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## Introduction

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***GUILDS AT THE MILLENNIUM:  
ANTITRUST AND THE PROFESSIONS  
ANNUAL CONFERENCE OF THE ASSOCIATION  
OF AMERICAN LAW SCHOOLS, SECTION ON  
ANTITRUST AND ECONOMIC REGULATION***

**Introduction**

Susan Beth Farmer\*

The papers published in this symposium issue were originally presented at the meeting of the Section on Antitrust and Economic Regulation of the Association of American Law Schools ("AALS"), at the Association Annual Conference, held January 2 - 6, 2002, in New Orleans, Louisiana. The audience for this conference is academics who research, teach and write in the area of antitrust and competition law, business regulation or economics, rather than legal practitioners or members of the various professions that are the subject of these articles. The papers that follow, however, are not solely theoretical or limited to a law and economics analysis, but analyze the role of competition among professionals in three concrete factual scenarios. Section Chair, Professor Spencer Weber Waller<sup>1</sup>

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\* Professor of Law, Pennsylvania State University, Dickinson School of Law. B.A. Wellesley College, J.D. Vanderbilt Law School. I would like to thank Professor Spencer Weber Waller, of Loyola University Chicago Law School and chair of the AALS Section on Antitrust and Economic Regulation for 2001, for facilitating the planning and organization of this program as well as the Section's activities, and Professor Barbara Ann White of the University of Baltimore School of Law for organizing the program and serving as one of the commentators.

<sup>1</sup> Professor of Law and Director, Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law. Professor Waller is a prolific antitrust scholar and frequent lecturer who also teaches civil procedure and various courses in international business law. He has taught and served as Associate Dean at Brooklyn Law School. He clerked with the United States Court of Appeals for the Seventh Circuit and is a former attorney with the United States Department of

describes the subject of the program, “the inherent conflict between self-regulation of the professions and its potential abuse for anti-competitive purposes,” as both a longstanding and important issue, recognizing that “the key question is whether a profession’s self-regulation serves the public interest in preserving professional quality or is a means to exclude competition and/or maintain anti-competitive prices.”<sup>2</sup> This topic is particularly timely in light of the 1999 Supreme Court decision in *California Dental Ass’n v. FTC*,<sup>3</sup> a government case challenging a non-profit association of dental societies ethical rules limiting advertising by member dentists, and the announcement by newly appointed Federal Trade Commission Chair Timothy Muris that investigation of unfair methods of competition by professionals would be an enforcement priority of the Commission under his leadership.<sup>4</sup>

The overall theme of the AALS program was an examination of the state of competition in aspects of three different professions: the practice and business of medicine, legal education, and the practice of antitrust law. In addition to their focus on different professions, the three speakers took diverse approaches to their general topic. Professor Stephen Calkins<sup>5</sup> examines the legal

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Justice, Antitrust and Criminal Divisions. He received his B.A. from the University of Michigan and J.D. from Northwestern University School of Law.

<sup>2</sup> Spencer Weber Waller, *Annual Newsletter* (AALS, Section on Antitrust and Economic Regulation), Nov. 2001, at 1 (on file with the *Consumer Law Review*).

<sup>3</sup> 526 U.S. 756 (1999).

<sup>4</sup> Timothy J. Muris, FTC Chairman, *Antitrust Enforcement at the Federal Trade Commission: In a Word – Continuity*, Aug. 7, 2001 (Before the Antitrust Section Annual Meeting in Chicago, IL, Chairman Muris stated, “[i]t is uncontroversial that horizontal activities should be a major focus of non-merger enforcement. You can be sure that we are going to be very active in finding, investigating, and bringing actions against anticompetitive horizontal activities. We already have a number of new initiatives under way. The professions and health care are areas of particular interest.”), at <http://www.ftc.gov/speeches/muris/murisaba.htm> (last visited Apr. 9, 2002).

<sup>5</sup> Professor of Law at the Wayne State University Law School, where he has also served as Interim Dean. Professor Calkins teaches antitrust and trade regulation as well as courses on consumer law, corporations, and torts. He served as General Counsel of the Federal Trade Commission from 1995 to 1997, having been nominated by then-Chairman Robert Pitofsky. Professor Calkins is a committee chair and former Council member of the American Bar Association Section of Antitrust Law, and currently serves on the Council of the ABA Section of Administrative Law and Regulatory Practice. He is also a member of the American Law Institute and a former chair of the AALS Antitrust and Economic Regulation Committee. A prolific scholar and lecturer on competition law and

profession, with a particular focus on antitrust lawyers and their pre-eminent professional association, the Section of Antitrust Law of the American Bar Association. Taking a retrospective view in this the 50th anniversary of the Section, Professor Calkins assumes the role of story-teller to provide a lively and engaging view of the Section's members, leaders, and activities over the years. He describes lawyers meeting and working together in the context of a trade association, sometimes in agreement and sometimes at odds with one another, as they pursue a variety of goals. The ABA Antitrust Section members were engaged in professional development and training in the form of continuing legal education ("CLE") programs and publication of comprehensive treatises long before any of the state bar licensing associations began to impose CLE requirements. In addition to this non-controversial role, the Section has actively sought to influence the development of law by adopting policy positions and providing testimony on proposed antitrust legislation before Congressional committees, submission of briefs *amicus curiae* in selected cases, and continuing dialogue with enforcement officials from the U.S. Department of Justice, Federal Trade Commission, and more recently, international enforcers including, among others, representatives from the European Union.

Professor Peter Hammer,<sup>6</sup> also speaking metaphorically, considers the relationship between physicians and hospitals as part of the fabled story of vertical agreements. Importantly, Professor Hammer identifies a critical development in the antitrust law surrounding doctors, and by extension all professionals, as the evolution from analysis based on their status to one based on the contractual aspects of the relationship. The relationship between doctors and hospitals, he argues, can be analogized to the vertical relationship between producers and distributors. This article elaborates on the strengths and limitations of that fable, supported with original empirical research into modern judicial treatment of antitrust litigation between physicians and hospitals. Ultimately, he concludes that the vertical relationship analogy, however flawed, is

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policy (most recently in Indonesia), he has taught at the Universities of Michigan, Pennsylvania, and Utrecht (The Netherlands). Professor Calkins received his J.D. from Harvard University and B.A. from Yale University.

<sup>6</sup> Assistant Professor, University of Michigan Law School. Professor Hammer received his J.D. and Doctorate in Economics from the University of Michigan. A recipient of a Robert Wood Johnson Foundation Health Policy Investigator Award, Professor Hammer's scholarship interest involves antitrust law and the health care industry. He is also the founder and director of the Program for Cambodian Law and Development at the University of Michigan.

useful because it moves courts further in the direction of sound economic analysis of exclusive contract issues over historic status-based rules. The precise content of the economic analysis, identifying and weighing competitive benefits against harms, remains to be theorized, but Professor Hammer points the direction.

Professor Marina Lao<sup>7</sup> has studied various aspects of competition and legal education in her previous work.<sup>8</sup> For this program, she focuses on law school accreditation and the role of the American Bar Association as an important participant, notwithstanding its status as a private actor.<sup>9</sup> Any restriction on entry into a profession has the potential to cause anticompetitive effects as well as pro-competitive benefits, such as quality certification and provision of valuable information not easily obtained or interpreted by non-professionals. However, there have been relatively few antitrust challenges to the ABA's role in law school accreditation, which Professor Lao describes as especially curious given the rather large number of antitrust challenges to analogous situations in the medical field, primarily involving physician allegations of illegal boycott exclusive contracting cases or adverse peer review decisions. The explanation, she posits, is the belief that law school accreditation is exempt from antitrust condemnation under the state action<sup>10</sup> or

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<sup>7</sup> Professor, Seton Hall University School of Law, where she teaches and writes in the antitrust area, and also teaches courses in commercial law, corporations, securities regulation, and torts. She is a former Trial Attorney with the United States Department of Justice, Antitrust Division, having served in both the Atlanta and Washington, D.C. offices of the Division. Professor Lao has also taught at the University of Connecticut and Temple University Law School. She received her B.A. from SUNY at Stony Brook, her J.D. from Albany Law School, Union University, and her L.L.M. from Temple University Law School.

<sup>8</sup> See Marina Lao, *Discrediting Accreditation?: Antitrust and Legal Education*, 79 WASH. U. L.Q. 1035 (2001).

<sup>9</sup> ABA approval is not technically mandatory for law schools, but is required as a practical matter because only graduates of ABA approved law schools are permitted to sit for the state bar exam in more than 4 out of 5 American jurisdictions.

<sup>10</sup> See *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 97 (1980) (holding that the two elements of antitrust immunity under the state action doctrine are that "the challenged restraint [must] be 'one clearly articulated and affirmatively expressed as state policy. . .'" and "the policy [must] be 'actively supervised' by the state itself. . ."); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634-35 (1992) (further defining the active supervision requirement to require the exercise of judgment and actual deliberation by the state rather than ratification of agreements among the private parties that are the subject of regulation.).

*Noerr*<sup>11</sup> doctrines. This article analyzes the reach of these two immunity doctrines and concludes that the standards *per se* do not have antitrust immunity but their use, when mandated by states, as a gatekeeper to the practice of law, enjoys immunity. First Amendment principles,<sup>12</sup> she argues, do not offer a perfect analogy because the accreditation standards and process are not properly characterized as pure speech. Finally, moving from theory to application, the article raises, but does not decide today, whether the law school accreditation standards are unlawful under substantive antitrust standards.

Thus, all of these papers present creative new approaches to longstanding issues surrounding antitrust treatment of professionals and leave the reader with provocative questions.<sup>13</sup> Future articles

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<sup>11</sup> See *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *UMW v. Pennington*, 381 U.S. 657 (1965); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

<sup>12</sup> See *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). A group of trial lawyers in the District of Columbia engaged in a boycott, refusing to accept appointments to represent indigent criminal defendants in the D.C. Superior Court until the D.C. government increased their compensation. The FTC filed a complaint under section 5 of the FTC Act, alleging that the trial lawyers' actions constituted an unlawful boycott and agreement to fix prices, and found that the activity violated section 5. On appeal, the Court of Appeals for the District of Columbia vacated and remanded, stating that "the SCTLTA boycott did contain an element of expression warranting First Amendment protection." 856 F.2d 226, 248 (1998), *rev'd in part by* 493 U.S. 411 (1990). Because of the First Amendment implications, the Court of Appeals refused to apply the *per se* rule, stating that "[w]e hold only that the evidentiary shortcut to antitrust condemnation without proof of market power is inappropriate as applied to a boycott that served, in part, to make a statement on a matter of public debate." *Id.* at 250. Moreover, ". . . our evaluation of the petitioners' conduct is not unaffected by the special concern of the First Amendment with efforts to petition the government for redress of one's grievances." *Id.* Reversing, the Supreme Court rejected the purported justification that higher prices promote high quality professional services, stating: "It is, of course, true that the city purchases respondents' services because it has a constitutional duty to provide representation to indigent defendants. It is likewise true that the quality of representation may improve when rates are increased. Yet neither of these facts is an acceptable justification for an otherwise unlawful restraint of trade." 493 U.S. at 423. On the First Amendment issue, the Court distinguished between the protected acts of publicizing the alleged problem of excessively low compensation and lobbying the government for change, on the one hand, and the unprotected concerted action for their own economic benefit. *Id.* at 425-28.

<sup>13</sup> Two commentators have expanded their remarks for this symposium. Professor Thomas Greaney is Professor of Law and co-director of the Center for

promise to add content to theory, elaborate on methodology, and guide scholars and courts in the application of substantive standards to balance the economic and competitive benefits and harms of competition among professionals.

The issue of competition and self regulation by professionals actually involves several subsidiary questions, including: whether the practice of a profession even constitutes "trade or commerce" within the meaning of the Sherman Act;<sup>14</sup> what constitutes a profession and, subsidiarily, the meaning of "practice" of a profession; whether and under what circumstances state regulation of professions and professional associations is exempt from the antitrust laws; and finally, whether professionals are subject to different substantive antitrust standards in any circumstances, in other words, whether professionals enjoy special antitrust treatment solely by virtue of their status. These are not easy questions and the correct resolutions are, in many respects, not intuitively obvious. It is well established, however, that competition, whether for services or goods, is a fundamental goal of antitrust, and agreements to fix prices or restrict output are, and ought to be, subject to condemnation.<sup>15</sup>

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Health Law Studies at St. Louis University. He is the author of the West treatise HEALTH LAW and the textbook HEALTH LAW: CASES, MATERIALS AND PROBLEMS (4th ed.) and is co-editor in chief of the Journal of Health Law, published by the American Health Lawyers Association. Before joining the faculty, he was assistant chief of the Department of Justice, Antitrust Division, supervising health care antitrust litigation. He has served as a Victor Kramer Fellow Yale University, a fellow at the Yale Institute for Social and Policy Studies, and a Fulbright Fellow studying competition law at the EC Commission in Brussels. He received his B.A. from Wesleyan University and his J.D. from Harvard Law School. Professor Barbara White is a member of the faculty of the University of Baltimore School of Law. She received her B.A. from Hunter College, her Ph.D. in Economics from Cornell University, and her J.D. from SUNY-Buffalo, where she was also an Assistant Professor of Economics. She has also taught at the University of Houston and Connecticut law schools, and in Economics at Wisconsin.

<sup>14</sup> Sherman Act § 1 provides that "[e]very contract, combination. . . , or conspiracy, in restraint of *trade or commerce* among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (emphasis added). Section 2 of the Sherman Act provides: "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the *trade or commerce* among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ." 15 U.S.C. § 2 (emphasis added).

<sup>15</sup> United States v. Joint Traffic Ass'n, 171 U.S. 505, 577 (1898); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940) ("Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the

Initially, there was a genuine question whether the antitrust laws were intended to reach the so-called learned professions.<sup>16</sup> Although the antitrust laws had been applied to professionals, for much of the history of the antitrust laws, the Court was able to avoid deciding whether Congress had originally intended to extend the Sherman Act to the practice of a profession *per se*.<sup>17</sup> This clearly was a potential issue of great significance, given the importance of health care markets in the modern economy and the antitrust issues presented by licensing and accreditation, exclusive contracting, mergers and acquisitions, and a variety of emerging managed care

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market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale.”); *Broad. Music Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 7 n.10 (1979) (rejecting *per se* rule of illegality because blanket licensing in essence creates new product and is not a naked restraint); *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 100 (1984) (finding NCAA rule anticompetitive and unlawful because it raised prices and limited output although not applying the *per se* rule).

<sup>16</sup> *United States v. Nat’l Ass’n of Real Estate Bds.*, 339 U.S. 485, 492 (1950) (rejecting exemption for real estate brokers whose “activity is commercial and carried on for profit” but reserving issue of whether “professions” are engaged in trade within the meaning of the Act.). *See also* *Fed. Club v. Nat’l League*, 259 U.S. 200, 209 (1922) (stating that “a firm of lawyers sending out a member to argue a case. . . does not engage in. . . commerce” simply because the attorney travels across state borders); *FTC v. Raladam*, 283 U.S. 643, 653 (1931) (action under FTC Act § 5 for unfair competition against sellers of claimed diet remedy, Justice Sutherland commented that “medical practitioners. . . are not in competition with respondent. They follow a profession and not trade, and are not engaged in the business of making or vending remedies but in prescribing them.”); *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 436 (1932) (antitrust action against dry cleaning and laundry business that claimed that it was provided services and therefore was not engaged in ‘trade or commerce’ as required for Sherman Act jurisdiction, the Court construed ‘trade’ broadly, citing with approval the language from *Nymph*, below). *See generally* *Nymph*, 18 F. Cas. 506, 507, 1 Sumn. 516 (Cir. Ct. D. Me. 1834) (in a case involving seizure of a schooner for violation of its fishing license, Circuit Justice Story construed the Coasting and Fishery Act of 1793, to determine whether mackerel fishery is a “trade” under the Act, stating that “the word ‘trade’ is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain or a livelihood, *not in the liberal arts or in the learned professions*, it is constantly called a trade.”) (emphasis added).

<sup>17</sup> *Am. Med. Ass’n v. United States*, 317 U.S. 519, 528 (1943) (holding that doctors and two medical associations were subject to indictment and conviction for ethical rules that resulted in boycott of pre-paid group health membership organization but finding it unnecessary to decide whether the practice of medicine is trade or commerce within the meaning of the Sherman Act).



models in the health care field. The question was finally resolved in 1975 by *Goldfarb v. Virginia State Bar*,<sup>18</sup> a case challenging minimum fee schedules of lawyers. There, the State bar association was found to effectively enforce the fee schedules of a voluntary local bar association, which lacked formal authority to enforce the minimum fee schedules, through the State Bar's prohibition and definition of unethical practice. The County bar association argued that Congress did not intend the Sherman Act to cover 'learned professions.'<sup>19</sup> Finding no support for that assertion, the Court announced broadly that:

The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, nor is the public-service aspect of professional practice controlling in determining whether s 1 includes professions. Congress intended to strike as broadly as it could in s 1 of the Sherman Act, and to read into it so wide an exemption as

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<sup>18</sup> 421 U.S. 773, 780 (1975) (the Court described itself as "confronted for the first time with the question of whether the Sherman Act applies to services performed by attorneys in examining titles in connection with financing the purchase of real estate.").

<sup>19</sup> The Court found that the justifications for adoption of the minimum fee schedules were not entirely to enhance professionalism. In an argument that extends to the earliest Sherman Act cases, and has been virtually uniformly rejected, the Court quoted a minimum fee schedule Report to the effect that "lawyers have slowly, but surely, been committing economic suicide as a profession." *Id.* at 787 n.16. But crisis cartels have long been rejected as a legitimate justification for price fixing. See *Ariz. v. Maricopa County Med. Soc'y*, 457 U.S. 332, 346 (1985); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 696 (1978) ("The Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) ("[F]or over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense."). *But see* *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933) (The objectives of the Sherman Act "call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from *injurious and destructive practices* and to *promote competition upon a sound basis*." (emphasis added)).

that urged on us would be at odds with that purpose.<sup>20</sup>

Following *Goldfarb*, business transactions involving services in general, and sales of professional services in particular, clearly constitute the “trade” required for antitrust jurisdiction and are entitled to no broad antitrust exemption.<sup>21</sup> This is an altogether salutary rule since the concept of “professional” or “learned profession” has not been adequately defined. The natural inclination of competitors is to seek to define themselves as “professionals” and, concomitantly, to seek state licensing and regulation to limit entry into their field. For example, the Pennsylvania Department of State, at last count, regulated some twenty-seven boards and commissions of professions and occupations, including: accountants, architects, engineers, doctors, nurses, dentists, and pharmacists, but also auctioneers, barbers, cosmetologists, not to mention funeral directors and vehicle dealers and salespeople.<sup>22</sup> This is illustrative of the potential for regulation of “professionals” to swamp the field.

As a fundamental antitrust principle, it is non-controversial that competition is preferred over government regulation, even when the product is professional services.<sup>23</sup> However, principles of federalism also require due deference to appropriate governmental decisions in favor of regulation. Accordingly, antitrust immunity doctrines have been developed to immunize activities that would constitute cartels if adopted solely by private actors, if they are subject to appropriate levels of oversight and regulation. The intricacies of the state action and *Noerr-Pennington* immunity doctrines are beyond the scope of this introduction, but the basic contours can be quickly sketched.

It is well-accepted that Congress did not seek to regulate the anticompetitive actions of government.<sup>24</sup> States and their entities are

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<sup>20</sup> *Goldfarb*, 421 U.S. at 787 (citations omitted).

<sup>21</sup> *Id.* at 787-88 (“Indeed, our cases have specifically included the sale of services within [§]1. Whatever else it may be, the examination of a land title is a service; the exchange of such a service for money is ‘commerce’ in the most common usage of that word. It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect, and [§]1 of the Sherman Act. . .”).

<sup>22</sup> See, e.g., Pennsylvania Department of State, available at <http://www.dos.state.pa.us/bpoa/bpoa.html> (last visited Apr. 4, 2002).

<sup>23</sup> *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363 (1977) (state bar prohibition of advertising by lawyers invalidated).

<sup>24</sup> *Parker v. Brown*, 317 U.S. 341, 351 (1943) (California adopted legislation

themselves immune from antitrust penalties, but they cannot merely authorize private parties to fix prices or otherwise violate the competition laws.<sup>25</sup> State action immunity has evolved into a two-part test, “[f]irst, the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’; second, the policy must be ‘affirmatively supervised’ by the State itself.”<sup>26</sup> Professionals, may, but are not necessarily entitled to, state action immunity.<sup>27</sup> The

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authorizing a commission to regulate raisin marketing, including limiting production and maintaining prices. The State was immune from antitrust challenge because “[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.”). The Court stated:

We find 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. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.

*Parker*, 317 U.S. at 350-51.

<sup>25</sup> *Id.* This is the case whether or not the State participates in an alleged conspiracy. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 374 (1991). However, whether a State becomes liable by acting as a market participant rather than solely in a regulatory capacity is another issue, as yet undecided by the Supreme Court. Lower courts that have considered the question have rejected such a market participant exception to state action immunity. *See, e.g., Endsley v. City of Chicago*, 230 F.3d 276, 285 (7th Cir. 2000) (no need to reach antitrust state action defense, market participant defense discussed under Commerce Clause); *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1313 (8th Cir. 1991) (“The market participant exception is merely a suggestion and is not a rule of law. Until such a transformation occurs, we will continue to use the necessary and reasonable test established by this circuit.”).

<sup>26</sup> *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). Elaboration of these standards has followed. A state policy that expressly permits, without compelling or specifically detailing, anticompetitive regulation, satisfies the clear articulation standard. *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61 (1985). Neither compulsion nor active supervision are required for municipal regulations. *Hallie v. City of Eau Claire*, 471 U.S. 34, 45-46 (1985). Recoveries in private plaintiffs’ actions against local government officials are limited to injunctive relief. *Local Government Antitrust Act*, 15 U.S.C. §§ 35 - 36 (2002). Active supervision requires that “the State has exercised sufficient independent judgment and control so that the details [of the regulation] have been established as a product of deliberate state intervention, not simply by agreement among private parties.” *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634-35 (1992).

<sup>27</sup> *See, e.g., Patrick v. Burget*, 486 U.S. 94, 102-03 (1988). A hospital peer

*Noerr-Pennington* doctrine will not be discussed here as it receives full treatment in Professor Lao's paper.

Professional associations, as well as other self regulatory groups and trade associations, have a legitimate role in promoting efficient, ethical practice, and therefore are in the public interest. This does not necessarily imply that a different substantive standard is appropriate, but the Court has in various cases strongly suggested that professionals are entitled to be judged under a different antitrust standard. In *Goldfarb*, the professionals were lawyers who adhered to a minimum fee schedule indirectly enforced by the Virginia State Bar Association.<sup>28</sup> Although holding that the minimum fee schedule was a naked restraint, the Court was moderately deferential to the association of professionals, suggesting that a broader analysis than the *per se* rule was required and that courts should consider non-economic factors in evaluating restraints of trade in this context.<sup>29</sup>

Similarly, a trade association of professional engineers advanced related arguments, claiming that agreements by professionals that are designed to protect health and safety should not be condemned as *per se* unlawful.<sup>30</sup> While not clear whether the case

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review committee of doctors were not entitled to state action immunity, not because of their status as physicians, but because the state of Oregon merely regulated the peer review process and did not have the power to overturn actual peer review decisions, and limited judicial review was not sufficient to meet the requirement of active supervision.

<sup>28</sup> 421 U.S. at 773.

<sup>29</sup> *Id.* at 787 (Stating that “[t]he nature of an occupation, *standing alone*, does not provide sanctuary from the Sherman Act, . . . nor is the public-service aspect of professional practice controlling in determining whether [§] 1 includes professions.”) (citations omitted) (emphasis added). The Court did note, however, that:

It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

*Id.* at 788 n.17. The following year, disciplinary rules prohibiting advertising by lawyers were invalidated under the First Amendment, in a case holding that the rules were immune from antitrust scrutiny under the state action doctrine. *Bates*, 433 U.S. at 362-63.

<sup>30</sup> *Prof'l Eng'rs*, 435 U.S. at 684-85. The Engineers' ethics rules prohibited competitive bidding. Upon Justice Department challenge, the Society justified the rules on the basis that it was a learned profession and had adopted the rules to

was decided under the *per se* rule or a more expansive rule of reason,<sup>31</sup> the Court firmly rejected the health and welfare justification.<sup>32</sup> The Court was not so clear on the standard to govern professionals,<sup>33</sup> explicitly allowing that the public service aspect of the profession could, in the appropriate fact situation, lead to a different result than would obtain with an ordinary business.

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prevent competition solely on price, which could lead to substandard work, risky practices to shave costs and increase profits, dangerous engineering, to the ultimate danger to the public.

<sup>31</sup> The Court describes Sherman analysis as unitary, involving two complementary categories: a *per se* category and a more searching rule of reason analysis, all part of a rule of reason. The actual case analysis states that “[w]hile this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.” *Id.* at 692. The case then proceeds to analyze the workings of the ban on competitive bidding in a more detailed fashion than would be expected in a *per se* case. *Catalano, Inc. v. Target Sales, Inc.*, appears to characterize *Professional Engineers* as a *per se* case, “[t]hus, we have held agreements to be unlawful *per se* that had substantially less direct impact on price than the agreement alleged in this case. . . an agreement among competing firms of professional engineers to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer was held unlawful without requiring further inquiry.” 446 U.S. 643, 647 (1980) (citing *Prof'l Engineers*, 435 U.S. at 692-93).

<sup>32</sup> *Prof'l Eng'rs*, 435 U.S. at 694-95. The Court stated:

The Sherman Act does not require competitive bidding; it prohibits unreasonable restraints on competition. Petitioner's ban on competitive bidding prevents all customers from making price comparisons in the initial selection of an engineer, and imposes the Society's views of the costs and benefits of competition on the entire marketplace. It is this restraint that must be justified under the Rule of Reason, and petitioner's attempt to do so on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act. (citations omitted) (footnotes omitted).

<sup>33</sup> *Id.* at 686-87. The Court stated:

The fact that a restraint operates upon a profession as distinguished from a business is, of course, *relevant* in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today. (emphasis added).

Unfortunately, the Court failed to explain when and under what circumstances this special deference might apply, nor the specifics of any such analysis.

Four years later, the Court in *Arizona v. Maricopa County Medical Society* had no trouble applying the *per se* rule to an agreement by participating doctors to accept maximum insurance payments as their full fee, in a case that appears to present some compelling efficiency justifications for the practice.<sup>34</sup> Without explicitly overruling the *Goldfarb* and *Professional Engineers* dicta, the Court severely limited it to situations in which “the *quality* of the professional service that their members provide is enhanced by the price restraint,”<sup>35</sup> yet public welfare and safety do not justify horizontal price agreements by professionals.<sup>36</sup> The paradigm case that appears crafted to fit within this narrow window, however, refused to apply a relaxed rule for professionals.<sup>37</sup>

In *Superior Court Trial Lawyers*, an association of lawyers, who served as court-appointed counsel for indigent criminal defendants, sought to persuade the District of Columbia government to increase their fees from \$30 per hour for time spent in court and \$20 per hour for out-of-court work in 1983, all the way up to the magnificent sum of \$55 per hour for in-court and \$45 per hour for out-of-court work.<sup>38</sup> The method chosen to achieve this result was an agreement, put into practice by about 90% of the approximately 100

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<sup>34</sup> 457 U.S. at 349. The defendant doctors had argued that, under the *Goldfarb* dicta, their status as professionals should allow the agreement to escape condemnation under the *per se* rule. Rejecting the invitation, the Court stated:

The price-fixing agreements in this case. . . are not premised on public service or ethical norms. The respondents do not argue, as did the defendants in *Goldfarb* and *Professional Engineers*, that the quality of the professional service that their members provide is enhanced by the price restraint. The respondents’ claim for relief from the *per se* rule is simply that the doctors’ agreement not to charge certain insureds more than a fixed price facilitates the successful marketing of an attractive insurance plan. But the claim that the price restraint will make it easier for customers to pay does not distinguish the medical profession from any other provider of goods or services.

<sup>35</sup> *Id.* (emphasis added).

<sup>36</sup> *Prof’l Eng’rs*, 435 U.S. at 695-96.

<sup>37</sup> *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 431-32 (1990).

<sup>38</sup> Importantly, the Court points out the lack of support in the record for the proposition that the low fees caused either a shortage of court-appointed lawyers or ineffective assistance of counsel. *Id.* at 416

lawyers who regularly participated in these appointments, to decline any further appointments until the government agreed to raise attorney's fees at a cost of \$4 million to \$5 million per year, which it did roughly two weeks later.<sup>39</sup> In its complaint, the FTC characterized the agreement as a horizontal conspiracy to boycott and fix prices.<sup>40</sup> The Court assumed for the purpose of discussion that:

Respondents' boycott may well have served a cause that was worthwhile and unpopular. We may assume that the preboycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants. Moreover, given that neither indigent criminal defendants nor the lawyers who represent them command any special appeal with the electorate, we may also assume that without the boycott there would have been no increase in District CJA fees at least until the Congress amended the federal statute.<sup>41</sup>

It is difficult to imagine any case tailored to fit better within the narrow professional limitation to the *per se* rule articulated in *Maricopa* than that presented by these facts; the argument is precisely that the *quality* of their professional representation, and the public service function of provision of legal services for indigent criminal defendants, are enhanced by the agreement on prices. Nevertheless, the Court found the agreement to be the "essence" of price fixing, "unquestionably a naked restraint" designed to increase prices for the lawyers' personal benefit by means of a concerted boycott, whether or not they possessed market power, and *per se* unlawful.<sup>42</sup> To the extent that a relaxed substantive antitrust rule ever genuinely existed for professionals,<sup>43</sup> after *Trial Lawyers*, the successful case is the

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<sup>39</sup> *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 416, 420.

<sup>40</sup> *Id.* at 418.

<sup>41</sup> *Id.* at 421.

<sup>42</sup> *Id.* at 423. The Court decided that the attorneys were essentially asking it to find the activity legal because the prices were fair, never a defense to price fixing, and moreover, "[t]he social justifications proffered for respondents' restraint of trade. . .do not make it any less unlawful." *Id.* at 424.

<sup>43</sup> *See Goldfarb*, 421 U.S. at 788-89 n.17:

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business

unicorn of antitrust law, a fabled beast never clearly seen but able to make mischief by distracting courts from the central focus of the competition inquiry. As Professor Hammer persuasively argues, cases involving professionals should be decided on their economic impact, weighing the procompetitive virtues of an agreement or ethical rule against the anticompetitive harms threatened. Adding an additional factor of professional status to the analysis adds little and increases the risk that decisions in antitrust cases against professionals will be incoherent and unpredictable.

Thus, *California Dental* is only the most recent in a long line of Supreme Court cases recognizing the importance of competition even among licensed professionals who seek to impose regulations on their competitor-colleagues. In the case, the FTC challenged an ethical rule by a non-profit association of dental societies with more than 1900 dentist members that prohibited false and misleading advertisements, and which had been interpreted by the association as severely limiting claims about discount prices and quality of services.<sup>44</sup> While the Commission found the practice illegal *per se*, or in the alternative, illegal under an abbreviated rule of reason, the Ninth Circuit affirmed the conclusion while finding that a rule of reason analysis was required and met by the Commission's "quick look" analysis.<sup>45</sup> Although the majority referred yet again to the *Goldfarb* decision and quoted footnote 17, panelist Professor Calkins has described the opinion as "evinc[ing] extraordinary antipathy towards professional advertising"<sup>46</sup> and ultimately "essential to an understanding of its opinion."<sup>47</sup> While not adopting a special standard for professionals, the majority opinion cited a variety of studies concerning advertising specifically for professional services, including the problems of confusion and inadequate information,<sup>48</sup> pointing out that the concurrence discussion of the Ninth Circuit

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activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

<sup>44</sup> Cal. Dental Ass'n v. FTC, 526 U.S. 756, 762 (1999).

<sup>45</sup> *Id.* at 763.

<sup>46</sup> Stephen Calkins, *California Dental Association: Not A Quick Look But Not The Full Monty*, 67 ANTITRUST L.J. 495, 510 (2000).

<sup>47</sup> *Id.* at 518.

<sup>48</sup> *Cal. Dental*, 526 U.S. at 771-73.



opinion “brush[es] over the professional context and describe[s] no anticompetitive effects. . . .”<sup>49</sup> The majority’s conclusion, that the Court of Appeals had failed to more thoroughly weigh the anticompetitive as compared to procompetitive effects of the rule, is inconsistent, in Professor Calkins’s view, with the decision that would have obtained had the product involved advertising of a commodity rather than professional services.<sup>50</sup> Therefore, here the special standard for professionals appears to cut against the challenged conduct rather than providing additional protection from antitrust liability that might not be available to defendants engaged in ordinary business. On the substantive side, if the case can be divorced from its factual setting, the Court does not adopt a new rule; it neither requires a full rule of reason nor adopts market power screens, rather it makes more explicit the understanding of a rule of reason as a sliding scale with *per se* analysis on one side and a full rule of reason inquiry on the other.<sup>51</sup>

The theme that emerges from the articles that follow is the increasing sophistication of antitrust law in cases affecting professionals: importing reasoning from roughly analogous vertical restraints fact patterns into cases involving medical professional contracting and managed care plans, and thoughtful application of the traditional antitrust exemption doctrines in reviewing standards for professional education. For the future, these papers point the way to thoughtful consideration the particular competitive effects of any practice involving professionals rather than blind deference to their status.

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<sup>49</sup> *Cal. Dental*, 526 U.S. at 774.

<sup>50</sup> Calkins, *supra* note 46, at 518.

<sup>51</sup> Justice Breyer, concurring, adds content to the majority’s conclusion that “there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effects and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.” *Cal. Dental*, 526 U.S. at 780-81. Justice Breyer would “break [the] question [whether the restraint at issue is anticompetitive] down into four classical, subsidiary antitrust questions: (1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?” *Id.* at 782.