Antitrust - Goldfarb v. Virginia State Bar - Professional Legal Services Are Held to Be Within the Ambit of Federal Antitrust Laws

Michael Sennett

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ANTITRUST—*Goldfarb v. Virginia State Bar*—Professional Legal Services Are Held To Be Within the Ambit of Federal Antitrust Laws.

The one great principle of the English law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.¹

**INTRODUCTION**

In *Goldfarb v. Virginia State Bar*,² the United States Supreme Court held that the minimum fee schedule published by the Fairfax County Bar Association and enforced by the Virginia State Bar³ violated section 1 of the Sherman Act.⁴ The Court, abandoning the historical presumption that the workings of the legal profession are immune from federal antitrust attack,⁵ termed the promulgation and enforcement of the fee schedule "a classic illustration of price fixing,"⁶ a per se violation of the Sherman Act. More significantly the Court ruled that interstate commerce had been affected and

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¹ C. Dickens, *Bleak House*, ch. XXXIX (1853).
² 95 S.Ct. 2004 (1975). Chief Justice Burger delivered the opinion of the Court, in which all other members joined except Mr. Justice Powell, who took no part in the consideration or decision of the case.
³ The Virginia State Bar is authorized by the Virginia Supreme Court pursuant to VA. Code Ann. §54-49 (1974) to render advisory opinions on contemplated professional conduct. In Opinion 98, issued June 1, 1960, and Opinion 170, issued May 28, 1971, the Virginia State Bar indicated that an attorney's habitual disregard of the minimum fee schedules of local bar associations might result in disciplinary proceedings. These opinions were supplemented by the State Bar's publication "Minimum Fee Schedule Report" which was issued to local bar associations as a guide for establishing minimum fee schedules. See Goldfarb v. Virginia State Bar, 355 F.Supp. 491, 498-99 (E.D.Va. 1973). See also ABA Code of Professional Responsibility, Disciplinary Rule 2-106(B) as adopted by the Supreme Court, 211 Va. 295, 313 (1970).
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is declared to be illegal . . . .
⁶ 95 S.Ct. at 2011.
that lawyers engage in interstate commerce. Chief Justice Burger noted, "it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce." Addressing the issue of whether the Virginia State Bar was exempt from liability under the state action doctrine of *Parker v. Brown,* the Court held that the State Bar "voluntarily joined in what is essentially a private anticompetitive activity." Thus, absent statutory command or administrative directive requiring fee schedules, the bar association was not exempt from federal antitrust laws.

**BACKGROUND**

The case arose when Lewis and Ruth Goldfarb, unable to obtain legal services below the minimum fixed fees of the local bar associations,11 challenged the fee schedules in an antitrust class action against the Virginia State Bar and the Fairfax County Bar Association.12 The Goldfarbs alleged, *inter alia,* that the adoption and enforcement of minimum fee schedules constituted price fixing and a conspiracy in restraint of trade.13 Representing a class of persons who had purchased homes in the Northern Virginia area within the previous four years and had paid for title examinations by lawyers in accordance with the applicable fee schedules,14 the plaintiffs sought a declaratory judgment, injunctive relief, and damages under section 4 of the Clayton Act.15 Since a title search was a...
necessary cost of a real estate transaction, the Goldfarbs argued that the fixed fees charged by attorneys operated to inflate artificially the market price of homes and create an unnecessary burden on consumers in the Northern Virginia area.

In the United States District Court for the Eastern District of Virginia, the issue of damages was severed and the case was tried on the issue of the defendants' liability. The district court concluded that the activities of the Virginia State Bar and the Fairfax County Bar Association in publishing and enforcing the minimum fee schedules amounted to price fixing. The court found a sufficient effect on interstate commerce to sustain federal jurisdiction and ruled that there is no basis for an implied exemption from antitrust laws for the legal profession. The district court held the Fairfax County Bar Association liable under section 1 of the Sherman Act for promulgating the minimum fee schedules, but dismissed the Virginia State Bar, finding its activities immune from antitrust challenge under the state action doctrine of Parker v. Brown.


16. The mortgagee requires title insurance which can only be secured after the title is examined. This service must be performed by a member of the Virginia State Bar. See Goldfarb v. Virginia State Bar, 95 S.Ct. 2004, 2007 n.1, citing Unauthorized Practice of Law Opinion No. 17, August 5, 1942, VIRGINIA STATE BAR—OPINIONS 239 (1965).

17. 95 S.Ct. at 2010.


20. Id. at 494. Jurisdiction under the Sherman Act is based on the commerce clause of the United States Constitution, art. 1, §8, which provides:

The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .

21. 355 F. Supp. at 493-94. Antitrust exemptions are rare. Baseball, for example, was exempted by case law in Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922), and reaffirmed in Flood v. Kuhn, 407 U.S. 258 (1972), but the Court there felt that baseball was indeed in interstate commerce although entitled to the benefit of stare decisis. Id. at 282. Other sports have not fared so well. See, e.g., International Boxing Club v. United States, 358 U.S. 242 (1959); Radovich v. National Football League, 352 U.S. 445 (1957). Other activities exempted in whole or in part, by statute or case law, include labor unions, air carriers, insurance conglomerates and trade organizations. See also Branca, Bar Association Fee Schedules and Suggested Alternatives: Reflections on a Sherman Exemption that Doesn't Exist, 3 UCLA-ALASKA L. REV. 207 (1974).


The Fourth Circuit reversed the district court’s application of the Sherman Act to the County Bar’s adoption and publication of the fee schedules and affirmed the lower court’s conclusion that the Virginia State Bar falls within the parameters of the state action exemption. The court of appeals held that the “learned professions” do not engage in trade or commerce, and that the nexus between the professional activities of lawyers and interstate commerce is too remote and indirect to sustain jurisdiction under the Sherman Act. In a concurring and dissenting opinion, Judge Craven would have affirmed the dismissal of the Virginia State Bar. However, he could find no exemption for the legal profession under federal antitrust laws and stated that the minimum fee schedule sufficiently affected interstate commerce transactions to fall under the Sherman Act.

The United States Supreme Court granted certiorari. The issues before the Court were fourfold: (1) whether the Fairfax County Bar’s minimum fee schedule constituted price fixing; (2) whether a minimum fee schedule published by the local bar association was exempt from liability for price fixing under the Sherman Act on the ground that the restraint on competition was among members of a “learned profession;” (3) whether interstate commerce was affected by fixed fees in connection with the purchase of real estate in Northern Virginia; and (4) whether the Virginia State Bar was immune from attack under the Sherman Act for its role in the establishment and enforcement of minimum fee schedules under the “state action” exemption of Parker v. Brown.

**ATTORNEYS’ FEE SCHEDULES AS PRICE FIXING**

The first question the Supreme Court considered was whether the minimum fee schedule published and distributed by the Fairfax County Bar Association amounted to a price fixing agreement in restraint of free trade and commerce. The County Bar contended

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25. Id. at 14.
26. Id. at 18-19. Finding that the activities of lawyers do not affect interstate commerce defeats jurisdiction under the federal antitrust laws. Arguably the Fourth Circuit’s conclusions on the “learned profession” immunity and the “state action” exemption are dicta.
27. Id. at 22 (Craven, J., concurring and dissenting). See also Note, Bar Association Minimum Fee Schedules and the Antitrust Laws, 1974 Duke L.J. 1164.
30. 95 S.Ct. at 2010. See generally Arnould & Corley, Fee Schedules Should Be Abolished,
that the fee schedule was merely a unilateral attempt to disseminate legitimate price information for its members consideration.\textsuperscript{31} The conscious design of the minimum fee schedule, the County Bar argued, was to assist the attorney in complying with the Virginia State Bar Committee on Legal Ethics, Opinion No. 98 and Opinion No. 170 which were designed to insure compliance with the disciplinary rules of the Virginia Supreme Court.\textsuperscript{32} Absent these ethical considerations, the Fairfax County Bar Association insisted it would not have promulgated the "suggested" fee schedule.\textsuperscript{33} In Sherman Act litigation, the Supreme Court has developed two theories for approaching the challenged activity: the "rule of reason" approach and the per se rule.\textsuperscript{34} Under the traditional rule of reason,\textsuperscript{35} whether or not a given system of associations and activities constitutes a restraint on trade depends in large measure on its direct and immediate effect on the public interest.\textsuperscript{36} Where the objective is the suppression of competition in interstate commerce or the artificial inflation of costs affecting interstate commerce, the Supreme Court has not had difficulty in concluding that the Sherman Act has been


\textsuperscript{32} The viability of bar associations disseminating price information as an alternative to the fixed minimum fee schedule was explored in Note, Bar Association Minimum Fee Schedules and the Antitrust Laws, supra note 27, at 1167-74. In Maple Flooring Manufacturers Association v. United States, 268 U.S. 563 (1925), the Supreme Court reviewed a scheme whereby the Maple Flooring Association, a group of twenty-two leading corporations in the Midwest, had agreed to compile and distribute information as to their average production cost, past selling history, raw material quotes, and percentages of industrial waste. The Court applied the rule of reason analysis and held that these activities in themselves do not constitute an illegal restraint of trade under the antitrust laws absent a showing that the information provided a basis for subsequent agreement to "lessen production arbitrarily or to raise prices beyond the levels of production and price." Id. at 585. See generally Arnould, Pricing Professional Services: A Case Study of the Legal Service Industry, 38 So. Econ. J. 495, 499-502 (1972).


\textsuperscript{34} 32. Id. at 2010.


\textsuperscript{36} 34. See Montague, "Per Se" Illegality: and the Rule of Reason, 12 ABA Antitrust L.J. 69 (1958).

\textsuperscript{37} 35. The notion that only unreasonable restraint of trade violates section 1 was first suggested in Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899). The rule of reason was more fully developed in Standard Oil Co. v. United States, 221 U.S. 1 (1911). See Silver v. New York Stock Exchange, 373 U.S. 341 (1963); Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

\textsuperscript{38} 36. See Nash v. United States, 229 U.S. 373, 376 (1913).
violated. Where, however, the public interest in an unrestricted market economy is not unreasonably compromised, the Supreme Court has expanded its scope of inquiry to include considerations of purpose and motivation as well as mitigating factors such as the public’s benefit from a particular industry’s economic stability.

The rule of reason analysis has frequently been applied in situations where a trade association, without express agreement among its members, took unilateral action to promote the industry’s interests. Where the record is devoid of any fact establishing an agreement, purpose, or intention on the part of an association to influence price levels or control production of the industry at large, the Supreme Court has concluded that legitimate business interests justify some slight restraint on the economy where the public is not unduly prejudiced. The Sherman Act under the rule of reason may allow members of an association who act purposefully and without agreement to foster their own particular interests.

In contrast, where the concerted efforts of businessmen in a particular industry affect price structure or market forces, the per se

38. See, e.g., Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

In that case the defendants who accounted for nearly 90 percent of the corrugated container sales in Southeastern United States employed an exchange of price information system to stabilize prices. The Court held that this activity raised an inference of an agreement to fix prices in restraint of trade. In reaching its result, the Court suggested that while the exchange of price information in some markets may have little effect on the price, in other markets the exchange may amount to a per se price fixing agreement where the “exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition.” Id. at 337. The Supreme Court in Goldfarb found the minimum fee schedule a price fixing arrangement without the necessity of drawing this inference. However, Container Corporation may serve as a basis for attack on “suggested” minimum fee schedules where a substantial effect can be shown on the legal industry to the point of stifling price competition.


Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction. General knowledge that there is an accumulation of surplus of any market commodity would undoubtedly tend to diminish production, but the dissemination of that information cannot in itself be said to be restraint upon commerce in any legal sense. The manufacturer is free to produce, but prudence and business foresight based on that knowledge influence free choice in favor of more limited production. Restraint upon free competition begins when improper use is made of that information through any concerted action which operates to restrain the freedom of action of those who buy and sell.

Id. at 583.
rule is employed. The Supreme Court has declared certain activities, including agreements to fix prices, anathema to the free trade market and has held those activities per se violations of the Sherman Act. When faced with per se illegality, the Court has refused to consider what just or honorable ends the restraint may serve. So long as there is an agreement to fix prices or activity from which such an agreement may be inferred, competition is presumed restrained regardless of how beneficial the activity may be to the public interest.

In United States v. National Association of Real Estate Boards, the Court considered a situation closely analogous to Goldfarb. The Washington Real Estate Board's membership included all the licensed real estate brokers in the Washington, D.C. area. As a requirement for licensing, the members subscribed to the Board's code of ethics which provided: "Brokers should maintain the standard rates of commission adopted by the board and no business should be solicited at lower rates." Since the Washington Board never imposed sanctions for departure from the rate schedule, the district court exonerated the defendants and termed the prescribed rates "nonmandatory." On appeal the Supreme Court reversed. Mr. Justice Douglas noted that "subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line."

Price-fixing is per se an unreasonable restraint of trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end. An agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, no matter what end it was designed to serve.

47. Id. at 488.
48. Id.
49. Id. at 489.
50. Id. See also United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
In concluding that there was an agreement to fix prices, the Court in *Real Estate Boards* relied heavily on the fact that the Washington Real Estate Board's members complied strictly with the fixed commission rates and did in fact act in concert to promote uniform price levels.  

The Supreme Court in *Goldfarb* followed the reasoning of the *Real Estate Boards* decision and held that the minimum fee schedule was not "advisory," but a classic price fixing scheme. Faced with what it considered an agreement by attorneys to unabashedly adhere to a minimum fee schedule, the Court saw little need to explore the purpose or effect of the activities. Furthermore, the fee schedule was an agreement enforced "through the prospective professional discipline from the State Bar" and a desire to respond to professional responsibilities. In addition, "the motivation to conform was reinforced by the assurance that other lawyers would not compete by underbidding."  

Once the Court determined that the minimum fee schedule operated as a price-fixing combination in restraint of trade, the County Bar could not invoke either the *Parker v. Brown* exemption or the extenuating and mitigating aspects of the professional legal code. In short, the County Bar was denied rule of reason benefit because the minimum fee schedule operated as a commercial agreement to fix price levels and influence consumer transactions in restraint of trade.  

Per se illegality in the context of *Goldfarb* means that the mere existence of a minimum fee schedule enforced under the semblance of disciplinary authority will be construed as an agreement to fix prices in violation of the Sherman Act no matter what legitimate

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53. 95 S.Ct. at 2010.

54. Id.

55. See text accompanying notes 104 through 121 infra.

56. See BNA ANTITRUST & TRADE REG. REP., No. 707 at A-4-10 (1975); Remarks of Deputy Ass't Att'y Gen. Bruce B. Wilson, BNA ANTITRUST & TRADE REG. REP., No. 720, at A-7 (1975) where he comments: "[U]nder a rule of reason analysis, it seems highly unlikely that all restrictions on advertising by professionals would be deemed illegal once balanced against the potential harm to society that certain forms of advertising could have." See also Zimroth, *Group Legal Services and the Constitution*, 76 YALE L.J. 966 (1967).

57. See also United States v. Colgate & Co., 250 U.S. 300, 307 (1919), where the Supreme Court held that in the absence of any intent to create a monopoly, a private manufacturer may exercise his discretion as to with whom he deals.
professional aims the schedule seeks to promote. The appropriateness of the per se rule to the minimum fee schedule is not completely unequivocal. However, the weight of authority supports the rule's application to an agreement in restraint of trade resulting from a bar association's promulgation of a minimum fee schedule. Hence, as a device for effectively fostering professional responsibility, the fee schedule is discredited and severely limited. In future minimum fee schedule challenges under the Sherman Act, professional organizations will be precluded from raising the mitigating aspects of their ethics codes unless it is impossible to infer from their activities an agreement to engage in anticompetitive price fixing. Insofar as attorneys, absent an agreement, use price information for legitimate purposes, the Goldfarb decision does not reach the bona fide "suggested" fee schedule. The distinction between unilateral action and the per se violation is apparent. It is only where the bar association enforces a minimum fee schedule under the threat of professional retribution that an agreement by member attorneys constitutes illegal price fixing.

**Effect on Interstate Commerce**

When the Sherman Act was enacted in 1890, Congress intended to exercise all the power it commanded under the commerce clause. In the last quarter century, this power has dramatically expanded. Supreme Court decisions in *National Labor Relations Board v. Jones & Laughlin Steel Corp.* and *United States v. Darby,* announced the "affectation" doctrine of the commerce power. Congress may reach activities that either occur within the flow of interstate commerce, or substantially and adversely affect the free flow of interstate commerce. In *United States v. South-Eastern Underwriters Association,* the Supreme Court took the position that the Sherman Act has a similarly broad reach. The

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60. 301 U.S. 1 (1937).
61. 312 U.S. 100 (1941).
63. 322 U.S. 533 (1944).
64. Id. at 547.
Goldfarb Court, in light of these historical developments, applied a relatively expansive interpretation of the test in determining whether local legal services affect interstate commerce.

The Court's broad interpretation was not without opposition. The Fairfax County Bar Association contended that the nexus between interstate commerce and the fee schedule's restraint on legal services was too incidental and remote to sustain jurisdiction. On oral argument, counsel for the County Bar insisted:

[...] it is clear that this case only involves residents of Virginia, who wanted a Virginia home, and went to a Virginia attorney, who examined a Virginia land title. The transaction was closed in Virginia, and the money to finance the transaction all came from a Virginia savings and loan association.

In addition, the County Bar contended that, as a practical matter, there was no showing that the fee schedule and its enforcement activities deterred prospective home buyers or raised fees. It also argued lawyering is principally a local activity not in trade or commerce and the failure to show direct economic impact on interstate commerce defeats federal jurisdiction and Sherman Act application.

In United States v. Frankfort Distilleries, Inc., producers, distributors and retailers had conspired to fix and maintain retail prices of alcoholic beverages shipped into a state. The defendants argued that their conduct was outside the parameters of the Sherman Act because the price fixing applied only to retail sales which were wholly intrastate and that the state's police power preempted Sherman Act application in essentially local activities. Speaking in terms of "conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states," the

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66. 95 S.Ct. at 2011. Chief Justice Burger noted: "It is in a practical sense that we must view an effect on interstate commerce." Id. at n.11.
67. Id.
69. 95 S.Ct. at 2011. The County Bar relied on United States v. Yellow Cab Co., 332 U.S. 218 (1947), in support of their argument, which proved to be ill-advised since the Court found that "it would be more apt to compare the legal services here with a taxi trip between stations to change trains in the midst of an interstate journey. In Yellow Cab we held that such a trip was a part of the stream of commerce." Id. at n.13.
70. 324 U.S. 293 (1945).
71. Id. at 297.
Court found the requisite jurisdictional basis in that the methods adopted in fixing prices reached beyond the boundaries of the state. Therefore, even indirect combinations restraining activities in interstate commerce are prohibited by the Sherman Act.\textsuperscript{72} Frankfort Distilleries unequivocally rejected the "direct" and "indirect" test of the commerce power to local activities under federal antitrust laws.

The Goldfarb Court faced two questions in regards to the commerce issue. First, were the legal services an integral part of an interstate transaction; second, did the minimum fee schedule substantially and adversely affect interstate transactions?

In the district court, the findings of fact indicated that large amounts of the funds furnished to purchase homes in Fairfax County came from outside the State. Nearly all the out-of-state lending institutions required a title examination by an attorney. The lower court also pointed out that a significant number of Fairfax County residents were employed outside the State of Virginia. In addition, federal agencies based in the District of Columbia guaranteed a large number of mortgages in Fairfax County.\textsuperscript{73}

Where the mortgagee conducting an interstate financial transaction requires legal services as a necessary part of that transaction, the legal services are in interstate commerce.\textsuperscript{74} In Goldfarb, the Court held there was ample justification for holding that lawyers' services in the examination of a title sustain Sherman Act jurisdiction. In a class action, where interstate transactions create a need for particular legal services, those legal services, in themselves, occur in the flow of interstate commerce.\textsuperscript{75}

\textsuperscript{72} Id. at 298. Mr. Justice Black succinctly stated for the Court:

Whatever was the ultimate object of this conspiracy, the means adopted for its accomplishment reached beyond the boundaries of Colorado. The combination concerned itself with the type of contract used in making interstate sales; its coercive power was used to compel the producers of alcoholic beverages outside of Colorado to enter into price-maintenance contracts. . . . The power of retailers to coerce out-of-state producers can be just as effectively exercised through pressure brought to bear upon wholesalers as though the retailers brought such pressure to bear directly upon the producers.

\textsuperscript{73} 95 S.Ct. at 2011.

\textsuperscript{74} Id. at 2012. Compare Goldfarb's treatment of the "flow of interstate commerce" theory with "substantial effect" theory in Wickard v. Filburn, 317 U.S. 111, 125 (1942). The Goldfarb Court suggests that the jurisdictional requirements of the Sherman Act are met under either theory where the services are an integral part of the transaction. 95 S.Ct. at 2012.

\textsuperscript{75} 95 S.Ct. at 2012. In United States v. Employing Plasterers Association, 347 U.S. 186 (1954), the Supreme Court held that the interstate commerce requirement of the antitrust laws was satisfied even though the restraint was merely a consequence of attempts to monopolize local trade.
The more difficult question the Court considered was whether the minimum fee schedule substantially and adversely affected commerce among the states. The court of appeals considered only the "affecting commerce" theory and held the nexus between the real estate transaction in interstate commerce and the minimum fee schedule too remote and insubstantial to sustain Sherman Act jurisdiction. In reversing, the Court held that if the financing institutions require title examination as a condition of financing, the cost of the legal services constitutes a significant part of the purchase. When the minimum fee schedule acts as a restraint on this cost, interstate commerce has been sufficiently affected. Also, it is immaterial whether or not there was a showing that real estate buyers were discouraged by the bar groups' activities. Since no special magnitude need be shown, the fact that the cost of the title examination constitutes a portion of the purchase price is sufficient.

The Court limited its inquiry into the relationships between the cost of the service and the minimum fee schedule because whether a given system of restraints "affects" interstate commerce is essentially a question of fact determined at the district court level. Also, the question of whether the fee schedule raised fees is moot in light of the Court's holding that the minimum fee schedule is a price-fixing device illegal per se under the Sherman Act. Such violations presume an adverse affect on price levels. Consequently, the Goldfarbs were under no duty to show the minimum fee schedule's direct economic consequences under section 1.

"Learned Profession" Exemption

Bar associations can no longer claim that publishing and enforcing minimum fee schedules is immune from antitrust statutes under the so-called "learned profession" doctrine. The County Bar had

76. 95 S.Ct. at 2012.


79. See, e.g., Apex Hosiery Co. v. Leader, 310 U.S. 469, 500 (1940).


argued in *Goldfarb* that Congress never intended to include the "learned professions" within the trade and commerce clause of section 1 of the Sherman Act. The bar group contended that professional services are non-commercial, and serve the interests of the community. Furthermore, the minimum fee schedule fosters professional responsibility and has an essentially non-commercial purpose.82

The *Goldfarb* Court rejected these contentions outright, finding no federal statute or legislative history expressly exempting the legal profession from the scope of the antitrust laws. The basis of the historical exemption is the belief that the practice of law does not constitute "trade or commerce" within the dimensions of the Sherman Act.83 In general, all the "learned professions" have at some point adopted this position.84 It is based on the negative inference that if the Sherman Act specifically controls "trade or commerce" any activity outside "trade or commerce" was not intended to be included in section 1.85

As *Goldfarb* rightly concluded, this inference is based on neither logic nor precedent. The nature of a man's profession, standing alone, does not shield him from the Sherman Act. In *Associated Press v. United States*,86 the Court confronted a situation where the Associated Press contracted with a Canadian press association to furnish news exclusively to each other thereby excluding their competitors. In holding this activity a restraint of trade and in violation of the Sherman Act, the Court found that the members of the Associated Press, no less than manufacturers who sell commodities, were

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The Illinois Antitrust Act is an excellent example of a legislative exemption for the "learned professions" from state antitrust laws. ILL. REV. STAT. ch. 38, §60-5 (1973) provides:

No provisions of this Act shall be construed to make illegal:

(12) . . . the activities of any bona fide not-for-profit association, society or board, of attorneys, practitioners of medicine, architects, engineers, land surveyors or real estate brokers licensed and regulated by an agency of the State of Illinois, in recommending schedules of suggested fees, rates or commissions for use solely as guidelines in determining charges for professional and technical services (emphasis added).


86. 326 U.S. 1 (1945).
engaged in business for profit.\textsuperscript{87} The fact that the publisher provides a public service generally in the public interest does not afford him sanctuary "in which he can with impunity violate laws regulating his business practice."\textsuperscript{88} The scope of section 1 of the Sherman Act is as broad as Congress' commerce power. Therefore, to judicially legislate an exemption is inconsistent with the distribution of powers under the tripartite system of government.\textsuperscript{89}

Judicial legislation of exemptions under the federal antitrust laws was explored in detail in \textit{Radovich v. National Football League}.\textsuperscript{90} \textit{Radovich} involved a Sherman Act challenge brought by a former professional football player against the National Football League. He claimed the league conspired to deny him freedom of contract and the right to organize an independent league in competition with the National Football League. The courts below dismissed his complaint on the basis of \textit{Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs}\textsuperscript{91} and \textit{Toolson v. New York Yankees, Inc.},\textsuperscript{92} which held that professional baseball was not trade or commerce within the meaning of the Sherman Act. Recognizing no logical basis for exempting professional sports, the Court nevertheless held that so long as Congress acquiesces to the \textit{Federal Baseball} and \textit{Toolson} decisions those rulings will be adhered to as stare decisis,\textsuperscript{93} but they will not be extended beyond baseball. Thus, except for baseball, professional sports teams engage in sufficient interstate commerce to invoke the Sherman Act.\textsuperscript{94} It is the sale of professional services that is considered to be trade and commerce within the meaning of section 1. The Court has therefore placed a heavy burden on the party claiming immunity under federal antitrust statutes where Congress has not expressly exempted the activities in issue.\textsuperscript{95}

The County Bar also argued that though Congress never expressly exempted the "learned professions" from the scope of the antitrust

\textsuperscript{87} Id. at 7.
\textsuperscript{88} Id.
\textsuperscript{90} 352 U.S. 445 (1957).
\textsuperscript{91} 259 U.S. 200 (1922).
\textsuperscript{92} 346 U.S. 356 (1953).
laws, there has been judicial recognition of a limited exclusion for the professions.66 Goldfarb rejects this contention. Previously the Court had specifically avoided the problem professional services pose to antitrust laws.97

The Court acknowledged that the case at bar was its first attempt at deciding whether the “learned professions” are exempt from the Sherman Act. Commentators have noted that the obiter dicta cited by the County Bar in support of the “learned profession” exemption were of no particular relevance to the issues confronting the Court in Goldfarb.98

The Court had observed prior to the Goldfarb decision that the distribution of legal services, like the distribution of goods, is generally controlled by the dynamics of private enterprise and economic intercourse.99 The lawyer offers his knowledge, expertise and experience in exchange for monetary compensation. Acknowledging this, Mr. Chief Justice Burger stated:

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 “[o]n its face shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.”100

Under this rationale, the Court held that the examination of a land title by an attorney in return for money is an exchange of a service for compensation, and thus commerce in the most traditional sense of the term.101 Absent an express congressional pronouncement or “state action” under Parker v. Brown,102 the commercial activities

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66. See Note, Antitrust Law—The Sherman Act and Minimum Legal Fee Schedules: Learned Professions and State Action Immunity, supra note 81, at 401-05.


101. Id. But compare Justice Story's remarks in The Nymph, 18 F.Cas. 506-07 (No. 10,388) (C.C.D.Me. 1834) where he states:

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.

102. 317 U.S. 341 (1943).
of lawyers are within the "trade or commerce" clause of section 1 of the Sherman Act.\textsuperscript{103}

\textbf{STATE ACTION EXEMPTION}

In \textit{Parker v. Brown},\textsuperscript{104} the Supreme Court held that where the state directs private persons to engage in activities in restraint of trade, the federal antitrust laws may not reach that activity. \textit{Parker} involved a Sherman Act challenge to an agricultural marketing plan under the California Agriculture Prorate Act.\textsuperscript{105} The legislature adopted the program to restrict raisin production in the state in order to maintain price levels.\textsuperscript{106} Under the statutory scheme, the governor appointed members to a public plan commission. This commission conducted hearings on the economic feasibility of local quota programs. The commission would review a tentative plan and send it to a committee of citizens from the affected area. That committee would then formulate the details and, together with its recommendations, return the program to the commission for its approval. In addition, the raisin producers were required to review and approve the specific program. Once the marketing plan was adopted, it was binding on the producers under penalty of law.\textsuperscript{107}

The Court considered these activities "state action" and immune from the Sherman Act. While the \textit{Parker} decision provided no meaningful guidelines for determining what kinds of private activities are protected, the Court stressed that the restraints were implemented at the direction of the state. It is not enough that the public benefits from the activity, or that the activity was supervised by the state, or that it receives its efficacy from the state. The legislature must command the restraint of trade, not simply condone it.\textsuperscript{108}

This distinction was recognized by the Fourth Circuit in \textit{Asheville Tobacco Board of Trade, Inc. v. Federal Trade Commission.}\textsuperscript{109} \textit{Asheville Tobacco} involved a marketing scheme whereby a group of tobacco warehousemen, the Asheville Board of Trade, Inc., entered

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\textsuperscript{103} 95 S.Ct. at 2014.
\textsuperscript{104} 317 U.S. 341 (1943).
\textsuperscript{105} Id. at 346-47.
\textsuperscript{106} Id. at 350-52.
\textsuperscript{107} Id. at 347-49.
\textsuperscript{108} Id. at 350.
\textsuperscript{109} 263 F.2d 502 (4th Cir. 1959). \textit{But see} Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248, 252 (4th Cir. 1971) where the Fourth Circuit held that the potential for state regulation satisfies the "state action" requirement of \textit{Parker}. The Fifth Circuit in \textit{Gas Light Co. of Columbus v. Georgia Power Co.}, 440 F.2d 1135, 1140 (5th Cir. 1971), \textit{cert. denied}, 404 U.S. 1062 (1972), expressly rejects the \textit{Washington Gas Light} reasoning and returned to the "meaningful regulation" standard adopted in \textit{Goldfarb.}
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into an agreement to govern the allotment of floor selling time by limiting new warehouse construction. Warehouse selling time was allotted on the basis of square footage of warehouse space. Several weeks after the agreement was adopted, one member submitted plans for the building of a new warehouse designed to capture 25 percent of the floor selling time. In response to this challenge, the Board of Trade modified its by-laws effectively excluding the challenger. After unsuccessful litigation in the state courts, the renegade member complained to the Federal Trade Commission. The Commission found that the challenged activities were an unreasonable restraint of trade contrary to the public’s interest and in violation of section 5 of the Federal Trade Commission Act. The Commission entered a cease and desist order. On appeal, the Fourth Circuit remanded to the Federal Trade Commission for further findings of fact. However, in order to settle the jurisdictional issue, the court explored the application of the Parker doctrine to the activities of the Board of Trade. The issue was whether the activities particularly in regard to the modification of the by-laws, constituted actions of state officers and agents. North Carolina law had provided for some private activities in the regulation of the tobacco industry. After examining the applicable statutes, the court of appeals concluded that these private activities were merely condoned since the legislature nowhere directed the Board of Trade to adopt regulations in restraint of trade. The court held that the Parker exemption protects state action not “individual action masquerading as state action.” The court further held that state action, here, was limited to the statutory requirement that the boards of trade adopt just regulations not restricting the tobacco trade or commerce, and legal decisions on controversies arising among the board members.

Conceding this point, the Virginia State Bar nevertheless argued that the legislature, in authorizing the Virginia Supreme Court to regulate the practice of law in the state, had directed the State Bar, as the supreme court’s agent, to enforce the disciplinary code. Since the ethical opinions and fee schedule reports serve to enforce the

114. Id. at 510.
disciplinary code, the bar group contended that their activities comprised "state action."

The question the Goldfarb Court confronted was whether these activities were required by Virginia acting as a sovereign. To merit the Parker exemption, the Virginia legislature must have either expressed the opinion that minimum fee schedules are in the best interest of the state, or enacted a statutory scheme necessarily calling for the fee schedule. Virginia Code section 54-48 grants the Virginia Supreme Court the power to prescribe the code of ethics and disciplinary rules applicable to Virginia attorneys. There is no suggestion in the Virginia Code that minimum fee schedules or anticompetitive activities of lawyers are in the state's interest. Virginia Code section 54-49 stipulates that the supreme court may

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115. 95 S.Ct. at 2014. On oral argument, counsel for the Virginia State Bar asserted:

The Virginia Supreme Court of Appeals is an administrative agency of the State of Virginia, and the Court has adopted rules on the Virginia State Bar, to which all Virginia attorneys must belong. By statute, the Virginia Legislature authorized the court to organize the Virginia State Bar to act as an administrative agency of the court to relieve the court of the burden of day-to-day supervision and regulation of all Virginia attorneys. The Virginia State Bar has authority from the Virginia Supreme Court to issue advisory ethical opinions, to analyze existing minimum fee schedules, and to ascertain the fairness of fees. Now, while it is true that any state action whatever does not automatically provide an exemption under Parker v. Brown, it is clear that the Virginia State Bar qualifies as an arm of the state under Parker, by virtue of its mandate from the Virginia Legislature and its mandate from the Virginia Supreme Court. . . . The State Bar did not undertake to set minimum fee schedules for the entire state as a whole. All the Virginia Bar did was analyze local versions and variations in them, and prepare reports showing these variations and analyzing them, which were made available to local bars. True, the Virginia Supreme Court has not required that schedules be adopted, nor has the State Bar required local bars to adopt the schedules.


116. VA. CODE ANN. §54-48 (1972) provides:

Rules and regulations defining practice of law and prescribing codes of ethics and disciplinary procedure.—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.

117. VA. CODE ANN. §54-49 (1972) provides:

Organization and government of Virginia State Bar.—The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations of organizing and governing the association known as the Virginia State Bar, composed of the attorneys at law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under this article to a court of competent jurisdiction for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing.
provide rules and regulations for the governing of the Virginia State Bar to act as its administrative arm in enforcing the disciplinary code. The disciplinary rules provide some guidance in establishing "reasonable fees" and "suggested" fee schedules. No mention is made that the state's interest is fostered by promoting anticompetitive practices within the legal profession. No legitimate state aim is advanced in support of price fixing through the use of minimum fee schedules. Perhaps the Virginia Supreme Court, in approving the ethical opinions of the State Bar, condoned the use of the fee schedules. But as Goldfarb correctly surmised, it cannot be said that the State of Virginia or the supreme court, arguably an alter ego of the State, required the promulgation or enforcement of the minimum fee schedules or the anticompetitive activities of its lawyers. For the Parker exemption to control, the state must be more than peripherally involved.

Goldfarb imposed liability on the State Bar precisely because it was in pari delicto with the County Bar in the practice of maintaining the efficacy of the minimum fee schedule. Without the State Bar's ethical opinions and its concurrent disciplinary power to enforce adherence, the bar associations' fee schedules may well have been "suggested," and the issues before the Court would have been very different. Since the Virginia State Bar participated in private, discretionary antitrust violations, it can claim no talismanic immunity from the Sherman Act by reliance upon Parker v. Brown.

IMPACT

The ramifications of Goldfarb extend beyond its treatment of the minimum fee schedule as a price fixing scheme. The decision is important for establishing the jurisdictional framework for future antitrust lawsuits against learned professions. Of course, the success of these challenges will depend in large measure on how strictly the Goldfarb Court's treatment of the commerce question is held to the facts. Clearly the Chief Justice was not unequivocal in deciding that

118. 95 S.Ct. at 2015. See also, Brief for United States as Amicus Curiae, supra note 28, at F-4.
119. 95 S.Ct. at 2015. See also Brief for United States as Amicus Curiae, supra note 28, at F-3.
120. 95 S.Ct. at 2015. The Court stated:
   The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.
   Id.
legal services affect interstate commerce. For the most part, the Court left the task of determining whether particular legal services affect interstate commerce to future case-by-case analysis. Although the Court provided no useful guidelines for determining this issue in other circumstances, it emphasized that the historical antitrust approach to the commerce clause is well suited for cases of this nature.

The potential significance of Goldfarb will in all probability lie in its abandonment of the "learned profession" exemption. Notwithstanding expressed exceptions, anticompetitive activities, even among learned professions are illegal under the antitrust statutes. An additional implication of Goldfarb's recognition that the activities of lawyers may be trade or commerce under the Sherman Act is that the professions are now subject to the historical developments and policy of the antitrust laws. In this regard, Chief Justice Burger expressed a caveat in a footnote:

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.

The Court acknowledged that the Parker v. Brown exemption still protects anticompetitive state action:

[T]he States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. . . . In holding that

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122. 95 S.Ct. at 2012:
Where, as a matter of law or practical necessity, legal services are an integral part of an interstate transaction, a restraint on those services may substantially affect commerce for Sherman Act purposes. Of course, there may be legal services that involve interstate commerce in other fashions, just as there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act.

123. Id.
124. Id. at 2013.
certain anticompetitive conduct by lawyers is within the reach of
the Sherman Act we intend no diminution of the authority of the
State to regulate its professions.\textsuperscript{125}

A legislature could then provide a mandate for the state and local
bar associations by passing a statute demanding lawyers to adopt
minimum fee schedules.\textsuperscript{126} Goldfarb, however, restricts this
exemption to “anticompetitive activities . . . compelled by direc-
tion of the State acting as a sovereign.”\textsuperscript{127}

In recognizing that the public is entitled to the benefits of price
competition among lawyers, Goldfarb indirectly raised the problem
of legal advertising. While the government stressed that fee adver-
tising was not an issue in Goldfarb, the question arises whether
there is “any reason to deny the . . . client-consumers the very sort
of specific fee information that they would need . . . to gain the
benefits of . . . price competition?”\textsuperscript{128} The American Bar Associa-
tion, under pressure from the Justice Department, adopted new
amendments to the Code of Professional Responsibility specifically
permitting prepaid and group legal services to use dignified com-
mercial advertising, “which does not identify any lawyer by name,
to describe the availability or nature of its legal services or legal
service benefits.”\textsuperscript{129} Recently, a solo practitioner challenged the gen-
eral ban on advertising in a Sherman Act suit against The Associa-
tion of the Bar of the City of New York and other agencies.\textsuperscript{130} In
addition to the antitrust count, the action seeks recourse under the
Civil Rights Act,\textsuperscript{131} the first amendment,\textsuperscript{132} and the fourteenth
amendment.\textsuperscript{133} The probable outcome of this suit and similar ac-
tions will be the striking of a balance between the need to
protect the public and the need to give them all of the information

\textsuperscript{125} Id. at 2016.
contains an exemption for activities of bar associations and its members that are directed to
professional objectives.
\textsuperscript{127} 95 S.Ct. at 2015.
\textsuperscript{129} Id. at A-10, citing ABA Code of Professional Responsibility DR2-101(B); see Com-
ment, Advertising, Solicitation, and Prepaid Legal Services, 40 Tenn. L. Rev. 439, 441-49
(1973).
\textsuperscript{130} Person v. The Association of the Bar of the City of New York, No. 75 C 987
(E.D.N.Y., filed June 23, 1975), as reported in BNA Antitrust & Trade Reg. Rep., No. 720,
at A-8 (1975). See Comment, Solicitation by the Second Oldest Profession: Attorneys and
and the Profession’s Duty to Make Legal Counsel Available, 81 Yale L.J. 1181 (1972).
\textsuperscript{132} U.S. Const. amend. I.
\textsuperscript{133} U.S. Const. amend. XIV.
relevant to access to the legal system. . . . But that balance must be struck as part of the broader effort to make legal services available to all who need them regardless of economic or social status.\textsuperscript{134}

One commentator has suggested that "[i]t is not the immediate result of \textit{Goldfarb} but rather . . . its ramifications and implications that now assume importance."\textsuperscript{135} By forsaking the rule of reason and holding that the attorneys' minimum fee schedule was a price fixing agreement, the Supreme Court has sounded the death knell of fee schedules in the learned professions. In addition, the decision reinforces the recent Justice Department activities against other professions.\textsuperscript{136} Moreover, on a practical basis, \textit{Goldfarb} illustrates the pressing need within the legal profession to re-examine the legal and moral foundations of its ethical standards in light of the abuses which have occurred. Traditionally, the legal community has justified its professional code not on the basis that it benefits lawyers but rather on the basis it benefits society.\textsuperscript{137} However, continued abuse of the self-regulation privilege at the public's expense invites intrusion by those less sympathetic to a lawyer's interests.\textsuperscript{138} The response of the legal profession to the \textit{Goldfarb} challenge will demon-

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\item \textsuperscript{134} Comment, Solicitation By the Second Oldest Profession: Attorneys and Advertising, \textit{supra} note 130, at 103. \textit{See} Remarks of Deputy Ass't Att'y Gen. Bruce B. Wilson, \textit{supra} note 56.
\item \textsuperscript{135} Opinion & Comment, \textit{From Goldfarb to Where}, 61 A.B.A.J. 965 (1975).
\item \textsuperscript{137} \textit{President's Page}, \textit{supra} note 33, at 1050.
\item \textsuperscript{138} One example of the tremendous disparity in legal costs caused by the minimum fee schedule is the situation of the Goldfarbs. A title search by a Virginia attorney cost the Goldfarbs $522.50. Had they been able to obtain a title examination by a Washington, D.C. lawyer searching the same property but not "bound" by the fee schedule, the cost would have been $80. Paulson, \textit{Title Search Fees}, National Observer, July 19, 1975, at 9, col. 1. Solicitor General Bork sums up the dilemma: "It is true that some cite professional ethics; but one searches in vain for any connection between professional ethics and price-fixing, and one searches in vain for the principle that price-fixing is ethical." \textit{BNA Antitrust & Trade Reg. Rep.}, No. 707, at A-4 (1975).\end{itemize}
strate whether it still has the capacity to subordinate financial reward to social responsibility.\textsuperscript{139}

\textbf{Michael Sennett}

\textsuperscript{139} For a suggestion of the possible retroactive ramifications of the \textit{Goldfarb} decision on state bar associations that practiced anticompetitive activities through the use of fee schedules but have since abandoned them, see United States v. Estate of Donnelly, 397 U.S. 286, 295 (1970) and Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971).