

BAR ASSOCIATION MINIMUM FEE SCHEDULES AND THE ANTTITRUST LAWS

OUTLINE

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*The first thing we do, let's kill all the lawyers.*¹

Sadly, Shakespeare's epigram may well bespeak the current mood, if not the preferred method, of a Watergate-weary American public; and self-appointed ombudsmen have not been loathe to synthesize this popular sentiment into a predictable series of newspaper articles, speeches, hearings, and reports decrying divers practices of the bar. Among the unflattering things that have been said about this country's lawyers is that they annually overcharge their customers an estimated 1.5 billion dollars because of their failure to compete effectively with

THE FOLLOWING CITATION WILL BE USED IN THIS COMMENT:

J. VON KALINOWSKI, BUSINESS ORGANIZATIONS, ANTTITRUST LAWS AND TRADE REGULATION (1972) [hereinafter cited as J. VON KALINOWSKI].

1. W. SHAKESPEARE, *King Henry VI*, Part II, Act IV, Sc. 2, Line 86.

one another.² Some of the bar's more iconoclastic members have concluded that their brothers' uncharacteristic dearth of competitiveness in the setting of fees may be more a result of organized price-fixing than the indicia of empathetic ennui. Organized price-fixing would in most contexts appear to be in contravention of the federal antitrust laws. But the defenders of bar association minimum fee schedules—the manifestation of organized price-fixing by lawyers—have suggested several ingenious, if not ingenuous, rationales by which the fixing of legal prices might be held legal.³ In the recent case of *Goldfarb v. Virginia State Bar*,⁴ the one court of appeals to have considered these arguments found them persuasive; but the Supreme Court has yet to rule on the matter,⁵ and the District Court for Oregon, disagreeing with

2. L.A. Times, Sept. 29, 1974, Part 1, at 19-20, col. 1, quoting Sen. John Tunney quoting an estimate by Group Legal Institute of California. If this estimate is correct, it implies that each of the nation's approximately 400,000 practicing lawyers receives, on the average, \$3,750 "excess" compensation annually.

3. The legality and utility of fee schedules have been the subject of extensive commentary. See Arnould & Corley, *Fee Schedules Should Be Abolished*, 57 A.B.A.J. 655 (1971); Note, *A Critical Analysis of Bar Association Minimum Fee Schedules*, 85 HARV. L. REV. 971 (1972); Note, *Antitrust Violation: Minimum Bar Fees—Goldfarb v. Virginia State Bar*, 10 IDAHO L. REV. 257 (1974); Comment, *Minimum Fee Schedules v. Antitrust: The Goldfarb Affair*, 45 MISS. L.J. 162 (1974); Comment, *Anxiety in the Legal Profession: Fee Schedules and Antitrust*, 19 S. D. L. REV. 400 (1974); Note, *Goldfarb Fights the Bar*, 27 SW. L.J. 524 (1973); Comment, *Minimum Fee Schedules: An Antitrust Problem*, 48 TUL. L. REV. 682 (1974); Note, *Bar Association Fee Schedules and Suggested Alternatives: Reflections on a Sherman Exemption That Doesn't Exist*, 3 U.C.L.A.-ALASKA L. REV. 207 (1974); Note, *Antitrust Law: An Application of the Sherman Act to the Professions*, 25 U. FLA. L. REV. 740 (1973); Note, *Attorneys' Minimum Fee Schedules—A Violation of the Sherman Act*, 9 WAKE FOREST L. REV. 616 (1973); Note, *The Wisconsin Fee Schedule: A Problem of Antitrust*, 1968 WIS. L. REV. 1237.

4. 497 F.2d 1 (4th Cir.), cert. granted, 95 S. Ct. 223 (1974). The same plaintiffs brought two actions, one against the Virginia State Bar and one against the Fairfax County Bar. The cases were consolidated, and the question of liability severed from that of damages. The district court found liability on the part of the local, but not the state bar. 355 F. Supp. 491 (E.D. Va. 1973). The Fourth Circuit affirmed with respect to the state bar on the ground that it shared the state's immunity from antitrust suit. 497 F.2d at 12. The appellate court reversed the district court ruling against the local bar and held that lawyers practice a learned profession not subject to the regulation of the antitrust laws, *id.* at 15, and that the practice of law in northern Virginia does not affect interstate commerce, *id.* at 18-19. Since this last finding defeats jurisdiction under the Sherman Act, the court's first two conclusions are arguably dicta.

5. The *Goldfarb* decision has been granted review in the Supreme Court. *Goldfarb v. Virginia State Bar*, 497 F.2d 1 (4th Cir.), cert. granted, 95 S. Ct. 223 (1974). In an apparent effort to render the case moot, the Fairfax County Bar has dropped its fee schedule. L.A. Times, *supra* note 2, at 20, col. 2; Washington Post, Sept. 24, 1974, Metro, at 1, col. 1. It would appear that there is still a live controversy between the parties, however, since the Goldfarbs continue to press their claims against the Virginia State Bar and are seeking damages for alleged past violations.

the Fourth Circuit's *Goldfarb* holding, has refused to grant the Oregon Bar Association's motion for summary judgment in an antitrust-price-fixing suit brought against it by the Justice Department.⁶

After a brief review of the status of minimum fee schedules in America today, this Comment will start with a proposition that appears inescapable: on the surface of things, the pronouncement of minimum fees, even "suggested" minimum fees, violates the antitrust laws; and the violation is made all the more egregious because of the presence of legal alternative methods of serving the legitimate (and perhaps even constitutionally mandated) objective of informing potential clients about the fees they may expect to be charged. The Comment will then examine each of the three rationales that are suggested to permit price-fixing by lawyers: that lawyers do not "engage in" or "affect" interstate commerce; that the practice of law is a "learned profession" outside the reach of the antitrust laws, or, similarly, that minimum fees have a "noncommercial" purpose and therefore do not run afoul of the proscriptions of those laws; and that a bar association's recommendation of minimum fees is a state activity sheltered from the antitrust plaintiff by the umbrella of a state's antitrust immunity.⁷

The Status of Fee Schedules Today

Although the administration of fee schedules was once one of the common activities of most state bar associations, inquiries sent to the bar associations of thirty-eight states and the District of Columbia⁸ have revealed that statewide fee schedules are very nearly extinct, a casualty of heavy pressure from the Justice Department and the spec-

See Petitioners' Reply Brief for Certiorari at 2-3, *Goldfarb v. Virginia State Bar*, 497 F.2d 1 (4th Cir.), cert. granted, 95 S. Ct. 223 (1974). Further, it is generally held that the voluntary cessation of allegedly illegal conduct does not make a case moot, even when only injunctive relief is sought. See *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Earlier, the Supreme Court had indicated that

[w]hen defendants are shown to have settled into a continuing practice or entered into a conspiracy violative of the antitrust laws, courts will not assume that it has been abandoned without clear proof It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption. *United States v. Oregon State Medical Soc'y*, 343 U.S. 326, 333 (1952).

6. *United States v. Oregon State Bar*, 43 U.S.L.W. 2234 (D. Ore. Nov. 25, 1974).

7. The three issues to be discussed here (interstate commerce, "learned profession" exemption and "state action" exemption) are those presented in the *Goldfarb*'s petition for certiorari. Petition for Certiorari at 2-3, *Goldfarb v. Virginia State Bar*, 497 F.2d 1 (4th Cir.), cert. granted, 95 S. Ct. 223 (1974).

8. This survey was conducted by mail during September, 1974. The responses of the bar associations are on file at the offices of the *Duke Law Journal*.

tre of enormous potential antitrust liability. Of the thirty-five associations responding, only three indicated that they still published schedules at the state level.⁹ Thirteen stated tersely that no statewide minimums are now in effect,¹⁰ while nineteen more indicated that they had abandoned or suspended the practice of setting minimum fees, most during the last few years.¹¹

While this revolution in the practices of the state bars may well have eliminated one class of potential antitrust defendants, it has not mooted the debate over the lawfulness of fee schedules, since many local bar associations continue to cling to them tenaciously.¹² Furthermore, it appears that the local bars may be more vulnerable to antitrust attack than their state counterparts. While a state bar association can arguably claim that its activities are those of the state and are thus blessed with the state's immunity from federal antitrust actions,¹³ even the Fourth Circuit is willing to concede that a local bar association is not sheltered by the state's immunity.¹⁴

It remains unclear to what extent those state bar associations which have abolished their own fee schedules nevertheless continue to discipline those who undercut minimum fees set at the local level. If the local schedules are unlawful, such conduct might itself make the state bar part of the conspiracy to restrain trade. Such liability seems remote, however. Judge Craven, concurring in the *Goldfarb* majority's rejection of liability for the state bar association, indicated that he would have justified its exoneration on the grounds that it played an "exceedingly 'minor role.'"¹⁵ He was convinced by the lower court's finding:

9. New Hampshire, Oregon, and Texas.

10. Alabama, Alaska, Arizona, California, Kansas, Nevada, New Jersey, New York, Ohio, Pennsylvania, South Dakota, Virginia, and Washington.

11. Arkansas, Delaware, Florida, Georgia, Idaho, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, North Carolina, Oklahoma, Rhode Island, Tennessee, Utah, and Wisconsin.

12. Until faced with the possibility of losing in the Supreme Court, the Fairfax County Bar, a defendant in *Goldfarb*, had maintained a fee schedule, although the parent Virginia Bar had not. While the California Bar Association maintains no minimum fee schedule, its constituent local bar associations continue to do so. L.A. Times, *supra* note 2, at 18, col. 4. Neither the ABA nor the Justice Department has current information on local fee schedules, both because of the empirical problem of gathering it, and because many local bars refuse to disclose their fee schedules to any nonmembers. *Id.*

13. See Part IV *infra*.

14. 497 F.2d at 12.

15. *Id.* The *Goldfarbs* had sought to establish state bar liability on the basis of [Virginia] State Bar Opinion 98 (June 1, 1960), which stated that any attorney who repeatedly charged less than the minimum fee set by his local association could be subject to discipline. 497 F.2d at 4.

[The district judge] found that the State Bar did not promulgate the minimum fee schedule, did not endorse or approve it, never undertook to discipline any attorney for violating it, and never contemplated any such action. All the State Bar ever did, apparently, was to suggest that local associations might wish to adopt a minimum fee schedule and to circulate reports on the schedules that local bar associations had adopted.¹⁶

Judge Craven's position can be supported by a Supreme Court decision if it is assumed that the position of the state bar association is analogous to that of the National Association in *United States v. National Association of Real Estate Boards*.¹⁷ In that case, the government tried to rely on the code of ethics and bylaws of the National Association to establish its part in the restraint of trade.¹⁸ The Court concluded that the national group's relationship to local association price-fixing was at best "a somewhat attenuated one."¹⁹ Thus, the focus of future litigation in most states is probably destined to be at the local level.

The ABA has been ambivalent. In 1961, it cautioned that "the habitual charging of fees less than those established in suggested or recommended fee schedules . . . may be evidence of unethical conduct."²⁰ In 1970, the Association retrenched somewhat, and announced that "mere failure to follow a minimum fee schedule, even when habitual, can not, standing alone and absent evidence of misconduct, afford a basis for disciplinary action."²¹ However, the contemporaneously enacted *Code of Professional Responsibility* provided in the Disciplinary Rules that "[f]actors to be considered as guides in determining the reasonableness of a fee include . . . [t]he fee customarily charged in the locality for similar legal services."²² The Ethical Considerations section of the Code provided that "[s]uggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees."²³ During its 1974 summer meeting, the ABA amended the Code to omit all refer-

16. 497 F.2d at 21.

17. 339 U.S. 485 (1950). See note 75 *infra*. But see *United States v. National Soc'y of Professional Eng'rs*, 43 U.S.L.W. 2269 (D.D.C. Dec. 12, 1974) (national engineering society's liability under Sherman Act predicated on code of ethics prohibiting competitive bidding, despite fact that national society had no enforcement powers, where it coordinated and encouraged stated society polieing actions).

18. *Id.* at 495.

19. *Id.*

20. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 302 (1961).

21. *Id.* No. 323 (1970).

22. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B)(3) (1969).

23. *Id.* EC 2-18 (1969).

ence to fee schedules, but apparently left standing the earlier rulings that failure to follow fee schedules could be *evidence* of misconduct.²⁴ Since it is hard to see how failure to adhere to a *minimum* fee schedule, *i.e.*, charging too little, could be relevant to any bona fide ethical consideration, it appears that the Association is reluctant to abandon the concept of fee schedules altogether. On the other hand, the portent of litigation has led the ABA's leadership to call publicly on state and local bar associations to drop their fee schedules.²⁵

I. FEE SCHEDULES AS A PER SE VIOLATION OF THE ANTITRUST LAWS

A. *The Nature of Bar Associations' Exposure to Antitrust Liability*²⁶

The practices of bar associations are subject to attack by a variety of public and private plaintiffs under numerous federal statutory provisions, for Congress has granted both public agencies and private parties wide latitude in suing under the antitrust laws. Both civil and criminal actions can be maintained by the Justice Department, either alternatively or simultaneously.²⁷ The Federal Trade Commission is also granted enforcement powers,²⁸ and the enforcers need not defer to each other in bringing an action, although in practice they do use a clearance procedure to avoid duplication of investigative effort.²⁹ The private plaintiff may sue for damages, injunctive relief, or both,³⁰ and need not await the outcome of government litigation, although he will usually do so.³¹

The private treble damage action has been a part of the antitrust laws since it first appeared in 1890 in the Sherman Act. The Clayton Act of 1914 expanded the scope of this authorization, and today, section four of the Clayton Act is the basic mandate for private relief. It

24. Amendments to the ABA Code of Professional Responsibility 2 (effective March 1, 1974).

25. Remarks of Mr. Chesterfield Smith, Immediate Past President, American Bar Association, at Duke University School of Law, Nov. 7, 1974.

26. The material in this section, and some of the material in the following section, is included to provide background for the general reader. The reader familiar with antitrust law may safely skip to the text accompanying note 72 *infra*.

27. See *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 52 (1912).

28. The Federal Trade Commission is specifically delegated certain enforcement powers. See 15 U.S.C. § 21 (1970). The violations subject to FTC action include price discrimination violations, *id.* § 13, unlawful contracts requiring an agreement not to use the goods of a competitor, *id.* § 14, corporate acquisitions tending to lessen competition, *id.* § 18, and interlocking directors and officers, *id.* § 19.

29. J. VAN CISE, *UNDERSTANDING THE ANTITRUST LAWS* 200 (1970 ed.).

30. 15 U.S.C. §§ 15, 26 (1970).

31. J. VAN CISE, *supra* note 29, at 200.

provides that "[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 . . ." ³² Section sixteen of the same Act authorizes injunctive actions: "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . ." ³³

The law governing the right of private parties to sue is complex and uncertain, ³⁴ largely because of the absence of definitive guidance from the Supreme Court on a number of important questions. Basically, the private plaintiff must prove (1) that the alleged violation has injured his business or property, ³⁵ and (2) that his injury was a "direct" consequence of the violation. ³⁶ Among those who have been granted standing to sue for damages and/or injunctive relief ³⁷ are competitors, ³⁸ suppliers, ³⁹ licensees, ⁴⁰ franchisees, ⁴¹ football players, ⁴² and, most signi-

32. 15 U.S.C. § 15 (1970). Section seven of the Sherman Act authorizing such suits was repealed in 1955 because section four of the Clayton Act superseded it. Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283.

33. 15 U.S.C. § 26 (1970). All actions commenced under either section four of the Clayton Act for damages or under section sixteen for injunctive relief must be brought in the federal district courts. *General Inv. Co. v. Lake Shore & M.S. Ry.*, 260 U.S. 261, 286-87 (1922). Thus, the state courts lack jurisdiction to entertain antitrust claims based on the federal laws. See *Gold Fuel Serv., Inc. v. Esso Standard Oil Co.*, 32 N.J. 459, 161 A.2d 246, *cert. denied*, 364 U.S. 882 (1960). The federal antitrust statutes contain their own jurisdictional provisions; therefore, neither diversity of citizenship nor a minimum dollar amount is required. 15 U.S.C. § 15 (1970).

34. See 3 CCH TRADE REG. REP. ¶ 9020, at 15,021.

35. See *Sam S. Goldstein Indus., Inc. v. Botany Indus., Inc.*, 301 F. Supp. 728, 733-34 (S.D.N.Y. 1969); *Thurston v. Setab Computer Institute*, 48 F.R.D. 134, 135 (S.D.N.Y. 1969); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 184 F. Supp. 440, 449 (E.D. Pa. 1960).

36. *Loeb v. Eastman Kodak*, 183 F. 704 (3d Cir. 1910). While the decisions relating to "directness" of injury are varied in their approach, the practical effect of the requirement is that plaintiff's injuries must be proximately caused by defendant's activities. The Second Circuit has stated the rule as follows: "Those harmed only incidentally by antitrust violations have no standing to sue for treble damages; only those at whom the violation is directly aimed, or who have been directly harmed may recover." *Productive Inventions, Inc. v. Trico Prod. Corp.*, 224 F.2d 678, 679 (2d Cir. 1955).

37. While actual injury must be shown for a damage recovery, a showing of a threatened or dangerous probability of injury is sufficient in a suit seeking injunctive relief. See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37, 54-55 (1927). The requirement of showing proximate cause between the threatened injury and the antitrust violation is applicable in an injunction action just as it is in damage actions. *Schwartz v. General Elec. Co.*, 107 F. Supp. 58 (S.D.N.Y. 1952).

38. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

39. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

40. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946).

ificantly, customers.⁴³ It is thus clear that consumers of legal services have standing to challenge bar association practices which may affect the prices they must pay.

Section one of the Clayton Act⁴⁴ defines the "antitrust laws" to include the Sherman Act,⁴⁵ certain sections of the Wilson Tariff Act of 1894,⁴⁶ and the Clayton Act itself.⁴⁷ In order to bring a private action for damages or injunctive relief, it is therefore necessary to allege a violation of one of these laws, since the Supreme Court has held that the enumeration in the Clayton Act is exhaustive as far as the private litigant is concerned.⁴⁸ The substantive provisions of the "antitrust laws" are sections one⁴⁹ and three⁵⁰ of the Sherman Act, prohibiting contracts, combinations, or conspiracies in restraint of trade; section two of Sherman,⁵¹ prohibiting monopolies or conspiracies to monopolize; sections two (a) through (f) of the Clayton Act,⁵² prohibiting various forms of price discrimination; section three of Clayton,⁵³ prohibiting tying arrangements and exclusive dealing contracts; sec-

41. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

42. *Radovich v. National Football League*, 352 U.S. 445 (1957).

43. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

44. 15 U.S.C. § 12 (1970).

45. *Id.* §§ 1-6.

46. *Id.* §§ 8-11.

47. *Id.* §§ 12, 14-19, 20, 21, 22-27; 29 U.S.C. § 52 (1970).

48. "In light of the much other so-called antitrust legislation enacted prior and subsequent to the Clayton Act, it seems plain that the rule *expressio unius exclusio alterius* is applicable . . ." *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 375-76 (1958). Private suits based upon alleged violations of the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.* (1970), are not permitted, even though the Act embraces many of the practices declared unlawful in the Sherman and Clayton Acts. See *Carlson v. Coca-Cola Co.*, 483 F.2d 279, 281 (9th Cir. 1973); *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 1002 (D.C. Cir. 1973); Note, *Judicial Refusal to Imply a Private Right of Action Under the FTCA*, 1974 DUKE L.J. 506. Enforcement of the FTCA is left to the Federal Trade Commission and the Justice Department.

Certain provisions of the Robinson-Patman Act amended section four of the Clayton Act and as such are considered part of the antitrust laws. However, section three of the Robinson-Patman Act, forbidding discriminatory and predatory pricing, is not considered an antitrust law, the violation of which gives a private party the right to sue. Of course, to the extent that the practices forbidden by section three of Robinson-Patman fall within the more general proscriptions of section two of the Clayton Act, 15 U.S.C. § 13 (1970), they are actionable, but only under Clayton. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958); *Safeway Stores, Inc. v. Vance*, 355 U.S. 389 (1958).

49. 15 U.S.C. § 1 (1970).

50. *Id.* § 3. Section three is similar to section one but applies to trade or commerce within the District of Columbia.

51. *Id.* § 2.

52. *Id.* §§ 13(a)-(f).

53. *Id.* § 14.

tion seven of Clayton,⁵⁴ prohibiting certain corporate acquisitions of stock or assets; and section eight of Clayton,⁵⁵ prohibiting interlocking directorates.⁵⁶ Although a number of these provisions might conceivably have application to various practices of the legal profession, it is the majestic sweep of section one of the Sherman Act⁵⁷ which has been held to ban price fixing, and which thus must provide the starting point for any inquiry into the lawfulness of minimum fee schedules.

B. Fee Schedules, Price-Fixing, and the Per Se Rule

A violation of section one is generally predicated on the presence of four factors:

- (1) There must be two or more persons acting in concert ("contract, combination . . . or conspiracy");
- (2) The act complained of must restrain trade or commerce;
- (3) The trade or commerce must be either interstate or foreign;
- (4) The restraint must be unreasonable.⁵⁸

The notion that only *unreasonable* restraints of trade or commerce violate section one, first suggested in 1899,⁵⁹ was most clearly enunciated by the Supreme Court in *Standard Oil Co. v. United States*:⁶⁰ "[I]t becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason guided by the established law"⁶¹ Later decisions⁶² further refined the unreasonable restraint requirement so that such restraints fall into two general categories: (1) those practices which are viewed as so inherently anti-competitive that they are condemned outright irrespective of their motives, purposes, or effects, *i.e.*, per se violations;⁶³ and (2) those prac-

54. *Id.* § 18.

55. *Id.* § 19.

56. See 3 CCH TRADE REG. REP. ¶ 9022, at 15,022-23.

57. "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal" 15 U.S.C. § 1 (1970).

58. 16 J. VON KALINOWSKI § 4.01, at 4-4, 4-5.

59. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). Prior cases had applied section one without reference to the reasonableness of the alleged restraint. See *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

60. 221 U.S. 1 (1911). See also *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

61. 221 U.S. at 62.

62. See, *e.g.*, *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953).

63. "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed

tices which, although suppressive of competition, may have sufficient social utility to escape condemnation under section one, *i.e.*, restraints judged by the rule of reason.⁶⁴

The principal practice to have been held a *per se* violation of section one is price-fixing.⁶⁵ Price-fixing is an arrangement, either among competitors (horizontal price-fixing) or between various entities in the chain of distribution (vertical price-fixing), the purpose of which is to raise, depress, fix, or stabilize prices.⁶⁶ It makes no difference that the resulting prices are reasonable,⁶⁷ and no degree of economic justification can save a price-fixing arrangement.⁶⁸ Thus, once price-fixing has been proven, the only available defenses are that there has been no restraint of trade or commerce,⁶⁹ that the trade or commerce is not interstate,⁷⁰ or that the particular defendant is for some other reason wholly exempt from the antitrust laws.⁷¹

It seems beyond dispute that an agreement by members of a bar association to adhere to a minimum fee schedule is a paradigmatic case of price-fixing.⁷² The agreement, of course, need not be verbal, but may be expressed in the rules and policies of the association. However, the constituents of many bar associations cannot properly be deemed to have agreed, even implicitly, to adhere to a fee schedule; rather, they have only authorized their leaders to promulgate a set of "suggested" minimum fees for the guidance of association members.⁷³

to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

64. See 16 J. VON KALINOWSKI § 4.01, at 4-4.

65. *Id.* § 6.02[3][a], at 6-93 n.52.

66. "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate . . . commerce is illegal *per se.*" *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

67. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). The case involved alleged price-fixing by manufacturers who had an eighty-two percent share of the market for the production of vitreous pottery fixtures. In rejecting the defendants' contention that their action was reasonable because the resultant prices were reasonable, the Court stated: "The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement of a price reasonable when fixed." *Id.* at 397.

68. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

69. See Part III *infra*.

70. See Part II *infra*.

71. See Part IV *infra*.

72. See Note, *A Critical Analysis of Bar Association Minimum Fee Schedules*, *supra* note 3, at 973.

73. Such was apparently the situation in the *Goldfarb* case. See 497 F.2d at 4.

This variation is unlikely to escape the fatal per se rubric, both because the portent of sanctions against renegades renders illusory the element of voluntariness implied by a merely "suggested" schedule⁷⁴ and because the Supreme Court has held that "suggestions" about appropriate prices are themselves obnoxious:

An agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, no matter what end it was designed to serve. . . . And the fact that no penalties are imposed for deviations from the price schedules is not material. . . . Subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line.⁷⁵

C. *The Publication of Fee Information—A Permissible Alternative*

Despite the awesome rigidity of the per se rule, it would seem unlikely that a court could remain oblivious to the plight of a defendant with some compelling, non-economic objective achievable only through a practice incidentally bearing the ugly label "price-fixing." A court faced with such a defendant might well be more amenable to opening some legal escape hatch found in the interstices of past cases; the practical attractiveness of each means of escape may well depend upon one's view of the ends sought to be attained by fee schedules, and the

Stapled inside the front cover of the eighty-seven page *Minimum Fee Schedule of the State Bar of Texas* (1968) is a mimeographed "Caveat" dated October 2, 1972, which states reassuringly: "It should be at all times made clear that minimum fee schedules constitute suggestions only as to fees that have generally been found reasonable for particular services"

74. See note 15 *supra*.

75. *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 489 (1950). The case involved a civil suit seeking to enjoin rate-fixing by real estate brokers in the District of Columbia. While the rates promulgated by the Washington Board were "suggested" only, the parent National Board's code of ethics stated that brokers should adhere to the standard rates. Since departure from the locally set rates had not caused the local board to invoke any sanctions, the district court upheld the rate schedules as being "nonmandatory." The Supreme Court's response, reversing this position, is quoted in the text.

While holding the Washington Board culpable, the Court refused to set aside as clearly erroneous the district court's exoneration of the National Board. The National Board's code of ethics provided that schedules of fees "should be observed," *id.* at 494, and its by-laws required local boards to adopt and enforce the code of ethics, under threat of expulsion from the National Board. Besides being deemed insufficient to subject the National Board to liability, this arrangement was apparently unnecessary to the Court's finding of a Sherman Act violation in the local board's promulgation of "suggested" fees. Thus, *Real Estate Boards* both strengthens the case against local bar associations' "suggested" fee schedules, and weakens the case that might otherwise have been made against state bars that have the authority to enforce locally set minimum fees. See notes 15-17 *supra* and accompanying text.

alternative means available for their attainment. While the advocates of fee schedules have been able to suggest a panoply of laudatory and beneficent objectives which the schedules are said to further, the goal most frequently and seriously espoused is that of informing the public and new members of the bar about prevailing prices for legal services.⁷⁶ If prohibitions on individual advertising are upheld as necessary to maintain the decorum befitting a profession,⁷⁷ and at the same time consumers are held to have a first-amendment-flavored "right to know" which cannot be impeded altogether by state bar associations,⁷⁸ the argument for saving fee schedules as an informational device is strengthened. On the other hand, the case for fee schedules is appealing only to the extent that other effective methods of conveying fee information suffer from similar antitrust infirmities. If alternative means are available which are independently free of antitrust problems, the practical appeal of sustaining fee schedules would be much diminished.

At least one such alternative exists: the dissemination of information about the fees actually charged for given services by attorneys in a community. Similar practices in other industries have been upheld, within limits, in a number of cases dealing with the publishing of statistical information regarding supply, demand, price, and other market factors by trade associations.⁷⁹ A review of these cases demonstrates that data gathering and reporting for informational purposes need not trigger the application of the per se rule and concomitantly deflates the strongest practical justification for fee schedules, lessening the temptation to bend the law in order to save the schedules.

Data gathering and reporting activities initially received a chilly reception from the Supreme Court,⁸⁰ although the cases left open the

76. Several of the state bar officers who responded to the survey discussed in the text at notes 8-11 *supra* expressed a belief that the demise of fee schedules in their states had hurt consumers' rights.

77. The Justice Department has announced its intention to challenge anti-advertising provisions on antitrust grounds. *L.A. Times*, *supra* note 2, at col. 1.

78. At least one court has recognized the consumers' right to know price information. *Virginia Citizens Consumer Council v. State Bds. of Pharmacy*, 373 F. Supp. 683 (E.D. Va. 1974). Also, the prohibition of the distribution of any price information might be attacked on the grounds that it chills the effective exercise of the sixth amendment right to counsel.

79. For commentary on the case law dealing with the exchange of information among competitors under the antitrust laws, see Kefauver, *The Legality of Dissemination of Market Data by Trade Associations: What Does Container Hold?*, 57 *CORNELL L. REV.* 777 (1972); *Supreme Court 1968 Term*, 83 *HARV. L. REV.* 7, 227 (1969); Note, *Antitrust Implications of the Exchange of Price Information Among Competitors: The Container Corporation Case*, 68 *MICH. L. REV.* 720 (1970); Comment, *Trade Association Statistics and the Anti-Trust Laws*, 18 *U. CHI. L. REV.* 380 (1951); 54 *MINN. L. REV.* 206 (1969).

80. In *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921),

possibility that statistical reporting might be a valid activity "[i]n the absence of a purpose to monopolize or the compulsion that results from contract or agreement,"⁸¹ and this proposition later received express approval in *Maple Flooring Manufacturers Association v. United States*.⁸² Taking its cues from hints in prior cases, the Maple Flooring Association gathered data dealing "exclusively with past and closed transactions," and maintained at all times the anonymity of specific buyers and sellers.⁸³ Additionally, the statistics gathered were "given wide publicity,"⁸⁴ a fact which the Supreme Court considered highly significant:

[T]rade associations . . . which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions . . . and who . . . meet and discuss such information and statistics without, however, reaching or attempting to reach any agreement or any concerted action with respect to price of production or restraining competition, do not thereby engage in unlawful restraint of commerce.⁸⁵

Thus, by reporting only past transactions, by reporting only composite

an "open competition" plan of the Hardwood Lumber Manufacturers Association was struck down as a restraint of trade. Under the plan, members of the Association were required to file monthly data on stocks, prices, current production, and future production to the association's manager of statistics. He compiled weekly and monthly reports showing sales and production and circulated these reports and a newsletter forecasting demand to members of the association. *Id.* at 394-96. The report was distributed to sellers only. *Id.* at 411. In holding the plan illegal, the Supreme Court stated:

Genuine competitors do not make daily, weekly and monthly reports of the minutest details of the business to their rivals . . . ; they do not contract . . . to submit their books to the discretionary audit and their stocks to the discretionary inspection of their rivals for the purpose of successfully competing with them *Id.* at 410.

A similar restraint was found in *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923). In that case, the Linseed Crushers Council adopted a plan whereby sellers of linseed products were supplied with very detailed information on market conditions. Members were to report "on all matters and conditions within their knowledge affecting the industry," *id.* at 385, were to supply each other with price lists, and were to reveal all sales made below "list." Failure to comply with the association's requirements resulted in the forfeiture of a bond and other sanctions. *Id.* at 382. This plan was struck down without hesitation as a restraint of trade. *Id.* at 389. See also *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U.S. 600 (1914) (agreement among retail dealers to circulate a list of wholesalers selling direct to consumers held illegal).

81. *United States v. American Linseed Oil Co.*, 262 U.S. 371, 390 (1923).

82. 268 U.S. 563 (1925).

83. *Id.* at 573.

84. *Id.*

85. *Id.* at 586. See also *Sugar Institute v. United States*, 297 U.S. 553 (1936) (agreement imposing more restraints than necessary to remove abuses in the trade held unreasonable and illegal).

figures, and by making the resulting data freely available, the association was able to avoid Sherman Act liability. While noting that this exchange of information might "stabilize prices or limit production through a better understanding of economic laws,"⁸⁶ the Court was unwilling to conclude that such activities, without more, were an unlawful restraint. Earlier cases with contrary holdings were distinguished on their facts.⁸⁷

The law of data dissemination by trade associations thus appeared settled in favor of the legality of such schemes until the Supreme Court held in *United States v. Container Corp. of America*⁸⁸ that a reciprocal arrangement among eighteen manufacturers of corrugated containers for the exchange of the most recent prices charged to a specific customer violated section one of the Sherman Act. While the Court recognized that there was no agreement to adhere to a price schedule, the plan did involve the identification of actual sales to specific customers.⁸⁹ Further, the Court noted:

Price information exchanged in some markets may have no effect on a truly competitive price. But the corrugated container industry is dominated by relatively few sellers. The product is fungible and the competition for sales is price. The demand is inelastic. . . . The exchange of price data tends toward price uniformity. For a lower price does not mean a larger share of the available business but a sharing of the existing business at a lower return.⁹⁰

While the full implication of *Container* is not yet clear, several

86. 268 U.S. at 584.

87. In *American Column & Lumber and American Linseed*, see note 80 *supra*, the restraint of trade, according to the Court,

arose not from the fact that the defendants had effected a combination to gather and disseminate information, but from the fact that the court inferred from the peculiar circumstances of each case that concerted action had resulted, or would necessarily result in tending to arbitrarily lessen production or increase prices. *Id.* at 585.

In a companion case, *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588 (1925), the Court upheld data dissemination pertaining to "specific job" contracts on the ground that the association had proven the necessity and utility of such a scheme in the cement industry and upon the finding that no coercion was exerted against members to utilize the data for other than informational purposes. *Id.* at 603. The Court made it clear that information gathering and dissemination was legal, absent a restraining agreement, since "it fails to show any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action." *Id.* at 606.

88. 393 U.S. 333 (1969).

89. *Id.* at 334. The Court explained that while *Cement Manufacturers* had upheld the exchange of prices charged specific customers, it did so only by virtue of the "controlling circumstance" that such information was necessary to prevent fraud in the unique context of the cement industry. *Id.* at 335.

90. *Id.* at 337.

observations can be made about its application to information exchanges within the legal profession. First, the case does not appear to have created a new per se rule that data gathering and dissemination which are somehow linked to price stabilization are irrebuttably presumed to be unlawful.⁹¹ This conclusion takes its support from the care with which the Court limited its decision to the specific industry involved, and its refusal to overrule or even limit *Maple Flooring*, which had specifically held that a "natural" stabilization of prices flowing from the exchange of economic data was not a violation of the anti-trust laws. Thus, *Container* is consistent with the practice announced in *Maple Flooring* of looking at the "peculiar circumstances of each case."⁹² Under this approach, the dissimilarities between the container industry and the legal profession are marked. While the Court found the container industry to be oligopolistic,⁹³ lawyers would appear to operate under conditions approaching classical atomistic competition. While containers are fungible and competition between manufacturers is based solely on price,⁹⁴ the opposite is probably true of legal services; lawyers are not interchangeable commodities, and the potential client is likely to be concerned with the skill of the particular attorney that he has engaged.

Furthermore, the *Container* case did not involve a trade association, even though all but one of the named defendants were members of the Fiber Box Association.⁹⁵ The Association did engage in data gathering of a generalized nature, not related to specific transactions and much like the program in *Maple Flooring*, and the government was careful to point out in oral argument that it was not challenging this practice.⁹⁶ Thus, *Container* may be seen as limiting prior cases to the situation in which the data gathering and reporting is done by an organization not itself involved in marketing the product or service involved, perhaps on the theory that direct information exchange between competitors is too ripe with possibilities for price-fixing to be tolerated. Under this view of the case, the collection and dissemination

91. See Kefauver, *supra* note 79, at 785. Cases subsequent to *Container* do not appear to have adopted a per se rule. See, e.g., *Wall Prods. Co. v. National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971); *United States v. FMC Corp.*, 306 F. Supp. 1106 (E.D. Pa. 1969).

92. 268 U.S. at 585.

93. 393 U.S. at 337.

94. "While containers vary as to dimensions, weight, color and so on, they are substantially identical, no matter who produces them, when made to particular specification." *Id.* at 336.

95. Kefauver, *supra* note 79, at 787.

96. BNA ANTITRUST & TRADE REG. REP., No. 384, Nov. 19, 1968, at A-13.

of fee information by a bar association would appear permissible if done consistently with the caveats in *Maple Flooring*.

The publication of fee information can therefore be safely assumed free from antitrust infirmity, provided:

- (1) The information disseminated pertains only to past practices or transactions;
- (2) The information does not reveal details relating to individual competitors or particular transactions;
- (3) The information is made available to consumers and to all parties who might need it to compete effectively;
- (4) The information is limited to raw statistics—comments or recommendations are avoided; and
- (5) The information is gathered and reported by an association in order to preclude direct discussions among competitors.⁹⁷

Since it appears that bar associations can serve their informational objective effectively by the implementation of such a program, they should not be heard to argue for the salvation of otherwise infirm minimum fee schedules as indispensable for the attainment of this legitimate goal.

II. THE JURISDICTIONAL REQUIREMENT OF INTERSTATE COMMERCE

Bar associations which circulate minimum fee schedules are engaged in a form of price-fixing, a per se violation of the Sherman Act;⁹⁸ thus, a plaintiff who can establish antitrust jurisdiction and demonstrate price-fixing will normally win his case without further proof. As a result, the alleged price-fixer's first line of defense is to argue that jurisdiction under the Sherman Act is lacking.⁹⁹ A court will have jurisdiction under the Sherman Act¹⁰⁰ if the plaintiff has pleaded facts which show a "restraint of trade or commerce among the several States."¹⁰¹ The courts have developed two theories upon which jurisdiction may be founded.¹⁰² The first theory, labeled the

97. See Kefauver, *supra* note 79, at 777.

98. See note 63 *supra* and accompanying text.

99. Indeed, if the allegations of price-fixing are true, the only meaningful defense may be a lack of jurisdiction. See 16 J. VON KALINOWSKI § 5.01[1], at 5-6 to -7.

100. 15 U.S.C. § 1 (1970).

101. The phrase "commerce among the several states" has been interpreted to reach to the constitutional limits of the commerce clause. *United States v. Southeastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944). Thus, the failure to allege that a practice restrains interstate commerce is a jurisdictional defect. See 16 J. VON KALINOWSKI § 5.01[1].

102. See *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732, 739 n.3 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954). See generally 16 J. VON KALI-

"flow of commerce" theory, requires only the allegation of a practice which restrains the flow of interstate commerce by *directly* impeding the interstate movement of goods or services. The other theory, the "affectation" theory, permits an allegation that a wholly *local* transaction *affects* interstate commerce; however, the plaintiff must also demonstrate that the quantitative effect of the local activity on interstate commerce is *substantial*. In this section, these two jurisdictional tests will be explained and related to the fixing of minimum legal fees.

A. Restraints in the Flow of Commerce

Under the "flow of commerce" theory, a plaintiff must show "[t]hat the acts complained of occurred within the flow of interstate commerce."¹⁰³ Only restraints which *directly* impede the movement of interstate goods or services may be reached under this theory of jurisdiction.¹⁰⁴ Once such a direct restraint is alleged, jurisdiction will obtain regardless of the substantiality of the restrained commerce; thus the "flow of commerce" theory embraces a qualitative jurisdictional standard.¹⁰⁵ *Teamsters Local 167 v. United States*¹⁰⁶ illustrates the sort of direct restraint which has been held to satisfy the "flow of commerce" jurisdictional test. It was alleged that union truckers in New York had refused to haul poultry to purchasers who were resisting a well-organized conspiracy to eliminate competitive poultry prices. Since the poultry was received from outside New York, the Supreme Court upheld Sherman Act jurisdiction, finding that the complaint had alleged a direct restraint on an item in interstate commerce.¹⁰⁷

However, the "flow of commerce" theory does not provide jurisdiction when the goods or services allegedly restrained are not actually in the flow of interstate commerce, even if the restraint affects other goods or services which are in the flow.¹⁰⁸ This restriction on the scope of the "flow of commerce" theory is typified by the district court decision in *Hotel Phillips, Inc. v. Journeymen Barbers Union*.¹⁰⁹ In

NOWSKI ch. 5; Eiger, *The Commerce Element in Federal Antitrust Litigation*, 25 FED. B.J. 282 (1965).

103. 210 F.2d at 739 n.3.

104. See *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103 (1933); *Industrial Ass'n v. United States*, 268 U.S. 64 (1925); *United Leather Workers Local 66 v. Herkert & Meisel Trunk Co.*, 265 U.S. 457 (1924).

105. 210 F.2d at 739 n.3; 16 J. VON KALINOWSKI § 5.01[1], at 5-12.

106. 291 U.S. 293 (1934).

107. The Court stated, "The interference . . . operates substantially and directly to restrain and burden the untrammelled shipment and movement of the poultry while unquestionably it is in interstate commerce." *Id.* at 297.

108. See 16 J. VON KALINOWSKI § 5.01[2], at 5-29 to -34.

109. 195 F. Supp. 664 (W.D. Mo. 1961), *aff'd*, 301 F.2d 443 (8th Cir. 1962) (per curiam).

that case, owners of hotel and airport barber shops alleged that the union had conspired to fix minimum prices for barber services and to enforce a five-day work week. Since many interstate travelers used these barber shops, the barbers' services were alleged to be in the flow of commerce. The court rejected this argument and characterized the services as "purely local" and not part of an interstate flow.¹¹⁰ The fact that the local restraint might have affected interstate travelers was held insufficient to invoke Sherman Act jurisdiction under the "flow of commerce" theory.¹¹¹

Whether or not a particular restraint has occurred directly in the flow of commerce will depend upon the court's decision as to the points at which the goods or services affected enter and leave the flow of interstate commerce.¹¹² Since services are intangible, the question of whether a service—such as the advice of a lawyer—is actually in the flow of interstate commerce is conceptually more difficult than that of whether certain goods are in the flow of commerce.¹¹³ The Supreme Court addressed the issue of when a service is in the flow of interstate commerce in *United States v. Yellow Cab Co.*¹¹⁴ The government first alleged that the three largest Chicago cab companies had violated the Sherman Act by agreeing that only one company would contract with the railroads to transport passengers between railroad stations. Cab transportation between stations was sold by the railroads as a part of the price of through tickets. Since many of the railroad passengers were in the course of travel between states, the Court stated that the cab service provided pursuant to the contract with the railroad was "an integral step in the interstate movement"¹¹⁵ and upheld jurisdiction

110. *Id.* at 668-69.

111. *Id.* at 668.

112. See 16 J. VON KALINOWSKI § 5.01[2], at 5-39 to -66.

113. Another difficulty with the "in the flow" test is that it largely depends "upon how far the court is willing to expand the conceptual entity known as the flow of commerce." Eiger, *supra* note 102, at 286. Thus, for example, the activities of a retailer who receives all his goods from wholesalers in the same state may be "in" interstate commerce if one views his retail outlet as the last link in the chain of distribution from an out-of-state producer to a local consumer. Yet, by defining the flow of goods to stop with an in-state wholesaler, one can just as easily view the retailer's activities as local in nature, having at most only an effect on interstate commerce. See *Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502, 507-08 (4th Cir. 1959) (local tobacco auction held "integral part" of flow of commerce); *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732, 740 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954).

114. 332 U.S. 218 (1947).

115. *Id.* at 229; see *Hotel Phillips, Inc. v. Journeymen Barbers Union*, 195 F. Supp. 664, 670 (W.D. Mo. 1961), *aff'd*, 301 F.2d 443 (8th Cir. 1962) (*per curiam*) (stating in dictum that the service of "red caps" in carrying travelers' bags may be considered as being performed in the flow of commerce).

under the "flow of commerce" theory. The Chicago cab companies were also alleged to have violated the Sherman Act by conspiring to prevent new operators from entering the cab business, inducing the city to limit the number of available cab licenses, and acquiring nearly all the available licenses. These cabs made only intrastate journeys and no contract with an interstate carrier was involved. The Court held that the alleged restraint was not in the flow of interstate commerce on the ground that passengers who used cabs to begin interstate trips had not yet entered the stream of commerce and that passengers who used cabs to end their interstate trips had already left the stream of commerce at the time they used the cabs.¹¹⁶

Application of the *Hotel Phillips* and *Yellow Cab* decisions to restraints of legal services provides little basis for an argument that minimum fee schedules directly restrain a service which is in the flow of interstate commerce. Legal services are generally local in nature and can hardly be characterized as an integral part of interstate movement as were the contract cab services in *Yellow Cab*. Although legal fees may affect certain elements of interstate movement, *Hotel Phillips* makes it clear that such an indirect restraint will not sustain jurisdiction under the "flow of commerce" theory. The *Goldfarb* court did not even find it necessary to analyze whether Virginia lawyers provided services in the flow of commerce. It merely noted that it was "undisputed that the activities of the [county bar] Association and its members were carried on wholly within the State of Virginia."¹¹⁷ Nevertheless, the assumption that legal services are not in the flow of commerce is probably a sound one. However, the Justice Department takes a contrary view. In a complaint filed against the Oregon State Bar,¹¹⁸ it alleged that

legal services provided by members of OSB [Oregon State Bar] involve and affect individuals, corporations, and other business entities throughout the United States. These legal services facilitate, direct, and shape the conduct of interstate and international business and contribute directly to the flow of persons, money, goods, and services into and out of the state of Oregon.¹¹⁹

116. The Court stated that "interstate commerce is an intensely practical concept," 332 U.S. 231, and that "the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of his destination." *Id.* The Court also found that the second alleged conspiracy had no "effect" on interstate commerce. See note 136 *infra*.

117. 497 F.2d at 16.

118. Complaint in *United States v. Oregon State Bar*, Civil No. 74-362 (D. Ore., filed May 9, 1974).

119. *Id.* at 2.

The government went on to urge that the activities of the state bar and its members are "within the flow of interstate commerce." While it is doubtful whether the government can in fact meet the narrow standards of the "flow of commerce" theory of jurisdiction, the Justice Department and other plaintiffs are not limited to this theory and may attempt to establish jurisdiction under the "affectation" test.

B. Affecting the Flow of Commerce

In *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*¹²⁰ the Supreme Court broadened the basis for obtaining jurisdiction under the Sherman Act. The defendants, California sugar refiners, had conspired to pay a uniform price for sugar beets grown by local farmers;¹²¹ the beets were refined into sugar which was sold throughout the United States.¹²² Under prior decisions, the complaining farmers could not have established jurisdiction, since the beets, whose sale was restrained, were processed into a "different" commodity, sugar, before entering the flow of commerce.¹²³ But the Court rejected these precedents and laid the foundation for an expansive "affectation" test of jurisdiction.

[T]he inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or *substantial effect upon* interstate commerce can be found in the *sum of the facts* presented. For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, *the vital question becomes whether the effect is sufficiently substantial* and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence.¹²⁴

The Ninth Circuit further refined the "affectation" test in the leading case of *Las Vegas Merchants Plumbers Association v. United States*.¹²⁵ This case dealt with an alleged conspiracy among Nevada plumbing contractors to fix prices through the use of an estimating bureau which established a price on each job which had been set for bids and allocated the work among the contractors.¹²⁶ Since "practi-

120. 334 U.S. 219 (1948).

121. *Id.* at 221.

122. *Id.* at 225.

123. See *United States v. E.C. Knight Co.*, 156 U.S. 1 (1894), an early Sherman Act case having facts very similar to *Mandeville*.

124. 334 U.S. at 234 (emphasis added).

125. 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954).

126. *Id.* at 743.

cally all" plumbing and heating supplies used in plumbing installations in Nevada were shipped into the state from California and other places,¹²⁷ the indictment alleged that the flow of goods into Nevada was restrained by the allocation system which forced contract prices to an artificial level. Relying on *Mandeville*, the court held the indictment sufficient for federal jurisdictional purposes, not because the alleged restraint was "in the flow" of commerce, but because it "substantially affected" interstate commerce in heating and plumbing supplies.¹²⁸

While *Mandeville* and later Supreme Court opinions¹²⁹ clearly sanction the Ninth Circuit's expansive jurisdictional approach in *Las Vegas Plumbers*, the cases provide no easy rules for determining when a wholly local activity "substantially affects" trade among the states. It is clear, however, that once an alleged restraint has been determined to fall outside the "flow of commerce," the first step in ascertaining Sherman Act applicability under the "affectation" theory must be a quantitative one.¹³⁰ The court must examine the specific economic data surrounding the transaction to decide whether the commerce allegedly affected by the restraint is "substantial." One court has suggested:

The key question in the case then is whether these clear "effects" on interstate commerce, caused by the activities alleged, are "substantial" enough to confer jurisdiction. Because this is an issue which involves many variables, no single, satisfactory test emerges from the precedent. When courts do speak in terms of a test, the formulations used are, of necessity, so broad and generalized that instead of providing a guide to the solution of the problem they do no more than restate the issue.¹³¹

The courts have not clearly indicated whether the effect should be measured in terms of some percentage of total interstate business affected, or whether an absolute dollar amount should be used as a cut-off, nor is it clear how broad a class of interstate transactions should be examined in search of the requisite effect.¹³² Because the "affecta-

127. *Id.* at 738.

128. *Id.* at 743.

129. See *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460 (1949).

130. See *Las Vegas Merchants Plumbers Ass'n v. United States*, 210 F.2d 732, 742-43 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954).

131. *Doctors, Inc. v. Blue Cross*, 490 F.2d 48, 51 (3d Cir. 1973). This court went on to observe that "the precedent in this area is unlikely to dictate the outcome in any given case. Instead, it is more likely to communicate a general sense as to how much of an impact local activities must have upon interstate commerce before they confer jurisdiction." *Id.*

132. Suppose a court following the substantiality test requires that a certain propor-

tion" theory is so imprecise, it has been susceptible to manipulation by the courts to support any conclusion that they want to reach, and some courts have gone so far as to abandon the quantitative substantiality test suggested by *Mandeville* in favor of an entirely different, qualitative test.

C. The "Dominant Purpose" Rationale

Some courts have adopted a "dominant purpose" test under which they attempt to determine whether a defendant engaging in an alleged restraint affecting commerce *intended* to restrain trade among the states. A frequently cited—and perhaps the clearest—expression of this qualitative purpose-oriented test is found in *Spears Free Clinic & Hospital for Poor Children v. Cleere*.¹³³ The plaintiffs in *Spears* were chiropractors who challenged Colorado licensing procedures for the practice of medicine and alleged a conspiracy among medical doctors to maintain monopolistic control over the treatment of disease by restraining competition from chiropractors. Using the language of "substantiality," the court nevertheless resorted to a different approach to defeat jurisdiction:

Here, the purpose and object of the conspiracy and of the means adopted to effectuate it, were to restrain the practice of chiropractic and to allocate to the medical profession the practice of the healing arts in Colorado. It is this exclusively local aim and not the fortuitous and incidental effect upon interstate and foreign commerce which gives character to the conspiracy. The effect upon interstate and foreign commerce was fortuitous and remote and not direct and substantial.¹³⁴

This "dominant purpose" rationale seems tailor-made as a jurisdictional

tion of interstate business be shown to have been affected by the challenged activity in order to uphold jurisdiction. Further suppose that the challenged activity is the setting of minimum fees for a broad range of legal services. The plaintiffs present evidence showing that a large amount of interstate real estate business is affected by the setting of minimum fees for title examinations. No evidence is presented showing any effect on any other interstate business. Should the effect be measured as a proportion of the real estate business, presumably "substantial," or as a proportion of all interstate business which might conceivably have been influenced by the price of legal services, presumably "insubstantial"? If the latter approach is chosen, should the court nevertheless uphold jurisdiction as to that portion of a minimum fee schedule which sets the fees for title examinations, thereby "severing" the schedule? See notes 171-80 *infra* and accompanying text.

133. 197 F.2d 125 (10th Cir. 1952).

134. *Id.* at 128. See *Elizabeth Hosp., Inc. v. Richardson*, 269 F.2d 167, 170 (8th Cir. 1959); *Riggall v. Washington County Medical Soc'y*, 249 F.2d 266, 268 (8th Cir. 1957). These cases follow *Spears* to hold that hospital activities do not have the requisite effect on interstate commerce.

shield for fee schedules promulgated by bar associations, and the *Goldfarb* court cited *Spears* and made use of its rationale.¹³⁵

In *Goldfarb*, the Fourth Circuit emphasized that "members of the [county bar] Association were engaged in the general practice of law and did not solicit out-of-state business."¹³⁶ This element—the absence of intent to seek interstate business—permitted the court to classify as a "fortuitous circumstance" the fact that the plaintiffs had used the services of Virginia attorneys "to secure a loan from a company engaged in interstate transactions."¹³⁷ Reiterating its finding that the bar association did not seek to restrain interstate commerce, the

135. 497 F.2d at 16 n.49. The court cited *Spears* for the proposition that a business whose customers may cross state lines to purchase a product or service is not necessarily engaged in interstate commerce.

136. *Id.* at 18.

The *Goldfarb* district court had found the requisite effect on interstate commerce in the fact that a "significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia." 355 F. Supp. at 494. The court based this finding on information supplied by the plaintiffs, who had sampled the recorded mortgage transactions in Fairfax County for 1970 and 1971. The study indicated that more than half the total mortgage funds recorded in the county—\$75,615,096 of \$136,281,120 in the sample—came from outside Virginia. Mortgages under \$100,000—those more likely to be used for residential purposes—were more than 40 percent out-of-state. *Id.* at 497. Since virtually all lenders required a title examination and title insurance which was available only through licensed Virginia attorneys, the district court held that artificial price restraints on legal services did have the requisite effect on interstate commerce to meet the jurisdictional requirement. *Id.* at 494. In addition, the lower court found support for its determination in the fact "that a large percentage of persons who live in Fairfax County work outside of Virginia" and that federal agencies guaranteed "significant amounts of loans on Fairfax County real estate." *Id.*

The Fourth Circuit disagreed. 497 F.2d at 16. The court made no reference to federal loan guarantees, and quickly dispensed with the fact that many Fairfax County homeowners are commuters as "totally irrelevant." *Id.* Under the court's analysis, only the finding of "significant" out-of-state mortgage funds presented a possible basis for jurisdiction; and according to the court, plaintiffs did not show the requisite "direct and substantial" effect on the interstate flow of mortgages. The court pointed out that "[t]he fact that a service is occasionally utilized to facilitate interstate activities does not subject the one providing the service to the proscriptions of the Sherman Act." *Id.* at 17, citing *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

In *Yellow Cab*, the Supreme Court had held that an alleged conspiracy to control taxicab service in Chicago, which was used by travelers going from their homes or hotels to train stations, had only an "incidental" effect on interstate commerce. The Court emphasized in ruling against jurisdiction that "the traveler has complete freedom to arrive at or leave the station by taxicab, trolley, bus . . . or various other means of conveyance." *Id.* at 232. The *Goldfarb* court did not examine the contrast between this "freedom" and the mandatory title services of the real estate transaction.

However, the *Yellow Cab* Court did hold that a conspiracy to limit competition in special contracts for taxi transportation of rail passengers *between* train stations met the in-the-flow jurisdictional test. See text accompanying notes 114-16 *supra*.

137. 497 F.2d at 18.

court was able to designate services included in the minimum fee schedule as "wholly local" and unreachable under the federal antitrust statutes:

We are constrained to hold that the Association sought to regulate only "general local services." The fact that those services are occasionally used by persons who are simultaneously engaged in an ancillary interstate transaction to facilitate the conduct of that transaction is merely "incidental"; this does not justify federal regulation of competitive restraints upon a business which is "wholly local" in character.¹³⁸

Thus, by focusing on the intent of the defendant in instituting the challenged activity, the court ignored the data which had influenced the district court to reach an opposite conclusion.¹³⁹

While the dominant purpose approach is supported by some older Supreme Court decisions,¹⁴⁰ the Court has more recently rejected the premise upon which it is based. In *United States v. Employing Plasterers Association*¹⁴¹ and *Burke v. Ford*,¹⁴² the Court upheld jurisdiction over alleged conspiracies that were "directed toward controlling

138. *Id.*

139. See note 136 *supra*. The *Goldfarb* court may have also erred by injecting elements of the "rule of reason" into its jurisdictional determination. The error was manifested by the citation of two prior Fourth Circuit cases, both dealing with the "rule of reason" issue: *Savon Gas Stations Number Six, Inc. v. Shell Oil Co.*, 309 F.2d 306 (4th Cir. 1962); *Lawson v. Woodmere, Inc.*, 217 F.2d 148 (4th Cir. 1954). 497 F.2d at 18. The "rule of reason" holds essentially that the Sherman Act applies only to unreasonable restraints of trade. See notes 60-64 *supra* and accompanying text. A "rule of reason" examination necessarily involves an inquiry into the purpose of a restraint to see whether or not it is "reasonable" under the circumstances. But "reasonableness" is not a jurisdictional question and should not be an element in measuring impact on commerce.

Even if the injection of the "reasonableness" issue into the jurisdictional determination could be justified conceptually, the use of a "reasonableness" test of jurisdiction runs head-on into the per se rule when price-fixing is alleged. See notes 65-68 *supra* and accompanying text. If the finding of a per se violation forecloses all inquiry into the reasonableness of a practice for the purpose of determining whether it constitutes a "restraint," such a finding logically should also prohibit resort to a reasonableness test for jurisdictional purposes.

140. In *Industrial Ass'n v. United States*, 268 U.S. 64 (1925), the Court found no antitrust jurisdiction where "interference with interstate trade was neither desired nor intended," *id.* at 77, and where it was "not within the design of appellants, but purely incidental to the accomplishment of a different purpose," *id.* at 80. Two years earlier, in 1922, the Court had found a "full local motive for the conspiracy" enough to defeat jurisdiction under the Sherman Act. *UMW v. Coronado Coal Co.*, 259 U.S. 344, 411 (1922); see *Levering & Garrignes Co. v. Morrin*, 289 U.S. 103, 107-08 (1933); *United Leather Workers Local 66 v. Herkert & Meisel Trunk Co.*, 265 U.S. 457, 471 (1924).

141. 347 U.S. 186 (1954).

142. 389 U.S. 320 (1967) (per curiam).

a purely intrastate market for goods or services."¹⁴³ The alleged restraint in *Employing Plasterers* was a conspiracy among plasterers' unions to dictate price and other terms to plastering contractors. Although the aim of the conspiracy was plainly local in that it sought to affect only dealings with Chicago contractors, the Court ignored the intrastate purpose in ascertaining that there was a sufficient effect on interstate movement of plastering materials into Illinois to sustain jurisdiction.¹⁴⁴ *Burke* involved horizontal territorial divisions among liquor wholesalers in Oklahoma, again a conspiracy directed solely at in-state commerce. This time the Court was able to uphold Sherman Act jurisdiction easily in a per curiam opinion.¹⁴⁵ Furthermore, the Third Circuit, in a well-reasoned opinion relying on *Employing Plasterers* and *Burke*, has flatly rejected the dominant purpose test. In the 1973 case of *Doctors, Inc. v. Blue Cross*,¹⁴⁶ the court held that an alleged restraint of trade in hospital services in the metropolitan Philadelphia area did have a substantial effect on interstate commerce, expressly rejecting the dominant purpose reasoning of *Spears* as "not in accord with the major relevant decisions which have been handed down" since it was decided.¹⁴⁷

The dominant purpose test has the additional disadvantage of relying too much on "conclusory phrases" which can offer "little guidance" to courts in their efforts to deal with jurisdictional questions in an antitrust context.¹⁴⁸ Once the intent of the defendant has been shown to be "regulation" of local services, any impact on commerce among the states necessarily would be merely "incidental" or "fortuitous" and thus insubstantial. Furthermore, it is puzzling how the intent of an antitrust defendant can be relevant to the interstate effect of his actions, which seemingly would have the same commercial impact even if accidental. Thus, a bar association would be imprudent to place much confidence in dominant purpose analysis as a jurisdictional

143. *Doctors, Inc. v. Blue Cross*, 490 F.2d 48, 52 (3d Cir. 1973) (relying upon *Employing Plasterers* and *Burke*).

144. 347 U.S. at 189.

145. 389 U.S. 320 (1967). The results in *Employing Plasterers* and *Burke* had been foreshadowed by the Court even before *Spears* was decided:

The fact that the ultimate object of the conspiracy charged was the fixing or maintenance of local retail prices, does not of itself remove it from the scope of the Sherman Act; retail outlets have ordinarily been the object of illegal price maintenance. *Whatever was the ultimate object of this conspiracy, the means adopted for its accomplishment reached beyond the boundaries of Colorado.* *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945) (emphasis added).

146. 490 F.2d 48 (3d Cir. 1973).

147. *Id.* at 52.

148. Krottinger, *The Essentially Local Doctrine and Section 1 of the Sherman Act*, 15 W. RES. L. REV. 66, 74 (1968).

shield against application of the Sherman Act. The dominant purpose approach is subject to such serious criticism that it seems unlikely many courts will accept it.

D. *Interstate Aspects of Professional Services*

A bar association faced with a federal antitrust suit could argue against Sherman Act jurisdiction by analogy to cases involving the medical profession; until recently, courts have been unwilling to find that the activities of the medical profession have a substantial effect on interstate commerce. On the other hand, to the extent that the lawyers' activities restrain real estate transactions, several cases dealing with the real estate business might be applicable. These cases are less consistent than those involving the medical profession and suggest that there is no uniform rule which would protect activities characterized as "professional" from antitrust regulation.

Several cases have minimized the impact of doctors' activities on interstate commerce. For example, the Supreme Court in *United States v. Oregon State Medical Society*¹⁴⁹ affirmed as "not clearly erroneous" the district court's finding that the activities of doctor-sponsored prepaid medical plans were wholly intrastate.¹⁵⁰ The Court explained that the doctor-sponsored plans' payments to out-of-state doctors and hospitals were "few, sporadic, and incidental,"¹⁵¹ and therefore did not cause the activities to be interstate commerce. The Court also distinguished *American Medical Association v. United States*,¹⁵² a case involving doctors in the District of Columbia, on the basis that interstate commerce is not necessary for prosecution under section three of the Sherman Act,¹⁵³ the provision applicable to restraints of trade in the District of Columbia. Thus, *American Medical Association* did "not stand for the proposition that furnishing of prepaid medical care on a local plane is interstate commerce."¹⁵⁴ The Tenth Circuit reached a like conclusion in a case similar to *Spears*¹⁵⁵ when a "naturopathic" physician challenged New Mexico's "Basic Science Law."¹⁵⁶ Dealing with the

149. 343 U.S. 326 (1952).

150. *Id.* at 338.

151. *Id.* at 339.

152. 317 U.S. 519 (1943).

153. 15 U.S.C. § 3 (1970).

154. 343 U.S. at 339.

155. See notes 133-34 *supra* and accompanying text.

156. *Polhemus v. American Medical Ass'n*, 145 F.2d 357 (10th Cir. 1944). Plaintiff alleged that state and local medical societies, along with the American Medical Association had conspired to procure passage of legislation which effectively barred him from medical practice, in violation of the Sherman Act.

jurisdictional issue in a summary manner, the court held: "[A]ll the transactions relate to the practice of such arts wholly within the state of New Mexico. Plaintiff's entire practice is confined to the state of New Mexico. . . . Under no circumstances can such a practice be considered commerce or affecting commerce within the meaning of the [Sherman] Act."¹⁵⁷ These decisions, along with lower federal court holdings following them,¹⁵⁸ do provide a solid base for asserting that medical services do not have a substantial effect on interstate commerce.

However, *Doctors, Inc. v. Blue Cross*¹⁵⁹ showed that proper application of the quantitative "affectation" test to a given factual situation can result in a finding of substantial impact on commerce even in the field of medical services.¹⁶⁰ Furthermore, if that case is read as requiring a comprehensive factual inquiry into any allegation of illegal restraints by professionals, then the courts need to examine carefully the activities of lawyers who have allegedly restrained trade. If such a factual analysis is undertaken, cases discussing Sherman Act jurisdiction over real estate transactions may prove illuminating because lawyers play a role in many of these transactions. Certainly, title searches—the practice at issue in *Goldfarb*¹⁶¹—are an integral part of many real property transactions.

Unfortunately, case law concerning real estate transactions is inconsistent. The Sixth Circuit, in cases three years apart, reached opposite conclusions on similar real estate questions. In *Bratcher v. Akron Board of Realtors*,¹⁶² the court sustained antitrust jurisdiction over a claim by blacks alleging a conspiracy by Ohio realtors to prevent them from purchasing residences in all-white neighborhoods. But in *Marston v. Ann Arbor Property Managers Association*,¹⁶³ the Sherman Act was held inapplicable to the apartment rental business in a university community. The court indicated in *Marston* that the alleged control of the

157. *Id.* at 359.

158. See, e.g., *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 1973-1 Trade Cas. ¶ 74,428 (E.D.N.C. 1973); *Robinson v. Lull*, 145 F. Supp. 134 (N.D. Ill. 1956).

159. 490 F.2d 48 (3d Cir. 1973).

160. The *Doctors* court was satisfied that *Doctors, Inc.* had established jurisdiction by making sufficient factual allegations concerning *Blue Cross'* and the Hospital Advisory Committee's effect upon the flow of out-of-state supplies to Philadelphia hospitals. *Id.* at 51.

161. See 497 F.2d at 4.

162. 381 F.2d 723 (6th Cir. 1967) (per curiam). This one page opinion is uninformative. The court does not indicate whether it is finding jurisdiction based on an in-the-flow theory or a substantial-effect-upon theory.

163. 422 F.2d 836 (6th Cir. 1970) (per curiam).

Ann Arbor rental market affected only "local commerce," with no "substantial . . . effect on interstate commerce."¹⁶⁴

Alleged antitrust violations by mortgage lending institutions also have produced differing results on the jurisdictional issue. In *Brett v. First Federal Savings & Loan Association*,¹⁶⁵ the Fifth Circuit upheld jurisdiction¹⁶⁶ under the Sherman Act when homeowners sued their mortgagees and savings and loan associations for allegedly conspiring to enforce unlawful "due on sale" clauses in deeds of trust and for refusing to allow sale of mortgaged property unless purchasers agreed to renegotiate interest rates.¹⁶⁷ An opposite result was reached in *United States v. Chicago Mortgage Bankers Association*,¹⁶⁸ where a district court held that an alleged antitrust violation by mortgage bankers dealing in real estate loans had no "substantial . . . effect on interstate trade or commerce . . ." ¹⁶⁹

The disparate results in these cases, which involved the same essential services, suggest that the question of whether the title searches

164. *Id.* at 837. In an earlier case, *Cotillion Club, Inc. v. Detroit Real Estate Bd.*, 303 F. Supp. 850 (E.D. Mich. 1964), the district court reached the same conclusion when presented with an antitrust claim by blacks against a real estate board and two real estate associations. Speaking about the real estate transactions, the court said, "[e]xcept for incidentals, the activities are local and intrastate. And significantly, no case has been cited or found which holds that dealing in real estate is commerce among the states." *Id.* at 854.

However, in later cases, district courts in Illinois and Maryland found real estate commission schedules had a sufficient impact on commerce to meet the jurisdictional requisites. *Mazur v. Behrens*, 1974-1 Trade Cas. ¶ 75,070 (N.D. Ill. 1972); *United States v. Prince George's County Bd. of Realtors, Inc.*, 1971 Trade Cas. ¶ 73,393 (D. Md. 1970). In *Mazur*, the district court found it "almost self-evident that the increase of a real estate commission from 6% to 7% . . . necessarily burdens the movement of persons and their effects from state to state." 1974-1 Trade Cas. at 96,788.

165. 461 F.2d 1155 (5th Cir. 1972).

166. The court suggested that the homeowners might establish jurisdiction based on at least three adverse effects that the defendants' activities allegedly had upon interstate commerce:

(1) that interstate movement is unreasonably obstructed by agreements restricting the transfer of equity in real property; (2) that one or more of defendants are subsidiaries of multi-state associations; and (3) that defendants' activities affect rental costs of lessees who are only temporarily in the state. *Id.* at 1157.

167. Other courts have also been able to find an effect upon commerce where real estate loans were involved. In *Stavrides v. Mellon Nat'l Bank & Trust Co.*, 353 F. Supp. 1072 (W.D. Pa.), *aff'd*, 487 F.2d 953 (3d Cir. 1973), a federal district court based its refusal to dismiss an antitrust claim on the assumption that local real estate loans increase a lending institution's assets and then "make their way through the normal course of the banking business into interstate commerce." *Id.* at 1075; *see Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 1974-1 Trade Cas. ¶ 74,927 (E.D. Pa. 1973), where the court found "the magnitude of the mortgage business in Eastern Pennsylvania must necessarily have impact on inter-state commerce . . ." *id.* at 96,153.

168. 123 F. Supp. 251 (N.D. Ill. 1954).

169. *Id.* at 256.

in *Goldfarb* had a substantial impact on the flow of commerce is a close one. The district court, after an extensive factual analysis, concluded that they did,¹⁷⁰ and the law is too unsettled to say that the lower court's decision was incorrect. The Fourth Circuit avoided this factual inquiry by examining the purpose of the restraint and reached a contrary result. The better-reasoned and more recent case law dealing with the medical profession suggests that the *Goldfarb* court erred in failing at least to examine the data which the trial court found dispositive, although admittedly other medical-antitrust cases have adopted a conclusory approach to the jurisdictional issue similar to that adopted in *Goldfarb*.

E. *The Question of Severability*

If a court finds that a legal fee schedule violates the Sherman Act, a bar association might try to sever the offending part in order to save the rest of the schedule. This division might be made by dividing legal services into interstate and intrastate segments. The concept of severability has frequently been applied in antitrust cases where a product is sold both in interstate and local trade. When this doctrine is applied, its effect is to allow a seller to continue to restrain trade for those transactions which he can label "intrastate." The severability concept was developed in 1899 when the Supreme Court modified a decree of the Sixth Circuit because the lower court's order would have reached intrastate as well as interstate activity. The Court held in *Addyston Pipe & Steel Co. v. United States*¹⁷¹ that Congress "does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate."¹⁷² The circuit court had issued a decree prohibiting a price-fixing scheme among six steel pipe producers.¹⁷³ The Supreme Court upheld the order, but limited its application to interstate sales, leaving the scheme intact with regard to sales by each producer within the state of manufacture.¹⁷⁴ In 1930, the Ninth Circuit reiterated the proposition that intrastate and interstate aspects of a business must be treated separately:

Business may be and usually is composed of both intrastate and interstate operations. The fact that these operations are conducted by a

170. See note 136 *supra*.

171. 175 U.S. 211 (1899).

172. *Id.* at 247.

173. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898).

174. 175 U.S. at 247.

single corporation or individual does not make the entire business so conducted either interstate commerce, or intrastate commerce. The character of the business is determined by the particular transactions involved and the respective jurisdiction of the federal and state governments is determined thereby.¹⁷⁵

Thus, the Supreme Court and lower federal courts have been consistent in their recognition that activities of a business or individual are severable for purposes of determining applicability of federal antitrust provisions.

The severability cases, however, all dealt with alleged restraints "in the flow" of commerce; the courts have not carefully examined how the concept should function where a "substantial effect" is the jurisdictional basis. If the "affectation" approach indeed does expand the reach of the Sherman Act, the statute may now reach activity which would have been severable under the "flow" test. Careful scrutiny of the "affectation" test reveals that it does erode some of the jurisdictional defenses afforded defendants by severability. The early cases make it manifestly clear that activities brought under the Sherman Act because they are in the flow of commerce can and must be segregated from activities of the same type which do not enter the stream of interstate commerce. But the substantiality test brings each of an entire class of activities within the scope of the Sherman Act if that class, considered as a whole, has the requisite effect on commerce. Thus, if a class of sales or services substantially affects commerce, then any restraint on those sales or services is illegal. A court may be unable to segregate those activities which have a "substantial" effect from those which do not, because the test affords no such precision and because jurisdiction is expanded to reach the entire class.¹⁷⁶

The result, as applied to minimum fee schedules, might mean that a bar association could not take advantage of the severability doctrine to salvage portions of a fee schedule setting prices for services with a *de minimis* impact on interstate commerce; the whole schedule would fall if the requisite effect was found with respect to the schedule

175. *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742, 753 (9th Cir. 1936); see *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614 (S.D.N.Y. 1953) (severability acknowledged in a Clayton Act suit).

176. "Substantiality," regardless of the court's precise definition of the term, would have no meaning in relation to the total activity of a defendant or group of defendants if each class of challenged activity could be severed into two distinct subclassifications. By simply segregating any part of the challenged activity which had no visible effect on commerce, the court could quickly define a class consisting only of *specific* transactions with an effect on commerce; thus, there would be no use for the aggregative substantiality concept.

as a whole.¹⁷⁷ The items in the minimum fee schedules might still be severed, however, if the court were to narrow its definition of the class of activities which has a substantial effect in any given case. In *Goldfarb*, for example, the court might have defined the class as either title searches or as legal services in general. Use of the more general classification, as the Justice Department implicitly urges,¹⁷⁸ would seem to eliminate severability as a useful tool for defendant bar associations. But a narrower classification would permit the bar associations to argue that other legal activities, essentially different "products," should be severed from title searches for jurisdictional purposes.

The *Goldfarb* court felt "some aspects of the practice of law are uniquely intrastate," citing as examples state criminal prosecutions and trials of criminal cases.¹⁷⁹ It is indeed difficult to discover an interstate impact resulting from an attorney's defense of a typical criminal case involving no theft of interstate goods. Similarly, a divorce action, assuming the absence of securities or other interstate property in the settlement, would have no discernible interstate effect. Preparation of wills, involving no property in another state, like representation in divorce cases, is a service frequently listed on fee schedules, and, like divorces, normally would not touch on interstate commerce. Advice on state income tax matters and civil commitment representations are other services for which one is hard-pressed to discover an impact on commerce among the states.¹⁸⁰ Thus, much of the business of the typical general practitioner might be severed from those legal activities that affect commerce, and he could continue to enjoy the benefits of a fee schedule which would cover most of his work. Other attorneys whose practice is more specialized and more clearly exerts an interstate impact are less likely to rely on fee schedules to provide a support for their income, and for them the practical effect of discarding the fee schedule may therefore be limited.

Despite the potential utility of severability, the Fourth Circuit did not examine the issue in *Goldfarb*, concluding that a fee schedule must be treated as an integral unit.¹⁸¹ While the confusion brought about by the interaction of the severability doctrine and "affectation" test leaves

177. See note 132 *supra* and accompanying text.

178. Complaint in *United States v. Oregon State Bar*, Civil No. 74-362 (D. Ore., filed May 9, 1974).

179. 497 F.2d at 17 & n.52.

180. Another factor which may play a key role in the jurisdictional determination is geography. The quantitative impact of legal services on interstate trade will be greater in a multi-state metropolitan area like Washington, New York, or St. Louis than in a small town in central Texas.

181. 497 F.2d at 17 n.52.

the severability of fee schedules in doubt, it would seem that an analysis based on the concept of severability and recognizing each item on the schedule as a separate "product" might well have led to the result that the *Goldfarb* court wanted to reach, while allowing the court to maintain a greater degree of intellectual integrity.

III. THE "LEARNED PROFESSION" AND "NON-COMMERCIAL PURPOSE" EXEMPTIONS

The activities of bar associations in promulgating minimum fee schedules may be exempt from the antitrust laws, even though they are interstate in nature, under the so-called "learned profession" doctrine¹⁸² or, alternatively, under the theory that the fee schedules are valid because they have an essentially "noncommercial" purpose.¹⁸³ Careful consideration of the cases said to support these two exemptions and other cases from related areas compels the conclusion that neither exemption can properly be used today to shield bar association fee schedules.

A. The "Learned Profession" Exemption¹⁸⁴

No federal statute has ever expressly exempted the "learned pro-

182. See *Riggall v. Washington County Medical Soc'y*, 249 F.2d 266 (8th Cir. 1957). But see *United States v. American Medical Ass'n*, 110 F.2d 703 (D.C. Cir.), cert. denied, 310 U.S. 644 (1940).

183. See *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970).

184. No court that has applied the "learned profession" exemption has enumerated the occupations included within its scope. For the purposes of this section it will be assumed that, at the least, medicine and law are "learned professions."

For varying treatments of the "learned profession" exemption, see 16F J. VON KALINOWSKI §§ 49.01-.02; Coleman, *The Learned Professions*, 33 ABA ANTITRUST L.J. 48 (1967).

Recently, the New York Court of Appeals held *In re Estate of Freeman*, 34 N.Y.2d 1, 311 N.E.2d 480, 355 N.Y.S.2d 336 (1974), that the Donnelly Act, N.Y. GEN. BUS. LAW §§ 340 *et seq.* (McKinney 1968), New York's antitrust law, did not apply to the practice of law. The court explained that "the issue, as it would be under Federal antitrust law, is whether the legal profession is a business or trade." 34 N.Y.2d at 7, 311 N.E.2d at 483, 355 N.Y.S.2d at 339. The court answered this question negatively, saying, "The history and purpose of the legal profession and the professional associations supports the view that the profession is not included within the terms 'business or trade' as used in section 340 of the General Business Law." *Id.* at 8, 311 N.E.2d at 483, 355 N.Y.S.2d at 340. The court added that if the legislature wanted to reach fee schedules, it could use a specific statute or the "court rules and controls within the existing scheme for judicial oversight of the Bar" which, in the court's view, would be more expeditious, effective, and direct than the "comparatively clumsy device of antitrust law enforcement." *Id.* at 9, 311 N.E.2d at 484, 355 N.Y.S.2d at 340.

Of course, a state court acting to construe a state antitrust law in harmony with a state-approved minimum fee schedule has greater latitude than a federal court faced

fessions" from the scope of the federal antitrust laws. The basis of the supposed exemption is the concept that the practice of such professions does not constitute "trade or commerce" within the meaning of the Sherman Act. Proponents of the exemption attempt to draw a negative inference from the language of the Sherman Act: since the Act specifically mentions "trade or commerce," any activity which is not "trade or commerce" was not intended to fall within the scope of the Act. The implication of this position is that either the Sherman Act established a jurisdictional definition less inclusive than the commerce clause of the Constitution, or that professional activities are not the sort of "commerce" constitutionally necessary for the exercise of federal jurisdiction. While the Fourth Circuit in *Goldfarb* did not hold that persons practicing the learned professions were exempt from all prosecution under the Sherman Act,¹⁸⁵ it did hold that when the activity allegedly restrained—in that case, the practice of law—did not constitute "trade or commerce," there could be no violation of the Sherman Act. The proposition that the practice of law is exempt from the Sherman Act because it does not constitute "trade or commerce" within the meaning of the Act is drawn from two distinct lines of cases, one beginning with *Federal Baseball Club v. National League of Baseball Clubs*¹⁸⁶ and the other with *FTC v. Raladam Co.*¹⁸⁷

B. Federal Baseball and Its Progeny

Federal Baseball is the case most often cited to support the contention that the Sherman Act was meant to apply only to "trade or commerce" and that in choosing those words Congress intended to exempt certain activities from the reach of the measure. In holding that baseball was not "trade or commerce" within the meaning of the Sherman Act, the Court said that "the [baseball] exhibition, although made for money, would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendants, personal effort, not related to production, is not a subject of commerce."¹⁸⁸

with a conflict between federal and state rules. In the latter case, harmonization may be precluded by the supremacy clause.

185. In *Goldfarb*, it was alleged that the bar association fee schedule restrained not only the practice of law but also the interstate housing financing market. It is clear that restraint of the housing financing market would not qualify for the "learned profession" exemption. See *American Medical Ass'n. v. United States*, 317 U.S. 519 (1943). Thus, the *Goldfarb* court was forced to excuse the housing restraint on the ground that no interstate commerce was affected. 497 F.2d at 15-19.

186. 259 U.S. 200 (1922).

187. 283 U.S. 643 (1931).

188. 259 U.S. at 209. In offering illustrations to support its position, the Court referred to the legal profession: "[A] firm of lawyers sending out a member to argue

The holding in the case led to the inference that Congress had intended to exclude certain activities, including baseball, from the scope of the Sherman Act by establishing the requirement that activities regulated must be "trade or commerce."

Those who read the case to mean that the regulated activity must be a form of "trade or commerce" that is defined more narrowly than "commerce" as it is used in the Constitution¹⁸⁹ fail to consider subsequent statements by the Court that

[a] consideration of the history of the period immediately preceding and accompanying the passage of the Sherman Act and of the mischief to be remedied, as well as the general trend of the debate in both houses, sanctions the conclusion that Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed.¹⁹⁰

While "all the power it possessed" has meant different things during different periods, the statement clearly undermines the theory that Congress meant for the jurisdiction of the Sherman Act to be narrower than that under the Constitution—*i.e.*, that it meant to exercise *less* than "all the power it possessed." If Congress did use the full extent of its power in enacting the Sherman Act, the logical interpretation of *Federal Baseball* is that the Court was holding that baseball in 1922 did not meet the constitutional requirements for the exercise of federal power under the commerce clause. This interpretation is plausible because the word "commerce" has not always been given the broad sweep afforded it today.¹⁹¹ *Federal Baseball* was itself a product of the narrower interpretation of "commerce" that was not entirely abandoned until the 1930's.¹⁹² Thus, while in 1922 baseball may not have

a case . . . does not engage in commerce because the lawyer . . . goes to another state." *Id.* While this language may be cited to support the contention that the Court does not consider the practice of law "commerce" within the Sherman Act, it is clearly dictum and its effect on any decision by the Court today would likely be minimal.

189. See *Goldfarb v. Virginia State Bar*, 497 F.2d 1, 13 (4th Cir.), *cert. granted*, 95 S. Ct. 223 (1974); *Coleman*, *supra* note 184.

190. *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 435 (1932) (emphasis added).

191. See *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1894), which held that "interstate commerce" did not include either the manufacturing or production process, but only the actual sale of goods.

192. See *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 233 (1947) (suggesting that the old standards of "trade or commerce" persisted in certain applications as late as the 1930's).

The Sherman Act was not applied to personal services until the 1930's and later. See *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950); *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

been considered within the regulatory power of Congress, *Federal Baseball* cannot support an inference that Congress intended to limit the reach of the Sherman Act to an earlier and more restrictive interpretation of the commerce clause.¹⁹³

This conclusion is supported by the Court's decision in *Atlantic Cleaners & Dyers v. United States*,¹⁹⁴ which arose under section three of the Sherman Act,¹⁹⁵ a provision dealing with the District of Columbia. The Court assumed, without deciding, that while Congress exercised all its power in passing section one of the Act,¹⁹⁶ that power was necessarily circumscribed by the commerce clause and therefore would not (when the *Atlantic Cleaners* case was decided in 1932) reach the defendant's cleaning and dyeing activities.¹⁹⁷ Congress' constitutional power to regulate activities in the District of Columbia was, however, plenary and thus any barrier to reaching the defendants' Washington operations would have to be implied from the language of section three of the statute, which contains the same "trade or commerce" phrasing as does section one. The defendants argued that the restrictive interpretation of "trade or commerce" enunciated in section one cases like *Federal Baseball* should logically be applied to the identical language in section three. The Court disagreed on the ground that the earlier limitations on section one jurisdiction were mandated only by the contours of the commerce clause and not the language or intent of Congress and thus should not be applied.¹⁹⁸

This interpretation of *Federal Baseball* is further supported by a review of the Court's subsequent treatment of the case. The *Federal Baseball* exemption has not been extended to other activities. This refusal to extend *Federal Baseball* is consistent with the thesis that the case concluded only that baseball was not within the scope of the commerce power in 1922: the Court could subsequently find that the definition of "commerce" had broadened and activities similar to baseball were, thus, within the scope of federal power.

In *Toolson v. New York Yankees*,¹⁹⁹ the Court reaffirmed *Federal*

193. See Note, *The Applicability of the Sherman Act to Legal Practice and Other "Non-commercial" Activities*, 82 YALE L.J. 313, 322-23 (1972).

194. 286 U.S. 427 (1932).

195. 15 U.S.C. § 3 (1970).

196. 286 U.S. at 435.

197. *Id.* at 433.

198. In fact, the use of the phrase "trade or commerce among the several states" probably stemmed from a congressional awareness of the constitutional limitations that would have to be placed on a "restraint of trade" doctrine in a federal statute. See H. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 222 n.151 (1955).

199. 346 U.S. 356 (1953).

Baseball, partially on the ground that Congress tacitly approved the case because it failed to legislatively modify the holding in the thirty years following it. In its per curiam opinion, the *Toolson* Court indicated that “[w]ithout reexamination of the underlying issues” it would adhere to the conclusion “that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.”²⁰⁰ However, the dissent understood the Court to be reaffirming *Federal Baseball* on the basis that baseball was still not commerce in 1953: “Whatever may have been the situation when the *Federal Baseball Club* case was decided in 1922, I am not able to join today’s decision which in effect, announces that organized baseball, in 1953, still is not engaged in interstate trade or commerce.”²⁰¹

In light of the Court’s strikingly dissimilar treatment of cases involving activities factually almost identical to professional baseball, it is now clear that *Toolson* rests almost solely on the principle of stare decisis. In one case²⁰² the Court refused to apply *Federal Baseball* to the business of producing, booking, and presenting legitimate theatrical attractions on a multistate basis, despite the fact that the actual presentation of a theatre attraction takes place locally in the same manner as a baseball game. The existence of certain interstate commercial transactions, insufficient in *Federal Baseball* to warrant application of the antitrust laws, was sufficient for a finding that “interstate commerce” included the business of producing theatrical attractions. In a companion case,²⁰³ the Court found that *Federal Baseball* did not apply to the multistate promotion of professional boxing contests. Acknowledging that a boxing match was essentially a local matter, the Court held that the local nature of the activity was immaterial to the commerce determination where there existed some related interstate commercial transactions.²⁰⁴

Finally, in refusing to apply the *Federal Baseball* ruling to professional football,²⁰⁵ the Court acknowledged its strong reservations about the baseball exemption: “If [the refusal to apply the baseball exemption to football] is unrealistic, inconsistent, or illogical, it is sufficient to answer . . . that were we considering the question of baseball for the first time upon a clean slate we would have no doubts.”²⁰⁶ Pointing

200. *Id.* at 357.

201. *Id.* (Burton, J., dissenting).

202. *United States v. Shubert*, 348 U.S. 222 (1954).

203. *United States v. International Boxing Club*, 348 U.S. 236 (1955).

204. *Id.* at 241.

205. *Radovich v. National Football League*, 352 U.S. 445 (1957).

206. *Id.* at 452.

to the practical problems in overruling *Federal Baseball*, the *Radovich* Court said that it would give the case only the narrowest possible application.²⁰⁷ In *Flood v. Kuhn*,²⁰⁸ the Court frankly acknowledged that the sports cases conflict:

Accordingly, we adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball. We adhere also to *International Boxing* and *Radovich* and to their respective applications to professional boxing and professional football. If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by Congress and not by this Court.²⁰⁹

An examination of the cases following *Federal Baseball* thus demonstrates that any reliance on the decision as supporting the existence of an antitrust exemption for the "learned professions" is misplaced. To attempt to justify the existence of a "learned profession" exemption on the basis of a case considered today to be an aberration, as the *Goldfarb* court did,²¹⁰ is plausible but fallacious.

C. *The Practice of Law as "Commerce"*

If *Federal Baseball* is properly interpreted and it is accepted that Congress "exercised all the power it possessed" in passing the Sherman Act,²¹¹ then the "learned profession" exemption can exist today only if Congress still does not have the power to regulate the interstate aspects of the practice of law because it does not constitute "commerce" in the constitutional sense and the activities of bar associations do not have a restraining effect on some other sector of the economy that is sufficiently "commercial." The Supreme Court has never directly answered the question of whether the practice of the "learned professions" is "commerce"²¹² and the circuit courts have split on the issue.²¹³

207. *Id.* at 451. In *Haywood v. National Basketball Ass'n*, 401 U.S. 1204 (1971), the Court refused to exempt professional basketball from the antitrust laws.

208. 407 U.S. 258 (1972).

209. *Id.* at 284.

210. 497 F.2d at 13.

211. *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 435 (1932).

212. In these instances where members of a "learned profession" have been found to have violated federal antitrust laws, the Court has based its decision on the fact that they had restrained some other "commercial" business. See *American Medical Ass'n v. United States*, 317 U.S. 519, 528 (1943).

213. In *Riggall v. Washington County Medical Soc'y*, 249 F.2d 266, 268 (8th Cir. 1957), the Eighth Circuit refused to apply the Sherman Act to a local medical society, basing its decision partially on the ground that the practice of medicine was not "trade or commerce" within the meaning of the Sherman Act. On the other hand, in *United States v. American Medical Ass'n*, 110 F.2d 703, 712 (D.C. Cir.), *cert. denied*, 310 U.S. 644 (1940), the District of Columbia Circuit refused to sustain the defendant's demurrer

However, the Supreme Court has made several decisions relevant to a consideration of the problem.

The first case to suggest that the practice of a profession might not be "commerce" within the meaning of the antitrust laws was *FTC v. Raladam Co.*,²¹⁴ decided by the Court in 1931. The action in that case was brought under the Federal Trade Commission Act.²¹⁵ The respondent had been ordered by the FTC to cease representing his "obesity cure" as a scientific method of treating obesity. The Supreme Court refused to uphold the order, finding that there was no showing of injury to competition in the record,²¹⁶ and thus, that the Commission was without jurisdiction.²¹⁷ Nevertheless, the Court went on to discuss in dictum the possibility that the medical profession might have been an injured competitor: "Of course, medical practitioners, by some of whom the dangers of using the remedy without competent advice was exposed, are not in competition with respondent. *They follow a profession and not a trade*, and are not engaged in the business of making or vending remedies, but in prescribing them."²¹⁸ It is this language that is often cited in support of the contention that lawyers are not engaged in "trade or commerce."²¹⁹ However, while the quoted language is strong, it does not state the holding of the case. Further, the issue under discussion was whether doctors would have been proper *plaintiffs*,²²⁰ while in the bar association cases the question is whether lawyers are proper *defendants*.

To determine the weight to be given the language in *Raladam*, it

based, in part, on the contention that the practice of medicine did not constitute a "trade" within the meaning of section three of the Sherman Act.

214. 283 U.S. 643, 653 (1931). The Fourth Circuit in *Goldfarb* placed heavy reliance on the language of *Raladam* in finding a "learned profession" exemption. 497 F.2d at 13.

215. See 15 U.S.C. § 45 (1970). The fact that the case arose under the Federal Trade Commission Act rather than the Sherman Act is not significant since the Federal Trade Commission Act is to be construed *in pari materia* with the Sherman Act. *American Cyanimid Co. v. FTC*, 363 F.2d 757, 770 (6th Cir. 1966); see *Atlantic Ref. Co. v. FTC*, 344 F.2d 599, 605 (6th Cir.), *cert. denied*, 382 U.S. 939 (1965).

216. It appears that the FTC assumed that there was an injury to the medical profession but made no attempt to show it. See *Raladam Co. v. FTC*, 42 F.2d 430 (6th Cir. 1930); *Raladam Co.*, 12 F.T.C. 363 (1927).

217. The Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.* (1970), requires, for jurisdiction, a showing of actual injury to *competition*, while under the Sherman Act it is sufficient that *anyone* is injured in his "business or property." 15 U.S.C. § 15 (1970).

218. 283 U.S. at 653 (emphasis added).

219. See *Goldfarb v. Virginia State Bar*, 497 F.2d 1, 13 & n.33 (4th Cir.), *cert. granted*, 95 S. Ct. 223 (1974).

220. Actually, private parties could not have been plaintiffs under the Federal Trade Commission Act. See note 48 *supra*. Thus the issue, more precisely stated, was whether the FTC could invoke its jurisdiction *on behalf of* injured doctors.

is necessary to examine the courts' subsequent treatment of the professions. The first case following *Raladam* to mention the relationship of the "learned professions" to the antitrust laws was *Atlantic Cleaners & Dyers, Inc. v. United States*,²²¹ in which the Court held that cleaners and dyers were engaged in trade and that a combination among them to maintain prices in the District of Columbia was a violation of section three of the Sherman Act. To support its decision, the Court quoted a passage from an earlier opinion in *The Nymph*²²² by Justice Story which dealt with the broad scope of the word "trade."

[T]he word 'trade' is often and, indeed, generally used in a broader sense, as equivalent to occupation, employment, or business, whether in a manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a *trade*.²²³

The last line has been said to support the existence of a "learned profession" exemption.²²⁴ Such a reading is inappropriate since the *Atlantic Cleaners* Court was considering only the question of whether "trade" was broad enough to include cleaners and dyers.²²⁵ The *Nymph* quotation was used to support an extension of the definition of "trade or commerce" to activities not previously considered within the scope of the phrase, not to establish the limits of its application. The passing reference to the learned professions would seem to be of little significance.

In a second case during the 1930's, *Semler v. Oregon State Board of Dental Examiners*,²²⁶ the Court did recognize that it was undesirable for professionals to engage in some competitive practices. The case upheld an Oregon statute which prohibited a dentist from advertising to solicit patients. The opinion focused on whether the statute violated due process and equal protection rights under the fourteenth amendment, and the Court, in upholding the regulation, noted the state's interest in restraining professional advertising:

221. 286 U.S. 427 (1932).

222. 18 F. Cas. 506 (No. 10,388) (C.C.D. Me. 1834).

223. 286 U.S. at 436, quoting *The Nymph*, 18 F. Cas. 506 (No. 10,388) (C.C.D. Me. 1834). The Court later cited the same language in *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 490-91 (1950).

224. *Goldfarb v. Virginia State Bar*, 497 F.2d 1, 13 & n.35 (4th Cir.), cert. granted, 95 S. Ct. 223 (1974).

225. "We think the word 'trade' was used in § 3 of the Sherman Act in the general sense attributed to it by Justice Story and, at least, is broad enough to include the acts of which the Government complains." 286 U.S. at 437.

226. 294 U.S. 608 (1935).

The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, . . . but against practices which would tend to demoralize the the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards.²²⁷

In a later decision, the Court reiterated that the ethical considerations involved in the practice of a profession might require different treatment of business and professional activities.²²⁸

In 1943, the Court was directly faced with the question of whether a "learned profession" exemption existed, but avoided answering it.²²⁹ The Court upheld the conviction of the American Medical Association for conspiring to violate the Sherman Act by obstructing the development of Group Health, a private prepaid medical group. The AMA argued that the practice of medicine was not "trade or commerce" within the meaning of the Act. The Court found it unnecessary to confront this argument²³⁰ and went on to hold that the AMA was subject to the Sherman Act in the instant case since "the calling or occupation of the individual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was such obstruction and restraint of the business of Group Health."²³¹ The decision made clear that when members of a learned profession con-

227. *Id.* at 612.

228. *United States v. Oregon State Medical Soc'y*, 343 U.S. 326 (1951). The Court said, "We might observe in passing, however, that there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary matters." *Id.* at 336. The case involved the charge that doctors conspired to restrain and monopolize the business of providing prepaid medical care in the state of Oregon. However, the case has limited precedential value because the Court concluded that "no concerted refusal to deal with private health associations has been proved, [so] we need not decide whether it would violate the antitrust laws." *Id.*

229. *American Medical Ass'n v. United States*, 317 U.S. 519 (1943). The case arose under section three of the Sherman Act, which applies to restraints of trade in the District of Columbia and the territories, rather than under section one. The distinction, however, is not relevant to the present question since the issue in the case was the definition of "trade or commerce" and not whether an admittedly "commercial" activity was "interstate."

230. The Court explained, "Much argument has been addressed to the question of whether a physician's practice of his profession constitutes trade under § 3 of the Sherman Act. In light of what we shall say with respect to the charge laid in the indictment, we need not consider or decide the question." *Id.* at 528.

231. *Id.* It was suggested in *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc.*, 432 F.2d 650, 654 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970), that the *American Medical Association* case required a showing of both a "purpose" and "effect" to restrain commerce.

spire to restrain "non-professional" commerce, they are fully subject to the provisions of the Sherman Act notwithstanding their occupation. The unanswered question was whether a restraint on the practice of a profession by its own members is within the reach of the Act.²³²

*United States v. National Association of Real Estate Boards*²³³ is the case most damaging to the contention that there is a professional exemption from the Sherman Act, although the defendants in this case probably would not fall within the ambit of the "learned professions." The Court had previously suggested that the Sherman Act was intended to reach the suppression of competition in the marketing of both goods and services, rejecting the prevailing assumption that the Act could be applied only to "trade or commerce" involving tangible goods.²³⁴ This broadened concept of the purpose of the Sherman Act became the basis of the Court's decision in *United States v. National Association of Real Estate Boards*.²³⁵

The Court held that the Washington Real Estate Board violated the Act by adopting a fee schedule for the various services performed by a realtor. To the contention that the personal services offered by a real estate broker did not come within the meaning of "trade or commerce," the Court replied:

The fact that the business involves the sale of personal services rather than commodities does not take it out of the category of "trade" within the meaning of § 3 of the Act. The Act was aimed at combinations organized and directed to control of the market by suppression of competition "in the marketing of goods and services."²³⁶

The Court went on to cite again the language of Justice Story from *The Nymph* describing the broad nature of "trade."²³⁷ Justice Douglas carefully noted that the Court did "not intimate an opinion on the cor-

232. While it was alleged in *Goldfarb* that bar association fee schedules restrained the interstate housing market, the court applied the "learned profession" exemption only to the alleged restraint of the practice of law. 497 F.2d at 15. It would appear that if the housing restraint had not been excused on the ground that it was not "interstate," the bar association fee schedules would have been subject to the antitrust laws under *American Medical Association*. See note 185 *supra* and accompanying text.

233. 339 U.S. 485 (1950).

234. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940). Until personal services were held to be within the scope of the Sherman Act, it was difficult to contend that the practice of a doctor or lawyer was subject to the law's restrictions. Thus, early cases must be examined with caution.

235. 339 U.S. 485 (1950).

236. *Id.* at 490.

237. *Id.*, quoting *The Nymph*, 18 F. Cas. 506 (No. 10,388) (C.C.D. Me. 1834). See note 223 *supra* and accompanying text.

rectness of the application of the term to the professions."²³⁸ Nevertheless, the effect of the decision was to undermine the argument that an exemption existed. The holding that the sale of nonprofessional personal services, absent the manufacture, purchase, or sale of goods *does* constitute a "trade" would appear difficult to distinguish, for any line drawn between "professional" and "nonprofessional" personal services would clearly have to be arbitrary. The Supreme Court might find it awkward to justify an exemption for doctors and lawyers, while architects,²³⁹ realtors,²⁴⁰ engineers,²⁴¹ pharmacists,²⁴² and accountants²⁴³ have allowed the Justice Department to obtain consent judgments against them and thus given up their claims to exemption.²⁴⁴ In addition, the Court specifically found that fee schedules used by the Washington Real Estate Board were a restraint of trade under the Sherman Act.²⁴⁵

Further doubt is cast upon the viability of distinguishing between professional and nonprofessional services by a decision which held that price schedules published by an association of pharmacists selling pre-

238. 339 U.S. at 492.

239. *See, e.g.*, United States v. American Institute of Architects, 1972 Trade Cas. ¶ 73,981 (D.D.C. 1972).

240. *See, e.g.*, United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950); United States v. Cleveland Real Estate Bd., 1972 Trade Cas. ¶ 74,020 (N.D. Ohio 1972); United States v. Long Island Bd. of Realtors, Inc., 1972 Trade Cas. ¶ 74,068 (E.D.N.Y. 1970).

241. *See, e.g.*, United States v. American Soc'y of Civil Eng'rs, 1972 Trade Cas. ¶ 73,950 (S.D.N.Y. 1972).

In United States v. National Soc'y of Professional Eng'rs, 43 U.S.L.W. 2269 (D.D.C. Dec. 12, 1974), the district court refused to exonerate engineers from Sherman Act liability on the basis of the "learned profession" exemption.

The concept of a learned profession exception to the antitrust laws is of dubious validity in view of the repeated reluctance of federal courts to recognize it as a legitimate exception to the Sherman Act. It would be a very dangerous form of elitism, indeed, to dole out exemptions to our antitrust laws merely on the basis of the educational level needed to practice a given profession

Id.

The court went on to note that engineers would not qualify for an exemption anyway, because of the business nature of professional engineering. *Id.*

242. *See, e.g.*, Northern Cal. Pharmaceutical Ass'n v. United States, 306 F.2d 379 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962); United States v. Utah Pharmaceutical Ass'n, 201 F. Supp. 29 (D. Utah), *appeal dismissed*, 306 F.2d 493 (10th Cir.), *aff'd mem.*, 371 U.S. 24 (1962).

243. *See, e.g.*, United States v. American Institute of Certified Pub. Accountants, Inc., 1972 Trade Cas. ¶ 74,007 (D.D.C. 1972).

244. A consent decree has the same force and effect as a litigative judgment, except that it may not be used as prima facie evidence of a violation in a subsequent civil proceeding. *See* 15 U.S.C. § 16(a) (1970). If the Supreme Court had created an antitrust exemption broad enough to encompass the groups enumerated in the text, they could petition for a modification of the decrees under FED. R. CIV. P. 60(b)(5). However, barring such action, the groups would be subject to the provisions of the decrees.

245. 339 U.S. at 488.

scription drugs violated section one of the Sherman Act.²⁴⁶ The District Court for the District of Utah flatly stated that "the mere circumstance that goods in commerce are treated or handled by, or otherwise connected with, a learned profession does not remove the goods themselves, nor transactions affecting them, from the applicability of the Sherman Act."²⁴⁷ The Supreme Court affirmed per curiam, upholding the outcome, if not the rationale, of the lower court decision.²⁴⁸ Thus, for the first time a professional association was found to be restraining trade when engaged in activities related to its own profession. While it might be argued that the pharmacists were restraining the sale of drugs rather than the practice of their own profession, such an argument cannot stand when examined closely. The drugs which a pharmacist dispenses are the product of the practice of his profession, as much as a will or a deed is the product of the practice of the legal profession.²⁴⁹ In most states only a licensed pharmacist can sell drugs; thus, the practice of pharmacy and the legal sale of drugs are one and the same. To hold that the sale of drugs is something separate from the profession of pharmacy would be to say that the practice of a profession is different from the profession itself.

The Supreme Court has not analyzed the policy reasons that might justify the creation of an exemption for members of the "learned professions." The lower courts have developed this concept from rather offhand dicta. It is now clear that activities of professionals that have a restraining effect on other businesses are not protected by any exemption.²⁵⁰ The Supreme Court has yet to rule directly on the question of whether it will recognize an antitrust exemption for professionals when the effect of their activity restrains only the practice of their own profession. Although policy arguments can be advanced in favor of an exemption, these arguments might more appropriately be addressed to a legislative body; and in any event they are unconvincing where price-fixing is the alleged offense.

[P]olicy arguments, of course, deserve serious consideration. There are indeed many factors which might convince a lawmaking body that the legal profession should not be subjected to all of the rigor of the Sherman Act. However, the creation of exemptions to the Sherman Act is the province of Congress, not the courts. . . .

246. *United States v. Utah Pharmaceutical Ass'n*, 201 F. Supp. 29 (D. Utah), *appeal dismissed*, 306 F.2d 493 (10th Cir.), *aff'd mem.*, 371 U.S. 24 (1962).

247. 201 F. Supp. at 33.

248. *Utah Pharmaceutical Ass'n v. United States*, 371 U.S. 24 (1962).

249. "[A] pharmacist in filling a prescription is engaged in the practice of a learned profession" 201 F. Supp. at 33.

250. *See American Medical Ass'n v. United States*, 317 U.S. 519, 528 (1943).

Furthermore, the argument for exempting price-fixing activities of a "learned profession" is significantly weaker than the argument for exemption of other professional activities. Price-fixing is a per se violation of the Sherman Act. . . . Most restraints of competition are subject to the "Rule of Reason," which calls for balancing the various harms and benefits occasioned to the public by the conduct in question. Thus, even though fee schedules are not immune from Sherman Act scrutiny, the professional bans on solicitation and advertising may still survive—if the public benefit from these ethical canons outweighs the competitive harm.²⁵¹

Thus reasoned the District Court for Oregon in rejecting the *Goldfarb* court's view and refusing to exonerate the Oregon State Bar on the basis of a supposed "learned profession" exemption.

D. The "Noncommercial Purpose" Exemption

The decision in the *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.*²⁵² raises the possibility that application of the antitrust laws to bar association fee schedules may be limited to the extent that the schedules have a "noncommercial purpose." *Marjorie Webster* involved a suit by a profit-making junior college against a regional college accreditation association made up of competing non-profit educational institutions. The college sought to enjoin enforcement of a rule denying accreditation to schools operated for profit without an inquiry into the quality of the education that they offered.²⁵³ One of the plaintiff's contentions was that the association's accreditation procedures violated the Sherman Act. The court found that the regional accrediting association had an essentially "noncommercial purpose" and therefore held that the antitrust laws were inapplicable to its activities.²⁵⁴ Relying on

251. *United States v. Oregon State Bar*, 43 U.S.L.W. 2234 (D. Ore. Nov. 25, 1974).

252. 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970). The *Marjorie Webster* "noncommercial purpose" doctrine should be distinguished from that developed earlier by several writers to protect expressive activities such as consumer boycotts. See Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247; Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW U.L. REV. 705 (1962).

253. 432 F.2d at 653.

254. *Id.* at 655. An exemption based on the theory that the *restrained* activity did not constitute "trade or commerce" within the meaning of the Sherman Act (*i.e.*, the "learned profession" exemption) was unavailable since the junior college, the alleged object of the restraint, operated for profit and thus was clearly engaged in "trade or commerce."

The court's resort to an inquiry into the purpose of the restraint is reminiscent of the "dominant purpose to affect interstate commerce" test adopted by some courts to avoid an otherwise inescapable finding that a restraint has an interstate effect. See notes 133-48 *supra* and accompanying text.

a presumed congressional intention that not all activities were to fall within the scope of the Sherman Act, the court asserted:

[T]he proscriptions of the Sherman Act were "tailored . . . for the the business world," not for the non-commercial aspects of the liberal arts and learned professions. In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant applications of the antitrust laws.²⁵⁵

In reaching its conclusion, the court seemed to rely on language in *Eastern Railroad Presidents' Conference v. Noerr Motor Freight* that the Sherman Act was "tailored for the business world."²⁵⁶ An examination of that case shows the phrase to be taken totally out of context. The full sentence reads, "The proscriptions of the Act, tailored as they are for the business world, are not appropriate for application in the political arena."²⁵⁷ *Eastern Railroad* dealt with the right of individuals to lobby for legislation, even though motivated by their commercial interests. The antitrust exemption for political activities is prompted by the constitutional problems that would arise if the Sherman Act were allowed to interfere with the constitutional right of free speech and the ability of individuals to communicate with their elected representatives. Cases articulating this exemption cannot be relied upon to support the contention that a "noncommercial purpose" exemption exists where no political activities are involved. To buttress its concept of the limitations of the Sherman Act, the *Marjorie Webster* court also cited²⁵⁸ language from *Klor's, Inc. v. Broadway-Hale Stores, Inc.*²⁵⁹ which described the antitrust exemption granted labor unions. On this point, the *Klor's* opinion stated: "The Court in *Apex* recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives."²⁶⁰ However, an examination of *Apex Hosiery Co. v. Leader*²⁶¹ reveals that the Sherman Act's limited application to labor unions is based upon explicit congressional enactments regarding unions,²⁶² not upon a "perceived intent" of the Sherman Act.²⁶³ There has been no legislation re-

255. *Id.* at 654 (footnotes omitted).

256. 365 U.S. 127, 141 (1961).

257. *Id.*

258. 432 F.2d at 654.

259. 359 U.S. 207 (1959).

260. *Id.* at 213 n.7.

261. 310 U.S. 469 (1940).

262. See Clayton Act § 6, 15 U.S.C. § 17 (1970).

263. 310 U.S. at 488. In fact, the Court pointed out that eleven bills were introduced

stricting the applicability of the Sherman Act to educational accrediting associations or the practice of law.

Marjorie Webster appears to be based principally on an erroneous inference drawn from the Supreme Court's statement in the *American Medical Association* case that "the calling or occupation of the . . . defendants is immaterial if the *purpose and effect* of their conspiracy" was to restrain commerce.²⁶⁴ The District of Columbia Circuit treated the case as establishing two separate elements necessary for the application of the antitrust laws: an anticompetitive "purpose" and an anticompetitive "effect." While the "effect" of the conspiracy in *Marjorie Webster* was anticompetitive, the court viewed its "purpose" as permissible. Of course, many anticompetitive schemes have *some* laudable purpose, and it was the difficulty of ferreting out the real or dominant purpose of a defendant's actions that led the Supreme Court in *United States v. Griffith*²⁶⁵ to hold that a defendant's purpose could be inferred from the natural consequences of his acts:

It is . . . not always necessary to find a specific intent to restrain trade or build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as a consequence of the defendant's conduct or business arrangements.²⁶⁶

Griffith suggests that only one element need be shown to establish anti-trust liability—an anticompetitive "purpose and effect" to be determined by examining the effect of the challenged activity. Thus, there would seem to be little foundation for *Marjorie Webster's* holding that a defendant may escape liability by demonstrating a sufficiently "non-commercial" (and therefore not anticompetitive) purpose.²⁶⁷

In support of the *Marjorie Webster* decision is the notion that a certain amount of professional self-regulation is acceptable and neces-

in Congress shortly after the passage of the Sherman Act, providing for exemption of labor from the Act; all failed to pass.

264. *American Medical Ass'n v. United States*, 317 U.S. 519, 528 (1943) (emphasis added).

265. 334 U.S. 100, 105 (1948).

266. *Id.*

267. It has been argued that failure to adopt something like a "noncommercial purpose" exemption might lead to antitrust liability for activities such as consumer boycotts of stores or products by civil rights groups. See 84 HARV. L. REV. 1912, 1916 (1971). There are several distinctions between the consumer boycott situation and that in *Marjorie Webster* which would justify exemptions for consumer actions. The boycott is generally ad hoc in nature, initiated by diverse individuals, and not the result of continuing associations. The consumers do not themselves engage in the sort of business being restrained (as did members of the accrediting association in *Marjorie Webster*). Finally, the consumer boycott action in many cases represents an expression of opinion which would be protected under the first amendment. See authorities cited in note 252 *supra*.

sary. It can be argued that *American Medical Association* did establish a separate "purpose and effect" test when dealing with the professions, and that *Griffith* would therefore be inapplicable. This argument is supported not by the case law but by what are believed to be paramount public policies. Government regulation of the profession may be deemed undesirable as too great an imposition on individual autonomy, yet it may still be important to insure the public some measure of protection against unscrupulous practices. In this scenario, the only alternative is self-regulation; there is thus a compelling need to permit it despite the language and interpretive history of the anti-trust laws. Of course, if the need to allow self-regulation is so compelling, surely Congress would recognize it and respond with appropriate legislation, as it has done for labor unions. However, in the absence of congressional action, it would seem inappropriate for a court to commit such drastic surgery on a statute.

Even if the *Marjorie Webster* court was correct in discerning a "noncommercial purpose" exemption from the antitrust laws, there are several reasons why such an exemption should not be extended to cover the promulgation of bar association fee schedules. First, bar association fee schedules are a form of price-fixing.²⁶⁸ To support its position that the Sherman Act was not intended to reach every restraint, the *Marjorie Webster* court had relied on *Standard Oil Co. v. United States*,²⁶⁹ but *Standard Oil* dealt with the "rule of reason," which the Supreme Court has rejected where price-fixing is concerned.²⁷⁰ Thus, the supposed "noncommercial purpose" limitation would apply only to situations where the restraint alleged is not price-fixing but one to which the "rule of reason" would apply. There is a hint in *Marjorie Webster* itself that had the restraint in that case been a per se violation like price-fixing, the outcome might have been different.²⁷¹ Since bar association fee schedules fix prices, and since price-fixing is a per se violation of the Sherman Act, fee schedules cannot be exempted from the anti-trust laws on the ground that they have a "noncommercial purpose."

A second reason that bar association fee schedules will not fall within any "noncommercial purpose" exemption is that, while many "noncommercial purposes" are cited for the fee schedules, their main

268. See notes 58-75 *supra* and accompanying text.

269. 221 U.S. 1, 59-60 (1911).

270. See notes 65-71 *supra* and accompanying text.

271. "Appellee does not suggest that appellant's accreditation activities constitute a *per se* violation of the Act, but only that the 'rule of reason' should apply." 432 F.2d at 653 n.7.

objective appears to be to provide a floor for lawyers' income above that which a competitive market would provide. Although other activities of bar associations might normally be considered to have a "noncommercial purpose," and hence be free from antitrust regulation under a "noncommercial purpose" exemption,²⁷² an examination of fee schedules leads to the conclusion that they have a clear commercial purpose.

Among the various justifications advanced for fee schedules are that they serve an informational function, both for lawyers and the public, that they avoid the ethical problem of solicitation that might arise if "price-shopping" for legal services was permitted, and that they protect the public from the lawyer who would take on a large number of cases at a low fee and then handle them incompetently.²⁷³ Several factors work against the presumption that fee schedules are designed solely to meet these problems. While fee schedules claim to be merely suggested or advisory, their violation may lead to disciplinary action.²⁷⁴ Further, fees are always expressed in terms of a minimum rate rather than an average rate or range of rates. Such measures would not seem necessary if the purpose of fee schedules was to provide a source of information. Solicitation in the form of advertising is at present effectively prohibited by independent sanctions.²⁷⁵ The problem of the lawyer who takes on more cases than he can handle exists today; it is not clear that the abolition of fee schedules would necessarily mean that the number of such lawyers would increase. Since the "noncommercial" reasons given for fee schedules are so unconvincing, the only remaining purpose to attribute to the schedules is the obvious one: providing a minimum income level for lawyers above that which would prevail in a free market. Of course, this objective is blatantly antithetical to the free-market philosophy underlying the Sherman Act, and is clearly anything but "noncommercial."

IV. THE STATE ACTION EXEMPTION

Even if a would-be antitrust plaintiff was able to demonstrate that the use of bar association minimum fee schedules restrains interstate commerce, and that the "learned profession" and "noncommercial purpose" exemptions are inapplicable, he would still have another barrier

272. Such activities might include regulation of admission to the bar and the accreditation of law schools.

273. See ABA STANDING COMM. ON THE ECONOMICS OF LAW PRACTICE, MINIMUM FEE SCHEDULES (1970); Arnold & Corley, *supra* note 3.

274. See note 74 *supra* and accompanying text.

275. See ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1969).

to overcome before he could establish a bar association's liability: the "state action" exemption from the antitrust laws.²⁷⁶ This exemption is applicable if a state calls for individuals to act in a way that would otherwise violate the antitrust laws; it places an umbrella over their activities which immunizes them from federal antitrust liability. The precise contours of this doctrine are unclear. Yet it could be of exceedingly great importance to the outcome of a case involving minimum fee schedules. If a bar association can convince a court that the state has acted to open its immunizing umbrella to cover the association's promulgation of fee schedules, then the association will have escaped liability, even though it might lose on every other issue.

The usefulness of the state action exemption as a means of protecting fee schedules may be diminished because most state bars have withdrawn or suspended their schedules.²⁷⁷ While many local associations retain schedules, they have, at present, little involvement with the state, and thus are less likely than their state counterparts to be able to claim the benefit of the state action exemption.²⁷⁸ Nevertheless, a study of the exemption remains relevant to the problem because (1) a few state bars do retain fee schedules;²⁷⁹ (2) the state action exemption is sufficiently nebulous that some local bars might be able to claim it;²⁸⁰ and (3) it might not be difficult for a state to rehabilitate an otherwise infirm fee schedule by legislation keyed to the requirements of the exemption. If all fee schedules appear to be in danger of falling before the antitrust laws, there could be pressure on some legislatures to do something about the situation, and while a state cannot legislate a "learned profession" exemption or redefine the meaning that federal courts give to "interstate commerce," it can, through appropriate steps, insulate price-fixing from liability by invoking the state action exemption.

This section begins with a discussion of the state action exemption as articulated by the Supreme Court, and the conflicting underly-

276. See *Parker v. Brown*, 317 U.S. 341 (1943).

277. See notes 8-11 *supra* and accompanying text.

278. See, e.g., *Goldfarb v. Virginia State Bar*, 497 F.2d 1, 12 (4th Cir.), *cert. granted*, 95 S. Ct. 223 (1974):

The Fairfax County Bar Association is a voluntary organization composed of members of the State Bar practicing in Fairfax County, Virginia. The Association is a private organization and does not derive its authority or efficacy from the State. While it is clear that the State Bar recognizes local bar associations it does not regulate or supervise local bar activities.

Thus, the local bar association was held not to qualify for the state action exemption.

279. See note 9 *supra* and accompanying text.

280. If a court were ready to find a state bar exempt from the antitrust laws on the ground that its activities were authorized and supervised by the state, and its constituent

ing policies. It then turns to the case law to see how the courts have accommodated these conflicting policies in delineating the scope of the exemption. No simple litmus test emerges; rather, different courts have considered different factors to be dispositive. Some of the factors most frequently used to support the exemption are the presence of a legislative policy favoring noncompetitive organization of a given industry²⁸¹ and the degree of state supervision of the industry.²⁸² Most state and local fee schedules are authorized and administered in such a way as to leave considerable doubt about their ability to meet these criteria for exemption. Other factors occasionally discussed, such as the consistency of state regulation with federal policy²⁸³ and the existence of a "public purpose" for the regulation,²⁸⁴ either create bogus issues or have been treated so loosely as to render them meaningless. While the eligibility of existing fee schedules for the state action exemption is uncertain—but probably doubtful—because of the courts' eclectic approach to construing the exemption, it is fairly clear that an ingeniously drafted minimum fee scheme *could* qualify.

A. *Parker v. Brown*

Despite the seeming finality of the language of section one of the Sherman Act,²⁸⁵ and despite the usual preference for broad application of the antitrust laws, the Supreme Court has on occasion seen fit to limit the scope of the Act in various ways. Perhaps one of the most significant of the limitations "legislated" by the Court came more than half a century after the enactment of the Act in *Parker v. Brown*,²⁸⁶

local bar associations could then factually be characterized as mere administrative subdivisions of the state association, instead of "voluntary organizations," no a priori reason is apparent for refusing to extend exemption to the local bars as well. Another basis for granting exemption to local bar associations might be the presence of express legislation establishing or regulating them. Of course, the availability of the exemption for local, as well as for state, bar associations will vary with the organization and interrelationship of the various groups in each state.

281. See authorities cited in note 302 *infra*.

282. See note 317 *infra* and accompanying text.

283. See authorities cited in note 330 *infra*.

284. See note 335 *infra* and accompanying text.

285. "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal" 15 U.S.C. § 1 (1970).

286. 317 U.S. 341 (1943). As important as this doctrine now seems, it may appear strange that it was so long in coming. The delay can be best attributed to the previous lack of state economic regulation which is so characteristic of our present societal structure. Even when *Parker* was finally decided, the state action exemption was apparently not recognized as an important addition to the law. Only two major legal publications discussed the case and, between them, only one footnote was devoted to the state action holding. See 41 MICH. L. REV. 968, 969 n.6 (1943); 27 MINN. L. REV. 468 (1943).

which held that Congress did not intend for the Sherman Act to apply to state activities.²⁸⁷ *Parker* arose when the California legislature passed the California Agricultural Prorate Act,²⁸⁸ which provided for the establishment of agricultural marketing programs designed to restrict competition among producers and maintain price stability. The Prorate Act first authorized the creation of a commission, with members appointed by the Governor, which, after public hearings and the consideration of relevant economic data, would select a Program Committee to formulate a marketing program. After another public hearing the commission would then modify or approve the program as it saw fit. Finally, the plan was to be submitted to the producers themselves for approval. A marketing program adopted pursuant to this process would be binding on all producers, and the state would impose penalties for its violation.

A producer of raisins sued to enjoin enforcement of a raisin marketing plan established under the statute on the grounds that it conflicted with the Sherman Act, the Agricultural Marketing Agreement Act,²⁸⁹ and the commerce clause of the United States Constitution. The district court granted the injunction,²⁹⁰ but the Supreme Court reversed. In disposing of the antitrust claim, the Court assumed that the marketing program would violate the Sherman Act if it were organized and made effective by strictly private means and that Congress could prohibit even a state plan by virtue of its commerce power. The Court then announced the basis of its holding, pointing out that the marketing program

derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.²⁹¹

287. Earlier cases had hinted that a state action exemption might exist, though none squarely so held until *Parker*. See, e.g., *Olsen v. Smith*, 195 U.S. 332, 344-45 (1904); *Lowenstein v. Evans*, 69 F. 908, 911 (C.C.D.S.C. 1895).

288. Act of June 5, 1933, ch. 754, [1933] Cal. Stat. 1969, as amended by chs. 471, 743, [1935] Cal. Stat. 1530, 2088; ch. 6, [1938] Cal. Stat. Extra Sess. 39; chs. 363, 548, 894, [1939] Cal. Stat. 1702, 1947, 2485; chs. 603, 1150, 1186, [1941] Cal. Stat. 2050, 2858, 2943 (now CAL. AGRIC. CODE §§ 59641 *et seq.* (West 1968)).

289. 7 U.S.C. §§ 601 *et seq.* (1970).

290. *Brown v. Parker*, 39 F. Supp. 895 (S.D. Cal. 1941), *rev'd*, 317 U.S. 341 (1943). The district court based its decision on the commerce clause issue, and did not even consider the Sherman Act claim.

291. 317 U.S. at 350-51. The Court supported its interpretation of the statute by reference to the words of the Act's sponsor, Senator Sherman of Ohio. Senator Sherman, who never expressly affirmed or denied that the Act was meant to apply to the

The Court refused to attribute to Congress the intent to deny to the States the ability to enact their own economic regulatory schemes in pursuit of a valid state purpose.²⁹²

Chief Justice Stone was careful to limit the holding in two ways. First, he stated flatly—if somewhat cryptically—that a state cannot simply authorize violations of the Sherman Act.²⁹³ Second, he expressly noted that the case did not present the “question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade.”²⁹⁴ Although there has been considerable disagreement as to the precise meaning of these reservations,²⁹⁵ it is clear that they do limit the scope of the *Parker* doc-

states, nevertheless did stress the fact that the proposed law was designed to limit *business* combinations. See 21 CONG. REC. 2562 (1890) (remarks of Senator Sherman). It is logical to assume that Congress never considered the question of the applicability of the Sherman Act to the states, given the narrow scope afforded the commerce clause at the time of the Act's passage. “As long as the state regulated events within its own borders other than transportation heading for an out-of-state destination, the federal government probably lacked authority to regulate these same events.” Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. U.L. REV. 71, 83 (1974).

292. 317 U.S. at 351. Different policy considerations have yielded diametrically opposite interpretations of the same language in different provisions of the Sherman Act. Principles of federalism led the Court in *Parker* to hold that states are not “persons” within the meaning of sections one and two of the Act, 15 U.S.C. §§ 1, 2 (1970), referring to *defendants*. Yet only a year earlier, the preference for broad construction of the statute had prompted the Court to hold that states were “persons” under section four of the Clayton Act, 15 U.S.C. § 15 (1970), defining proper *plaintiffs*. *Georgia v. Evans*, 316 U.S. 159, 162 (1942).

Parker would appear to be on firmer ground than *Evans* under standard principles of statutory construction. Section eight of the Sherman Act, 15 U.S.C. § 7 (1970), and section one of the Clayton Act, *id.* § 12. Both define “person” to include corporations and associations for the purposes of all the substantive sections, and thus application of the maxim *inclusio unius est exclusio alterius* would suggest that Congress did not intend to consider states “persons” for any purpose. However, the prior decision in *Evans* precluded this argument in *Parker*.

293. “True, 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 . . .” 317 U.S. at 351. Justice Stone cited *Northern Sec. Co. v. United States*, 193 U.S. 197, 332, 344-47 (1904), in support of his statement. The defendant in *Northern Securities* had unsuccessfully contended that it was immune from antitrust liability by virtue of its state-granted charter.

294. 317 U.S. at 351-52.

295. An extensive discussion of “participant” immunity is presented in White, *Participant Governmental Action Immunity from the Antitrust Laws: Fact or Fiction*, 50 TEXAS L. REV. 474 (1972). See also Comment, Whitten v. Paddock: *The Sherman Act and the “Government Action” Immunity Reconsidered*, 71 COLUM. L. REV. 140 (1971) (*Parker* applies only to regulatory, as opposed to proprietary, activity); Note, *Antitrust Immunity—Reevaluation & Synthesis of Parker v. Brown—Intent, State Action, Causation*, 19 WAYNE ST. L. REV. 1245 (1973) (any contract with the state should be valid absent conspiracy).

trine.²⁹⁶

Although *Parker* delimited the rough outlines of an exemption from the federal antitrust laws,²⁹⁷ it did not establish any definitive standards. Consequently, there has been a great deal of confusion in the interpretation and application of the doctrine.²⁹⁸ The only aspect of this state action theory which does clearly emerge from the *Parker* opinion is the presence of two conflicting policy considerations: (1) the express congressional policy to foster free competition, embodied in the Sherman Act, our "economic magna carta,"²⁹⁹ and the concomitant notion that exemptions free from the statute should be tightly construed;³⁰⁰ and (2) the implied congressional policy, bottomed on the concept of federalism, of allowing the states to regulate their own economic affairs by establishing noncompetitive market structures to which the Sherman Act would not apply.³⁰¹ Although the courts do

296. A third limitation on state action is the commerce clause itself, which may prohibit intolerably severe "burdens on interstate commerce" which nevertheless qualify for *Parker* immunity. See Note, *State Action Exemption from the Antitrust Laws*, 50 BOSTON U.L. REV. 393, 397 (1970).

297. Apparently the exemption is available under not only the Sherman Act but also all of the antitrust laws. In *Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502, 509 (4th Cir. 1959), the exemption was held to be available under section five of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970), and in *United States v. Pacific Sw. Airlines*, 358 F. Supp. 1224, 1226-27 (C.D. Cal. 1973), the exemption was deemed available (but not granted) under section seven of the Clayton Act, 15 U.S.C. § 18 (1970).

298. One of the greatest sources of confusion in the interpretation and application of the *Parker* doctrine is the great variety of different types of state participation encountered. They range from instances where the state operates a business, the ultimate in state action, see *Ladue Local Lines, Inc. v. Bi-State Dev. Agency*, 433 F.2d 131 (8th Cir. 1971), to the case where the state simply authorizes a private entity to engage in whatever anticompetitive activities it desires, a practice clearly invalid under *Parker*, cf. *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011 (3d Cir. 1971) (invalidating a Virgin Islands statute which in effect authorized price-fixing by private persons). Thus, it is important in considering the exemption in relation to minimum fee schedules to confine oneself to cases treating analogous factual situations, i.e., those involving state regulation as opposed to state proprietorship.

299. *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1302 (5th Cir. 1971).

300. Actually, the *Parker* opinion never expressly mentioned the policy for broad application of the antitrust laws, but the Court has emphasized that preference on other occasions. See, e.g., *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348 (1963); *California v. FPC*, 369 U.S. 482, 485 (1962). See also *White*, *supra* note 295, at 479; Note, *Parker v. Brown—Gone to Hecht: A New Test for State Action Exemptions*, 24 HASTINGS L.J. 287, 288 (1973).

301. See Teply, *Antitrust Immunity of State and Local Government Action*, 48 TUL. L. REV. 272, 278 (1974) (state experimentation should be encouraged); Comment, *supra* note 295; Note, *Of Raisins and Mushrooms: Applying the Parker Antitrust Exemption*, 58 U. VA. L. REV. 1511, 1514 (1972).

A reasonable synthesis of these two policies would be that when a state has chosen

not always deal explicitly with these policies, they do often focus on the presence or absence of one or more of several factors in deciding whether to grant or withhold exemption, and it will be seen that these inquiries are implicit attempts to see that the conflicting policies are accommodated to the greatest possible degree. The gist of what follows, however, is an analysis of the various approaches explicitly enunciated in court opinions, and an evaluation of these approaches on minimum fee schedules at the state and local level.

B. Legislative Policy Against Competition

One factor which many courts and commentators have deemed important to a decision to grant the *Parker* exemption is the presence of a legislative policy against competition.³⁰² This element is described variously as a legislative intent to supplant competition,³⁰³ a legislative determination that competition is not "*summum bonum*,"³⁰⁴ or, as the *Parker* Court itself phrased the requirement, that the program receives "its authority and its efficacy from the legislative command of the state."³⁰⁵ Despite the variety of expression, the tests applied under these rubrics appear to be about the same. To merit the exemption, the legislature must have either expressed its view that a competition is undesirable or, as is the more usual case, enacted a scheme necessarily calling for anticompetitive activity. The facts of *Parker* itself provide an excellent example of the first situation. There the establishment of marketing programs was authorized by the legislature

to enact a system of economic organization which is a *substitute* for the free market which the Sherman Act seeks to protect, those persons participating in the system so enacted should be exempt from the Act.

302. See *Goldfarb v. Virginia State Bar*, 497 F.2d 1, 6 (4th Cir.), cert. granted, 95 S. Ct. 223 (1974); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 30-31 (1st Cir. 1970); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 576-77 (10th Cir. 1962); *Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502, 509 (4th Cir. 1959); *United States v. Pacific Sw. Airlines*, 358 F. Supp. 1224, 1227-28 (C.D. Cal. 1973); *Travelers Ins. Co. v. Blue Cross*, 298 F. Supp. 1109, 1111-12 (W.D. Pa. 1969); *Schenley Indus., Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n*, 272 F. Supp. 872, 882 n.16 (D.N.J. 1967); *Simmons & Fornaciari, State Regulation as an Antitrust Defense: An Analysis of the Parker v. Brown Doctrine*, 43 U. CINN. L. REV. 61, 68 (1974); Comment, *Antitrust Immunity: State Action Protection Under Parker v. Brown*, 7 U.S.F.L. Rev. 453, 467-72 (1973); Note, *supra* note 295, at 1252-56; Comment, *The Wisconsin Minimum Fee Schedule: A Problem of Antitrust*, *supra* note 3, at 1248.

303. See *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 576-77 (10th Cir. 1962); *United States v. Pacific Sw. Airlines*, 358 F. Supp. 1224, 1228 (C.D. Cal. 1973).

304. *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 30 (1st Cir. 1970) (roughly translated to "the highest good").

305. 317 U.S. at 350.

for the specific purpose of eliminating price competition.³⁰⁶

The consideration of this factor seems to facilitate the implementation of both underlying policies. First, by requiring that the legislature have authorized the questioned activity, a court will have no doubt that the state has indeed acted; and the argument for national deference to state programs, based on concepts of federalism, is probably strongest when the state acts through its legislature. Second, by requiring an express or necessarily implied preference for anticompetitive activity, the court has the greatest possible assurance that had the state considered the matter, it would have *wanted* the antitrust laws suspended.³⁰⁷ Thus, the legislative policy inquiry serves the sensible function of seeing that the exemption is not granted for conduct which the state never intended to be immunized.³⁰⁸

Just how stringently this requirement can be applied is illustrated by *Travelers Insurance Co. v. Blue Cross*.³⁰⁹ The Pennsylvania Department of Insurance regulated almost every aspect of Blue Cross' operations and approved its contracts with hospitals. Yet, on a narrow view of the state action exemption, Blue Cross was held not to be immune to a claim that some of these contracts violated the antitrust laws.³¹⁰ The court observed that where the exemption is merited, "not only does the legislature create the entity involved or endow it with governmental character, but it also directs and authorizes that entity by means of the same statute to utilize anticompetitive means to achieve a specific governmental purpose."³¹¹ Under this view, a legislative authorization for pervasive regulation of an industry is insufficient to trigger the exemption unless the regulating agency is left with no option but to employ anti-competitive measures.³¹²

Apparently, the only case to use the legislative policy test and find it satisfied was *Goldfarb*.³¹³ However, the facts upon which *Goldfarb*

306. *Id.* at 346.

307. For a discussion of when it may be necessary to imply an intent to supplant competition, see Comment, *Antitrust Immunity: State Action Protection Under Parker v. Brown*, *supra* note 302, at 468; Note, *supra* note 295, at 1225.

308. See Comment, *Antitrust Immunity: State Action Protection Under Parker v. Brown*, *supra* note 302, at 477.

309. 298 F. Supp. 1109 (W.D. Pa. 1969).

310. However, the defendant was able to escape the application of federal antitrust laws by means of the McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. §§ 1011 *et seq.* (1970). See *Travelers Ins. Co. v. Blue Cross*, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973).

311. 298 F. Supp. at 1111.

312. See *Simmons & Fornaciari*, *supra* note 302, at 73. *Contra*, *Gas Light Co. v. Georgia Power Co.*, 440 F.2d 1135, 1140 (5th Cir. 1971).

313. 497 F.2d at 12.

was tried were somewhat peculiar. The Goldfarbs made the rather puzzling stipulation that the Virginia State Bar had been given authority to disseminate minimum fee schedule reports,³¹⁴ and this stipulation made it quite easy for the Fourth Circuit to conclude that the legislative intent requirement had been satisfied. The apparent basis for the stipulation was a Virginia statute which authorized the Supreme Court of Appeals, the state bar's supervisory agency, to make rules and regulations defining the practice of law and to prescribe a code of ethics.³¹⁵ It seems highly doubtful that, absent the stipulation, the statute (or its counterparts in other states) could be held to call *necessarily* for anti-competitive organization of the legal profession.

Indeed, the district court in *Goldfarb* questioned the propriety of the stipulation.³¹⁶ The Fourth Circuit would not extend the *Parker* exemption to the Fairfax County Bar Association partly because its "regulatory activities are not founded on a legislative command as are the activities of the State Bar."³¹⁷

A legislature could provide a mandate for both state and local bar associations by the simple expedient of passing a statute authorizing lawyers to adopt minimum fee schedules.³¹⁸ However, no court has

314. *Id.* at 9. One possible explanation for the stipulation is that the Goldfarbs, wanting to bring a "test" case to determine the status of fee schedules in general, did not want the decision to turn on the absence of legislative authorization, a defect which could readily be remedied by a sympathetic legislature, necessitating relitigation of other more dispositive issues.

315. 7 VA. CODE ANN. § 54-48 (Supp. 1974). Other states have similar statutes. See, e.g., OREGON REV. STAT. §§ 9.010, 9.080 (1973) (rule-making power delegated to board of governors of state bar); TEXAS CIV. STAT. §§ 320a-1 *et seq.* (Supp. 1974) (rule-making power delegated to Supreme Court of Texas). The Texas law contains the following provision: "Nothing herein shall be construed as authorizing the Court to prescribe fees to be charged for legal services rendered by any attorney." *Id.* § 320a-1(4). In light of this provision, it is curious that Texas is one of the few states retaining a minimum fee schedule, albeit a "voluntary" one. See *Antitrust Law Misapplication to Minimum Fee Schedules*, 36 TEXAS B.J. 201, 220 (1973).

316. *Goldfarb v. Virginia State Bar*, 355 F. Supp. 491, 496 n.4 (E.D. Va. 1973), *aff'd in part, rev'd in part*, 497 F.2d 1 (4th Cir.), *cert. granted*, 95 S. Ct. 223 (1974).

In finding no legislative authorization for the Oregon State Bar's fee schedule, the District Court for Oregon observed:

[I]n *Goldfarb* the parties also stipulated that the regulation program received its authority and efficacy from legislative command. No such stipulation exists in the instant case. And even so, reliance on the stipulation in *Goldfarb* begged the question, for the issue was whether the promulgation of *fee schedules* was authorized by the legislature, *not whether the general regulation of attorneys was so authorized*. *United States v. Oregon State Bar*, 43 U.S.L.W. 2234 (D. Ore. Nov. 25, 1974) (emphasis added).

317. 497 F.2d at 12.

318. Such was apparently the situation in *Allstate Ins. Co. v. Lanier*, 361 F.2d 870 (4th Cir. 1966), where the North Carolina legislature authorized a rating bureau composed of representatives of the insurance companies being regulated to prescribe mini-

yet gone so far as to permit a state to authorize anticompetitive practices in such a casual manner; no court has yet confronted the question of whether the legislative policy element standing alone is enough to support exemption.

C. State Supervision

Some courts have construed *Parker's* caveat—that a state cannot simply authorize violations of the Sherman Act—to require a modicum of state supervision of the activities sought to be exempted from antitrust liability.³¹⁹ Thus, at the least some state agency must have the power to monitor and modify the practices of the private entities involved. This requirement serves the important function of assuring that the state has really opted for a noncompetitive, regulatory *alternative* to the free market, and is not just trying to avoid the Sherman Act's safeguards while retaining a system of unsupervised competition.

One of the principal unresolved questions about the state supervision factor is whether the power to supervise need be *actively* exercised by the state. Only the Fourth Circuit has held that the mere power to regulate is sufficient to satisfy the requirement. In *Washington Gas Light Co. v. Virginia Electric & Power Co.*,³²⁰ a state statute provided that utility rates and practices would go into effect unless modified or disapproved by the state's corporation commission. Plaintiff Washington Gas Light leveled an antitrust attack against certain of VEPCO's rates and practices which had gone into effect under this statute, although they had not been investigated or approved by the commission. The Fourth Circuit held that VEPCO met the state supervision requirement because "it is just as sensible to infer that silence means consent, i.e., approval."³²¹ The obvious problem with this theory is that without active state supervision, the industry involved will be regulated by neither the state nor the antitrust laws; and for this reason the *Washington Gas Light* case has been much criticized.³²²

imum insurance rates. The court did not specifically address itself to the legislative intent issue, and upheld the legislation on other grounds. A similar scheme was struck down in *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011 (3d Cir. 1971).

319. See *Goldfarb v. Virginia State Bar*, 497 F.2d 1, 6 (4th Cir.), *cert. granted*, 95 S. Ct. 223 (1974); *Gas Light Co. v. Georgia Power Co.*, 440 F.2d 1135, 1140 (5th Cir. 1971); *Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248, 251 (4th Cir. 1971); *Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502, 509 (4th Cir. 1959).

320. 438 F.2d 248 (4th Cir. 1971).

321. *Id.* at 252.

322. See *United States v. Oregon State Bar*, 43 U.S.L.W. 2234 (D. Ore. Nov. 25, 1974); *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 351 F. Supp. 1153,

Another issue yet to be settled is whether the existence of *active* state supervision alone is sufficient to warrant the grant of the exemption. The notion is that the legislature, although not necessarily having called for anticompetitive conduct, may regulate an industry so comprehensively that its organization no longer resembles a free market; thus application of the Sherman Act would be inapposite.³²³ Further, the state, because of the pervasiveness of its regulation, should be able to combat any abuses that might develop. Of course, to fit this "substitute for competition" model, the state's regulation would have to be *economic* in nature; regulation of legal ethics, for example, however tight, would probably be insufficient.

Apparently, only the Fifth Circuit has adopted this approach.³²⁴ In *Gas Light Co. v. Georgia Power Co.*,³²⁵ the court found the Georgia Public Service Commission's regulation of the defendant to be sufficient to immunize the defendant's alleged anticompetitive practices from Sherman Act liability. The commission had given lengthy consideration to each of the challenged rates and practices and had effected major modifications in some of them. It seems clear that no state now engages in the kind of active economic supervision of its bar which would be necessary to claim exemption under the Fifth Circuit's test, at least in the absence of other factors supporting exemption. Furthermore, most lawyers would probably feel that really comprehensive regulation would be an intolerable burden on their profession and too high a price for the retention of fee schedules.

D. *Legislative Policy Plus State Supervision*

The Fourth Circuit, recognizing that the "legislative policy against competition" or "state supervision" factors standing alone may provide an inadequate guide to whether the exemption should be granted, has incorporated both elements into its *Parker* test.³²⁶ Apparently, the relationship between the factors is multiplicative, and both must be

1203 n.129 (D. Hawaii 1972) (*Washington Gas Light* was an unwarranted hyperextension of *Parker*); Teply, *supra* note 301, at 292-93; Note, *supra* note 300, at 305-06; Note, *supra* note 301, at 1536-42; 85 HARV. L. REV. 670 (1972).

323. *Contra*, *Travelers Ins. Co. v. Blue Cross*, 298 F. Supp. 1109 (W.D. Pa. 1969). See notes 309-12 *supra* and accompanying text.

324. Most courts have held that state supervision alone is insufficient to warrant the exemption. See, e.g., *United States v. Pacific Sw. Airlines*, 358 F. Supp. 1224, 1227, 1229 (C.D. Cal. 1973); *Travelers Ins. Co. v. Blue Cross*, 298 F. Supp. 1109, 1112 (W.D. Pa. 1969).

325. 440 F.2d 1135 (5th Cir. 1971).

326. See *Goldfarb v. Virginia State Bar*, 497 F.2d 1, 6 (4th Cir.), *cert. granted*, 95 S. Ct. 223 (1974); *Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502 (4th Cir. 1959).

present in some degree. Superficially, this standard appears very strict, and it might have been expected to have made for a contrary result in *Goldfarb*. However, the Fourth Circuit's "silent supervision" doctrine, enunciated in *Washington Gas Light*,³²⁷ renders the supervision requirement virtually meaningless, and allowed the *Goldfarb* court to find that the Virginia Supreme Court of Appeals provided the necessary regulatory oversight.³²⁸ While the "legislative policy" requirement would not even have been colorably satisfied in *Goldfarb* absent the parties' unusual stipulation of state authorization, it would not seem difficult for the legislature of Virginia or any other state to pass a pro forma authorizing statute which would also delegate supervisory power over the bar to some agency; by doing nothing the agency would satisfy *Washington Gas Light*, and the Fourth Circuit would then presumably grant the exemption. There is no reason why such a scheme would not be equally workable for local bar associations. On the other hand, a court like the Fifth Circuit which takes a more serious view of the Supreme Court's caveat in *Parker* and requires active supervision³²⁹ would probably never find the "policy plus supervision" standard met in any imaginable situation involving lawyers.

E. Other Factors

Some courts and commentators, including some of those for whom the "legislative policy" factor standing alone is insufficient, have occasionally emphasized the importance of other factors in passing on the applicability of the *Parker* exemption. One factor which is sometimes mentioned is the consistency of the state's program with federal statutes other than the antitrust laws.³³⁰ In *Parker* itself the Court pointed out that the California law under attack was harmonious with the federal Agricultural Marketing Agreement Act.³³¹ While at present there appears to be no federal statute either consistent or inconsistent with the practice of promulgating minimum fee schedules, the emergence of legislation embodying an aggressive federal policy of increasing the availability of legal services to the middle-income citizen

327. See notes 320-22 *supra* and accompanying text.

328. 497 F.2d at 11.

329. See notes 324-25 *supra* and accompanying text.

330. See Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation*, 39 ABA ANTITRUST L.J. 950 (1970); Simmons & Fornaciari, *supra* note 302, at 67; Teply, *supra* note 301, at 285-88; Note, *supra* note 296, at 400-02; *cf.* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 386-89 (1951); Hecht v. Pro-Football, Inc., 444 F.2d 931, 937 (D.C. Cir. 1971).

331. 317 U.S. at 352-59.

could well militate against the granting of the exemption by a court which deemed the "federal policy" factor important.³³²

Others have suggested that the activity sought to be exempted must be a "suitable" one for state regulation.³³³ Since state power over economic matters is acknowledged to be plenary, this requirement can only mean that the state regulation is not preempted by some other law, state or federal. Internal inconsistency of state law is not a proper issue for a federal court. The state regulation may be "preempted" by the federal antitrust laws, but that is the issue to be resolved. Thus, those endorsing the "suitability" requirement must be referring to the possible inconsistency of the state regulation with the existence of Congress' general power to regulate interstate commerce. But an analysis based on the federal commerce clause can be undertaken only after it has been determined that Congress has not exercised its commerce power in some way relevant to the problem—*i.e.*, it must first be determined that the antitrust laws do not apply. This too is the issue to be resolved. Thus, the "suitability" analysis seems to be circular. However, a minimum fee schedule, though exempt from the antitrust laws under *Parker*, might be struck down because it places a "burden on interstate commerce."³³⁴

332. The resort to an inspection of other federal statutes as a means of resolving the *Parker* question appears indefensible on theoretical grounds. If a state scheme is inconsistent with a federal statute then it should be struck down directly under the supremacy clause. On the other hand, if state and federal programs are consistent, and the state program is being subjected to antitrust attack, the logical inference is that there is some contradiction between the federal program and the antitrust laws. The problem could then be resolved by determining Congress' intent in passing the non-antitrust federal measure. If a court determined that Congress intended to suspend the antitrust laws *pro tanto* for the new federal program, it might reasonably extend this effect to similar state programs, without having to ponder the vague *Parker* doctrine. In both cases, if consideration of other federal laws proves helpful, the court should not be proceeding under *Parker*.

333. See Teply, *supra* note 301, at 288; Note, *supra* note 296, at 397; Comment, *The Wisconsin Minimum Fee Schedule*, *supra* note 302, at 1249.

334. Even if the *Parker* exemption operates to insulate a state-approved minimum fee schedule from antitrust liability, it is still possible that the schedule might be struck down as a burden on interstate commerce. Long ago the Supreme Court established the principle that the federal commerce power in its dormant state might invalidate some state restraints on interstate commerce. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 209 (1824). Before undertaking an analysis based on the dormant commerce clause, it must first be determined that Congress has not exercised its commerce power in some way relevant to the problem being considered. But when the *Parker* exemption is invoked, and the antitrust laws are inapplicable, the Court has indicated that the situation is the same as if Congress had never acted: "The question is thus presented whether in the absence of Congressional legislation prohibiting or regulating the transactions affected by the state program, the restrictions . . . violate the Commerce Clause." *Parker v. Brown*, 317 U.S. 341, 359 (1943). Therefore, a minimum fee schedule, exempt from

Finally, the *Goldfarb* court added another factor—benefit to the public. Because “the declared purpose of the [California] Act was to conserve the agricultural wealth of the State and prevent its economic waste,”³³⁵ the Fourth Circuit concluded that *Parker* requires that the legislation creating the restraint of trade be for the benefit of the public.³³⁶ The effect of applying the “public benefit” requirement will vary greatly, depending upon whether a court requires an “actual” benefit, or only an “intention to benefit.” The *Goldfarb* court, which thought it clear “that courts should take cognizance of the benefits ac-

the antitrust laws under *Parker*, could still be invalidated if it constituted a sufficient burden on interstate commerce.

Of course, the first step in a commerce clause analysis must be to determine whether some interstate commerce is affected by the challenged activity; if commerce is not even affected, it cannot be “burdened.” Thus, if an activity does not have enough effect on commerce to invoke Sherman Act jurisdiction, it will probably be true that it cannot be a burden on interstate commerce. Beyond this point, however, the antitrust and constitutional approaches diverge. Under the commerce clause approach, a court must determine for itself the nature and magnitude of the state’s interest in fostering the activity that it has caused to be exempt from the antitrust laws. This interest must then be weighed against the nature and magnitude of the deleterious effect produced on interstate commerce. *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 781 (1945). Although some lower courts seem to have balked at making the kind of in-depth inquiry mandated by the *Southern Pacific* case, the Supreme Court has recently reaffirmed that even an “incidental consequence” for interstate commerce will warrant striking down a state regulatory scheme where the state’s interest is “tenuous.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145-46 (1970).

Under the approach endorsed by the Supreme Court in *Southern Pacific* and *Pike*, a court faced with an attack on a minimum fee schedule would first have to determine the actual purpose underlying the fee schedule. *See* 397 U.S. at 144. A conscientious court might well find the true purpose of the schedules to be the none-too-worthy one of inflating lawyers’ incomes. Even if a more proper purpose is assumed, it would still be necessary to judge the effectiveness of minimum fees in achieving that purpose. *See* 325 U.S. at 779. It seems doubtful that fee lists are an effective means of informing the public about legal services. Nevertheless, it can be speculated that most courts would find that even the slight legitimate state interest in fee schedules would outweigh the even slighter effect of the schedules on interstate commerce. While the schedules’ effect on commerce might be enough to invoke jurisdiction under an express congressional measure, the Sherman Act, it is dubious that this effect is sufficient to invalidate the schedules under a Court-created doctrine based only on the commerce clause.

The commerce clause analysis is available only when *state* action is claimed to burden commerce; strictly private fee-fixing agreements would not be subject to attack under this theory. But strictly private fee-fixing agreements should not be eligible for the *Parker* exemption either. Conversely, once a fee schedule was found to have sufficient state involvement to merit the *Parker* exemption, any burden it placed on interstate commerce would be considered a state-imposed burden. *See* 317 U.S. at 359.

335. 497 F.2d at 6.

336. Although the Fourth Circuit implied this requirement from the factual situation of *Parker*, it finds no support in the express language of the opinion. Furthermore, the *Goldfarb* court did not cite the opinion of any court which has imposed such a requirement.

cruing to the public"³³⁷ nevertheless opted for the latter approach. Since the state's entire ethics-regulating scheme was intended to protect and benefit the public, it would be "manifestly unfair to dissect a state's regulatory program into its various component parts, parts that were meant to interrelate,"³³⁸ and to consider the public benefit derived from the minimum fee schedules alone. Given that practically all legislation is presumably enacted with the intention of benefiting the public, the Fourth Circuit's formulation of this requirement seems vacuous. However, if a demonstration of real benefit was required as to each challenged practice, the door would be opened for the courts to engage in a sort of substantive due process-style analysis under the guise of construing the Sherman Act. The ability of fee schedules to pass a true "public benefit" as opposed to "lawyer benefit" test seems dubious. "The fee schedule should be examined apart from the general regulatory scheme; such an examination would disclose little public benefit."³³⁹

The multiplicity of factors considered by the courts in passing on a *Parker* state action exemption claim, the disagreements among the courts about the proper criteria for each factor and the weight, if any, to be assigned it, and the unending variations in possible state schemes for authorizing and administering minimum fee schemes all contribute to the uncertainty shrouding the status of "state"-approved fee-fixing under the antitrust laws. The commentators have set forth still other factors which they say should be considered, such as the existence of a causal link between the state action taken and the anticompetitive effect created³⁴⁰ and the existence of an adequate state remedy,³⁴¹ and have even proposed wholly different tests.³⁴² About all that can be

337. 497 F.2d at 6 n.9.

338. *Id.* at 10.

339. *United States v. Oregon State Bar*, 43 U.S.L.W. 2234 (D. Ore. Nov. 25, 1974). The District Court found the *Parker* exemption unavailable because the Oregon fee schedule failed to meet any criteria for exemption. The factual differences between the Oregon case and *Goldfarb* were slight, and the former decision was explicitly based on a disagreement with the Fourth Circuit as to the law. *Id.*

340. *See Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (regulated company not allowed to claim exemption where it had filed false documents with state regulatory commission which subsequently approved company's practices, since company's falsification and not state approval was "cause" of anticompetitive practice); Note, *supra* note 295, at 1258-65.

341. *See Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248, 252 (4th Cir. 1971) (plaintiff chastised in dicta by Craven, J., for "failure to promptly protest" to the appropriate state agency); Handler, *Twenty-Fourth Annual Antitrust Review—Parker v. Brown Revisited*, 72 COLUM. L. REV. 4, 13 (1972).

342. *See Slater, supra* note 291, at 101-08 (proposing a balancing test to weigh the benefits of state regulation against the injury to competition).

said with certitude in the midst of this sea of confusion is that (1) a *conscientious* application of almost any of the test factors discussed here would lead to a refusal to exempt bar associations' fee-fixing activities from the antitrust laws, while a superficial result-oriented application of all the tests combined could rationalize granting the exemption; and (2) in some circuits, at least, it is possible that appropriate legislation could "rehabilitate" fee schedules and qualify them for the exemption, although lawyers' unwillingness to submit to closer supervision and legislators' unwillingness to anger constituents already intolerant of the bar may make this outcome unlikely.

V. CONCLUSION

If the Supreme Court applies existing antitrust case law to *Goldfarb*, it seems almost inevitable that the Fourth Circuit's opinion as to the local bar association will be reversed. However, the Court would be justified in considering this case as one of first impression and might take this opportunity to expressly recognize some exemption, such as the "learned profession" exemption, to save fee schedules. If fee schedules are held to be in violation of the Sherman Act, Congress will probably be asked to pass legislation to grant lawyers a special exemption. This legislation might take the form of the McCarran-Ferguson Insurance Regulation Act,³⁴³ which exempts insurance companies from federal antitrust laws so long as they are regulated by state authorities. Perhaps legal fee schedules would be exempted if an independent state agency had determined that they were reasonable. If nothing is done to shield the activities of lawyers from antitrust laws, then it is likely that the economics, as well as the nature and character, of the practice of law will change dramatically. The consumer of legal services may welcome this change; practicing lawyers will face many difficult adjustments which all may not be able to make.

When a court is confronted with a conflict between the antitrust laws and another federal statute, which seems to authorize activities forbidden by the antitrust measures, it must undertake an analysis similar, but distinct, from that required under *Parker* in order to determine whether the non-antitrust statute should be held to grant an "exemption." The analysis in the federal context must be different because considerations of federalism are absent and Congress' intent in passing the non-antitrust statute may be of great importance. In *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), the D.C. Circuit enumerated six criteria to be used in making such an analysis. See *id.* at 935. At least one commentator has urged the application of this test in the *Parker* situation. See Note, *supra* note 300. While such a transposition would seem to be unwise in most cases because of the disparities in the two situations, it may very well be appropriate for a court to proceed under a *Hecht*-style test, instead of *Parker*, when a state-approved activity is said to be justified because of its consistency with a non-antitrust federal statute. See note 332 *supra*.

343. 15 U.S.C. §§ 1011 *et seq.* (1970).