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Antitrust and the Professions: Where Do We Go from Here

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Comment

ANTITRUST AND THE PROFESSIONS: WHERE DO WE GO FROM HERE?

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I. INTRODUCTION

The status of the "learned professions"¹ under the antitrust laws has long been an unsettled question.² This uncertainty is of great concern to professionals, many of whose activities could be viewed as anticompetitive.³ Law, medicine and other professions have strict requirements for admission,⁴ often have associations which set standards for their practices, and often are adverse to new and different methods of providing their services to the public.⁵ While strong ethical considerations have been advanced for many of these practices,⁶ arguments have also been made that the primary purpose of these practices is to limit competition among professionals in order to maintain high costs of services and ensure lucrative earnings.⁷

1. At the time of the American Revolution, it was stated that "with regard to the learned professions, little need be observed; they truly form no distinct interest in society and according to their situation and talents, will be indiscriminately the objects of the confidence and choice of each other, and of other parts of the community." THE FEDERALIST No. 33, at 219-20 (H. Dawson ed. 1864). The genesis of the term "learned profession" as used in antitrust analysis is found in *The Schooner Nymph*, 18 F. Cas. 506 (C.C.D. Me. 1834) (No. 10,388). For a discussion of how this case was used in later antitrust analysis, see note 22 *infra*.

Some of the various occupations that have been considered "professions" in certain antitrust contexts include the following: accountants, architects, clergymen, dentists, doctors, engineers, lawyers, opticians, optometrists, pharmacists, real estate brokers and veterinarians. Bauer, *Professional Activities and the Antitrust Laus*, 50 NOTRE DAME LAW. 570, 570 n.6 (1975). See also J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 49.01[1] n.1 (1979).

2. For a discussion of when the Supreme Court first directly addressed the liability of professionals under the antitrust laws and the remaining questions of how professionals are to be treated under the antitrust laws, see notes 8-10 and accompanying text *infra*.

3. Various practices of professionals have been challenged as anticompetitive. See, e.g., *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) (setting of maximum fees); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) (prohibition of competitive bidding); *Bates v. State Bar*, 433 U.S. 350 (1977) (prohibition of advertising); *American Medical Ass'n v. FTC*, 1980-2 Trade Cas. (CCH) ¶ 63,569 (2d Cir. 1980) (restraints on advertising, solicitation, and contract practices), *aff'd by an equally divided Court*, 455 U.S. 676 (1982); *Hyde v. Jefferson Parish Hosp.*, 686 F.2d 286 (5th Cir. 1982) (denial of hospital staff privileges).

4. See, e.g., 63 PA. CONS. STAT. ANN. (Purdon 1983) (various statutes regulating professionals such as physicians, surgeons, dentists, accountants, and engineers).

5. See generally Sims, *Maricopa: Are the Professions Different?*, 52 ANTITRUST L.J. 177 (1983).

6. See, e.g., *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) (ban on competitive bidding by professional engineers asserted to protect the public welfare). For a further discussion of *Professional Engineers*, see notes 63-69 and accompanying text *infra*.

7. See, e.g., *Ronwin v. State Bar*, 686 F.2d 692 (9th Cir. 1981), *cert. granted sub nom. Hoover v. Ronwin*, 103 S. Ct. 2084 (1983), and *cert. denied sub nom. Ronwin v. Hoover*, 103 S. Ct. 2110 (1983). In *Ronwin*, a person who had failed the Arizona bar examination sued the examination committee alleging that the committee had violated federal antitrust law. 686 F.2d at 694. The plaintiff alleged a scheme to restrict competition among Arizona attorneys by grading the bar examination to admit a predetermined number of applicants. *Id.* at 695. For a further discussion of *Ronwin*, see notes 96-100 and accompanying text *infra*.

Yet, with this potential for competitive abuse and conflict between anti-trust policy and other ethical considerations, it was not until eighty-five years after the passage of the Sherman Act⁸ that the United States Supreme Court in *Goldfarb v. Virginia State Bar*⁹ conclusively determined that antitrust law applies to the “learned professions.”¹⁰ The *Goldfarb* decision, however, created many questions concerning how professionals are to be treated under the antitrust laws.

This comment will discuss the status of the professions under the anti-trust laws prior to the *Goldfarb* decision, *Goldfarb's* impact on the professions and cases subsequent to *Goldfarb* that have attempted to further resolve the professions' status under the antitrust laws. In addition, this comment will discuss the “state action” doctrine, the McCarran-Ferguson Act exemption,¹¹ and associational liability as these concepts relate to the professions. In so doing, this comment endeavors to shed light on the professions' current status under the antitrust laws and to demonstrate how these laws will be applied to professional activities in the future.

II. THE PROFESSIONS: UNLIKELY TARGETS OF THE SHERMAN ACT

A. *The Professions Are Not Involved in “Trade or Commerce”*

The belief that the professions were beyond the jurisdiction of the Sherman Act was based in part on an analysis of the language of the Act. Although this language is broad in scope,¹² it does require that “trade or commerce” be restrained in order for the Act to be violated.¹³ It was the idea that professionals were not involved in “trade or commerce” that initiated the belief that the Sherman Act did not encompass the professions.¹⁴

8. 15 U.S.C. §§ 1-7 (1982). The Sherman Act is the basic antitrust legislation in the United States; most substantive antitrust law derives from the concepts contained in sections 1 and 2 of the Act. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTI-TRUST § 3, at 13 (1977). These sections provide in pertinent part as follows:

Sec. 1. 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . .

Sec. 2. Every 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. §§ 1-2 (1982).

9. 421 U.S. 773 (1975).

10. *Id.* at 788.

11. 15 U.S.C. §§ 1011-1015 (1982).

12. See *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). In *Northern Pacific*, the Court observed, “The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.” *Id.* at 4-5.

13. 15 U.S.C. §§ 1-7 (1982). For the text of the pertinent parts of §§ 1 and 2 of the Act, see note 8 *supra*.

14. The genesis of the belief that the “learned professions” were not involved in

In the years following the passage of the Sherman Act, the Supreme Court did not directly address the issue of whether professionals were involved in trade or commerce.¹⁵ However, in several cases not directly concerned with the professions, the Supreme Court implied that the professions were not involved in such an activity.¹⁶ Further, several lower federal courts, when squarely faced with this issue, held that the professions were not engaged in trade or commerce and thus were not within the jurisdiction of the Sherman Act.¹⁷

Sections 1 and 2 of the Sherman Act also require that the alleged restraint of trade occur in *interstate* trade or commerce.¹⁸ In the years immedi-

trade is found in an opinion written by Justice Story. See *The Schooner Nymph*, 18 F. Cas. 506 (C.C.D. Me. 1834) (No. 10,388). In *The Schooner Nymph*, a decision which preceded the Sherman Act by 60 years, Justice Story ruled that the word "trade" as used in a 1793 coasting and fishery act encompassed employment in mackerel fisheries. 18 F. Cas. at 507 (citing Coasting and Fishery Act, ch. 52, § 32, 1 Stat. 316 (1793)). However, in determining that such employment constituted a "trade," Justice Story stated as follows: "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." *Id.* (emphasis added).

This definition of trade was later cited with approval in construing the prohibition against restraints of trade in the territories and the District of Columbia contained in § 3 of the Sherman Act. See *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 437 (1932) (business of cleaning, dyeing and renovating wearing apparel constitutes trade within the meaning of § 3 of the Sherman Act). However, *Atlantic Cleaners* did not address whether the professions were trades.

For additional discussion of the "learned professions" exclusion from Sherman Act liability, see Little & Rush, *Resolving the Conflict Between Professional Ethics Opinions and Antitrust Laws*, 15 GA. L. REV. 341, 246-48 (1981). See also Bauer, *supra* note 1, at 571-82; Comment, *The Professions and Noncommercial Purposes: Applicability of Per Se Rules Under the Sherman Act*, 11 U. MICH. J.L. REV. 387, 393-96 (1978).

15. The *Goldfarb* case was the first Supreme Court decision to address directly the issue of whether the practice of the "learned professions" comes within the Sherman Act. See *Goldfarb*, 421 U.S. at 786 n.15.

16. *FTC v. Raladam Co.*, 283 U.S. 643, 653 (1931) ("medical practitioners follow a profession and not a trade"); *Federal Baseball Club v. National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922) ("a firm of lawyers sending out a member to argue a case . . . does not engage in . . . commerce because the lawyer . . . goes to another State"); *The Schooner Nymph*, 18 F. Cas. 506, 507 (C.C.D. Me. 1834) (No. 10,388).

17. See, e.g., *Goldfarb v. Virginia State Bar*, 497 F.2d 1 (4th Cir. 1974) (practice of law is not trade or commerce), *rev'd*, 421 U.S. 773 (1975); *Riggall v. Washington County Medical Soc'y*, 249 F.2d 266 (8th Cir. 1957) (practice of medicine is not trade or commerce), *cert. denied*, 355 U.S. 954 (1958); *United States v. American Medical Ass'n*, 28 F. Supp. 752 (D.D.C. 1939), *rev'd*, 110 F.2d 703 (D.C. Cir.), *cert. denied*, 310 U.S. 644 (1940).

18. For the relevant portions of the text of §§ 1 and 2 of the Sherman Act, see note 8 *supra*.

Two distinct sub-issues arise when the problem of whether an activity constitutes "trade or commerce" under the first two sections of the Sherman Act is examined. L. SULLIVAN, *supra* note 8, § 233, at 708. The first issue is constitutional in scope and involves a determination of whether the activity in question constitutes "commerce" within the meaning of the commerce clause of the United States Constitution. *Id.* See U.S. CONST. art. I, § 8, cl. 3. The second question is one of statutory construction and involves a determination of whether the activity constitutes "trade or commerce"

ately following the passage of the Act, the Supreme Court interpreted this interstate commerce requirement in such a fashion that most professional activities would not be deemed to affect interstate commerce.¹⁹ For example, in dicta contained in the 1922 decision of *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,²⁰ Justice Holmes

within the meaning of the Sherman Act. L. SULLIVAN, *supra* note 8, § 233, at 708. The Supreme Court has recognized that Congress went as far as was constitutionally permissible in passing the Act and, therefore, most activities which are in "commerce" in a constitutional sense also constitute "trade or commerce" within the meaning of the Sherman Act. *Id.* § 233, at 709-10. For cases construing the Sherman Act to embody the full scope of congressional power under the commerce clause, see, e.g., *United States v. Frankfort Distilleries*, 324 U.S. 293, 298 (1945) ("Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied"); *United States v. Southeastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944) (Congress intended to expend its full power in limiting interstate restraints of trade); *Rasmussen v. American Dairy Ass'n*, 472 F.2d 517, 521 (9th Cir. 1973) ("Congress [in passing the Sherman Act] wanted to go to the utmost extent of its Constitutional power") (quoting *Southeastern Underwriters*, 322 U.S. at 558-59); *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732, 739 (9th Cir. 1954) ("In the enactment of the Sherman Act Congress exercised its full power over interstate commerce"). For a discussion of the relationship between the jurisdictional requirements of the commerce clause and the Sherman Act, see Comment, *The Confusing World of Interstate Commerce and Jurisdiction Under the Sherman Act—A Look at the Development and Future of the Currently Employed Jurisdictional Tests*, 21 VILL. L. REV. 721 (1976); Note, *Portrait of the Sherman Act as a Commerce Clause Statute*, 49 N.Y.U. L. REV. 323 (1974).

19. *Cf.* *United States v. E. C. Knight Co.*, 156 U.S. 1, 12 (1895). In *E.C. Knight Co.*, the first antitrust case to reach the Supreme Court, the Court held there was no federal jurisdiction over a firm's alleged monopolization of sugar refining because "manufacturing" was deemed a wholly local activity. *Id.* This was so, even though the raw materials needed to produce the finished product and the finished product itself were shipped in and out of the state. *Id.* at 17. Because in most cases the services rendered by a professional will have been wholly performed within one state, an argument could have been made under *Knight* that these services were not in trade or commerce, despite the fact that they may have had a substantial effect on it.

The reaches of the commerce clause and the Sherman Act, were subsequently broadened through judicial interpretation. See *Swift & Co. v. United States*, 196 U.S. 375 (1905) (price-fixing agreement among local meat dealers was within the Act's jurisdiction because it was "aimed" at the flow of interstate commerce); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899) (price-fixing agreement among six iron pipe manufacturers in several states fell within the Act's jurisdiction because the combination affected national distribution). Later cases would also discredit the *Knight* rationale as arbitrarily distinguishing manufacturing from interstate commerce. See, e.g., *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 229-35 (1948); *Standard Oil Co. v. United States*, 283 U.S. 163, 169 (1931); *Standard Oil Co. v. United States*, 221 U.S. 1, 68-69 (1911). However, despite the retreat from the view that manufacturing was a purely intrastate activity, there remained considerable question whether professional activities occurred in interstate commerce. See, e.g., *Federal Baseball Club v. National League of Professional Baseball Clubs*, 259 U.S. 200, 208-09 (1922).

20. 259 U.S. 200 (1922). In *Federal Baseball Club*, the Supreme Court was faced with the issue of whether the business of professional baseball, in which teams travelled to different states for games, was within interstate commerce. *Id.* at 208. Justice Holmes, writing for the Court, found that it was not so engaged. *Id.* Justice Holmes stated that "personal effort, not related to production, is not a subject of commerce." *Id.* at 209. The fact that the team travelled across state lines to play games was

indicated that a law firm did not engage in interstate commerce by sending one of its lawyers to another state to argue a case.²¹ The Supreme Court had thus planted the seeds for a belief that the professions would not be subject to antitrust scrutiny.

B. *The "State Action" Doctrine: A Potential Shield for Professional Activity From Antitrust Liability*

The belief that the professions were beyond the jurisdiction of the Sherman Act drew further support from the so-called "state action" doctrine, formulated by the Supreme Court in several cases,²² culminating in the 1943 decision of *Parker v. Brown*.²³ In *Parker*, the Court held, the Sherman Act was not meant "to restrain a state or its officers or agents from activities directed by its legislature."²⁴ This doctrine was thought to be particularly pertinent

considered a "mere incident" and "not the essential thing." *Id.* (citing *Hooper v. California*, 155 U.S. 648, 655 (1895)).

21. *Id.* at 209.

22. *Olsen v. Smith*, 195 U.S. 332 (1904) (state statute which limited pilotage business to licensed pilots is not violative of the Sherman Act); *Lowenstein v. Evans*, 69 F. 908 (C.C.D.S.C. 1895) (state liquor monopoly does not violate Sherman Act).

23. 317 U.S. 341 (1943). The *Parker* Court considered whether a marketing program under the California Agricultural Prorate Act was in conflict with the Sherman Act. *Id.* at 344. The California statute regulated the marketing of raisin crops grown within the state, most of which ultimately entered interstate commerce. *Id.* at 345-48. The statute authorized the establishment of marketing programs which restricted competition among growers and maintained market prices. *Id.* at 346. Under the statutory scheme, growers would petition for the establishment of a private marketing plan for a commodity within a defined production zone. *Id.* The Commission, after hearings, would select a committee to formulate a plan if it found that the program would prevent agricultural waste and would not permit producers to reap unreasonable profits. *Id.* The Commission was authorized to approve proposed plans after hearings if it found that the program was designed to carry out the objectives of the Act. *Id.* at 347. A producer and packer of raisins in California challenged the scheme as invalid under the commerce clause of the Constitution, the Sherman Act, and a federal statute. *Id.* at 348-49.

24. *Id.* at 350-51. The Court saw no indication in the language of the Sherman Act or in its legislative history that Congress had intended the Act to apply to state action. *Id.* The Court pointed out that §§ 1 and 2 of the Act refer to "persons" who violate its provisions. *Id.* at 351. See note 8 *supra* for the text of §§ 1-2. The Court noted that § 7 of the Act defines "persons" to "include corporations and associations," but no mention is made of states. 317 U.S. at 351. See 15 U.S.C. § 7 (1982). The Court did not wish to attribute to Congress an intent to limit the states' sovereignty unless expressly manifested. 317 U.S. at 351.

The Court also stated that the Sherman Act would not apply to "officers or agents" of a state acting under the discretion of the state's legislature. *Id.* at 350-51. The Court, however, limited this principle by noting that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351 (citing *Northern Securities Co. v. United States*, 193 U.S. 197, 332, 344-47 (1904)). The Court also implied that a state or municipality may not participate "in a private agreement or combination by others for restraint of trade." 317 U.S. at 351-52 (citing *Union Pac. R.R. Co. v. United States*, 313 U.S. 450 (1941)). For a further discussion of the origin and impact of the *Parker v. Brown* doctrine, see Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1 (1976).

to the professions since their activities are often heavily regulated by the states. Therefore, actions taken pursuant to state regulations could be viewed as "state actions," immune from antitrust liability.²⁵

C. *The McCarran-Ferguson Act: A Potential Shield for Professional Activity from Antitrust Liability*

The professional was given further cause for hope that his activities were not covered by the antitrust laws with the passage of the McCarran-Ferguson Act. Enacted in 1945, the McCarran-Ferguson Act provided for a limited federal antitrust exemption for the insurance industry.²⁶ Although

25. 317 U.S. at 350-51. In 1976, the Court indicated that the state action doctrine protected some anticompetitive practices by the legal profession when it dismissed a Sherman Act attack against an Arizona State Bar Association Disciplinary Rule which barred advertising by lawyers. *Bates v. State Bar*, 433 U.S. 350 (1977). The Court's decision was based on a determination that the state bar association had exercised its rulemaking power as an agent of, and under the supervision of, the Arizona Supreme Court. *Id.* at 361. For a discussion of *Bates*, see notes 81-84 and accompanying text *infra*. See also *Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272 (9th Cir. 1982) (dental board sufficiently supervised by state to render its examination system immune from antitrust attack). For a discussion of *Benson*, see notes 97-100 and accompanying text *infra*. For a discussion of the current status of the state action doctrine as applied to the professions, see notes 80-92 and accompanying text *infra*. For a general discussion of the relationship of the *Parker* doctrine to state regulation of professions, see Bauer, *supra* note 1, at 598-601. For a discussion of the state action doctrine as a defense against federal antitrust law in general, see Little & Rush, *supra* note 14, at 357-64; Simmons & Fornaciare, *State Regulation as an Antitrust Defense: An Analysis of the Parker v. Brown Doctrine*, 43 U. CIN. L. REV. 61 (1974).

26. 15 U.S.C. §§ 1011-1015 (1982). The Act provides in relevant part as follows:

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Id. § 1011.

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That . . . the Clayton Act, and . . . Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

Id. § 1012 (emphasis in original) The Act further States that "[n]othing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." *Id.* § 1013(b).

Prior to the passage of the Sherman Act, the Supreme Court had stated that "[i]ssuing a policy of insurance is not a transaction of commerce." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868). This led to a widespread belief that the insurance business was beyond the reach of the Sherman Act. Sullivan & Wiley, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of*

the Act specifically exempted insurance industry, individuals or organizations, other lines of work were able to obtain antitrust immunity under the Act when they were doing business with an insurance company.²⁷ The McCarran Act proved important to professionals, especially those involved in providing health-related services, because these professionals were often reimbursed by insurance companies for services rendered.²⁸ In addition, professionals often worked closely with insurance companies in determining the standards for reimbursement. These activities were thought to be exempt from antitrust liability.²⁹

Reason, 27 U.C.L.A. L. REV. 265, 269-70 (1979). This belief was, however, shattered in 1944, when the Supreme Court held that Congressional regulation of the insurance business was within the reach of the commerce clause, and subject to federal antitrust law. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). The South-Eastern Underwriters Association (Association) was composed of a membership of nearly 200 private stock fire insurance companies. *Id.* at 534. The Association and 27 individuals were charged with violating §§ 1 and 2 of the Sherman Act by fixing premium rates on fire and other types of insurance in several states, and by attempting to monopolize those lines of insurance in those states. *Id.* at 534-35. The Court first rejected the defendants' contention that the business of fire insurance was not in interstate commerce. *Id.* at 539-53. The Court next considered the Association's contention that Congress did not intend the Sherman Act to reach the interstate insurance business. *Id.* at 553. The Court concluded that Congress had not intended to exempt the insurance industry under the "all-inclusive" scope of the Sherman Act. *Id.* at 560. The Court also rejected the argument that if the Sherman Act were held applicable, much beneficial state insurance regulation, which was based on the theory that "unrestricted competition in insurance results in financial chaos and public injury," would be destroyed. *Id.* at 561. The Court found this argument to be exaggerated, noting that few states allowed private companies without state supervision to fix insurance rates. *Id.* at 562.

Congress swiftly responded to *South-Eastern Underwriters* by passing the McCarran-Ferguson Act which provided a federal antitrust exemption to state-regulated insurance companies. See Sullivan & Wiley, *supra*, at 270.

27. See *Proctor v. State Farm Mut. Auto. Ins. Co.*, 561 F.2d 262 (D.C. Cir. 1977) (agreement between insurer and auto repair shops, allegedly fixing hourly labor rates paid by repair shops, held to be within McCarran-Ferguson Act exemptions absent an illegal boycott), *vacated*, 440 U.S. 942 (1979); *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564 (E.D. Pa. 1974) (actions by insurance companies and rating organizations to set fees for services to sellers of real estate held to be within the McCarran-Ferguson Act exemption); *Travelers Ins. Co. v. Blue Cross*, 361 F. Supp. 774 (W.D. Pa. 1972) (agreement between hospitals and Blue Cross which resulted in charging Blue Cross policyholders 14% less for hospital services, held to be within the McCarran-Ferguson Act exemption).

28. The McCarran Act exemption was utilized frequently by professions providing medical services. See, e.g., *United Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). For a discussion of *Pireno*, see notes 111-16 and accompanying text *infra*. For a discussion of *Royal Drug*, see notes 104-10 and accompanying text *infra*.

29. The domination of insurance boards by physicians and other suppliers of health-care services has been generally said to result in a rapid escalation of health-care costs to the detriment of consumers. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 232 n.40 (1979) (citing *Skyrocketing Health Care Costs: The Role of Bule Shield, Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce*, 95th Cong., 2d Sess., 4-34 (1978) (remarks of Michael Pertschuk, Chairman, Federal Trade Commission)). One study showed

III. THE FIRST BLOW: THE SUPREME COURT INDICATES THAT PROFESSIONAL IMMUNITY FROM THE SHERMAN ACT IS NOT COMPLETE

If one adhered to the view that the professions were not engaged in interstate trade or commerce, and followed the Supreme Court's interpretation of the state action doctrine and the McCarran Act exemption, a professional could be confident that the Sherman Act did not apply to his activities.³⁰ The Supreme Court, however, eroded some of this confidence in the 1943 case of *American Medical Association v. United States*.³¹ In this case, the American Medical Association (AMA) and certain individuals were charged with violating section 3 of the Sherman Act³² by obstructing the operations of Group Health Associates, Inc. (Group Health), a non-profit corporation which provided medical services on a risk-sharing pre-payment basis.³³ The AMA asserted at the trial level that neither the practice of medicine nor the business of Group Health constituted trade within the meaning of section 3 of the Sherman Act.³⁴ Although the Supreme Court expressly declined to

that Blue Shield payments to doctors were 16% higher in areas where doctors selected Blue Shield board members than in areas where they did not. Wall St. J., Nov. 21, 1979, at 3, col. 4.

30. For a discussion of the various ways that the professions were protected from the Sherman Act, see notes 20-37 *supra*.

31. 317 U.S. 519 (1943), *aff'g*, 110 F.2d 703 (D.C. Cir. 1940)).

32. Section 3 of the Sherman Act states in pertinent part as follows:

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal.

15 U.S.C. § 3 (1982).

33. 317 U.S. at 526. Group Health was formed by government employees in order to provide medical care, including hospitalization. *Id.* Group Health sought to accomplish this end by employing physicians on a full-time salary basis and having hospital facilities available to participants covered by their plan. *Id.* This plan allegedly violated the AMA's code of ethics. *Id.* at 526-27. The AMA, prompted by a fear of increased competition among physicians, adopted a policy in opposition to risk-sharing prepayment plans for medical services. *See* *United States v. American Medical Ass'n*, 110 F.2d 703, 707 (D.C. Cir.), *cert. denied*, 310 U.S. 644 (1940). The defendants in *AMA* were charged with conspiring to coerce physicians to refuse employment with Group Health, restraining physicians from consulting with Group Health's physicians, and depriving Group Health of hospital facilities for its patients. 317 U.S. at 527.

The indictment of the defendants was based upon § 3 of the Sherman Act, which prohibits restraints of trade or commerce within the District of Columbia. *Id.* at 526. Because all of Group Health's activities took place within the District, there was no need to establish that the activities occurred in interstate commerce. *Id.* *See* 15 U.S.C. § 3 (1982).

34. 317 U.S. at 527. The trial court had sustained a demurrer to the indictment on these grounds. *Id.* On appeal, the court of appeals reversed and remanded the case. *Id.* Upon remand, a jury found petitioners guilty as charged. *Id.* The court of appeals affirmed the judgment. *Id.*

decide whether the practice of medicine constituted trade, it ruled that Group Health was engaged in trade or business, despite the cooperative nature of their enterprise.³⁵ The Court further held that because section 3 of the Sherman Act was applicable to "any person" violating its strictures, the defendants' status as physicians did not render them immune from antitrust liability.³⁶

Seven years later, the Supreme Court further eroded professionals' confidence concerning their status under the Sherman Act when it found that personal services could constitute "trade" within the meaning of the Sherman Act. In *United States v. National Association of Real Estate Boards*,³⁷ the Court held that the activities of a real estate broker were subject to the strictures of the Sherman Act, despite the fact that these activities involved the sale of personal services, rather than the sale of commodities.³⁸ Justice Jackson, in a dissenting opinion, foreshadowed the partial impact of the majority opinion on professionals when he stated as follows: "I am not persuaded that fixing uniform fees for the broker's labor is more offensive to the antitrust law than fixing uniform fees for the labor of a lawyer, a doctor, a carpenter, or a plumber."³⁹ Although *Real Estate Boards* did not involve professional

35. *Id.* at 528. The Court's determination that Group Health's activities fell within the sphere of business was influenced by several findings:

[Group Health's] corporate activity is the consummation of the co-operative effort of its members to obtain for themselves and their families medical service and hospitalization on a risk-sharing prepayment basis. The corporation collects its funds from members. With these funds physicians are employed and hospitalization procured on behalf of members and their dependents.

Id.

36. *Id.* at 528-29. The court stated that it was immaterial that the defendants were physicians, if the purpose and effect of their conspiracy was to obstruct and restrain the business of Group Health. *Id.* at 528. One commentator has noted that the *AMA* decision is significant because it shifted the focus from whether the defendants were engaged in trade or commerce to whether the *object* of the restraint was so involved. See Bauer, *supra* note 1, at 576.

37. 339 U.S. 485 (1950).

38. *Id.* at 490. In *Real Estate Boards*, members of the Washington Real Estate Board were charged with conspiring to fix commission rates for the use of their services in real estate transactions in the District of Columbia. *Id.* at 487. As in *AMA*, this action was brought under § 3 of the Sherman Act, which prohibits restraint of trade in the District of Columbia. *Id.* For the relevant text of § 3 of the Sherman Act, see note 33 *supra*.

Although the holding of the Court in *Real Estate Boards* applied only to § 3, language in the opinion indicated that the Court's broader use of the term "trade" applied to the entire Sherman Act. *Id.* at 491-92. The Court stated that "we would be contracting the scope of the concept of 'trade,' as used in the phrase 'restraint of trade,' in a precedent-breaking manner if we carved out an exemption for real estate brokers." *Id.* at 492.

39. *Id.* at 496 (Jackson, J., dissenting). Justice Jackson argued in dissent that the antitrust laws should not be applied to a real estate broker. *Id.* Justice Jackson implied that, for antitrust purposes, the services provided by a real estate broker could not be distinguished from those provided by "professionals." *Id.* He stated, "Services of the real estate broker, if not strictly fiduciary, are at least those of a trusted agent and, oftentimes, advisory as to values and procedures." *Id.*

services, and the Court specifically stated that they were not addressing the question of whether professional services constituted "trade," the professional could no longer be assured that "trade" would be so narrowly construed as to preclude professional services.⁴⁰

Although the Court's opinion in *American Medical Association and Real Estate Boards* suggested that some activities of professionals were within the jurisdiction of the Sherman Act, the Supreme Court was still sending out mixed signals as to how professionals were to be treated under the Act.⁴¹ In *United States v. Oregon State Medical Society*,⁴² the Court observed in dicta that the ethical considerations of a patient-physician relationship are quite different from those prevailing in commercial matters.⁴³ The Court noted that the competition of the business world "may be demoralizing to the ethical standard of a profession."⁴⁴ The case involved a suit brought by the United States government against several medical societies in Oregon, alleging a conspiracy to restrain competition in the business of providing prepaid medical care.⁴⁵ However, the Supreme Court held that because the government

40. 339 U.S. at 490-92.

41. In *Real Estate Boards*, the Supreme Court approved a broad reading of the term "trade" in the Sherman Act. 339 U.S. at 491 (citing *The Schooner Nymph*, 18 F. Cas. 506 (C.C.D. Me. 1834) (No. 10,388)). However, the Court declined to adopt or reject the court of appeals' view that the term "trade" included "all occupations in which men are engaged for a livelihood." 339 U.S. at 491-92 (citing *United States v. American Medical Ass'n*, 110 F.2d 703, 710 (D.C. Cir. 1940)). In *American Medical Ass'n*, the District of Columbia Circuit had held that the term "trade" as used in the phrase "restraint of trade" included the medical profession. 110 F.2d at 710. Rather than venture an opinion as to the correctness of the applicability of the term "trade" to the professions, the Court in *Real Estate Boards* concluded that whatever the term "trade" meant, it included the real estate brokerage business. *Id.* at 492.

Similarly, in *AMA* the Supreme Court refused to address the status of professionals under the Sherman Act. 317 U.S. at 528. Two years after the *Real Estate Boards* decision, the Court again declined to provide explicit guidance on the applicability of the Sherman Act to the professions. *See United States v. Oregon State Medical Soc'y*, 343 U.S. 326, 336 (1952).

42. 343 U.S. 326 (1952).

43. *Id.* at 336.

44. *Id.* (citing *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608 (1935)). *Semler* did not involve the antitrust laws, but rather, a 1933 Oregon statute which prohibited advertising by dentists. *Semler v. Oregon State Bd. of Dental Examiners* 15, 294 U.S. 608, 608-09 (1935). *Semler*, a dentist who had advertised his services, sought to enjoin enforcement of the statute, alleging that it violated the due process and equal protection clauses of the fourteenth amendment, and impaired the obligation of contracts in violation of the contracts clause of the United States Constitution. *Id.* at 609. In upholding the statute against these challenges, the Court stated that "the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous." *Id.* at 612.

45. 343 U.S. at 328-30. In 1936, several organizations of doctors in Oregon were opposed to prepaid medical care. *Id.* at 329. The physicians were concerned it would divert patients from independent practitioners. *Id.* However, in 1941, there was an abrupt change of mind by the organized medical profession in Oregon con-

had failed to prove this conspiracy, it was unnecessary to resolve the question of whether such a conspiracy would have violated the antitrust laws.⁴⁶

IV. *Goldfarb v. Virginia State Bar*: THE SUPREME COURT DEEMS THE SHERMAN ACT APPLIES TO THE PROFESSIONS

In 1975, the Supreme Court squarely held that the terms "trade or commerce" as used in the Sherman Act encompassed the professions. In *Goldfarb v. Virginia State Bar*, a husband and wife, in connection with the purchase of a new home, were required to have a title examination performed by a lawyer.⁴⁷ They were unable to find a lawyer who would perform this service for less than the fee listed in a "minimum fee schedule" that had been adopted by the county bar association and enforced by the state bar association.⁴⁸ The couple brought suit against the state and county bar associations alleging that the operation of the minimum fee schedule in this context resulted in an unreasonable restraint of trade in violation of section 1 of the Sherman

cerning prepaid medical care. *Id.* The physicians were apparently convinced that the public demanded and was entitled to the protection provided by prepaid medical services. *Id.* The organized physicians decided to get into the business themselves by rendering such a service on a non-profit basis. *Id.* at 329-30. This case arose out of allegations that the defendant physicians, their professional organizations and their prepaid medical care company conspired to restrain and monopolize the business of providing prepaid care in Oregon. *Id.* at 330.

46. 343 U.S. at 336. As in both *AMA* and *Real Estate Boards*, the Supreme Court was able to avoid deciding the issue of whether the professions' actions were trade or commerce subject to the Sherman Act.

47. 421 U.S. 773, 775 (1975). The financing agency required the Goldfarbs to obtain title insurance in order for them to obtain financing for the purchase of their home. *Id.* As a practical matter, purchasers of property were required to obtain a title examination and only a member of the Virginia State Bar could perform that service. *Id.* (footnote omitted).

48. 421 U.S. at 776. The fee schedule adopted by the county bar association was a list of recommended minimum prices for common legal services. *Id.* at 776. In 1969, the state bar had published a fee-schedule report which stated that lawyers "should feel free to charge *more than the recommended fees.*" *Id.* at 777 n.4 (emphasis in original). Although the report stated that county bar associations were not bound by the fee schedule, the Fairfax County Bar Association adopted a fee schedule similar to the one suggested by the state bar association. *Id.* at 777 n.4.

The lawyer whom the Goldfarbs initially contacted told them that it was his policy to keep his charges for a title examination in line with the minimum fee schedule of the county, which called for a fee of one percent of the value of the property to be purchased. *Id.* at 776. The Goldfarbs sent letters to 36 other lawyers in the county inquiring about fees. *Id.* Nineteen responded and none indicated that they would perform the title examination for less than the fixed rate. *Id.* Several lawyers responded that they knew of no lawyers who would do so. *Id.*

Although the Fairfax County Bar Association, which published the fee schedule, was a voluntary association and had no formal power to enforce the schedule, enforcement was provided through the state bar. *Id.* at 776-78. The state bar, while never having taken any formal disciplinary action to compel compliance with fee schedules, had published reports condoning the fee schedule and issued two ethical opinions indicating fee schedules "cannot be ignored." *Id.* One ethical opinion stated that a lawyer who habitually charges lower than the fee schedule recommended by the local bar association would be presumed guilty of misconduct. *Id.* at 777-78.

Act.⁴⁹

The Court, in finding that the lawyers were not immune from Sherman Act liability, stated that Congress never intended a sweeping exclusion for the professions, but rather attempted broad coverage for anyone in business whose activities might restrain interstate commerce.⁵⁰ The Court went on to state that “[i]n the modern world 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.”⁵¹

In finding that the availability of title examinations has a substantial affect on interstate commerce, the Court adopted the district court’s observation that a significant portion of the funds used for financing the purchase of homes in the county came from outside the state, thus making the purchase of a home an interstate transaction.⁵² The Court stated that the title examination was an integral part of the purchase of a home, and a restraint of this service “may substantially affect commerce for Sherman Act purposes.”⁵³

However, in a cautionary footnote, the Court stated that it would be

49. *Id.* at 775. The Goldfarbs brought a class action suit, seeking damages and injunctive relief. *Id.* at 778.

50. *Id.* at 786-88. The Court stated that there was no explicit exemption in the Act nor was there anything contained in the legislative history to support the contention that professionals were exempt from § 1 of the Sherman Act. *Id.* at 786. The Court found that the nature of an occupation, in itself, does not provide relief from the Sherman Act. *Id.* at 787 (citing *Associated Press v. United States*, 326 U.S. 1, 7 (1945)). The Court also found that the public service aspect of professions was not controlling in determining whether § 1 of the Sherman Act includes professions. *Id.* (citing *Real Estate Boards*, 339 U.S. at 489). The Court also found that Congress intended § 1 to be as broad as possible. *Id.* (citing *South-Eastern Underwriters*, 322 U.S. at 553). In addition, the Court stated there was a “heavy presumption against implicit exemptions.” *Id.* (citing *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 350-51 (1963); *California v. Federal Comm’n*, 369 U.S. 482, 485 (1962)).

The Court found that a title examination is a service and since money is received for this service, it constituted “commerce” in the most common usage of the word. *Id.* at 787-88. The Court stated that it was “no disparagement of the practice of law as a profession to acknowledge that it has this business aspect.” *Id.*

As to the earlier Supreme Court cases which indicated that professions were not involved in trade or commerce, the Court stated these were simply “passing references in cases concerned with other issues.” *Id.* at 786 n.15 (citing *Real Estate Boards*, 339 U.S. at 490; *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 426, 436 (1932); *FTC v. Raladam Co.*, 283 U.S. 643, 653 (1931); *Federal Baseball Club*, 259 U.S. at 209). The Court went on to state that it had not previously attempted to decide whether the practice of a learned profession was within § 1 of the Sherman Act. *Id.* at 785 n.15.

51. *Id.* at 788.

52. *Id.* at 783. In addition to a significant portion of the loans coming from outside the state, many of the loans were guaranteed by the United States Veterans Administration and the Department of Housing and Urban Development. *Id.*

53. *Id.* at 784-85. The Court reasoned that because a title examination was necessary to assure a lender that the borrower has a valid title in a real estate purchase, the title examination was an integral part of the transaction. *Id.* at 784. The Court found this to be the necessary connection between the interstate transaction and the restraint of trade. *Id.* at 783-84. The Court stated that given the large volume of commerce involved, and the inseparability of the title examination from the inter-

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.⁵⁴ The Court went on to state that

state aspects of real estate transactions, interstate commerce was sufficiently affected. *Id.* at 785.

The Court rejected the argument that because there was no showing that home buyers were discouraged from purchasing homes by the fixing of fees for title examination, there was no effect on interstate commerce. *Id.* The Court stated that to accept this argument would be to concede that the magnitude of the effect controls the analysis. *Id.* The Court noted that its cases "have shown that, once effect is shown, no specific magnitude need be proved." *Id.* (citing *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 310 (1956)). The Court also rejected the assertion that it was necessary to prove that the fee schedule actually increased fees. *Id.* The Court stated that it was sufficient to prove that "the fee schedule fixed fees and thus 'deprive[d] purchasers or consumers of the advantages which they derive from free competition.'" *Id.* (quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 501 (1940)).

The *Goldfarb* Court's expansive view of what is considered interstate commerce for Sherman Act purposes is not surprising when considered in conjunction with the Court's modern view of what constitutes interstate commerce for constitutional commerce clause analysis. For discussion of the relationship between the Sherman Act and the commerce clause of the United States Constitution concerning what constitutes "interstate commerce," see note 19 *supra*. Modern commerce clause cases have given a very broad meaning to the term interstate commerce. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942). In *Wickard*, the Supreme Court found that a wheat farmer who grew wheat for his own on-farm consumption affected the total national sale and supply of wheat and thus could be subject to a production quota as part of Congress' constitutional power to regulate interstate commerce. *Id.*

There are now two jurisdictional tests to determine whether an activity constitutes interstate commerce for purposes of antitrust analysis. Sullivan, *supra* note 8, § 233a, at 709. The first is whether the activity is "in" or "in the flow of" interstate commerce. *Id.* Once an activity is determined to be in interstate commerce, the extent of its effect is not considered. *Id.* § 233a, at 709-10. The second test inquires whether the activity has a "substantial effect" on interstate commerce. *Id.* § 233a, at 710. To have a substantial effect on commerce, there must be a logical, causal connection between the activity and the flow of interstate commerce, and the flow must be affected in some substantial way. *Id.*

In *Goldfarb*, although the actual fixing of fees was not "in" or "in the flow" of interstate commerce, the fixing of fees did substantially affect the purchase of real estate, which was in the flow of interstate commerce. 421 U.S. at 785. For further discussions of interstate commerce under the Sherman Act, see generally Eiger, *The Commerce Element in Federal Antitrust Litigation*, 25 FED. B.J. 282 (1965); Kallis, *Local Conduct and the Sherman Act*, 1959 DUKE L.J. 236; Krotinger, *The "Essentially Local" Doctrine and Section 1 of the Sherman Act*, 15 CASE W. RES. L. REV. 66 (1963). See also Bauer, *supra* note 1, at 592-98.

54. 421 U.S. at 788 n.17. The Court cautioned as follows:

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 other other situation than the one with which we are confronted today.

Id. (emphasis in original).

a particular practice which would violate the Sherman Act in one context may have to be treated differently in a professional context.⁵⁵ Yet, the Court did not offer any guidance as to when these situations might occur, or what they might be.⁵⁶

In *Goldfarb*, the Court also considered whether the bar associations' activities were outside the jurisdiction of the Sherman Act by operation of the "state action" doctrine set forth in *Parker v. Brown*.⁵⁷ The bar associations in *Goldfarb* had argued that since the Virginia legislature had authorized Virginia's highest state court to regulate the practice of law, and that court had in turn adopted rules permitting use of a fee schedule, the bar associations' adoption of such schedules, constituted state action.⁵⁸ In rejecting this argument, the Court stated that the state's highest court would had to have mandated the use of these fee schedules for their use to be considered state action; instead the state court simply permitted the bar associations to use these fee schedules.⁵⁹

55. *Id.*

56. *Id.* For a discussion of the effects of the *Goldfarb* footnote on later cases, see notes 73-76 and accompanying text *infra*.

57. 421 U.S. at 780. For a discussion of *Parker* and its formulation of the state action doctrine, see notes 23-25 and accompanying text *supra*.

58. 421 U.S. at 788-90. The relevant Virginia statute which authorized Virginia's highest state court to regulate the practice of law provided as follows:

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 disbaring attorneys at law.

Id. at 789 n.18 (quoting VA. CODE § 54-48 (1972)).

The Supreme Court of Virginia, which is Virginia's highest state court, had adopted ethical codes which dealt in part with fees. 421 U.S. at 789. Under the then-most current rules, there were eight factors that the Court directed to be considered in setting a fee. *Id.* at 789 n.9. One of these factors used in the fee-setting process was the fee customarily charged in that area for similar legal services. *Id.* (citing VIRGINIA CODE OF PROF. RESPONSIBILITY, DR 2-106, 211 Va. 295, 313 (1970)).

The state bar asserted that by issuing the fee schedules, they were simply a state agency implementing the fee provisions set forth in the ethical codes by the Virginia Supreme Court. *Id.* at 789-90. The county bar, although a voluntary association, claimed that the actions of the state bar "prompted" it to issue fee schedules and, therefore, its actions should also be considered state action for Sherman Act purposes. *Id.* at 790.

59. *Id.* at 790-91. The Court stated that the threshold inquiry to determine if an anticompetitive activity is state action under the Sherman Act is whether the activity is "required by the State acting as sovereign." *Id.* at 790. (citations omitted). The Court found that it did not have to go beyond this threshold inquiry "because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent." *Id.* at 790. The Court stated that there was no Virginia statute that required the state bar association to promulgate a fee schedule, and in fact, there was no state law referring to fees whatsoever. *Id.* Although the supreme court's ethical codes mentioned advisory fee schedules, it did not direct the bar associations to supply them or require a minimum fee

V. POST-*GOLDFARB*: ARE THE PROFESSIONS ENTITLED TO
PREFERENTIAL TREATMENT UNDER THE SHERMAN ACT?

A. *The Professions and the Rule of Reason*

The *Goldfarb* decision did not provide any insight on the type of analysis to be used in determining whether professional activities violate the antitrust laws. In assessing activities which may potentially violate the Sherman Act, courts generally utilize either the "rule of reason analysis" or the "*per se* doctrine."⁶⁰ Under the rule of reason analysis, a court will analyze all the factors relevant to the activities at issue to decide whether the activities operate to diminish competition.⁶¹ If competition is found to be diminished, the activities will be held to unreasonably restrain trade and thus violate the Sherman Act.⁶² Soon after *Goldfarb*, the Supreme Court was faced with the issue of whether a professional society could justify its actions by asserting that under the rule of reason its anticompetitive actions were necessary to protect the public welfare.

In *National Society of Professional Engineers v. United States*,⁶³ the National Society of Professional Engineers (Society) attempted to defend its policy of

which the bar associations had set. *Id.* The Court stated that it was not enough that state action "prompted" anticompetitive conduct; rather, the state must compel the conduct. *Id.* at 791.

60. See L. SULLIVAN, *supra* note 8, § 63, at 166. The rule of reason analysis originated in a 1911 case which involved allegations that the Standard Oil Company of New Jersey engaged with others to fix the price of oil. See *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911). For a discussion of the *per se* rule, see notes 70-81 and accompanying text *infra*.

61. See L. SULLIVAN, *supra* note 8, § 65, at 173. Section 1 of the Sherman Act literally prohibits *every* agreement in restraint of trade. 15 U.S.C. § 1 (1982). For the relevant portion of the text of section 1, see note 8 *supra*. The Supreme Court has recognized that all agreements restrain trade to some degree and has reasoned that Congress could not have intended a literal interpretation of the word "every." See *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 568 (1898).

The Court has construed the Sherman Act to prohibit only those agreements which unreasonably restrain competition. See *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911). In *Standard Oil*, the Court recognized that unreasonableness can be based either on the nature or character of the contracts or on surrounding circumstances which give rise to the inference or presumption that the contracts were intended to restrain trade. *Id.* at 58.

In a case decided seven years after *Standard Oil*, Justice Brandeis, writing for the Court, further defined the rule of reason analysis by outlining some of the factors a court should consider when using that analysis. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). Justice Brandeis noted that such relevant factors included the facts peculiar to the business to which the restraint is applied, the condition of the business before and after the restraint was imposed, the nature of the restraint and its actual or probable effect, the history of the restraint, the evil believed to exist, the reason for adopting that particular restraint as a remedy, and the purpose or the end sought to be attained. *Id.*

For further discussion of the rule of reason see E. KINTER, *FEDERAL ANTITRUST LAW* § 8.2, at 350-62 (1980); L. SULLIVAN, *supra* note 8, §§ 63-66, at 165-82.

62. L. SULLIVAN, *supra* note 8, § 65, at 172 (citing *Standard Oil Co. v. United States*, 221 U.S. 1 (1911)).

63. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978).

prohibiting members from submitting competitive bids for engineering services by asserting that this policy protected the public safety by maintaining the quality of its members' services.⁶⁴ In rejecting the Society's argument under the rule of reason, the Court stated that the Society's ban on competitive bidding both prevented all customers from making price comparisons in the initial selection of an engineer and also imposed its views of the costs and benefits of competition on the entire marketplace.⁶⁵

The Court further stated that it adhered to the view expressed in *Goldfarb* that the nature of professional services may differ significantly from that of other business services.⁶⁶ However, the Court cautioned that there was no broad exemption under the rule of reason for the professions.⁶⁷ The Court stated that although ethical norms may be considered under the rule of reason when they serve to regulate and promote competition,⁶⁸ the rule does

64. *Id.* at 684-85. In *National Soc'y of Professional Eng'rs*, the government alleged that members of the Society had agreed to abide by canons of ethics prohibiting the submission of competitive bids for engineering services. *Id.* at 684. Section 11 of the Society's Code of Ethics stated, "The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding. . . ." *Id.* at 683 n.3. The Society did not deny the government's essential facts, but asserted in a rule of reason analysis that the prohibition of competitive bidding was justified to protect the public safety. *Id.* at 685. The Society stated that the rule against competitive bidding prevented production of inferior work. *Id.* at 684-85. Without this rule, awards frequently would be made to the lowest bidder, regardless of quality. *Id.* at 685. The Society argued that "it would be cheaper and easier for an engineer 'to design and specify inefficient and unnecessarily expensive structures and methods of construction.'" *Id.* at 684-85 (citing Brief for Appellant at 21-22). The Society claimed that this practice of awarding bids regardless of quality would be dangerous to the public health, safety and welfare. *Id.* at 685.

65. *Id.* at 694-95. In discussing the rule of reason analysis, the Court quoted with approval the Report of the Attorney General's National Committee to study the Antitrust Laws:

While *Standard Oil* gave the courts discretion in interpreting the word "every" in Section 1, such discretion is confined to consideration of whether in each case the conduct being reviewed under the Act constitutes an undue restraint of competitive conditions, or a monopolization, or an attempt to monopolize. This standard permits the courts to decide whether conduct is significantly and unreasonably anticompetitive in character or effect; it makes obsolete once prevalent arguments, such as, whether monopoly arrangements would be socially preferable to competition in a particular industry, because, for example, of high fixed costs or the risks of "cutthroat" competition or other similar unusual conditions.

Id. at 691 n.16 (quoting REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 11 (1955)).

The *Professional Engineers* Court noted that in the free market system it is assumed that competition favorably affects not only cost but all aspects of a bargain, including quality, service, safety, and durability. *Id.* at 695. The Court stated that the existence of occasional exceptions to this assumption could not justify deviations from the statutory policy, which precluded inquiry into the merits of competition. *Id.*

66. *Id.* at 696.

67. *Id.*

68. *Id.* (citing *Tripoli Co. v. Wella Corp.*, 425 F.2d 932 (3d Cir. 1970)). In *Trip-*

not support a defense based on the assumption that competition itself is unreasonable.⁶⁹

B. *The Professions and the Per Se Rule*

Although most alleged antitrust violations are analyzed under the rule of reason, courts have recognized certain practices as being so clearly anticompetitive that they are conclusively held to be *per se* illegal.⁷⁰ The Supreme Court's past experience with these types of practices allows it to find these practices *per se* illegal without the necessity of the often long, complex and expensive analysis which the rule of reason requires.⁷¹ Both the

oli, the Third Circuit held that a marketing plan which limited the distribution of cosmetic products to licensed beauticians and barbers rather than to the general public was permissible because of the potentially dangerous effects of the products' use by those not having the requisite training and skills. *Tripoli Co. v. Wella Corp.*, 425 F.2d 932, 936-37 (3d Cir. 1970). In addition, the *Tripoli* court found no "meaningful" anticompetitive effects from the marketing plan because there was considerable competition among wholesalers of these types of products. *Id.* at 938-39.

In *Professional Engineers*, the Court noted that the Society's argument was a "far cry" from the position advanced in cases such as *Tripoli*. 435 U.S. at 696. In rejecting the Society's attempt to argue that competition would automatically foster deceptive practices in the engineering profession, the Court stated that "we may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition." *Id.*

For a general discussion of *Professional Engineers*, see Note, *Per Se Rule Applied to Ethical Canon Against Competitive Bidding*, 62 MARQ. L. REV. 260 (1978).

69. 435 U.S. at 696. One commentator has noted that the mere invocation of "ethics" as a justification for anticompetitive conduct will not be sufficient. It didn't work in *Goldfarb* or *Professional Engineers* or *AMA*, and it won't work in the future. While it seems to be difficult for doctors and lawyers to appreciate this point, the prevalence of self-regulation is a reason for *more* antitrust concern, not less.

Sims, *supra* note 5, at 186 (emphasis in original).

70. See *Continental T.V. v. GTE Sylvania*, 433 U.S. 36, 50 (1977) (footnote omitted). Various practices have been held *per se* illegal. See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596 (1972) (horizontal restraint); *Fortner Enters. v. United States Steel*, 394 U.S. 495 (1969) (tying arrangement); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (maximum price fixing); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960) (price maintenance combination); *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959) (group boycott); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958) (tying arrangement); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951) (horizontal market division); *Kiefer-Stewart Co. v. Joseph F. Seagram & Sons*, 340 U.S. 211 (1951) (vertical price-maintenance agreements); *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457 (1941) (group boycotts); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (artificial raising and fixing prices); *United States v. Joint-Traffic Ass'n*, 171 U.S. 505 (1898) (horizontal price-fixing agreements).

71. See *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 343-44 (1982). Although the Court recognized that certain agreements may be invalidated under the *per se* rule where those same agreements may have been proven reasonable under a full rule of reason inquiry, the Court will tolerate this solution for the sake of business certainty and litigation efficiency. *Id.* at 344 (footnote omitted). The Court went on to state,

Per se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that an-

Fourth and Ninth Circuit Courts of Appeals have interpreted *Goldfarb* to require a rule of reason analysis in situations where professionals were involved, even if the same practice in a purely commercial setting would be held *per se* illegal.⁷²

In *Arizona v. Maricopa County Medical Society*,⁷³ the Ninth Circuit refused to apply the *per se* rule to an agreement among physicians to set maximum fees for medical services, even though the Supreme Court had previously found other maximum price-fixing schemes to be *per se* illegal.⁷⁴ The Ninth Circuit reasoned that it could not find the plan *per se* illegal because, among other reasons, it was "uncertain about the competitive order that should exist within the health care industry pursuant to the Sherman Act as interpreted by the courts."⁷⁵ The court went on to state that since *Goldfarb*, the parameters of professional liability under the Sherman Act are being defined on a case-by-case basis.⁷⁶

On certiorari, however the Supreme Court reversed the Ninth Circuit, and held that the physicians' plan was *per se* illegal.⁷⁷ The Court reiterated its statement in *Goldfarb* that the public service aspects and other features of

ritcompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflected the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.

Id. at 344 n.16 (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977)).

72. See *Arizona v. Maricopa County Medical Soc'y*, 643 F.2d 553 (9th Cir. 1980) (*per se* rule not applied to setting of maximum fees by medical society), *rev'd*, 457 U.S. 332 (1982); *Virginia Academy of Clinical Psychologists v. Blue Shield*, 624 F.2d 476 (4th Cir. 1980) (*per se* rule not applied to medical plans which boycott competitors), *cert. denied*, 450 U.S. 916 (1982).

73. 643 F.2d 553 (9th Cir. 1980), *rev'd*, 457 U.S. 332 (1982).

74. 643 F.2d at 557. In *Maricopa County*, a group of licensed physicians started a non-profit corporation which established a schedule of maximum fees that the participating physicians agreed to charge for services rendered to patients covered by corporation-approved insurance plans. *Id.* at 554-55. The physicians could charge an amount less than the maximum fee and could charge any fee to patients not insured by approved plans. See *Maricopa County Medical Soc'y*, 457 U.S. at 341. Patients insured by an approved plan could go to non-member physicians, but would only be reimbursed for fees paid up to the schedule maximums. *Id.*

75. 643 F.2d at 556. The court went on to state,

The present supply and demand functions of medical services in no way approximate those which would exist in a purely private competitive order. An accurate description of those functions moreover is not available. Thus, we lack baselines by which could be measured the distance between the present supply and demand functions and those which would exist under ideal competitive conditions.

Id.

76. *Id.*

77. *Maricopa County Medical Soc'y*, 457 U.S. at 332. The Court stated that two of its earlier decisions precluded the argument that the setting of maximum fees is not *per se* illegal. *Id.* at 348 (citing *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951)). For a general discussion of the impact of *Maricopa* on the professions, see *Sims*, *supra* note 5.

the professions may require different treatment for professionals in some contexts, but further stated that the price-fixing agreement by the physicians in the instant case was not premised on public service or ethical norms, and therefore was to be treated as any other price-fixing agreement.⁷⁸ In response to the Ninth Circuit's belief that it did not have sufficient experience with the health care industry to find the plan *per se* illegal, the Supreme Court stated that, with respect to price-fixing, the Sherman Act " 'establishes one uniform rule applicable to all industries alike.' " ⁷⁹

C. *The Professions and the State Action Doctrine*

Although the *Goldfarb* Court recognized the possibility that the state action doctrine might protect anticompetitive acts of professionals from the reach of the Sherman Act, the Court provided little guidance regarding the extent of state involvement required to invoke this protection.⁸⁰ In subsequent cases, however, the Court attempted to clarify the circumstances under which activities could constitute state action such that Sherman Act liability is inapplicable.

First, in *Bates v. State Bar*,⁸¹ the Supreme Court held that a ban on ad-

78. 457 U.S. at 348-49. The Court noted that the physicians did not argue that the quality of their professional services would be enhanced by the price restraint. *Id.* at 349. The claim that the maximum fee schedule would make it easier for customers to pay their medical bills "does not distinguish the medical profession from any other provider of goods or services." *Id.*

79. *Id.* (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220 (1940)). The Court also stated that "[t]he elimination of so-called competitive evils [in an industry] is no legal justification for price-fixing agreements." *Id.* (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220 (1940)).

The lower federal courts have attempted to avoid the strict application of the *per se* rule to professionals. For example, in *Hospital Bldg. Co. v. Trustees of Rex Hospital*, the Fourth Circuit analyzed under the rule of reason a group boycott and attempted monopolization, an activity usually accorded *per se* treatment. *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 691 F.2d 678, 683-87 (4th Cir. 1982). The court's rationale in so doing was that there was statutory authorization designed to avoid duplication of health care services by promoting planned development of health facilities. *Id.* at 684. The court ruled that the restraints may have been reasonable "if undertaken in good faith and if their actual and intended effects lay within those envisioned by specific federal legislation." *Id.* at 685.

80. 421 U.S. at 788-92. The *Goldfarb* Court did not consider the extent of state involvement required to invoke the protection of the state action doctrine, because it found the use of the fee schedules had not been mandated by the state. *Id.* at 790. For discussion of the state action doctrine, see notes 22-25 and accompanying text *supra*. For an additional discussion of the state action doctrine issue in *Goldfarb*, see notes 57-59 and accompanying text *supra*.

81. 433 U.S. 350 (1977). In *Bates*, two attorneys operated a "legal clinic" which offered modest-cost legal services to persons with moderate incomes who did not qualify for legal aid. *Id.* at 354. The attorneys depended on substantial volume due to the low return on individual cases. *Id.* After practicing in the legal clinic for two years, the attorneys began to advertise the availability of their low-cost legal services, in contravention of an Arizona Supreme Court disciplinary rule. *Id.* at 345-55 (citing 17A ARIZ. REV. STAT. ANN. Rule 29(a) (West Supp. 1976)). After the president of the state bar association filed a complaint against the attorneys, a hearing was held

vertising by attorneys did not violate the Sherman Act because it was protected by the state action doctrine.⁸² In *Bates*, the Court found that the state bar association prohibition of advertising by attorneys had been directed by the Arizona Supreme Court and was thus “‘compelled by direction of the State acting as sovereign.’”⁸³ The Court distinguished *Bates* from *Goldfarb* by noting that although the action was merely permitted in *Goldfarb*, the action was compelled by the state in *Bates*.⁸⁴

In 1980, the Supreme Court, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,⁸⁵ formulated a two-part standard for immunity under the state action doctrine.⁸⁶ This standard required that the challenged restraint of trade be “‘clearly articulated and affirmatively expressed as state

before a special administrative committee as prescribed by Arizona Supreme Court Rule 33. *Id.* at 356. The committee recommended that the attorneys be suspended from the practice of law for not less than six months. *Id.* After further review, the Board of Governors of the State Bar recommended only a one-week suspension for each attorney. *Id.* Subsequently, the Arizona Supreme Court rejected the attorneys’ claims that the rule violated both the Sherman Act and the first amendment to the Constitution. *Id.*

82. *Id.* at 359-60. The rule prohibiting advertising stated in pertinent part as follows:

A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so on his behalf.

Id. at 355 (quoting 17A ARIZ. REV. STAT. ANN. Rule 29(a) (West Supp. 1976)). Although the Court found that the prohibition of advertising did not violate the Sherman Act, the Court held that the prohibition against advertising violated the first amendment. 433 U.S. at 363 & 384.

83. *Id.* at 359-60 (quoting *Goldfarb*, 421 U.S. at 791). The Court noted that the Arizona State Constitution gives the state supreme court the ultimate authority over the state’s power concerning the practice of law. *Id.* at 360 (citing ARIZ. CONST. art. III). Utilizing that constitutional authority, the Arizona Supreme Court adopted the rules prohibiting advertising. *Id.*

84. *Id.* at 359-60. For a discussion of why the Supreme Court ruled that the fee schedule in *Goldfarb* was not mandated by the state, see notes 58-59 and accompanying text *supra*.

85. 445 U.S. 97 (1980).

86. *Id.* at 105. These standards were based on prior decisions of the Supreme Court. See *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 340 (1978); *Parker v. Brown*, 317 U.S. 341 (1943). For a discussion of *Parker*, see notes 25-27 and accompanying text *supra*. *Louisiana Power & Light* involved a group of Louisiana cities which owned and operated electric utility systems pursuant to a state law. 435 U.S. at 391. The group brought an antitrust action against several investor-owned electric service utilities against which the city systems competed outside the city limits. *Id.* at 391-92. An investor-owned system counterclaimed, alleging that the city-owned systems were guilty of various antitrust offenses. *Id.* at 392. The plaintiff cities moved to dismiss the counterclaims on the ground that the “state action” doctrine, as formulated in *Parker*, rendered federal antitrust laws inapplicable to them. *Id.* The district court granted the city’s motion, but the court of appeals reversed. *Id.* at 392-93. In affirming the decision of the Fifth Circuit, the Court refused to find that the *Parker* “state action” exception automatically applied to cities or subdivisions of the state. *Id.* at 408.

policy' ” and “be ‘actively supervised’ by the State itself.”⁸⁷ In *Midcal*, a California statute required wine producers and wholesalers to file with the state fair trade contracts or price schedules, and prohibited the sale of wine to retailers at other than the price set by schedule or contract.⁸⁸ A wholesaler who had sold wine for less than the price set by a price schedule defended his actions by asserting that the wine pricing scheme violated the Sherman Act.⁸⁹ The Court agreed with the wholesaler’s assertion that the state action exemption was inapplicable, stating that although the first prong of the test had been met because the legislative policy was clear in purpose, the second prong had not been met because the state neither established the prices nor reviewed the reasonableness of the price schedules.⁹⁰ This minimum involvement by the state was deemed insufficient to justify “what is essentially a private price-fixing arrangement.”⁹¹

In *Ronwin v. State Bar*,⁹² the Ninth Circuit analyzed the state action doctrine in a manner which narrowly limited the circumstances under which an agency could base its claim of antitrust immunity upon delegation of authority from the state. In *Ronwin*, a prospective attorney who had failed the Arizona bar examination challenged the examination grading procedures as

87. 445 U.S. at 105 (quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1975)).

88. *Id.* at 99 (citing CAL. BUS. & PROF. CODE §§ 24866(b), 24866(c) & 24862 (West Supp. 1980)). Under this statute, a single fair trade contract or schedule sets the terms of all wholesale transactions in a prescribed area. *Id.* at 99 (citing CAL. BUS. & PROF. CODE §§ 24862, 24864-24865 (West Supp. 1980)). State regulations also provided that the wine prices posted by a single wholesaler within a given area bound all wholesalers within that area. *Id.* at 99-100 (citing *Midcal Aluminum v. Rice*, 90 Cal. App. 3d 979, 983-84, 153 Cal. Rptr. 757, 760 (1979)). A licensee, found to be selling below the established prices, may be fined or have his license suspended or revoked. *Id.* at 100 (citing CAL. BUS. & PROF. CODE § 24880 (West Supp. 1980)).

89. *Id.* at 100. According to charges by the California Department of Alcoholic Beverage Control, *Midcal Aluminum*, a wholesale distributor of wine in Southern California, sold 27 cases of wine at less than the effective price schedule set by the E. & J. Gallo Winery. *Id.* It was also alleged that *Midcal* had sold wines for which no fair trade contract or schedule had been filed. *Id.* *Midcal* stipulated that the allegations were true, but filed a writ of mandate in the California Court of Appeal for the Third Appellate District seeking an injunction against the state’s wine pricing system. *Id.*

90. *Id.* at 105-06. Before the Court reached the issue of whether the state action doctrine protected the California plan, the Court addressed the issue of whether California’s plan for wine pricing violated the Sherman Act. *Id.* at 102. The Court found that the “system for wine pricing plainly constitute[d] resale price maintenance in violation of the Sherman Act.” *Id.* at 103 (citations omitted).

The Court found that under the California plan, the state had authorized and enforced prices established by private parties, but did not review the reasonableness of the prices or regulate the terms of the fair trade contract. *Id.* at 105-06. The Court also found that the state did not monitor market conditions or engage in any “pointed reexamination” of the program. *Id.* at 106 (footnote omitted).

91. *Id.* at 106.

92. 686 F.2d 692 (9th Cir. 1981), *cert. granted sub nom.* *Hoover v. Ronwin*, 103 S. Ct. 2084 (1983) and *cert. denied*, *Ronwin v. Hoover*, 103 S. Ct. 2110 (1983).

violative of section 1 of the Sherman Act.⁹³ The plaintiff alleged that the defendant grading committee, its individual members, their wives, and the state bar, illegally restricted competition among attorneys practicing in Arizona by admitting a predetermined number of persons “without reference to ‘achievement by each bar applicant of a pre-set standard [of competence].’”⁹⁴ The court determined that in contrast to *Bates*, the restraint challenged in *Ronwin* “was not adopted or directly authorized by the Arizona Supreme Court.”⁹⁵ According to the court, the fact that the Arizona Supreme Court had delegated to the committee the authority to examine applicants and had retained an oversight capacity regarding the admissions decisions, was insufficient to immunize the committee’s grading policies.⁹⁶

Although the *Midcal* decision limited the scope of the state action doctrine, anticompetitive professional activity may still be immune from antitrust liability if that activity has been mandated by a self-regulating organization that acts as an arm of the state. For example, in *Benson v. Arizona State Board of Dental Examiners*,⁹⁷ the United States Court of Appeals for the Ninth Circuit held that allegedly anticompetitive licensing practices promulgated by the Board of Dental Examiners constituted state action and were, therefore, immune from antitrust liability.⁹⁸ In *Benson*, twenty-five dentists licensed to practice in states other than Arizona challenged a licensing scheme which permitted only dentists who had passed the state’s dentistry examination to practice in Arizona for compensation, but permitted dentists licensed in other states to obtain a “restricted permit” which allowed them to practice as unsalaried employees of charitable dental clinics.⁹⁹ The court found that the two-prong standard of *Midcal* had been satisfied because the challenged licensing practices were clearly articulated in the state’s statutes and expressed as state policy, and the state, through the Board of

93. *Id.* at 694-95.

94. *Id.* at 695.

95. *Id.* The court noted that in *Bates*, “the real party in interest was the Arizona Supreme Court because it had adopted the challenged restraint.” *Id.* The court asserted that the facts in *Ronwin* were more analogous to *Goldfarb* than *Bates*. *Id.* at 695-96. The court asserted that the characteristic which distinguished *Goldfarb* from *Bates* was that the challenged restraints in *Bates* were “clearly articulated and affirmatively expressed as state policy and [were] actively supervised by the state itself.” *Id.* at 696 (citations omitted).

96. *Id.* The court indicated that its decision might have been different if it had been made clear at the district court level that the rules of the Arizona Supreme Court required submission of the committee’s proposed grading formula at least 30 days before each examination. *Id.* at 697 (citing ARIZ. SUP. CT. R. 28(c)(VII)(B) (effective Jan. 15, 1974)).

97. 673 F.2d 272 (9th Cir. 1982).

98. *Id.* at 275.

99. *Id.* at 273. The dentists alleged that the State Board of Dental Examiners had combined with Arizona dentists and dentists’ organizations to restrain and monopolize the practice of dentistry in Arizona by restricting entry into the profession, limiting the number of dentists practicing within the state, and fixing prices. *Id.* at 274.

Dental Examiners, actively supervised the licensing scheme.¹⁰⁰

The anticompetitive actions of a state agency, however, will not necessarily be immune from antitrust liability.¹⁰¹ Although it has been argued successfully that a state agency is the "state" for state action purposes, the *Goldfarb* Court recognized a distinction between the state and its agencies, concluding that immunity will not be granted to every entity simply because it is labeled a "state agency."¹⁰²

D. *The Professions and the McCarran-Ferguson Act*

In analyzing an activity to determine if it is within the scope of the

100. *Id.* at 275. The court found that the first prong of the *Midcal* test, requiring that there be a clearly articulated and affirmatively expressed state policy, was satisfied by the Arizona statutes. *Id.* These statutes expressly established the State Board of Dental Examiners, conferred upon the Board the power to regulate the practice of dentistry and admission into that practice, and directed the Board to both administer examinations as a prerequisite for a dental license and establish the system of restricted permits. *Id.* (citations omitted).

The court also found that the second prong of the *Midcal* test, requiring actual supervision by the state, was satisfied in *Benson*. *Id.* The court found the state supervision of the Board of Dental Examiners to be "just as much active state supervision" as the Arizona Supreme Court's supervision in *Bates*, 673 F.2d at 275 (citing *Bates*, 433 U.S. at 362). For a discussion of *Bates*, see notes 81-84 and accompanying text *supra*.

101. See, e.g., *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103-06 (1980); *Goldfarb*, 421 U.S. at 791-92. For a discussion of *Goldfarb* as it relates to the "state action" doctrine, see notes 57-59 and accompanying text *supra*. For a discussion of *Midcal*, see notes 85-91 and accompanying text *supra*.

102. 421 U.S. at 791-92. The Supreme Court reiterated its view that the state action doctrine is to be narrowly construed when it found that a city could not avail itself of the state action doctrine, even though the city derived its power from the state constitution. *Community Communications Co. v. Boulder*, 455 U.S. 40 (1982). *Boulder* was primarily concerned with the application of the state action doctrine to cities and municipalities. *Id.* at 43. The city of Boulder, as a "home rule" municipality, had been granted "the full right of self-government in local and municipal matters" by the Colorado Constitution. *Id.* As a result of this "home rule" status, city ordinances superseded the law of the state in local and municipal matters. *Id.* at 43-44. An ordinance passed by the Boulder City Council, regulating cable television within the city, limited the Boulder Communications Company (BCC) to service of only a part of the city. *Id.* at 44. BCC sought an injunction against the city alleging that these restrictions on BCC's business expansion violated § 1 of the Sherman Act. *Id.* at 46-47. The city responded that it enjoyed antitrust immunity under the "state action" doctrine. *Id.* at 47.

In finding that the City of Boulder could not avail itself of the "state action" doctrine, the Court stated, "A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive action for which municipal liability is sought." *Id.* at 55. A state's broad delegation of the full right of self-government was not enough to satisfy the *Midcal* requirement that the state itself authorize the anticompetitive practice. *Id.* at 56.

In *Boulder*, the Court relied primarily on *Lafayette v. Louisiana Power & Light Co.* *Id.* (citing *Lafayette*, 435 U.S. 389 (1978)). In *Lafayette*, a plurality of the Court noted that municipalities would be shielded from antitrust liability by the "state action" doctrine only if their actions were taken pursuant to an express state anticompetitive policy. *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412-13 (plurality opinion). For a discussion of the facts of *Lafayette*, see note 94 *supra*.

McCarran-Ferguson Act and thus exempt from antitrust liability, the critical determination is whether the activity in question is in "the business of insurance" within the meaning of the Act.¹⁰³ Although the "business of insurance" had been broadly construed in the past, two recent Supreme Court cases have greatly narrowed the scope of this term, thereby drastically reducing the usefulness of the McCarran Act exemption.

*Group Life & Health Insurance Co. v. Royal Drug Co.*¹⁰⁴ involved an insurance plan which reimbursed policyholders for the purchase price of prescription drugs.¹⁰⁵ In connection with this plan, the insurance company had an agreement with certain "participating" pharmacists whereby these pharmacists would limit their mark-up on prescription drugs.¹⁰⁶ When a group of independent pharmacists challenged this agreement as anticompetitive, the defendants asserted that the agreement was in the "business of insurance" and therefore protected from antitrust scrutiny by the McCarran Act.¹⁰⁷ In holding that the agreement was not exempt from antitrust attack, the Supreme Court ruled that the McCarran Act does not exempt insurance companies, but rather, exempts the *business of insurance*, which consists of the spreading and underwriting of policyholders' risks.¹⁰⁸ In addition to limiting the exemption to the underwriting of risks, *Royal Drug* developed two other criteria to aid in identifying the "business of insurance" touchstone. First, the challenged practice must be an integral part of the relationship

103. 15 U.S.C. §§ 1011-1015 (1982). For the text of the relevant portions of the McCarran-Ferguson Act and a discussion of the antitrust liability of the business of insurance prior to the passage of the McCarran-Ferguson Act, see note 26 and accompanying text *supra*.

104. 440 U.S. 205 (1979).

105. *Id.* at 209.

106. *Id.* Group Life and Health Insurance Co., known as Blue Shield of Texas (Blue Shield) offered to enter into a "Pharmacy Agreement" with each licensed pharmacy in Texas. *Id.* Under the terms of this agreement, a participating pharmacy agreed to furnish prescription drugs to Blue Shield's policyholders at a price of two dollars for each prescription. *Id.* Blue Shield would then reimburse the pharmacy for the pharmacy's cost of acquiring prescribed drugs. *Id.* If an insured under the Blue Shield plan chose a pharmacy which had not entered into the pharmacy agreement, the insured would have to pay the full amount to the pharmacy for that drug. *Id.* Blue Shield would then reimburse the insured for 75% of the difference between the purchase price of the drug and two dollars. *Id.*

107. *Id.* at 207-08. Eighteen owners of independent pharmacies brought an action alleging that Blue Shield and three participating pharmacies had violated § 1 of the Sherman Act by entering into an agreement to fix retail prices of drugs and engaging in an unlawful group boycott. *Id.* at 207. The only issue before the Supreme Court was whether the McCarran-Ferguson Act exempted the agreements from the reach of the Sherman Act. *Id.* at 210. The Court did not address the issue of whether the agreements were illegal under the antitrust laws. *Id.*

108. *Id.* at 210-14. The Court noted a distinction between risk reduction and risk underwriting. *Id.* at 214 n.12. The Court found that although the agreements with the participating pharmacies may have been cost-saving arrangements which may well have inured ultimately to the benefit of policyholders in the form of lower premiums, the agreements did not involve any underwriting or spreading of risk. *Id.* at 214. In essence, the agreements were merely arrangements for the purchase of goods and services by Blue Shield. *Id.*

between insurers and insured;¹⁰⁹ and second, the practice must be limited to persons within the insurance industry.¹¹⁰

The *Royal Drug* criteria were applied directly to the price-setting practices between an insurer and a professional association in *United Labor Life Insurance Co. v. Pireno*.¹¹¹ In *Pireno*, United Labor Life Insurance Co. (ULL) issued policies under which the company agreed to reimburse its insureds "reasonable" claims for "necessary" chiropractic treatment.¹¹² ULL used a peer review committee of practicing chiropractors to determine whether fees and services were reasonable and necessary within the meaning of the policy.¹¹³ When the use of the committee was alleged to be a vehicle for fixing prices, ULL asserted that the practice was exempt from antitrust scrutiny as part of the "business of insurance."¹¹⁴ The Court applied the *Royal Drug* criteria and determined that the practice was subject to antitrust scrutiny,¹¹⁵ finding that the practice was not involved in the underwriting of insurance risks, was not an integral part of the relationship between insurer and insured, and was not limited solely to members of the insurance industry.¹¹⁶

109. *Id.* at 215-16. The Court noted that in enacting the McCarran-Ferguson Act, Congress was concerned with

[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder.

Id. (quoting *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969)).

110. 440 U.S. at 231. The Court not only stated that exemptions from the anti-trust laws were to be narrowly construed, but also noted that in analogous situations such exemptions may be forfeited when an exempt entity acts in concert with a non-exempt party. *Id.* The Court stated that this narrow construction was "particularly appropriate" in *Royal Drug* "because the Pharmacy Agreements involve[d] parties wholly outside the insurance industry." *Id.*

111. 458 U.S. 119 (1982).

112. *Id.* at 122. ULL was a Maryland insurer doing business in New York. *Id.* As required by New York law, ULL's health insurance policies covered certain claims for chiropractic treatments. *Id.* Certain ULL policies, however, limited ULL's liability to "reasonable charges" for "necessary medical care and services." *Id.* (emphasis in original).

113. *Id.* at 123. The committee was composed of 10 practicing New York chiropractors who served as members of the New York State Chiropractor Association (NYSCA) on a voluntary basis. *Id.* At the request of an insurer, the committee would examine a chiropractor's treatments and charges in a particular case. *Id.* The committee would then render an opinion on the necessity of the treatments and the reasonableness of the amounts charged. *Id.*

114. *Id.* at 124.

115. *Id.* at 129-34.

116. *Id.* The Court found that none of these criteria was necessarily determinative in itself of whether a particular practice is exempted from the antitrust laws. *Id.* at 129. However, by scrutinizing the arrangement between ULL and the NYSCA with respect to all three criteria, the Court concluded that the agreement was not a part of the "business of insurance." *Id.*

ULL argued that their use of the peer review committee played a part in the

E. *The Professions and Their Associations*

In *Goldfarb*, the Supreme Court contrasted the fixed fee schedule of the county bar association with a purely advisory fee schedule, stating that an advisory fee schedule would have presented the Court with a different question.¹¹⁷ Although this dictum from *Goldfarb* indicated that purely advisory activities of professional associations may escape antitrust liability, the Court retreated from this position in *American Society of Mechanical Engineers v. Hydrolevel Corp.*¹¹⁸ In *Mechanical Engineers*, Hydrolevel, a manufacturer of a safety device for heating boilers brought an action against the American Society of Mechanical Engineers (ASME), claiming that improper activity on the part of ASME members in interpreting boiler and pressure vessel codes, violated the Sherman Act.¹¹⁹ Hydrolevel alleged that the interpretation of the codes, which had a negative bearing on the safety of its product, was substantially influenced by the vice chairman of an ASME subcommittee, who also served as vice president of one of Hydrolevel's competitors.¹²⁰ Al-

spreading and underwriting of a policyholder's risk because the review practice "help[ed] 'determine whether the risk . . . ha[d] been transferred' and acted as 'an aid in determining the scope of the transfer.'" *Id.* at 130 (quoting Brief for the Petitioner at 17, *Pireno*, 458 U.S. at 119). The Court rejected this argument, finding no logical or temporal connection between the arrangement and the transfer of risk accomplished by the insurance policies. *Id.* The Court noted that "[t]he transfer of risk from insured to insurer is effected by means of the contract between the parties—the insurance policy—and that transfer is complete at the time that the contract is entered." *Id.* (citing 9 G. COUCH, CYCLOPEDIA OF INSURANCE LAW §§ 39:53, 39:63 (2d ed. 1962)).

The Court also stated that the peer review process was not an integral part of the relationship between insured and insurer. *Id.* at 131-32. The Court noted that when presented with policyholder claims, ULL *alone* could decide whether the claims were covered by the policies. *Id.* at 132. According to the Court, ULL's use of the peer review committee was "a matter of indifference to the policyholder, whose only concern is *whether* his claim is paid, not *why* it is paid." *Id.* (emphasis in original).

The Court found that the challenged peer review practice would not be denied McCarran-Ferguson Act exemption solely because it involved parties outside the insurance industry. *Id.* at 133. However, the Court went on to state that "involvement of such [outside] parties, even if not dispositive, constitutes part of the inquiry mandated by the *Royal Drug* analysis." *Id.* The Court noted that § 2(b) of the McCarran-Ferguson Act was intended primarily to protect intra-industry cooperation in the underwriting of risks, and arrangements between insurance companies and parties outside the insurance industry were not the focus of congressional concern. *Id.* (citing *Royal Drug*, 440 U.S. at 221). The Court further reasoned that "[m]ore importantly, such arrangements may prove contrary to the spirit as well as the letter of § 2(b) [of the McCarran-Ferguson Act], because they have the potential to restrain competition in noninsurance markets." 458 U.S. at 133.

117. 421 U.S. at 781 (citations omitted).

118. 456 U.S. 556 (1982).

119. *Id.* at 559-60.

120. *Id.* at 559-62. McDonnell & Miller, Inc. (M&M), a member of ASME, designed "low-water fuel cutoffs" for heating boilers. *Id.* at 560. The cutoffs were necessary to prevent fires or explosions which could occur when the water in a boiler drops below a level sufficient to moderate the boiler's temperature. *Id.* at 559.

Hydrolevel Corp., a non-member of ASME, devised a variant of the low-water fuel cutoff used by M&M. *Id.* at 560. Although M&M had dominated the market

though ASME was not aware of the improper activities and in no way benefited from these activities, the Court, employing an agency theory, found ASME liable for the anticompetitive acts of its volunteer members.¹²¹ In so doing, the Court expressed concern about the potential for anticompetitive abuses by standard-setting associations, noting that interpretations of so-called "voluntary standards" set by influential organizations such as ASME often become compulsory standards through incorporation into various local and national laws.¹²² In addition, the Court went on to state that the imposition of liability on a standard-setting organization like ASME best served Congress' intent of deterring antitrust violations because the organization is best situated to prevent antitrust violations through abuse of its

for low-water fuel cutoffs for decades, Hydrolevel was able to induce an important M&M customer to switch to the Hydrolevel device. *Id.* An M&M vice-president was vice chairman of the ASME subcommittee which drafted, revised and interpreted the segment of the Boiler and Pressure Vessel Code governing low-water fuel cutoffs. *Id.* After M&M had lost the important customer to Hydrolevel, the vice-president of M&M and other M&M officials met with the chairman of the ASME subcommittee. *Id.* at 560-61. The participants of the meeting drafted a letter to the subcommittee implicitly raising concerns about a feature of the Hydrolevel device. *Id.* at 561. The letter, signed by another M&M vice president, was mailed to the secretary of the Boiler and Pressure Vessel Committee. *Id.* The secretary referred the letter to the chairman of the subcommittee as part of the standard routine. *Id.* The chairman then drafted an "unofficial response" even though he was one of the authors of this public inquiry. *Id.* The chairman did not have to refer to the entire subcommittee because his response was "unofficial." *Id.* This response was signed by the secretary of the committee and sent out on ASME stationery. *Id.* The response indicated that Hydrolevel's device might not meet ASME standards and could be dangerous. *Id.* at 561-62. M&M then used this response from ASME as a marketing tool to discourage customers from purchasing Hydrolevel's low-water fuel cutoffs. *Id.* at 562.

121. *Id.* at 570. The Court held that ASME would be liable for its agent's actions because the agent had acted with apparent authority. *Id.* at 566-67. The theory of apparent authority was, according to the Court, consistent with congressional intent to encourage competition. *Id.* at 570. The Court found that "when [ASME] cloaks its subcommittee officials with the authority of its reputation, [it] permits those agents to affect the destinies of businesses and thus gives them the power to frustrate competition in the marketplace." *Id.* at 570-71.

ASME argued that treble damages for antitrust violations constituted punitive damages, and under traditional agency law, courts do not employ apparent authority to impose punitive damages upon a principal for acts of its agents. *Id.* at 574-75 (citations omitted). The Court agreed that antitrust treble damages were designed in part to punish past antitrust violations. *Id.* at 575. However, the Court noted that because treble damages served as a means of both deterring future violators and compensating victims, it was in accord with both the purposes of antitrust law and the principles of agency law to hold ASME liable for treble damages as the result of the acts of its agents. *Id.* at 575-76.

122. *Id.* at 559 & 571. One of ASME's primary functions is to promulgate and publish codes and standards for areas of engineering and industry. *Id.* at 559. Although only advisory, these codes are extremely important since they are incorporated by reference into many federal, state, and city laws and regulations. *Id.* For example, the Boiler and Pressure Vessel Code involved in the *Hydrolevel* dispute had been adopted by 46 states and all but one of the Canadian provinces. *Id.* The force of ASME's reputation was so great that M&M was able to use one "unofficial" response to injure seriously Hydrolevel's business. *Id.* at 571.

reputation.¹²³

In a strongly worded dissent, Justice Powell stated that the Court had devised what amounted to a rule of strict liability for voluntary associations in antitrust cases.¹²⁴ Justice Powell went on to argue that the Court was so intent on imposing antitrust liability “that it pu[t] . . . at risk much of the beneficial private activity of the voluntary associations of our country.”¹²⁵ In concluding, Justice Powell noted that the extent of the majority’s holding was unclear, and expressed concern that “the new doctrine . . . [would] be read as exposing the array of nonprofit associations—*professional*, charitable, educational, and even religious—to a new theory of strict liability in treble damages.”¹²⁶ Thus, in holding that purely advisory activities of a professional association may be subject to the strictures of the antitrust laws, the Court appears to have retreated from its dicta in *Goldfarb*.

Finally, in *Blue Shield v. McCready*,¹²⁷ the Supreme Court further demonstrated a willingness to impose antitrust liability upon professionals. In *McCready*, an employee was provided coverage under a group health insurance plan purchased by her employer from Blue Shield.¹²⁸ The plan provided reimbursement for the cost of treatment for nervous disorders.¹²⁹ Blue Shield refused to provide reimbursement however, citing a provision in the insurance policy which required that treatment provided by a psychologist be supervised by, and billed through, a physician.¹³⁰ *McCready* brought

123. *Id.* at 572-74. The Court found that only ASME could take systematic steps to deter improper conduct on the part of its agents. *Id.* at 572. Further, the Court stated that imposition of civil liability would be a strong incentive for ASME’s agents to refrain from such conduct. *Id.*

124. *Id.* at 592 (Powell, J., dissenting). Justice Powell characterized the imposition of treble damages based solely on an apparent authority theory of liability as a “dubious new doctrine” which had not even been argued in the lower courts. *Id.* at 584 (Powell, J., dissenting).

125. *Id.* at 594 (Powell, J., dissenting). Justice Powell accused the majority of being “so zealous to impose treble-damages liability that it ignore[d] a basic purpose of the Sherman Act: the preservation of *private* action contributing to the public welfare.” *Id.* at 593 (Powell, J., dissenting) (citing *United States v. United States Gypsum Co.*, 438 U.S. 422, 438-43 (1978)) (emphasis in original). Justice Powell recognized that nonprofit associations were subject to the antitrust laws. *Id.* at 580 (Powell, J., dissenting). However, he pointed out that the Court had previously noted in *Goldfarb* that antitrust laws need not be applied to professional organizations in exactly the same manner as they are applied to commercial enterprises. *Id.* (citing *Goldfarb*, 421 U.S. at 788 n.17). Justice Powell expressed surprise that the Court took the occasion of the *Hydrolevel* case “to promulgate an expansive rule of antitrust liability not heretofore applied by it to a commercial enterprise much less to a nonprofit organization.” *Id.* at 580-81 (Powell, J., dissenting).

Justice Powell also stated that to his knowledge, *Hydrolevel* was the first case in which the Court had explicitly held a nonprofit, tax-exempt organization subject to treble-damages liability. 456 U.S. at 580 n.2 (Powell, J., dissenting).

126. *Id.* at 594 (Powell, J., dissenting) (emphasis added).

127. 457 U.S. 465 (1982).

128. *Id.* at 467-68.

129. *Id.* at 468.

130. *Id.* *McCready*’s treatment had neither been billed through, nor supervised by, a physician. *Id.*

suit against Blue Shield and the Neuropsychiatric Society of Virginia, alleging that they had conspired to exclude psychologists from receiving compensation under the insurance plan, and that Blue Shield's failure to reimburse was in furtherance of that conspiracy.¹³¹ The Court remanded the case for a hearing on the merits,¹³² even though there was considerable doubt as to whether McCready had suffered economic injury and had standing to sue.¹³³ Significantly, the Court did not even mention the possibility that the

131. *Id.* at 468-70. McCready brought a class action suit on behalf of all Blue Shield subscribers who had incurred costs for psychologists since 1973, but who had not been reimbursed for such expenses. *Id.* at 468-69. The complaint alleged that Blue Shield and the Neuropsychiatric Society of Virginia had conspired to exclude clinical psychologists from receiving compensation under the Blue Shield plans, in violation of § 1 of the Sherman Act. *Id.* at 469-70. McCready further alleged that failure to reimburse her was in furtherance of the alleged conspiracy and it resulted in injury to her business or property which entitled her to treble damages and attorney's fees under § 4 of the Clayton Act. 457 U.S. at 470 (citing 15 U.S.C. § 15 (1982)).

Section 4 of the Clayton Act provides in pertinent part as follows:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1982).

132. The district court had dismissed the suit, holding that McCready had no standing to sue under § 4 of the Clayton Act. 457 U.S. at 470 (footnote omitted). The district court held that the alleged boycott was intended to exclude psychologists from the psychotherapy market only, and that while McCready had suffered an injury, it was too indirect and remote to be considered antitrust injury. *Id.* at 470-71. A divided panel of the United States Court of Appeals for the Fourth Circuit reversed, holding that although the boycott was directed at clinical psychologists, McCready's property loss was directly or proximately caused by the boycott and her losses were not too remote or indirect to be covered by the Act. *Id.* at 471. The Fourth Circuit then remanded the case for further proceedings. *Id.* at 471-72.

133. *Id.* at 485. In reaching its decision, the Court first considered whether the plaintiff's claim for damages was barred by the doctrine set forth in *Illinois Brick Co. v. Illinois*, where the Court announced a rule which bars suits for damages by indirect purchasers against antitrust violators. *Id.* at 474-75 (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)). According to the *McCready* Court, the result in *Illinois Brick* was based on a desire to avoid "the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws." *Id.* at 474-75. The Court concluded that this policy concern was not present in *McCready*, noting that because the psychologist had been fully paid for his services and therefore had suffered no antitrust injury, the patient alone remained to recover against Blue Shield. *Id.* at 475.

The Court next considered whether the plaintiff had standing to sue. *Id.* at 476. In making that determination, the Court looked to two factors: first, whether there was a sufficient physical and economic nexus between the alleged violation and the harm to the plaintiff; and second, whether the injury alleged was one about which Congress was likely to have been concerned when it allowed private parties to maintain antitrust actions. *Id.* at 478. Applying the first criterion to *McCready*, the Court concluded that a consumer of psychotherapeutic services who has been denied benefits under an insurance plan because the services were performed by a psychologist, rather than a psychiatrist, has clearly suffered an economic injury resulting from anticompetitive practices. *Id.* at 478-79. In applying the second criterion to *McCready*, the Court found that although McCready had not suffered the typical anticompeti-

defendants should be afforded special protection from antitrust liability due to their professional status.¹³⁴

VI. PROFESSIONALS AND SPECIAL TREATMENT UNDER THE ANTITRUST LAWS—AN ANALYSIS

While at one time there was considerable question as to whether professional activity fell outside the ambit of the antitrust laws, there is no longer any valid argument that this exclusion still exists.¹³⁵ The important question which remains is whether activities involving professionals, as opposed to commercial or non-professional activities, are to be accorded any preferential treatment under the antitrust laws.¹³⁶ A reading of the cases subsequent to *Goldfarb* indicates that no such preferential treatment has been given professionals. Although the now famous footnote from *Goldfarb* indicates an answer to the contrary, a closer analysis is required.¹³⁷ In *Goldfarb*, the Court stated that a particular practice which would violate the Sherman Act in one context may have to be treated differently in a professional context.¹³⁸ Yet, it is submitted that the Court has not found any such situations and has abandoned its cautionary dicta in *Goldfarb*.¹³⁹ For example, in *Pro-*

itive harm of increased fees or diminished competition, the harm caused was "inextricably intertwined with the injury conspirators sought to inflict on psychologists. . . ." *Id.* at 484.

In dissent, Justice Stevens argued that a person is not injured merely because he voluntarily chooses to spend money for services not covered by his insurance policy. *Id.* at 494 (Stevens, J., dissenting).

134. Nowhere in either the majority or dissenting opinions in *McCready* is the *Goldfarb* dicta mentioned. It is also significant that the Supreme Court did not address the issue of the availability of the McCarran-Ferguson exemption to the petitioners. *Id.* at 470 n.7.

135. *Goldfarb* was the first decision by the Supreme Court to address directly the issue of the professions' potential liability under the Sherman Act. For a discussion of how the belief that the "learned professions" were not covered by the Sherman Act arose, see notes 12-21 and accompanying text *supra*.

136. Now that the professions have been drawn into the antitrust circle by cases such as *Goldfarb*, *Professional Engineers*, and *Maricopa County*, the focus of the professions' concern must be on whether the vast precedents of antitrust law will be applied to situations involving the professions in the same manner that they have been applied to other situations, or whether the professions may indeed be accorded special treatment. For a discussion of *Goldfarb*, see notes 47-59 and accompanying text *supra*. For a discussion of *Professional Engineers*, see notes 63-69 and accompanying text *supra*. For a discussion of *Maricopa County*, see notes 73-79 and accompanying text *supra*.

137. Footnote 17 of the *Goldfarb* opinion stated that under an antitrust analysis the practices of the professions may be distinguished from other business situations. 421 U.S. at 788 n.17. For the full text of footnote 17 of *Goldfarb*, see note 54 *supra*.

138. 421 U.S. at 788 n.17. The *Goldfarb* Court did not give any guidance as to what situations might cause the professions to be treated differently under antitrust laws.

139. In *Professional Engineers*, the Court, although not formally retreating from its statement in *Goldfarb*, indicated that "the cautionary footnote in *Goldfarb* . . . cannot be read as fashioning a broad exemption under the Rule of Reason for learned professions." 435 U.S. at 696. In *Maricopa County*, the Court again reiterated its statement from *Goldfarb*, but then held that in regard to price-fixing agreements, the Sher-

Professional Engineers, the defendant advanced an argument that appeared to be based solely upon the *Goldfarb* footnote.¹⁴⁰ There, the defendant's argument that anticompetitive activity may be protected where the restrained activity involves a public service aspect of professional activity was soundly rejected by the Court.¹⁴¹ Although the Court did not specifically retreat from its position in *Goldfarb*, it severely restricted it by stating that ethical norms may be considered in the rule of reason only when they serve to regulate and promote competition.¹⁴²

The Court further retreated from the language of the *Goldfarb* footnote in *Maricopa County*.¹⁴³ In *Maricopa County*, the Court refused to look into the economics of the health care industry, stating that price-fixing agreements are *per se* violations of the Sherman Act, no matter what industry is involved.¹⁴⁴ It is therefore submitted that the Court has precluded any argument that a restraint, which classically has been accorded *per se* treatment, should be deemed to have a different affect on competition in a professional setting than in a non-professional setting.¹⁴⁵ However, the *Maricopa County* Court was again able to avoid formal retreat from its position in *Goldfarb*,

man Act "establishes one uniform rule applicable to all industries alike." 457 U.S. at 349 (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940)).

Justice Powell in his dissenting opinion in *Mechanical Engineers* criticized the Court for backing away from its position in *Goldfarb* and applying "an expansive rule of antitrust liability" to a professional nonprofit organization. 456 U.S. at 580-81 (Powell, J., dissenting). For a discussion of Justice Powell's dissent in *Mechanical Engineers*, see notes 124-26 and accompanying text *supra*.

140. 435 U.S. at 684-85. In *Goldfarb*, the Court stated that "[t]he 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." 421 U.S. at 788 n.17. For the full text of footnote 17, see note 54 *supra*. In *Professional Engineers*, the National Society of Professional Engineers (Society) advanced a justification for their ban on competitive bidding based on the premise that the rule was necessary to protect the public from potentially faulty construction. 435 U.S. at 684-85. For a further discussion of *Professional Engineers*, see notes 63-69 and accompanying text *supra*.

141. For a discussion of the Court's rejection of the Society's "public service" defense, see notes 64-66 and accompanying text *supra*.

142. For a discussion of the *Professional Engineers* narrowing of *Goldfarb's* footnote 17, see notes 67-68 and accompanying text *supra*.

143. For a discussion of *Maricopa County*, see notes 73-79 and accompanying text *supra*.

144. 457 U.S. at 349 (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940)).

145. The Court in *Maricopa County* quoted with approval the language from *Northern Pac. Ry. v. United States*, that indicated that the very purpose of a *per se* rule was to avoid complex and prolonged analysis of various industries. 457 U.S. at 350-51 (quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958)). Once a profession has been proved to have engaged in activities that have been labeled as classical *per se* violations of the Sherman Act, no further analysis will be allowed.

Despite *Maricopa County*, some lower federal courts have attempted to avoid the strict application of the *per se* rule to alleged antitrust violations committed by professionals. *See, e.g.*, *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 691 F.2d 678 (1982) (analyzing group boycott, usually accorded *per se* treatment, under the rule of reason analysis). For a discussion of *Trustees of Rex Hospital*, see note 79 *supra*.

stating that the price-fixing agreements were not premised on public-service or ethical norms.¹⁴⁶ However, given the Court's holding in *Professional Engineers* that the rule of reason analysis is limited to an examination of competitive effects, it is difficult to see how the Court's holding would have been different in *Maricopa County* had the physicians advanced a public service or ethical norms justification for their actions.¹⁴⁷ To be consistent with *Professional Engineers*, it is submitted that the Court could not have accepted any argument that competition needed to be restrained to promote some ethical norm.¹⁴⁸ It is further suggested that a professional advancing an ethical consideration in defense of a potential restraint of trade will be accorded no more deference by the courts than the non-professional asserting an ethical consideration in defense of an alleged anticompetitive act.¹⁴⁹

The Supreme Court's holdings in the last few years indicate a strong willingness to pull professionals into the circle of antitrust liability.¹⁵⁰ Apart from *Goldfarb*, there are other Supreme Court decisions which substantially affect the relationship between the professions and the antitrust laws.¹⁵¹ For example, the narrowing of the state action doctrine by the decision in *Midcal* greatly diminished the power of state agencies to promulgate anticompetitive rules and regulations at their own discretion.¹⁵² Currently, any state agency restricting competition, whether among the professions or not, must

146. 457 U.S. at 348-49. For a discussion of *Maricopa County*, see notes 73-79 and accompanying text *supra*.

147. In *Professional Engineers*, the Court noted that the rule of reason cannot encompass factors which bear no relation to the competitive effect of the activity. 435 U.S. at 692. For a discussion of the Court's holding in *Professional Engineers*, see note 65 and accompanying text *supra*.

148. Even if the Court had allowed a rule of reason analysis in *Maricopa County* and the physicians had advanced several persuasive arguments as to why their maximum price fixing enhanced the quality of medical services, these arguments could not have been considered under the *Professional Engineers* view of the rule of reason. For a discussion of the Court's view in *Professional Engineers* of the rule of reason analysis, see notes 65-69 and accompanying text *supra*.

149. *But see Professional Engineers*, 435 U.S. at 696. In *Professional Engineers*, the Court cited with approval *Tripoli Co. v. Wella Corp.* as an example of a case where ethical norms properly were considered when assessing the impact of a practice upon competition. *Id.* (citing *Tripoli*, 425 F.2d 932 (3d Cir. 1970) (en banc)). The *Tripoli* case did *not* involve professionals and is very limited in application, since the *Tripoli* court found no "meaningful" effects on competition. *Tripoli Co. v. Wella Corp.*, 425 F.2d 932, 939 (3d Cir. 1970) (en banc). For a discussion of the *Tripoli* case and its relation to *Professional Engineers*, see note 68 *supra*.

150. In *Mechanical Engineers* for example, the Court applied what Justice Powell considered to be "new law" to find a voluntary professional organization liable under an apparent authority theory in an antitrust case. 456 U.S. at 581 (Powell, J., dissenting) (emphasis in original). For a discussion of Justice Powell's dissent in *Mechanical Engineers*, see notes 124-26 and accompanying text *supra*.

151. For a discussion of the cases involving the professions and the "state action" doctrine, see notes 80-102 and accompanying text *supra*. For a discussion of the cases involving the professions and the McCarran-Ferguson Act exemption, see notes 103-16 and accompanying text *supra*.

152. For a discussion of the *Midcal* decision, see notes 85-91 and accompanying text *supra*.

do so at the explicit authorization of the state and for the purpose of furthering a clearly-articulated state policy.¹⁵³ It is submitted that this decision greatly reduces the availability of the state action doctrine in defending against allegations of antitrust violations.¹⁵⁴

It is further submitted that the Supreme Court, in *Royal Drug* and *Pireno*, removed from the professions the availability of the McCarran-Ferguson Act exemption.¹⁵⁵ There may be cases where an agreement between a group of professionals and an insurer involves the spreading of insurance risks and the agreement is an integral part of the relationship between the insurer and the insured. However, the requirement that the Act be applied only to members of the insurance industry effectively precludes this exemption from aiding the professions despite a particular agreement's integral relationship with the insurance industry.¹⁵⁶

It is also submitted that in two recent cases, *McCready* and *Mechanical Engineers*, the Court has shown an increased willingness to impose antitrust liability upon professionals.¹⁵⁷ In *McCready*, the Court did not even address the possibility that professionals should be afforded some form of immunity from antitrust suits when it permitted a plaintiff to sue a group of physicians for allegedly anticompetitive acts.¹⁵⁸ In *Mechanical Engineers*, the Court expressed its concern over the potential for anticompetitive actions by standard-setting organizations and formulated an extensive rule imposing liability on such organizations.¹⁵⁹

VII. CONCLUSION

The professions are in a new era with respect to their relationship with the antitrust laws. No longer can professionals assume that their practices will go unnoticed under the antitrust laws.¹⁶⁰ In fact, it appears that professional action is being scrutinized more than ever before.¹⁶¹ The professions

153. See *Midcal*, 445 U.S. at 105.

154. For a discussion of the standards necessary for action to be exempt from the Sherman Act, see notes 85-102 and accompanying text *supra*.

155. For a discussion of *Royal Drug*, see notes 104-10 and accompanying text *supra*. For a discussion of *Pireno*, see notes 111-16 and accompanying text *supra*.

156. For a discussion of the requirements necessary to invoke the McCarran-Ferguson Act exemption, see notes 26-29 and accompanying text *supra*.

157. For a discussion of *Mechanical Engineers*, see notes 118-26 and accompanying text *supra*. For a discussion of *McCready*, see notes 127-34 and accompanying text *supra*.

158. 457 U.S. at 465.

159. 456 U.S. at 570-74. For a discussion of *Mechanical Engineers*, see notes 118-26 and accompanying text *supra*.

160. One commentator has noted that the antitrust actions brought by the Federal Trade Commission in the past were directed at occupations such as dairies, bakeries, and steel-makers, but are now often directed at doctors, lawyers, accountants, and pharmacists. See Kauper, *Antitrust and The Professions: An Overview*, 52 ANTI-TRUST L.J. 163, 164 (1983).

161. As one commentator has noted, "By rough count, five times as many health antitrust actions have been brought since the epic *Goldfarb* decision in 1975,

must now take a hard look at their various practices to determine which of them have as their purpose the protection of the public welfare and which serve to restrict competition. The best method for avoiding antitrust problems may be for professionals to stop viewing themselves as different from individuals and organizations in the main-stream of commerce.¹⁶²

Even with this extensive antitrust analysis of the professions, there may not be radical change in the manner professionals practice.¹⁶³ Many, if not most of the rules surrounding the professions are intended to serve the public good and promote or simply regulate competition.¹⁶⁴ However, the changes that come from the stricter application of the antitrust laws to the professions may actually strengthen the professions and the services they provide to the public.¹⁶⁵ If this proves to be the case, it will certainly strengthen the belief that the intent behind the Sherman Act was correct—that competition best serves the needs of our society.¹⁶⁶

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than during the previous 85 years of Sherman Act history.” Halper, *The Health Care Industry and Antitrust Laws: Collision Course?* 49 ANTITRUST L.J. 17, 17 (1980) (footnote omitted).

162. See Kauper, *supra* note 160, at 166-67.

163. The medical profession has already attempted to make an “end-run” around the antitrust laws by attempting to remove the American Medical Association from the jurisdiction of the Federal Trade Commission. This move was unsuccessful. See Kauper, *supra* note 160, at 176.

A strategy which may be in the best interest of both professionals and society may be to require professionals to simply review their practices to determine whether they truly serve a public good which could not better be served in some manner less detrimental to competition.

164. See Clanton, *The FTC and the Professions*, 52 ANTITRUST L.J. 209, 210-11 (1983).

165. See Sachs, *Antitrust, The States, and the Professions*, 52 ANTITRUST L.J. 189-206 (1983).

166. See *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958). In *Northern Pacific*, the Court stated:

[The Sherman Act] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions.

Id.

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