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George T. Rogister Jr.

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NOTES

Antitrust Law—The Sherman Act and Minimum Legal Fee Schedules: Learned Professions and State-Action Immunity

The question of whether the minimum fee schedules promulgated by state and local bar associations violate the Sherman Act has caused considerable debate both inside and outside the legal profession. Commentators have not only questioned the legality of these pricing arrangements, but also the motives behind minimum fee schedules and the results they produce. In 1973 a federal court considered for the first time the antitrust questions raised by the legal profession's use of minimum fee schedules. In *Goldfarb v. Virginia State Bar* a United States district court ruled that minimum fee schedules constitute price-fixing in violation of section 1 of the Sherman Act. On appeal, the United States Court of Appeals for the Fourth Circuit reversed. In reaching its decision, the Fourth Circuit vitalized the "learned profession" exemption from the antitrust laws, extended the "state action" immunity from antitrust liability, and found that the practice of law, at least the practice of examining titles in Fairfax County, Virginia, does not sufficiently "affect" interstate commerce to meet the jurisdictional requirements of the Sherman Act.

3. E.g., Arnold & Corley, supra note 2.
6. Goldfarb v. Virginia State Bar, 497 F.2d 1 (4th Cir. 1974). On the day after the Fourth Circuit handed down the *Goldfarb* decision, the Antitrust Division of the Department of Justice filed a complaint charging the Oregon State Bar with combining and conspiring "to raise, fix, stabilize, and maintain fees charged by its members . . . for rendering legal services." United States v. Oregon State Bar, Civil No. 74-362 (D. Ore., filed May 9, 1974).
8. This note will discuss only the "learned profession" and "state action" defenses accepted by the Fourth Circuit in *Goldfarb*. However, in regard to the interstate commerce test, the author is of the opinion that Judge Craven in his dissent correctly articulated and applied the test for determining when interstate commerce is sufficiently af-
The Goldfarbs contracted to purchase a home in Reston, Virginia on October 26, 1971. To finance the purchase, they obtained a home mortgage, which required that they obtain title insurance. Thus a title examination of the real estate had to be made by an attorney. Unable to purchase the services of a Virginia attorney at less than the rate prescribed by the locally adopted minimum fee schedule, the Goldfarbs paid an attorney the minimum rate and subsequently instituted a class action against the Virginia State Bar and three local bar associations seeking treble damages for violation of the federal antitrust laws.9

The United States District Court found that the minimum fee schedule was a price-fixing agreement, a per se violation of the federal antitrust laws.10 Finding a sufficient effect on interstate commerce to sustain jurisdiction under the Sherman Act, the district court concluded that the Fairfax County Bar Association's adoption and distribution of a minimum fee schedule was a violation of the Sherman Antitrust Act.11 The court dismissed the action against the Virginia State Bar because "[i]n its minor role in this matter, the Virginia State Bar was engaged in state action," and was, therefore, exempt from the prohibitions of the Sherman Act.12 The Goldfarbs and the Fairfax County Bar Association appealed.

The Fourth Circuit unanimously agreed that the action of the Virginia State Bar did not violate the federal antitrust laws. Judge Boreman for the majority concluded that the State Bar came within the state action immunity13 from the antitrust laws set out by the United States Supreme Court in Parker v. Brown.14 The court of appeals, however, reversed the district court's decision that the Fairfax

9. Two of the local bar associations, the Alexandria Bar Association and the Arlington County Bar Association, agreed to consent judgments prior to the trial of the case. They were directed by the district court "to cancel their existing minimum fee schedules and enjoined from adopting, publishing or distributing any future schedules of suggested or minimum fees." 355 F. Supp. at 492 n.1.
10. Id. at 493-94.
11. Id. at 494, 496.
12. Id. at 496; see Parker v. Brown, 317 U.S. 341, 350 (1943); text accompanying note 50 infra.
13. 497 F.2d at 8-12.
14. 317 U.S. 341 (1943). In a concurring and dissenting opinion in Goldfarb, Judge Craven was unwilling to conclude that the Parker requirements for state action immunity had been satisfied, but he found that the "minor role" of the Virginia State Bar in the price-fixing arrangement was insufficient to justify imposition of Sherman Act liability. 497 F.2d at 21.
County Bar Association's adoption and publication of a minimum fee schedule violated section 1 of the Sherman Act.\textsuperscript{15} Acknowledging that "the fee schedule and the enforcement mechanism supporting it act as a substantial restraint upon competition among attorneys practicing in Fairfax County,"\textsuperscript{16} the court concluded that anticompetitive restraints on the practice of law are not within the scope of the Sherman Act. The court reasoned that law is a "learned profession" and not a "trade or commerce" within the meaning of the Act.\textsuperscript{17} In addition, the court of appeals held that the restraining effect of the minimum fee schedule on the interstate business of financing and insuring home mortgages was "fortuitous," "incidental," and too "remote" to satisfy the interstate commerce requirement of the Sherman Act.\textsuperscript{18}

**THE "LEARNED PROFESSION" EXEMPTION**

The language of section 1 of the Sherman Act declares that "every contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several states . . ." is unlawful.\textsuperscript{19} There is not express exception for professional activities and the statutory language is "so expansive that courts have been reluctant to find exceptions."\textsuperscript{20} The only extended analysis of the meaning of the word "trade" in the Sherman Act was made by Chief Judge Groner in *United States v. American Medical Association.*\textsuperscript{21} Judge Groner pointed out that "[t]he phrase 'restraint of trade' had its genesis in the common-law, and its legal import and significance is declared again and again in the decisions of English courts . . . as well as in American decisions in many of the States. The Supreme Court has said that Congress passed the Sherman Act with this common-law background in

\textsuperscript{16} 497 F.2d at 13.
\textsuperscript{17} Id. at 13-15.
\textsuperscript{18} Id. at 18-19. Judge Craven dissented from the majority opinion on the Sherman Act liability of the local bar association. \textit{Id.} at 21-24.
\textsuperscript{21} 110 F.2d 703, 710 (D.C. Cir. 1940), \textit{aff'd}, 317 U.S. 519 (1943). The Supreme Court affirmed the result in this case without reaching the question of whether the term "trade" applies to the professions. \textit{See also} United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 491-92 (1950), in which Mr. Justice Douglas refers to Chief Judge Groner's "extended analysis and summary of the problem."
mind." 22 At common law an agreement by an individual not to engage in the practice of his occupation, including the "learned professions," was considered an illegal contract in restraint of trade unless the court found that the agreement was "reasonable." 23 Since these "ancillary" restraints 24 of trade were, and still are, illegal if unreasonable, 25 it follows that a direct restraint on the practice of a "learned profession" is also within the scope of the Sherman Act. Judge Groner concluded that "[t]he indubitable effect of . . . English and American [cases], is to enlarge the common acceptance of the phrase 'restraint of trade' to cover all occupations in which men are engaged for a livelihood." 26

Although the Supreme Court has stated that it is in the "broad sense that 'trade' is used in the Sherman Act," 27 it has on two occasions side-stepped the opportunity to determine if "trade" in this "broad sense" includes the professions. 28 In American Medical Association v. United States, 29 the Supreme Court affirmed the result reached by Judge Groner for the court of appeals. The Court, however, avoided the question of whether the practice of medicine is a "trade" within the meaning of the Sherman Act by focusing on the fact that the illegal anticompetitive activities of the local medical association were directed against a business engaged in trade or commerce within the meaning of the Sherman Act.

Seven years later, in United States v. National Association of Real

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22. 110 F.2d at 707.
23. Id. at 708.
24. "An ancillary restraint refers to a covenant or a separate contract which is subordinate to the main lawful purpose of a larger transaction it is designed to effectuate. Illustrative is a covenant not to compete accompanying the sale of a business or professional practice or a contract of employment." S. OPPENHEIM & G. WESTON, supra note 20, at 4.
25. See United States v. American Medical Ass'n, 110 F.2d 703, 709 (D.C. Cir. 1940), aff'd, 317 U.S. 519 (1943); Beam v. Rutledge, 217 N.C. 670, 9 S.E.2d 476 (1940). See generally Note, Professional Responsibility—Covenants Not to Compete Between Attorneys, 50 N.C.L. REV. 936 (1972). See also N.C. STATE BAR CODE OF PROFESSIONAL RESPONSIBILITY DR2-108(A) which makes it a disciplinary violation for an attorney to "be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits."
26. 110 F.2d at 710.
29. 317 U.S. 519 (1943).
Estate Boards, the Supreme Court again sidestepped the "learned profession" issue. The Court stated:

We do not intimate an opinion on the correctness of the application of the term "trade" to the professions. We have said enough to indicate we would be contracting the scope of the concept of "trade," as used in the phrase "restraint of trade," in a precedent-breaking manner if we carved out an exemption for real estate brokers. Their activity is commercial and carried on for profit.

The Supreme Court's failure to consider the validity of the "learned profession" exemption has allowed the professions to focus on three older Supreme Court decisions in supporting a claim of Sherman Act exemption. In Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, the Supreme Court held that professional baseball was not subject to the prohibitions of the Sherman Act, in part because the Court found that "personal effort, not related to production, is not a subject of commerce." Although the Supreme Court has on two occasions affirmed its decision in Federal Base Ball, the Court in Flood v. Kuhn explained that Federal Base Ball and its progeny are "aberration[s] confined to baseball." In two other decisions, Federal Trade Commission v. Raladam Co. and Atlantic Cleaners & Dyers, Inc. v. United States, the Supreme Court in dicta stated that the "learned professions" are not "trades" within the meaning of the Sherman Act. The dicta in these two cases "decided in an era of judicial antagonism to governmental regulation of business and commerce," stand as the only affirmative support for an exclusion of the "learned professions" from the scope of the Sherman Act.

Until the Fourth Circuit's decision in Goldfarb, no court has found enough vitality in the "learned profession" exemption to base a dis-
missal of charges of antitrust violations primarily on this defense. In *Northern California Pharmaceutical Association v. United States* and *United States v. Utah Pharmaceutical Association*, lower courts imposed Sherman Act liability on professional groups. Those courts found that the "commercial" aspects of the alleged anticompetitive professional activities brought the professionals within the scope of the Sherman Act. At the same time, because of the Supreme Court's dicta relating to the professions, no court has declared that the exemption does not exist.

The *Goldfarb* majority argued that the traditional belief in an exemption for the "learned professions," as evidenced by dicta in *Radadam and Atlantic Cleaners & Dyers*, is entitled to great weight. In the court's opinion, to overturn this traditional belief would amount to judicial legislation. While this argument is analogous to that made by the Supreme Court in justifying the continued vitality of *Federal Base Ball*, the "learned profession" exemption does not share the history of professional baseball's exemption. The "learned profession" exclusion is supported only by dicta, while baseball's exemption is supported by three affirmative Supreme Court decisions. Faced since 1922 with baseball's "aberrational," judicially granted exemption from the antitrust laws, Congress has failed to pass remedial legislation. The Supreme Court has found that this is "something other than mere Congressional silence and passivity," concluding "that Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes." In contrast, the dicta supporting the "learned profession" exemption has not stood as a red flag inviting affirmative Congressional action to close a gap in Sherman Act

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40. E.g., Riggall v. Washington County Medical Soc'y, 249 F.2d 266 (8th Cir. 1957), the court of appeal's opinion was based primarily on the absence of interstate commerce, but the court included a statement that "the practice of [medicine] . . . is neither trade nor commerce within Section 1 of the Sherman Antitrust Act." Id. at 268.
41. 306 F.2d 379 (9th Cir.), cert. denied, 371 U.S. 862 (1962).
43. Both cases involved agreements among pharmacists to fix the prices of prescriptions. See Alabama Optometric Ass'n v. Alabama State Bd of Health, 5 TRADE REG. REP. (1974-2 Trade Cas.) ¶ 68,914 (M.D. Ala. July 26, 1974). Cf. Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc., 432 F.2d 650 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970), in which the court concluded that "an incidental restraint of trade absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws." Id. at 654.
44. 497 F.2d at 19.
45. Id.
47. Id. at 283.
coverage. The reach of the Sherman Act has continued to expand into areas at one time thought to enjoy professional immunity,48 while the Congress has done nothing to stop this extension.

The Fourth Circuit also found justification for the "learned profession" exemption on the basis of extensive state regulation of the legal profession.49 State regulation, however, brings immunity only if the requirements of Parker v. Brown50 are met. The "learned" or "unlearned" nature of the activity regulated by the state has never been a consideration in the analysis of a claim of Parker immunity. If the "learned professions" are to enjoy immunity from the federal antitrust laws because of "the special form of regulation already imposed upon those in the legal profession," that "special regulation" must meet the requirements for "state action" immunity set out by the Supreme Court.

STATE ACTION

In Parker the Supreme Court concluded that there is "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."51 The Court held that the California Raisin Prorate Program, an anticompetitive agricultural marketing scheme, did not violate the Sherman Act. The program "derived its authority and efficacy from the legislative command of the state," and it was executed and enforced by state officials.

Since Parker, the Supreme Court has failed to refine its definition of the scope of the "state action" immunity. Although Parker dealt specifically with immunity for state officials acting under the mandate of legislative command, the case has been interpreted to confer antitrust immunity on private persons who engage in anticompetitive activities under a similar mandate.52 When extending the Parker exemption to activities of private parties, the lower courts have agreed

48. E.g., United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950); American Medical Ass'n v. United States, 317 U.S. 519 (1943). The Department of Justice has been very successful in recent years in getting consent decrees in cases it has brought against professional groups challenging their fee setting arrangements. Cf. United States v. American Institute of Architects, 1972 Trade Cas. 92,091 (D.D.C.); United States v. American Soc'y of Civil Eng'rs, 1972 Trade Cas. 91,972 (S.D.N.Y.).
49. 497 F.2d at 14-15.
50. 317 U.S. 341 (1943).
51. Id. at 350-51.
that the proposition that there was government participation "only begins the analysis, for it is not every governmental act that points a path to an antitrust shelter." 53

The anticompetitive activities must be specifically authorized by legislative command and aimed at achieving some legitimate state objective. 64 In addition, the activities of the private parties must be "actively supervised" by independent state officials. 65 General supervision over the private parties is not sufficient to invoke "state action" immunity in the majority of federal courts. 66

In Washington Gas Light Co. v. Virginia Electric & Power Co. 57 the Fourth Circuit departed significantly from this standard. The court rejected an argument that the "active supervision" requirement of Parker was not satisfied because the Virginia State Corporation Commission had not affirmatively approved promotional practices of VEPCO alleged to violate the Sherman Act. The court stated: "The argument is not without merit but the conclusion is not inevitable unless one equates administrative silence with abandonment of administrative duty. It is just as sensible to infer that silence means consent, i.e., approval." 58 The conclusion of the Fourth Circuit that the potential for state regulation satisfies the "active supervision" requirement of Parker has been characterized by one court as an "unwar-ranted hyperextension of Parker." 59 The Fifth Circuit in Gas Light Co. v. Georgia Power Co. 60 expressly declined to adopt the Washington Gas Light reasoning. The court stated: "The Parker exclusion applies to the rates and practices of public utilities enjoying monopoly status under state policy when their rates and practices are subjected

55. E.g., Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011 (3d Cir. 1971).
56. See, e.g., Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), cert. denied, 404 U.S. 1062 (1972); Kintner & Kaufman, supra note 52, at 533.
57. 438 F.2d 248 (4th Cir. 1971).
58. Id. at 252.
60. 440 F.2d 1135 (5th Cir. 1971), cert. denied, 404 U.S. 1062 (1972).
to meaningful regulation and supervision by the state to the end that they are the result of the considered judgment of the state regulatory authority . . . . \textsuperscript{61}

Assuming arguendo that Washington Gas Light is a correct application of Parker, \textsuperscript{62} Goldfarb remains an unwarranted extension of "state action" immunity. In Washington Gas Light the state regulatory agency was directed by statute to fix the rate structure of public utilities.\textsuperscript{63} In addition, the anticompetitive practices complained of in Washington Gas Light were reviewed and disapproved by the regulatory agency after the antitrust action had been filed, but prior to the court's decision.\textsuperscript{64} In Goldfarb the Virginia Supreme Court had no mandate to impose or approve fixed fee schedules for Virginia attorneys. Furthermore, there was no prior or subsequent approval or disapproval of the price-fixing arrangements.\textsuperscript{65}

The statutes that granted power to the Virginia Supreme Court and the Virginia State Bar to regulate the practice of law in Virginia did not authorize or direct the state agencies to approve or disapprove

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\textsuperscript{61} Id. at 1140. Georgia Power is in line with the interpretation of the Parker "active supervision" requirement reached by the majority of lower courts. See Kintner & Kaufman, supra note 52, at 530.

\textsuperscript{62} The validity of this assumption has been questioned by other courts. E.g., Gas Light Co. v. Georgia Power Co., 440 F.2d 1135, 1140 (5th Cir. 1971), cert. denied, 404 U.S. 1062 (1972); International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 351 F. Supp. 1153, 1202 (D. Hawaii 1972).

\textsuperscript{63} 438 F.2d at 251.

\textsuperscript{64} Id. at 252.

\textsuperscript{65} Judge Craven, who wrote the Washington Gas Light opinion, although concurring in the majority's result in Goldfarb as to the State Bar, did not agree that the State Bar was excluded from antitrust liability under Parker v. Brown. He concluded that the Virginia Supreme Court would be "surprised to learn that it is engaged in active supervision of the State Bar's implementation of minimum fee schedules in Virginia." 497 F.2d at 21. Judge Craven concluded that the State Bar should not be subject to Sherman Act liability because of the "exceedingly 'minor role' of the State Bar in this matter." In reaching this result Judge Craven looked to the Supreme Court's decision in National Association of Real Estate Boards, in which the Court affirmed the district court's decision that the National Association did not share the Sherman Act liability of the Washington Real Estate Board. The Supreme Court concluded that although "we might give the facts another construction . . . and find a more sinister cast to its actions . . ., we cannot say that the District Court was clearly erroneous in finding that the National Association . . . was not laced into the conspiracy to fix commissions." 339 U.S. at 495. In Goldfarb the district court did not find that the State Bar's "minor" involvement in the implementation of the minimum fee schedules by the Fairfax County Bar Association was insufficient to justify imposition of Sherman Act liability. Instead it concluded that in its minor role the Virginia State Bar was engaged in immune state action. The state action immunity is discounted by Judge Craven in his dissenting opinion. To characterize the threat of disciplinary action against those who failed to follow the local bar associations' minimum fee schedules as "minor," gives very little weight to the enforcement aspect of the alleged price-fixing agreement.
minimum fee schedules. Although the parties stipulated that "the Virginia statutes have given the Virginia court authority to make questions involving suggested minimum fee schedules . . . questions of ethics under the laws of Virginia," Judge Craven in his dissent correctly pointed out that the trial court expressly rejected this stipulation as "a conclusion of law rather than a fact." Absent an express legislative declaration commanding anticompetitive behavior as a part of the regulatory scheme, courts have been very reluctant to imply a grant of immunity from antitrust liability.

CONCLUSION

The Goldfarb decision places unwarranted restraints on the scope of the federal antitrust laws. The decision breathes new life and respectability into the "learned professions" claim of antitrust exemption, a claim that is supported only by antiquated dicta of the United States Supreme Court. Neither the modern decisions of the Supreme Court nor the common-law history of the phrase "restraint of trade" supports such an exemption. Judicial recognition of an antitrust exemption for the "learned professions" can only lead courts into the quagmire of determining in future cases which professions are "learned" and which are "unlearned." Because the policy of prohibiting price-fixing agreements is vital to the nation, the federal antitrust laws implementing that policy should apply to the profession largely entrusted with enforcement of those laws.

66. Va. CODE ANN. § 54-48 (1972), as amended (Supp. 1974) provides:
The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:
(a) Defining the practice of law.
(b) Prescribing a code of ethics governing the professional conduct of attorneys at law and a code of judicial ethics.
(c) Prescribing procedure for disciplining, suspending, and disbarring attorneys at law.
67. 497 F.2d at 9.
68. Id. at 20.
69. See generally Semke v. Enid Automotive Dealers Ass'n, 456 F.2d 1361 (10th Cir. 1972); Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970); George R. Whitten, Jr. Inc. v. Paddock Pool Builders, 424 F.2d 25 (1st Cir. 1970). This interpretation of the scope of the Parker "state action" immunity is supported by a long line of Supreme Court decisions dealing with the antitrust liability of federally regulated industries. In those cases the Court concluded that absent an express Congressional exemption from the federal antitrust laws, implied exemptions are "strongly disfavored" and will only be found in cases of "plain repugnancy between the antitrust and regulatory provisions." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963). See also Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Teply, Antitrust Immunity of State and Local Governmental Action, 48 TUL. L. REV. 272 (1974).
If the learned professions are to enjoy immunity from liability when engaging in anticompetitive activities that would otherwise violate the federal antitrust laws, that immunity must be found in the Parker "state action" doctrine. Parker, however, requires much more than a stipulation that the legislature granted a state regulatory agency power to sanction generally price-fixing arrangements and an inference that failure to act amounts to "active supervision." If allowed to stand, the Fourth Circuit's decision in Goldfarb will mark a significant erosion of the scope of the Sherman Act. 70

GEORGE T. ROSTER, JR.

Civil Procedure—Class Actions—Amending Rule 23 in Response to Eisen v. Carlisle & Jacquelin

The federal class action1 has been praised as a device that provides for the small claimant a means of obtaining redress for injuries to his legally protected rights.2 Without this device many wrongs that are too small in relation to the cost of obtaining relief would go unremedied.3 Recently, in Eisen v. Carlisle & Jacquelin4 the United

70. The North Carolina State Bar and the North Carolina Bar Association have acted to foreclose antitrust suits similar to those in the instant case. In 1972, prior to the district court decision in Goldfarb, the State Bar repealed paragraph three of the Canon of Ethics Number 12 relating to the use by attorneys of minimum fee schedules. In addition, the State Bar rescinded all ethics opinions that discussed or related to minimum fee schedules. At the same time, the North Carolina Bar Association eliminated from its Advisory Handbook on Office Management and Fees the schedule of fees for specific services. Many local bar associations in North Carolina have followed suit and have also wisely eliminated minimum fee schedules. Sitton, Professional Liability, 25 Bar Notes 84, 96-97 (1974).

1. FED. R. CIV. P. 23.