of the plausibility of the plaintiff's inference of conspiracy has been raised in relation to the defendants' perceived motive, or lack of motive, to conspire. Some courts have found no conspiracy because the defendants appeared to have no rational motive to conspire, thus making the inference of conspiracy implausible.\textsuperscript{393} In \textit{Weiss v. York Hospital},\textsuperscript{394} the court reasoned that because the hospital administration makes the ultimate decision on the plaintiff's privileges, and because it would benefit from having more rather than fewer qualified members on the medical staff in order to bring more patients to the hospital, the hospital had no motive to conspire because a conspiracy to deny staff privileges to qualified medical practitioners would have been against its own self-interest.\textsuperscript{395} Through oversimplification, this argument has the potential to eliminate automatically every staff privileges plaintiff who has no direct evidence of conspiracy among the defendants.

Motive to conspire should be analyzed more closely in individual cases. A finding that an action is against an alleged co-conspirator's apparent self-interest if undertaken unilaterally is frequently interpreted as proper evidence of a conspiracy rather than as lack of a motive to conspire.\textsuperscript{396} For the members of the medical staff, the

\textsuperscript{390} 475 U.S. at 593.
\textsuperscript{391} See infra notes 421-437 and accompanying text.
\textsuperscript{392} Note, supra note 145, at 517.
\textsuperscript{393} See, e.g., Mosby v. American Medical Int'l, Inc., 656 F. Supp. 601, 607 (S.D. Tex. 1987) (elimination of an on-call roster was not rationally related to a plan to eliminate the plaintiff's practice at the hospital because the hospital's bylaws required an open staff policy).
\textsuperscript{394} 745 F.2d 786 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985).
\textsuperscript{395} See id. at 828-29.
\textsuperscript{396} See Ratino v. Medical Serv. of D.C., 718 F.2d 1260, 1271 n.28 (4th Cir. 1983) (inference of conspiracy is appropriate "where the actions taken are in apparent contradiction to the party's economic self-interest"); Nurse Midwifery Assocs. v. Hibbett, 689
motive to conspire may be economic. For example, in Bolt v. Halifax Hospital Medical Center, the court concluded that the defendant doctors had a rational economic motive to conspire because by excluding other doctors from the hospital, they could charge higher prices for their services. 997 Likewise in Quinn v. Kent General Hospital, 998 the court observed that the members of a hospital's medical staff, regardless of their specialty, "have a financial interest in limiting the number of physicians admitted to active staff privileges at the Hospital, for all admitting staff members compete with one another for operating room facilities and the limited number of beds." 999 Similarly, the appellate court in Nurse Midwifery Associates v. Hibbett 400 observed that there "is certainly some danger of anticompetitive decision-making when a group of physicians recommends to the hospital that an applicant who is in competition with those physicians be denied privileges at the hospital." 401

For the hospitals, however, the motive to conspire may not be directly economic. Rather, a hospital may act to further the anticompetitive objectives of some of the members of its medical staff. 402 For example, the district court in Nurse Midwifery Associates found sufficient evidence from which to infer a conspiracy between two hospitals to exclude nurse midwives from their staffs. 403 In that case, the plaintiffs demonstrated that the hospitals had a motive to

F. Supp. 799, 808-09 (M.D. Tenn. 1988) (evidence that defendants' actions were contrary to their individual self-interests in the absence of concerted action supports an inference of conspiracy), aff'd in part, rev'd in part, 918 F.2d 605 (6th Cir. 1990), modified on reh'g, 927 F.2d 904 (1991); 6 P. AREEDA, supra note 119, ¶ 1434. See also Ponsoldt & Lewyn, Judicial Activism, Economic Theory and the Role of Summary Judgment in Sherman Act Conspiracy Cases: The Illogic of Matsushita, 33 Antitrust Bull. 575, 577 n.9, 604-08 (1988) (Matsushita Court should have found an inference of conspiracy from evidence that defendants acted contrary to their economic self-interests if acting unilaterally).


399. Id. at 1242.

400. 918 F.2d 605 (6th Cir. 1990), modified on reh'g, 927 F.2d 904 (1991).

401. Id. at 614.

402. See, e.g., Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1451 (9th Cir. 1988) (evidence showed that the hospital was coerced by medical staff members who threatened to leave the hospital unless the plaintiff's staff privileges were terminated); see also Dolan & Ralston, supra note 5, at 712-24 (discussing the stakes in a hospital's staff privileges decision).

conspire in order to satisfy the objectives of certain members of their medical staffs who wanted to eliminate the competition that the plaintiffs posed to local physicians, and the plaintiffs also showed that it was against the hospitals' self-interest to deny the nurse midwives privileges, because the hospitals could have improved their occupancy rates and revenues if they granted the privileges.  

For these reasons, with or without HCQIA, courts should carefully analyze the practical as well as financial dynamics among the hospital and members of the medical staff before concluding that an inference of conspiracy is implausible (or that the HCQIA presumption is not rebutted) on the ground that the defendants appear to have no anticompetitive motive or reason to act adversely to the plaintiff.

The second limitation on the traditional rule that requires the plaintiff to be given the benefit of all reasonable inferences occurs when the policies underlying the substantive law of the case are implicated. Because in a section 1 case "antitrust law limits the range of permissible inferences from ambiguous evidence," a court must sometimes refuse to permit a jury to draw an inference of conspiracy from the evidence, even when the inference is a reasonable one. As has been discussed earlier, this limitation typically occurs when the evidence from which the plaintiff urges that an adverse inference be drawn is of conduct that is likely to be engaged in by innocent actors as well as guilty ones. In order to avoid deterring innocent procompetitive conduct in the marketplace generally, the court in such a case requires the plaintiff to produce additional evidence which tends to exclude the possibility that the particular conduct of these defendants was undertaken anticompetitively.

In a circumstantial section 1 case in which the plaintiff urges an inference of conspiracy based on defendants' conduct, evidence that the defendants had a motive to conspire will not, by itself, support

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404. See id. at 809. Contrast Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1456-59 (11th Cir. 1991) (finding insufficient evidence to infer that hospital was acting to advance anticompetitive purposes of members of medical staff by denying the plaintiff's application for staff privileges).


406. For example, in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 n.8 (1984), the Court acknowledged that evidence of a post-complaint dealer termination was probative on the issue of conspiracy, but because of the policy reasons, discussed supra at notes 123-134 and accompanying text, the Court required that plaintiff introduce additional evidence to avoid a directed verdict.

407. See supra notes 143-150 and accompanying text.

408. See id.
an inference that they did conspire.409 Moreover, the mere opportunity to conspire, through contacts and communications among the defendants, does not alone give rise to an inference of conspiracy.410 Similarly under HCQIA, evidence that peer reviewers had a motive or the opportunity to act otherwise than in the reasonable belief that patient-care concerns justified their actions should not, by itself, rebut the presumption of compliance with the reasonable-belief standards.411

In peer-review cases where an inference of conspiracy has been permitted, the plaintiff typically has produced additional evidence of affirmative actions by the defendants that tended to exclude the possibility that the defendants were acting as they claimed. Such additional evidence has sometimes shown a pattern of exclusionary actions by the defendants,412 or actions taken by the defendants ostensibly pursuant to health-care concerns but when such concerns had no factual support.413 Such evidence would also rebut the presumptions under HCQIA.

Evidence of coercion by some of the defendants against other defendants has also been offered to exclude the possibility of unilateral action. A conspiracy may be inferred when one party acquiesces in the anticompetitive demand of another, even if the acquiescence is obtained through coercion.414 In Oltz v. St. Peter's

409. See 6 P. Areeda, supra note 119, ¶ 1412.
410. See id., ¶ 1417(b).
411. In a case not under HCQIA, the court refused to permit an inference that the hospital was acting anticompetitively solely from evidence that the individual peer reviewers had an anticompetitive motive to exclude the plaintiff. See Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1456-59 (11th Cir. 1991).
412. Such exclusionary conduct has included systematic refusals by doctors to make patient referrals to the plaintiff’s patients, e.g., Patrick v. Burget, 486 U.S. 94, 96-97 (1988); Shah v. Memorial Hosp. [Shah J], 1988-2 Trade Cas. (CCH) ¶ 68,199, at 59,328 (W.D. Va. 1988); a variety of increasing limitations on the plaintiff’s practice, e.g., Sweetney v. Athens Regional Medical Center, 709 F. Supp. 1563, 1572 (M.D. Ga. 1989); and unusual treatment of the plaintiff, e.g., Miller v. Indiana Hosp., 843 F.2d 139, 144 (3d Cir.) (evidence of hospital’s interference in the plaintiff’s recruitment of medical staff; hospital’s more lenient treatment of poorer physicians; and irregularities and conflicts of interest in the hearing), cert. denied, 488 U.S. 870 (1988).
413. See, e.g., Bolt v. Halifax Hosp. Medical Center, 891 F.2d 810, 821 (11th Cir.) (inference of conspiracy is proper if evidence showed that the peer reviewers’ conclusions were so baseless that no reasonable medical practitioner could have reached them), cert. denied, 110 S. Ct. 1960 (1990); see also Cooper v. Forsyth County Hosp. Auth., Inc., 789 F.2d 278, 282 (4th Cir.) (Motz, J., concurring) (absence of demonstrably sound reasons relating to the quality of patient care in conjunction with threats of mass resignations from the medical staff is sufficient basis from which a jury might infer an unlawful conspiracy), cert. denied, 479 U.S. 972 (1986).
414. See Nurse Midwifery Assocs. v. Hibbett, 689 F. Supp. 799, 807 (M.D. Tenn. 1988), aff’d in part, rev’d in part, 918 F.2d 605 (6th Cir. 1990), modified on reh’g, 927 F.2d
Community Hospital, all of the anesthesiologists threatened to resign from the hospital’s medical staff unless the hospital terminated its billing contract with the plaintiff, a nurse anesthetist. From evidence that the board of trustees knew about the threat and feared that the quality of the hospital might deteriorate if the threat were carried out, the court found that the jury justifiably could conclude that the trustees submitted to pressure from the anesthesiologists, thereby joining the conspiracy. Similarly under HCQIA, evidence that a hospital was pressured by its medical staff to act adversely to the plaintiff should be sufficient evidence on a motion for summary judgment to create a genuine issue over whether the defendants were acting out of reasonable, patient-care concerns. This is true even where, as in Oltz, the hospital acts to prevent the quality of medical care from deteriorating at the facility. HCQIA’s immunity applies only when the defendants’ quality-of-care concerns arise out of the plaintiff’s competence or professional conduct, not when the defendants’ own course of conduct necessitates such concerns.

The third circumstance in which the court may keep a case with competing inferences away from the jury is when the jury would have no rational way to choose between them. This situation is like asking a jury to choose between the competing inferences of “heads” or “tails” to decide what the outcome was of a coin toss.

904 (1991); see also Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717 (1988) (manufacturer’s response to an ultimatum that one dealer would terminate his dealership unless the manufacturer terminated its relationship with a second, price-cutting dealer can constitute an agreement under § 1, although not necessarily a per se illegal restraint of trade). See generally 7 P. Areeda, supra note 119, ¶ 1457.

415. 861 F.2d 1440 (9th Cir. 1988).

416. See id. at 1451; see also Cooper, 789 F.2d at 282 (Motz, J., concurring) (§ 1 prohibits medical staff members from agreeing to coerce hospital’s trustees to deny privileges to a competitor in order to further their economic self-interest), cert. denied, 479 U.S. 972 (1986); McElhinney v. Medical Protective Co., 549 F. Supp. 121, 130 (E.D. Ky. 1982) (evidence of coercive choices given to a hospital by doctors (“it’s either him or me”) was sufficient, along with other evidence, to permit an inference of an agreement to effect a concerted refusal to deal with the plaintiff), remanded on other grounds, 738 F.2d 439 (6th Cir. 1984).

417. See 42 U.S.C. § 11151(9) (1988) (“professional review action” that qualifies for immunity must be “based in the competence or professional conduct of an individual physician”). Peer reviewers should not be able to bootstrap an argument that they were motivated by legitimate medical care concerns if it is their own actions, or threats to act, that jeopardized the quality of care in the first instance. Query whether such bootstrapping was permitted in Sweeney v. Athens Regional Medical Center, 705 F. Supp. 1556, 1564-65 (M.D. Ga. 1989) (“The undisputed evidence is that [the hospital] was presented with a demand from the doctors which it thought prudent to grant.”).

418. Dean Friedenthal gives the example of two cars that collide at right angles in an
In the context of peer review, the analogous case would consist solely of evidence of an adverse action against a physician's privileges. Caution should be exercised, however, to confine this limitation on the traditional rule to cases in which the plaintiff has no evidence to support the inference of the defendants' fault or illegality beyond evidence that the defendants' conduct harmed the plaintiff by excluding her from the staff or otherwise restricting her privileges. A court should not grant the defendants' motion for summary judgment simply because, despite additional evidence supporting the plaintiff's inference, the judge believes the parties' competing inferences are still equally plausible. After all, if a judge finds the inferences to be equally plausible, a reasonable jury could find that one inference was more plausible than the other.419

Finally, it should be stressed that what has been said about the judge's role in assessing plausibility and permissibility of inferences applies only to circumstantial cases. Where the plaintiff presents credible direct evidence of a conspiracy, summary judgment against her is not available, despite the defendants' protests that they had no motive to conspire.420

e. No Weighing of Evidence.—Another traditional maxim of summary judgment procedure is that "the judge's function is not himself to weigh the evidence and determine the truth of the matter."421 The majority in Liberty Lobby carefully reiterated that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."422 The dissents in Matsushita and Liberty Lobby worried, how-

intersection with a working traffic light, killing both drivers and all passengers and leaving no eye-witnesses. The circumstantial evidence of the working light suggests that one of the drivers ran a red light, and thus leads to two competing inferences that either one of the drivers could have done so. Because there would be no way a reasonable jury could choose between the inferences, however, summary judgment should be granted in favor of the party without the burden of persuasion. Friendenthal, supra note 289, at 785.

419. See Note, supra note 145, at 504, 506; see also Friedenthal, supra note 289, at 786 (discussing cases in which undisputed evidence can give rise to competing inferences and when a reasonable choice between them can be made); infra notes 421-437 and accompanying text (judge's role on summary judgment motion is not to decide which of the competing inferences is more plausible or probable).

420. See Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1451 (9th Cir. 1988) (court rejected the defendant's argument that no motivation was shown because the plaintiff presented direct evidence of conspiracy); 6 P. Areeda, supra note 119, ¶ 1425(b); supra note 327 and accompanying text.


422. Id. at 255.
ever, that despite the majorities' invocation of the traditional rule, those cases sent contrary signals to lower courts that a judge "should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff." 423

The dissents' fears seem justified. In peer-review cases, some lower courts appear to have interpreted the trilogy as license to decide whether the plaintiff's inference of conspiracy from the circumstantial evidence is more probable than the defendants' innocent explanation of their conduct, rather than leaving it to the jury to make that determination. The judge in *Shah v. Memorial Hospital*, 424 for example, seemed to make precisely this decision. In light of the defendants' evidence that they restricted the plaintiff's privileges because of alleged problems with her medical care, the court granted summary judgment and observed: "I cannot find the hospital's decision to restrict her privileges was *more likely* motivated by conspiracy than by the concern for patient care." 425 The district court in *Nurse Midwifery Associates v. Hibbett* 426 similarly found that "if the [defendant's] innocent explanation of the questioned conduct is plausible and *more logical* than a concerted action theory," 427 then summary judgment against the plaintiff was appropriate. The court in *Castelli v. Meadville Medical Center* 428 granted summary judgment after finding that the facts were "*much more consistent* with a unilateral decision by [defendant] than with any conspiracy." 429

At least in their characterizations of their conclusions, these courts have erroneously failed to distinguish the judge's role on a motion for summary judgment from the jury's role at trial. Despite its uncritically loose references to "implausible," 430 "more plausible," 431 and "equally plausible" 432 inferences, the *Matsushita* major-

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423. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 600, (White, J., dissenting). *See Liberty Lobby*, 477 U.S. at 266 (Brennan, J., dissenting) ("Court's opinion is also full of language which could surely be understood as an invitation—if not an instruction—to trial courts to assess and weigh evidence much as a juror would").


425. *Id.* at 59,329 (emphasis added).


427. *Id.* at 808 (emphasis added).


429. *Id.* at 1205 (emphasis added).

430. *Matsushita*, 475 U.S. at 593.

431. *Id.* at 579.

432. *Id.* at 596.
ity did not "give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not."433

On a motion for summary judgment, the judge's role is to assess whether the plaintiff has met her burden of production with sufficient evidence that a reasonable jury could return a verdict in her favor. It is for the jury after trial to determine whether the plaintiff has in fact carried the burden of persuasion with credible evidence to convince the jury that the plaintiff's view of the facts is, more probably than not, the correct one.434 The judge's function to evaluate the evidence for its sufficiency must be carefully distinguished from the jury's function to weigh the evidence for its persuasiveness.435

On the issue of the defendants' purpose in undertaking their peer-review action, summary judgment should be handled similarly with or without HCQIA. In neither case is the court authorized to balance all the evidence pointing toward conspiracy or noncompliance with the reasonable-belief immunity standards against all the evidence pointing toward independent action or compliance with the standards.436 At the summary judgment stage, the plaintiff need not disprove the defendants' innocent explanation for their conduct. Rather, independently of the defendants' denials and explanations,437 the court should evaluate whether the plaintiff's evidence is

433. Id. at 601 (White, J., dissenting) (to do so would be "overturning settled law"); see Note, supra note 145, at 492 (interpretation of Matsushita, that the judge may grant summary judgment to the defendant upon finding the competing inferences of the plaintiff and the defendant to be equally plausible, is dangerously overbroad).
434. See 21 C. Wright & K. Graham, supra note 157, § 5122, at 558-59 (distinguishing between a plaintiff satisfying the burden of production for the judge and the burden of persuasion for the jury).
435. See Friedenthal, supra note 289, at 783 ("decisions concerning the sufficiency of evidence to get to a trier of fact... are of a different quality than decisions by the trier of fact on evidence that it receives"); Mullenix, supra note 302, at 569 ("The judge at the summary judgment stage was never intended to assess and weigh evidence as jurors would at trial."); supra note 320.
436. See Matsushita, 475 U.S. at 600 n.1 (White, J., dissenting).
437. See McElhinney v. Medical Protective Co., 549 F. Supp. 121, 130 (E.D. Ky. 1982) ("For purposes of reviewing the directed verdict motion, defendants' denials and explanations cannot be considered."); remanded on other grounds, 738 F.2d 439 (6th Cir. 1984); Louis, supra note 293, at 760 ("The effect of not allowing the judge to weigh the evidence is that the moving party's evidence is usually ignored in evaluating the sufficiency of the opposing party's response."); Schwarzer, supra note 148, at 482 ("Each party's showing should be independently examined to determine if it meets the requirements of [rule 56]."); see also P. Areeda & H. Hovenkamp, Antitrust Law § 1405, at 899 (1990 Supp.) (Matsushita Court "surely did not mean that the plaintiff must disprove all nonconspirational explanations for the defendants' conduct").
sufficient for a rational factfinder to find in her favor.

Finally, it should be stressed that both HCQIA and the trilogy have only allocated burdens of proof; neither authorizes judicial deference to the actions of peer reviewers. Citing a reluctance to substitute their judgment for that of a hospital administration’s, however, several lower courts have deferred to a hospital’s restriction or denial of staff privileges if the medical or business reasonableness of that action was supported by “substantial evidence” in the record.438 Such an approach is not warranted by HCQIA. Because the Act permits the presumption of compliance with the immunity standards to be overcome by a preponderance of the evidence, the presumption does not serve to increase the weight of plaintiff’s burden of proof.439 Nor is judicial deference to the peer reviewers warranted under antitrust law.440 Under the trilogy, the peer-review defendants could support an innocent explanation for their conduct with “substantial evidence,” and yet the case would nonetheless go to the jury if the plaintiff supported the inference of conspiracy with sufficient probative evidence to permit the jury to return a verdict in her favor.

IV. CONCLUSION

Does HCQIA accomplish anything, conceptually or practically?

438. The leading case for this approach is Sosa v. Board of Managers of Val Verde Memorial Hosp., 437 F.2d 173, 177 (5th Cir. 1971) (“No court should substitute its evaluation of [physician competence and staff privileges] matters for that of the Hospital Board.”). See also Castelli v. Meadville Medical Center, 702 F. Supp. 1201, 1206 (W.D. Pa.) (plaintiff must demonstrate a lack of substantial evidence to support the hospital’s decision), aff’d, 872 F.2d 411 (1988); Nafrawi v. Hendrick Medical Center, 676 F. Supp. 770, 776 (N.D. Tex. 1987) (“The court must accept the findings and conclusions of the hospital’s trustees and of its subordinate committees—so long as there is substantial evidence on the record to support them.”). Some commentators have erroneously advanced this substantial-evidence approach. See, e.g., Comment, Antitrust Liability in the Context of Medical Peer Review: Implications of Patrick v. Burget and the Health Care Quality Improvement Act of 1986, 28 DUQ. L. REV. 577, 583-84 (1990) (concluding that if judicial review is necessary, courts should not review the merits of the decision, but only whether substantial evidence was presented).

439. See C. WRIGHT & K. GRAHAM, supra note 157, § 5126, at 611-12 (argument has usually been rejected that when a presumption is invoked against a party with the burden of proof, the presumption should operate to increase the weight of the burden of proof).

440. See Miller v. Indiana Hosp., 843 F.2d 139, 143 (3d Cir.) (substantial evidence test “has no place in an antitrust case where Congress has given the jury the responsibility of resolving disputed fact issues”), cert. denied, 488 U.S. 870 (1988); Havighurst, supra note 78, at 1130 (an antitrust defense that the actions of a peer review body were taken in the public interest, with due process, and supported by substantial evidence, is “conceptually mistaken”).
As far as hospitals are concerned, the Act will very likely affect the way they structure the peer-review process.\footnote{See Gleitz & Strickland, Informal Peer Review Actions: Can They Survive the Health Care Quality Improvement Act?, MEd. Staff Counselor, Summer 1989, at 25 (HCQIA has made peer review a "more formal, structured process"). The National Practitioner Data Bank has imposed additional reporting obligations on hospitals. See supra note 8.} As far as the courts are concerned, however, HCQIA is probably more of a placebo than a cure for concerns about peer-review litigation under the antitrust laws. Conceptually, the Act effects no real change in how substantive antitrust principles should be applied to these cases. Because of the 1986 Supreme Court trilogy on summary judgment, the procedural handling of peer-review litigation should be the same, with or without HCQIA.

Courts have applied traditional antitrust doctrines and procedural principles to terminate before trial nearly all of the hundreds of reported peer-review cases in the defendants' favor, without the benefit of HCQIA's protection.\footnote{See supra notes 77-87, infra note 452, and accompanying text.} Remarkably, of the few remaining cases that courts have said were proper for jury resolution, only a handful could even in theory have qualified for immunity.\footnote{See supra note 44 and accompanying text.} Moreover, it is doubtful that on their facts a court would have given those cases pre-trial protection under the Act. One such case is \textit{Patrick v. Burget}, which one of the Act's drafters made clear was precisely the sort of case for which immunity was not intended.\footnote{See supra note 49 and accompanying text. Another such case is \textit{Bolt v. Halifax Hospital Medical Center}, in which the court found that the plaintiff's evidence, offered to show that the hospital's conclusions about the plaintiff's competence were so baseless that no reasonable practitioner could hold them, sufficed to create a jury question on the issue of conspiracy;\footnote{See 891 F.2d 810, 821 (11th Cir.), cert. denied, 110 S. Ct. 1600 (1990); see also Shah v. Memorial Hosp. [\textit{Shah I}], 1988-2 Trade Cas. (CCH) ¶ 68,199, at 59,928 (W.D. Va. 1988) (no single rationale underlay defendants' actions against plaintiff).} this same evidence should also create a jury question on the issue of compliance with the reasonable-belief immunity standards. In a few other cases, the peer-review process was sufficiently tainted to raise a question of whether HCQIA's due-process immunity standard would have been
If Congress had intended to provide significant protection to peer reviewers from antitrust liability, Congress could have enacted other reforms. Congress might, for example, have granted blanket immunity for peer review; or changed the plaintiff's burden of proof; or authorized judges to act as factfinders on the immunity question. Because Congress did not choose these alternatives, however, courts should be wary of interpreting HCQIA as if it had.\textsuperscript{447}

Blanket immunity for peer review has not been granted. Congress might have chosen to give antitrust protection to peer reviewers analogous to the protection it gave to local governments in the Local Government Antitrust Act of 1984, which precludes the recovery of damages from municipalities for their anticompetitive conduct.\textsuperscript{448} Such broad immunity may be appropriate where there is sufficient governmental action or governmental regulation of an industry's activities to have displaced competition within it. However, most states have not yet chosen to regulate medical peer review that extensively.\textsuperscript{449}

Nor has the plaintiff's burden of proof been increased by the Act. Congress might have altered this burden to require that the plaintiff overcome the presumption of compliance with the immunity standards by clear and convincing evidence. The clear and con-

\textsuperscript{446} E.g., Miller v. Indiana Hosp., 843 F.2d 139, 144 (3d Cir.) (evidence presented of irregularities and possible conflicts of interest in the hearing process as well as of motivation to destroy the plaintiff's competition), \textit{cert. denied}, 488 U.S. 870 (1988).

\textsuperscript{447} See Patrick v. Burget, 486 U.S. 94, 106 n.8 (1988) ("If physicians believe that the Act provides insufficient immunity to protect the peer-review process fully, they must take that matter up with Congress.").


\textsuperscript{449} Where states have chosen to regulate peer review, the state-action doctrine would serve to immunize peer-review participants. The state-action doctrine originated with Parker v. Brown, 317 U.S. 341 (1943), and immunizes the conduct of the state or private parties acting at the direction of the state from antitrust liability even if such conduct would have violated the Sherman Act if undertaken by private individuals without state involvement. The peer-review statutes of some states have been held not to provide state-action immunity. E.g., Coastal Neuro-Psychiatric Ass'n v. Onslow Memorial Hosp., 795 F.2d 340, 342 (4th Cir. 1986) (North Carolina); Ezpeleta v. Sisters of Mercy Health Corp., 800 F.2d 119, 121-22 (7th Cir. 1986) (Indiana). The peer-review statutes of some states have been held not to provide state-action immunity. E.g., \textit{Patrick}, 486 U.S. at 105 (Oregon); Miller v. Indiana Hosp., 1991-1 Trade Cas. (CCH) ¶ 65, 649 (3d Cir. 1991) (Pennsylvania); Pinhas v. Summit Health Ltd., 894 F.2d 1024, 1034 (9th Cir. 1989) (California), \textit{cert. granted in part}, 110 S. Ct. 3268, \textit{cert. denied in part}, 111 S. Ct. 61 (1990); Shahawy v. Harrison, 875 F.2d 1529, 1534-56 (11th Cir. 1989) (Florida); Tambone v. Memorial Hosp. for McHenry County, 825 F.2d 1132, 1135 (7th Cir. 1987) (Illinois); Griffith v. Health Care Auth. of City of Huntsville, 705 F. Supp. 1489, 1503-1505 (N.D. Ala. 1989) (Alabama).
vincing standard is a higher burden of proof which, at least in defamation actions, severely restricts the plaintiff’s opportunity to litigate the defendant’s state of mind.\textsuperscript{450} Congress chose, however, to retain the usual antitrust preponderance-of-the-evidence standard.\textsuperscript{451} Because the Act does not expressly change the quantum of proof necessary for the plaintiff to prevail at trial, courts should not implicitly adopt an attitude of judicial deference to the actions of peer reviewers.

As a practical matter, the Act does not even necessarily change the focus of judicial review before trial. There are a multitude of other defenses and immunities that defendants have successfully employed to avoid protracted litigation.\textsuperscript{452} In cases where the defendants advance a legitimate reason for acting adversely to the plaintiff, this issue as well can be handled separately and prelimina-

\begin{itemize}
\item 450. See Note, supra note 304, at 213 (clear and convincing standard “has virtually eliminated trials on the issue of malice”); Note, Federal Summary Judgment: The “New” Workhorse for an Overburdened Federal Court System, 20 U.C. Davis L. Rev. 955, 973 (1987) (\textit{Liberty Lobby} standard “is a nearly insurmountable hurdle for claimants with a heightened evidentiary burden”).
\item 451. See supra note 170 and accompanying text.
\item 452. A variety of issues have been raised to dispose of peer-review litigation prior to trial. For example, in addition to dismissals under the state-action doctrine, see supra note 449, summary judgment has been granted to defendants on the grounds: (1) that their actions were immune from damage liability under the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (1988), \textit{e.g.}, Sandcrest Outpatient Servs. v. Cumberland County Hosp. Sys., 853 F.2d 1139, 1141-46 (4th Cir. 1988); Sweeney v. Athens Regional Medical Center, 705 F. Supp. 1556, 1561-62 (M.D. Ga. 1989); (2) that the members of a hospital’s board or medical staff lacked the legal capacity to conspire with the hospital, \textit{e.g.}, Potters Medical Center v. City Hosp. Ass’n, 800 F.2d 568, 572-73 (6th Cir. 1986); McMorris v. Williamsport Hosp., 597 F. Supp. 899, 914-15 (M.D. Pa. 1984); (3) that the statute of limitations barred plaintiff’s antitrust claims, \textit{e.g.}, Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649-50 (9th Cir. 1988) (motion to dismiss granted); Baker v. Chagrin Valley Medical Corp., 1985-1 Trade Cas. (CCH) ¶ 66,622, at 66,100 (N.D. Ohio 1985); (4) that plaintiff failed to demonstrate sufficient impact on interstate commerce, \textit{e.g.}, Sarin v. Samaritan Health Center, 813 F.2d 755, 758 (6th Cir. 1987); Seglin v. Esau, 769 F.2d 1274, 1278-84 (7th Cir. 1985) (motion to dismiss); Loiterman v. Antani, 1990 U.S. Dist. LEXIS 7955, *8-14 (N.D. Ill. 1990) (motion to dismiss); Thompson v. Wise Gen. Hosp., 707 F. Supp. 849, 855-56 (W.D. Va. 1989) (motion to dismiss), aff’d, 896 F.2d 547 (4th Cir.), \textit{cert. denied}, 111 S. Ct. 132 (1990); Jaffee v. Horton Memorial Hosp., 680 F. Supp. 125, 127 (S.D.N.Y. 1988) (motion to dismiss); Rosenberg v. Healthcorp Affiliates, 663 F. Supp. 222, 224-26 (N.D. Ill. 1987) (motion to dismiss); and (5) that the plaintiff did not suffer antitrust injury and hence did not have standing to bring an antitrust claim, \textit{e.g.}, Todorov v. DCH Healthcare Auth., 921 F.2d 1438 (11th Cir. 1991) (motion for summary judgment); Boczkar v. Manatee Hosps. & Health Sys., Inc., 731 F. Supp. 1042, 1046 (M.D. Fla. 1990) (motion to dismiss); Colorado Chiropractic Council v. Porter Memorial Hosp., 650 F. Supp. 231, 235-36 (D. Colo. 1986) (motion to dismiss); Griffing v. Lucius O. Crosby Memorial Hosp., 1984-1 Trade Cas. (CCH) ¶ 65,854, at 67,565-66 (S.D. Miss. 1984) (motion for summary judgment).
rily to trial without HCQIA. Although Congress could have made judges the ultimate arbiters of compliance with the reasonable-belief immunity standards, it did not. Rather, the defendants' reasonable belief in the health-care quality justifications for their actions is still a fact question for the jury like any other fact question in an antitrust conspiracy case.

That statutory reform may be ineffectual is not necessarily a bad state of affairs. After all, if it ain't broke, why fix it? There is scant evidence that traditional principles were not adequately protecting peer-review defendants from nonmeritorious lawsuits. As Justice Stevens once observed: "Our legal system has developed procedures for speedily disposing of unfounded claims; if they are inadequate to protect [defendants] from vexatious litigation, then there is something wrong with those procedures, not with the law of antitrust immunity."