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Antitrust Law — Sherman Act — Attorneys' Minimum Fee Schedules — Goldfarb v Virginia State Bar

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Antitrust Law—Sherman Act—Attorneys' Minimum Fee Schedules —*Goldfarb v. Virginia State Bar*[1]—Petitioners, Mr. & Mrs. Goldfarb, were required to obtain a title examination by the mortagee in conjunction with their purchase of a house in Fairfax County, Virginia. In Virginia, such an examination must be performed by a member of the Virginia State Bar.[2] When they could not find an attorney who would perform the title examination for less than the minimum prescribed in the Fairfax County Bar Association fee schedule,[3] the Goldfarbs brought a class action under section 1 of the Sherman Act[4] seeking damages[5] and injunctive relief[6] against the Fairfax County and Virginia State Bar Associations. They alleged "that the operation of the minimum fee schedule, as applied to fees for legal services relating to residential real estate transactions" constituted price fixing in violation of the Sherman Act.[7]

The district court held that the minimum fee schedule, as promulgated by the County Bar Association[8] and as enforced by the State Bar Association,[9] did indeed constitute price fixing under section 1.[10] However, the court found that under the "state action" doctrine of *Parker v. Brown*[11] the State Bar Association was immune from antitrust liability.[12]

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[1] 421 U.S. 773 (1975).

[2] *Id.* at 775. Petitioner Lewis H. Goldfarb was an attorney for the Federal Trade Commission but could not perform the title examination himself, because he was not licensed to practice in Virginia. Statement of Lewis H. Goldfarb, *Hearings on Legal Fees Before the Subcomm. on Representation of Citizens Interests of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., pt. 1, at 84 (1973).

[3] 421 U.S. 776-78. The petitioners had contacted thirty-seven Fairfax County attorneys, of whom twenty (all who replied) felt obliged to adhere to the minimum fee set forth by the County Bar Association. *Id.* The fee for title examinations was set at a minimum of 1% of the loan or purchase price, whichever was greater, plus one-half of 1% from $50,000 to $100,000 and one-quarter of 1% from $100,000 to $1,000,000, above which the amount was negotiable. Brief for Petitioners at 6.

[4] 15 U.S.C. § 1 (1970) provides in pertinent part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal."

[5] 15 U.S.C. § 15 (1970) provides for damages for section 1 violations.

[6] 15 U.S.C. § 26 (1970) provides for injunctive relief from section 1 violations.

[7] 421 U.S. at 778.

[8] Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 498 (E.D. Va. 1973). The fee schedule had been adopted in 1969 by the Fairfax County Bar Association "in conjunction with the bar associations of Loudoun and Arlington counties and the City of Alexandria." Brief for Petitioners at 6.

[9] 355 F. Supp. at 496. *See* VIRGINIA STATE BAR ASS'N COMM. ON LEGAL ETHICS, OPINIONS, NO. 98 (1960); VIRGINIA STATE BAR ASS'N COMM. ON LEGAL ETHICS, OPINIONS, NO. 170 (1971) concerning the possibility of disciplinary actions with respect to departures from the minimum fee standards.

[10] 355 F. Supp. at 492-94.

[11] 317 U.S. 341 (1943). Under the *Parker* doctrine, restraints of trade do not violate the Sherman Act where they (1) derive their "authority and efficacy from the legislative command of the state," *id.* at 350, (2) are "not intended to operate or become effective without that command," *id.*, and (3) are adopted and enforced by the state in the "execution of a governmental policy," *id.* at 352.

[12] 355 F. Supp. at 496.

The United States Court of Appeals for the Fourth Circuit held that both bar associations were immune from Sherman Act liability.[13] After affirming the State Bar Association's immunity under *Parker,*[14] the Fourth Circuit found that the County Bar Association was also immune because the promulgation of a fee schedule by a "learned profession" does not constitute "trade or commerce" within the meaning of the Act.[15] Alternatively, the Fourth Circuit found that the effect of the bar associations' activities on interstate commerce was insufficient to support Sherman Act jurisdiction.[16]

In an 8-0 decision[17] the Supreme Court reversed,[18] and HELD: The County Bar Association's minimum fee schedule and the State Bar Association's enforcement mechanism constitute illegal price fixing.[19] The Court utilized a four-step analysis in concluding that the bar associations' activities violated section 1. First, the Court found that such activities constituted a "classic illustration of price fixing."[20] Second, the Court determined that a substantial volume of interstate commerce was involved since a "significant" portion of funds had been furnished, and a "significant" amount of loans guaranteed, for real estate within Fairfax County, Virginia by persons outside the state.[21] The jurisdictional requirements of the Sherman Act were met through the "inseparability" of attorneys' title examinations from the interstate aspects of real estate transactions.[22]

Third, the Court found that as a commercial transaction, the exchange of money for an attorney's title examination was not free from Sherman Act liability under a broad "learned profession" exemption from the antitrust laws.[23] Congress, in fashioning the Sherman Act, had "intended to strike as broadly as it could" against combinations in restraint of trade.[24] The Court reasoned that a broad "learned profession" exemption would frustrate this intent, since attorneys, if exempt from all antitrust scrutiny, "would be able to adopt anticompetitive practices with impunity."[25] In addition, the Court refused to carve out a specific exemption with respect to the bar associa-

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[13] Goldfarb v. Virginia State Bar, 497 F.2d 1, 12-15 (4th Cir. 1974).

[14] *Id.* at 12.

[15] *Id.* at 14-15.

[16] *Id.* at 18.

[17] Justice Powell, past president of the Virginia State Bar Association, took no part in the decision. 421 U.S. at 793.

[18] *Id.* The Court remanded for a determination of the State Bar Association's contention that it is protected from monetary liability by the Eleventh Amendment. *See id.* at 792 n.22; Edelman v. Jordan, 415 U.S. 651, 662-71 (1974).

[19] 421 U.S. at 783, 793.

[20] *Id.* at 783. *See, e.g.,* United States v. Trenton Potteries Co., 273 U.S. 392, 397-99 (1927).

[21] 421 U.S. at 783.

[22] *Id.* at 783-85.

[23] *Id.* at 787.

[24] *Id.*

[25] *Id.* at 787-88.

tions' "fee control" activities because such activities were not sufficiently related to the general professional goal of "providing services necessary to the community."[26]

Fourth, the Court found that the *Parker* doctrine[27] was inapplicable since neither the County Bar Association's promulgation nor the State Bar Association's enforcement of the minimum fee schedule was compelled by the state of Virginia.[28] The bar associations' activities in *Goldfarb* were not required by state law; "at most their activities complemented the objectives" of the Virginia Supreme Court's ethical codes,[29] which merely "mention" the propriety of an attorney's use of advisory fee schedules for "some guidance" in fee setting.[30] Since the codes did not "direct" either respondent to supply the fee schedule, the respondents' activities were not compelled by the state as required under the *Parker* doctrine.[31] In addition, since the State Bar Association had provided a mechanism for enforcing the fee schedule, the Court concluded that it had "voluntarily joined in what is essentially a private anticompetitive activity."[32] As a result, the fee control activities of the State Bar Association in *Goldfarb* were found not to be beyond the reach of section 1.[33] In summary, through its four-step analysis, the Court concluded that the bar associations' voluntary activities constituted a price fixing violation of the Sherman Act.[34]

Prior to *Goldfarb,* the Court had never been faced with the issue of whether the legal profession is exempt from the antitrust laws of the United States.[35] However, due to its determination in *Goldfarb* that certain types of minimum fee schedules promulgated by the legal profession violate section 1 of the Sherman Act, the Court has opened the activities of the legal and other "learned professions" to antitrust scrutiny.[36] This note will first discuss the Supreme Court's determination that the bar associations' activities in *Goldfarb* constituted a "classic illustration of price fixing." The Court's refusal to grant a broad Sherman Act exemption to the commercial activities of the "learned professions," and its consideration and rejection of a specific Sherman

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[26] *Id.* at 786. The Court's consideration of the general professional goal of the legal profession lays the foundation, however, for possible Sherman Act exemptions for "professional" activities other than "fee control" activities. *See id.* at 787-88 n.17. See text at notes 94-102 *infra.*

[27] See note 11 *supra.*

[28] 421 U.S. at 791.

[29] *Id.*

[30] *See id.* at 788-91.

[31] 421 U.S. at 790-91.

[32] *Id.* at 791-92.

[33] *Id.* at 791.

[34] *Id.* at 793.

[35] *See id.* at 786 n.15. *See also* Coleman, *The Learned Professions,* 33 ABA ANTITRUST L.J. 48 (1967); Comment, *The Applicability of the Sherman Act to Legal Practice and Other "Non-Commercial" Activities,* 82 YALE L.J. 313 (1972).

[36] Axinn, *Warning to Lawyers in 'Goldfarb' Ruling,* 174 N.Y.L.J. 1 (1975); *see* Goldstein, *Advertising is Less of a Taboo Now in the Learned Professions,* N.Y. Times, Dec. 28, 1975, sec. 4 at 12, col. 3.

Act exemption for bar association "fee control" activities, will then be analyzed. Finally, the validity under the Sherman Act of the legal profession's price advertising restrictions[37] will be evaluated under the analysis utilized by the Court in determining the validity of the bar associations' direct fee control activities in *Goldfarb*.

I. MINIMUM FEE SCHEDULES AS A "CLASSIC ILLUSTRATION" OF SHERMAN ACT PRICE FIXING

Price fixing exists where competitors combine, contract, or conspire for the purpose or with the effect of "raising, depressing, fixing, pegging, or stabilizing" market price.[38] Price fixing arrangements in interstate commerce constitute *per se* violations of section 1 of the Sherman Act[39] for which no defense of reasonableness of the restraint,[40] or

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[37] *See ABA CODE OF PROFESSIONAL RESPONSIBILITY*, DR 2-101, DR 2-102, and DR 2-105. See text at notes 114-119 *infra*.

[38] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940). Purpose and effect need not both be shown; a finding of either alone is sufficient to sustain a determination of *per se* illegality. *Id.* at 224-26 n.59; Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614 (1953); American Column & Lumber Co. v. United States, 257 U.S. 377, 400 (1921). *See* United States v. Container Corp. of America, 393 U.S. 333, 337 (1969); Ricci v. Chicago Mercantile Exch., 447 F.2d 713, 716 (7th Cir. 1971), *aff'd*, 409 U.S. 289 (1973). *But see* Cities Serv. Oil Co. v. Coleman Oil Co., 470 F.2d 925, 930-31 (1st Cir. 1972), *cert. denied*, 411 U.S. 967 (1973).

[39] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940). Under section 1, agreements which restrain trade or commerce are classified by degree. *See* L. SCHWARTZ, FREE ENTERPRISE AND ECONOMIC ORGANIZATION 12-13 (4th ed. 1972). The classification process determines the standards by which the validity of agreements which are alleged to restrain trade is tested. *Id. Per se* violations are considered to be so egregious in nature and to have such a pernicious effect on competition that they are conclusively presumed to be unreasonable; such *per se* violations of section 1 include collective boycotts, divisions of markets, tying arrangements, and price fixing. *See* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 500-01 (1969) (tying arrangement); United States v. Sealy, Inc., 388 U.S. 350, 358 (1967) (Harlan, J., dissenting) (division of markets); United States v. General Motors Corp., 384 U.S. 127, 146-48 (1966) (collective boycott); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 210-12 (1959) (collective boycott); Northern Pac. Ry. v. United States, 356 U.S. 1, 5-8 (1958) (tying arrangement). *See also* the price fixing cases cited in note 38 *supra*.

The validity of all other agreements is determined under the "rule of reason," which requires a thorough examination of the nature and effects of the restraint and of the reasons, if any, for its existence. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 380-81 (1967); Apex Hosiery Co. v. Leader, 310 U.S. 469, 486-501, 512 (1940); Board of Trade v. United States, 246 U.S. 231, 238 (1918); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 58 (1911).

[40] United States v. McKesson & Robbins, Inc., 351 U.S. 305, 308-10 (1956). ("[P]rice fixing is contrary to the policy of competition underlying the Sherman Act and . . . its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable." *Id.* at 309-10.) *See also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927).

good motive of the price fixers,[41] is considered.[42]

The *sine qua non* of all section 1 violations—an agreement among competitors[43]—was found to exist in *Goldfarb* in the attorneys' joint activity as members of the bar associations.[44] Attorneys, as actual or potential competitors, had combined to form the respondent bar associations which had promulgated and set up the mechanism for enforcing the minimum fee schedule.[45] The Court then examined the effect of their agreement and determined that the agreement placed an actual restraint upon trade, since it pegged the minimum market price for title examinations. The Court found that the petitioners were faced with "a fixed, rigid price floor" in their attempt to obtain a title examination.[46] The Court noted that none of the twenty attorneys who had responded to the petitioners' request for such an examination would charge less than the fee provided by the minimum schedule.[47] Moreover, even though ethical opinions of the State Bar allowed for deviations from the minimum fee where a lower charge appears justified,[48] none of the attorneys approached by the Goldfarbs asked for any additional information with which to set an individualized fee.[49] Thus, once having found an agreement among competitors which had the effect of pegging a market price, the Court was squarely faced with a price fixing arrangement.[50]

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[41] White Motor Co. v. United States, 372 U.S. 253, 262 (1963), *quoting* Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 225-28 (1940). *See* United States v. McKesson & Robbins, Inc., 351 U.S. 305, 310 (1956).

[42] For a discussion of the rationale for fee schedules see, *e.g.*, Arnould & Corley, *Fee Schedules Should Be Abolished*, 57 A.B.A.J. 655 (1971); Comment, *Bar Association Fee Schedules And Suggested Alternatives: Reflections On A Sherman Exemption That Doesn't Exist*, 3 U.C. ALAS. L. REV. 207, 238-43 (1974); Comment, 1968 WISC. L. REV. 1237, 1238-40. For an economic analysis of the use of fee schedules by the legal profession see Note, 85 HARV. L. REV. 971, 974-81 (1972).

[43] *See* L. SCHWARTZ, FREE ENTERPRISE AND ECONOMIC ORGANIZATION 11 (4th ed. 1972).

[44] 421 U.S. at 782.

[45] *See id.*

[46] *See id.* at 781, 782 n.9. At least one econometric study has demonstrated that the legal profession's minimum fee schedules have an actual price effect. *See* Arnould & Corley, *supra* note 42, at 657-71.

[47] *See* 421 U.S. at 781, 782 n.9.

[48] VIRGINIA STATE BAR ASS'N COMM. ON LEGAL ETHICS, OPINIONS NO. 98 (1960) provides:

> each lawyer has both a right and an ethical duty to charge a fee lower than that recited in a minimum fee schedule where the time required for the particular service, and its value, are themselves minimal, or where the poverty of a client, or other proper ethical consideration justifies such lower charge.

[49] 421 U.S. at 781. It is difficult to conceive, however, what additional information the Court expected the attorneys to obtain. A title examination is a standard procedure. The Goldfarbs could hardly have been poverty-stricken: the minimum fee with which they were faced was $522.50, Brief for Petitioners at 6, which corresponds to a purchase price of approximately $54,500. See note 8 *supra*.

[50] 421 U.S. at 783.

Respondents claimed, however, that despite the potential for price fixing, the fee schedule was purely advisory.[51] Nevertheless, the Court found that the schedule dealt with prices to be charged in future transactions and was enforceable through either "the desire of attorneys to comply with announced professional norms,"[52] or the prospect of the State Bar Association's discipline of those attorneys who "habitually charge less than the minimum fee."[53] Therefore, the Court concluded that "a naked agreement was clearly shown."[54]

It is unfortunate, nonetheless, that the Court even considered the advisory nature of the minimum fee schedule, as a finding that the fee schedule was not advisory was wholly unnecessary to support the Court's traditional price fixing determination. Even a purely advisory fee schedule would appear to constitute price fixing where, as in *Goldfarb,* it placed an actual restraint upon trade.[55] In *United States v. Container Corp. of America*[56] the Court was faced with a reciprocal agreement among container producers merely to exchange recent, particularized price information.[57] The Court held that the agreement was a section 1 price fixing violation even though the producers could withdraw from the agreement at any time,[58] because the *result* of the agreement was price uniformity in the industry.[59] No question of the advisory nature of the information exchanged by the producers was entertained by the Court; the fact that the agreement was unenforceable was deemed irrelevant.[60] Thus, in light of *Container Corp.,* once the Court in *Goldfarb* determined that the result of the bar associations' activities was a "fixed, rigid price floor,"[61] those activities constituted price fixing even if the minimum fee schedule had been completely advisory.[62]

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[51] *Id.* at 781-82.

[52] *Id.* at 781.

[53] *Id.* at 777-78, 781.

[54] *See id.* at 782.

[55] *See id.* at 781.

[56] 393 U.S. 333 (1969).

[57] *Id.* at 335.

[58] *Id.*

[59] *Id.* at 336-38. *But see id.* at 338-40 (Fortas, J., concurring in the Court's judgment but finding no *per se* violation of the Act).

[60] *See id.* at 335-38.

[61] 421 U.S. at 781.

[62] *See* 393 U.S. at 335-38. In American Column & Lumber Co. v. United States, 257 U.S. 377 (1921), the Court found a price effect and thus a section 1 price fixing violation even though no formal mechanism existed to penalize those who strayed from the desired norm. *Id.* at 411-12. In United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950), the Court also found a price fixing violation even though, as in *Goldfarb,* previous departures from rates set by the Board had resulted in none of the sanctions which it was authorized to impose. *Id.* at 488-89. Moreover, the fact that *Container Corp.* concerned information on present market conditions, whereas *Goldfarb* concerned future market conditions, lends even more credence to this position because the exchange of present market information may be held valid whereas the exchange of future market information will not. *Compare* Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 586 (1925) *with* United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 488 (1950).

It is also unfortunate that the Court in *Goldfarb* examined the extent of harm that the fee schedule caused consumers. The Court found that no alternatives were available to the petitioners from which to obtain the title examination.[63] As a result, the Court concluded that the restraint on competition and the resultant harm to consumers were "unusually damaging."[64] Ordinarily however, an examination of neither the combination's power to fix prices nor the extent of harm to the consumer is necessary to a section 1 price fixing determination, because "[i]t is the 'contract, combination . . . or conspiracy in restraint of trade or commerce' which [section 1] strikes down," not the power or success of those who engage in the activity.[65]

The Court's examination of whether the bar associations could effectively fix prices and the degree of harm which would develop therefrom, when viewed in conjunction with the Court's analysis of the non-advisory nature of the fee schedule, might be perceived as establishing a standard for proving the presence of price fixing in the legal profession higher than that which would be applied in an ordinary business context.[66] This interpretation of the Court's price fixing determination in *Goldfarb* appears unsupportable, however, in light of the Court's conclusion that the bar associations' activities constituted a "classic illustration of price fixing."[67] Thus, it appears that the Court itself believed that it was applying ordinary section 1 standards to the legal profession. It is submitted that the Court's discussion of these factors—advisory nature and consumer harm—should be interpreted merely as dicta buttressing its traditional section 1 price fixing conclusion rather than as the implementation of a higher standard for the legal profession.[68]

II. EXEMPTION OF THE LEGAL PROFESSION FROM SECTION 1

Prior to *Goldfarb*, the United States Supreme Court had never

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A determination of purpose appears to become relevant beyond mere buttressing evidence of an unreasonable restraint of trade only where there is no finding that the actual effect of the agreement is a restraint upon trade. Where the purpose of the agreement is to restrain trade, such an agreement violates section 1. *See* United States v. Gasoline Retailers Ass'n. Inc., 285 F.2d 688, 690-91 (7th Cir. 1961). However, where the purpose is actually to foster competition through increased knowledge of market conditions such an agreement does not violate the Act. *See* Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 582-86 (1925).

[63] 421 U.S. at 782.

[64] *Id.* at 782-83.

[65] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-26 n.59 (1940).

[66] This possible higher standard should be distinguished from the limited professional activities exemption discussed in text at notes 92-102 *infra*.

[67] *See* 421 U.S. at 781-83.

[68] The Court previously has made similar observations to buttress price fixing determinations. *See, e.g.*, American Column & Lumber Co. v. United States, 257 U.S. at 400, 411-12.

been faced squarely with the issue of whether the practice of attorneys, as the practice of a learned profession, constitutes activities exempt from section 1 of the Sherman Act.[69] The Court had, however, denied Sherman Act exemptions in cases with similar issues involving the commercial activities of real estate brokerage,[70] news distribution,[71] insurance,[72] theatrical production,[73] pharmacology,[74] and sports[75] other than baseball.[76] Similar issues had also been avoided in two cases involving the medical profession.[77] In *Goldfarb,* however, the Court was left no alternative but to decide the learned profession exemption issue once it had found that the bar associations' price fixing activities sufficiently affected interstate commerce[78] and were not immune as state action.[79]

Although there is dicta prior to *Goldfarb* which might support a broad learned profession exemption,[80] the Court determined in *Goldfarb* that the learned professions were not completely excluded from section 1 proscriptions.[81] The Court concluded that the commercial activities of the legal profession should be distinguished from the non-commercial in considering the applicability of the Sherman Act.[82] Thus, faced with a restraint which operated directly upon a commercial activity of the legal profession—fee setting—the Court refused to exempt the profession from the antitrust laws.[83]

The foundation of this analysis appears to lie in the Court's unequivocal affirmation of general antitrust policies: Congress intended

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[69] 421 U.S. at 786. *See also* Coleman, *The Learned Profession,* 33 ABA ANTITRUST L.J. 48 (1967); Comment, *The Applicability of the Sherman Act to Legal Practice and Other "Non-commercial" Activities,* 82 YALE L.J. 313 (1972).

[70] United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 490 (1950).

[71] Associated Press v. United States, 326 U.S. 1, 18-20 (1945).

[72] United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553-61 (1944).

[73] United States v. Shubert, 348 U.S. 222, 230-31 (1955).

[74] United States v. Utah Pharmaceutical Ass'n, 201 F. Supp. 29, 33 (D. Utah), *aff'd per curiam,* 371 U.S. 24 (1962); *cf.* Northern Calif. Pharmaceutical Ass'n v. United States, 306 F.2d 379, 383-84 (9th Cir.), *cert. denied,* 371 U.S. 862 (1962).

[75] Radovich v. National Football League, 352 U.S. 445, 449-52 (1957); United States v. International Boxing Club, 348 U.S. 236, 241-44 (1953).

[76] Baseball is an "exception and an anomaly." Flood v. Kuhn, 407 U.S. 258, 282-84 (1972).

[77] American Medical Ass'n v. United States, 317 U.S. 519, 528-29 (1943); *see* F.T.C. v. Raladam Co., 283 U.S. 643, 652-53 (1931).

[78] *See* 421 U.S. at 785.

[79] *Id.* at 790-92.

[80] *See* United States v. Oregon Medical Soc'y, 343 U.S. 326, 336 (1952) (dicta) ("This Court has recognized that forms of competition in the business world may be demoralizing to the ethical standards of a profession."); F.T.C. v. Raladam Co., 283 U.S. 643, 653 (1931) (dicta) ("Of course, medical practitioners . . . are not in competition with the respondent. They follow a profession and not a trade . . . ."); *cf.* Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1938).

[81] 421 U.S. at 786-87.

[82] *Id.* at 787-88.

[83] *Id.*

to bring within the ambit of the Sherman Act "every person engaged in business whose activities might restrain or monopolize commercial intercourse."[84] Adhering to this broad policy, the Court decided that it should neither infer[85] nor construct an antitrust exemption for the legal profession's commercial activities since Congress had not expressly exempted the profession from antitrust proscriptions.[86] The Court concluded that the nature of the legal profession "standing alone" should not provide any unique sanctuary from the Sherman Act.[87]

Initially, the respondents in *Goldfarb* contended that the existence of state regulation exempted the legal profession from section 1 scrutiny.[88] The Court rejected this argument since its adoption would have allowed attorneys to employ "anticompetitive practices with impunity."[89]

The respondents then argued that the application of section 1 to the legal profession would place other restrictions on the practice of law in jeopardy of falling under the antitrust laws.[90] The Court appears to have circumvented this argument by specifically limiting its holding to the "fee control" activities with which it was confronted.[91]

Third, and most important, the respondents argued that the competition which would be stimulated if section 1 were applied to the legal profession is "inconsistent with the practice of a profession," because the goal of professional activities, unlike that of ordinary businesses, is to provide "services necessary to the community" and not to enhance profit.[92] In response, the Court laid the foundation for treating antitrust issues involving the commercial activities of the

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[84] *Id.*, *quoting* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944).

[85] 421 U.S. at 787.

[86] *See id.* at 787-88; *cf.* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 561 (1944). For several of the exemptions expressly provided by Congress see L. SCHWARTZ, FREE ENTERPRISE AND ECONOMIC ORGANIZATION 13-14 (4th ed. 1972).

[87] 421 U.S. at 787.

[88] *Id.* at 785-87. The state regulation argument should be distinguished from the state action argument discussed in text at notes 27-34 *supra*. State regulation is argued where the defendant claims that his activities are controlled by the state and thus exempt from section 1; state action is argued where the defendant claims that his activities are those of the state, or are compelled by the state, and thus immune from section 1. *Compare Goldfarb*, 421 U.S. at 785-87 *with* Parker v. Brown, 317 U.S. 341, 350-52 (1943).

[89] 421 U.S. at 787.

[90] Brief for Respondent Fairfax County Bar Association at 34-36. The other restrictions on the legal profession referred to by the County Bar Association are restrictions on advertising, soliciting, fee-splitting for referrals, pricing on a contingent basis in criminal cases, and charging what the traffic will bear. *Id.* at 34-35. In addition, the County Bar Association claimed that antitrust scrutiny of monopolization by attorneys, under section 2 of the Sherman Act, 15 U.S.C. § 2 (1970), and of the establishment of partnerships and the amalgamation of law firms by attorneys, under section 7 of the Clayton Act, 15 U.S.C. § 18 (1970), would result from the initial application of section 1. Brief, *supra*, at 35.

[91] *See* 421 U.S. at 787-88 n.17.

[92] *See* 421 U.S. at 786.

legal profession differently than those of ordinary businesses.[93] The different treatment entails examination of the general goal of professional activities to determine whether an activity otherwise violative of the Sherman Act should be exempt from the Act because engaged in by a profession.[94]

The Court noted that even if the general goal of professional activities is to provide necessary services and not to enhance profit, this argument "loses *some* of its force when used to support the fee control activities involved here;"[95] had the bar associations truly been concerned with *providing* necessary services they would not have prevented competition among attorneys which might have lowered the cost and increased the availability of title examinations.[96] The Court thus concluded that the relationship between the bar associations' fee control activities and the general goal of professional activities was insufficient to exempt the fee control activities from section 1. The Court's analysis therefore appears to leave open the possibility that the Court would exempt from section 1 a commercial activity of the legal profession which has a sufficient nexus to the general professional goal of providing necessary services.

The Court's approach in *Goldfarb* is a departure from the traditional approach taken in price fixing cases.[97] Since price fixing is considered a *per se* violation of section 1, the Court generally will not consider the goal or purpose of the price fixers' activities. It is black letter law that an activity falling within the *per se* category of Sherman Act violations will not be saved by the good motives of the violators.[98] Yet, not once in its opinion did the Court mention the term *per se* even though it was dealing with price fixing. This apparently deliberate omission, in addition to the Court's consideration of the general goal of professional activities, indicates a unique departure from established section 1 price fixing analysis where the activities of the legal profession are involved. It is suggested that *Goldfarb* acknowledges *a fortiori* the existence of a *limited* legal profession exemption to the antitrust laws.

The Court's professional goal analysis in *Goldfarb* is not merely an application of the traditional "rule of reason" analysis to an otherwise *per se* violation of section 1. Rule of reason analysis requires a thorough examination of the nature and effects of the restraint and of the justifications for its existence before a violation may be said to

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[93] *See id.*

[94] *See id.*

[95] *Id.* at 786 (emphasis added).

[96] *See id.* at 786 n.16 where the Court wryly noted that "[t]he reason for [the bar association's] adopting the fee schedule does not appear to have been wholly altruistic," since the State Bar Association's fee schedule report was introduced with the observation that "[t]he lawyers have slowly, but surely, been committing economic suicide as a profession." *Id.*

[97] See text & notes 38-42 *supra.*

[98] See note 41 *supra.*

exist.[99] The Court in *Goldfarb,* however, did not make a thorough examination of the reasonableness of the bar associations' activities. Rather, the Court considered whether the bar associations' activities constituted section 1 price fixing under its *ordinary* standards, and then examined whether the relationship between those activities and the general goal of professional activities was *sufficient* to exempt the activities from Sherman Act proscription.[100] Moreover, under the rule of reason approach courts examine only the reasons underlying the activities specifically alleged to violate section 1, not the goal of the defendants' activities generally, to determine whether the former activities violate the Act.[101]

It thus appears that the Court has adopted a hybrid approach to determine the section 1 validity of activities of the legal profession. This hybrid is basically a two-step test in which the Court first examines whether the activities specifically alleged to violate the Act would constitute a *per se* violation of the Act under the Court's traditional approach. Second, the Court determines whether those activities are sufficiently related to the general goal of professional activities to warrant exemption from section 1 proscription.[102]

III. THE SECTION 1 VALIDITY OF PRICE ADVERTISING[103] RESTRICTION IN THE LEGAL PROFESSION

Even though the Court explicitly limited its consideration in

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[99] *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 380-81 (1967); Apex Hosiery Co. v. Leader, 310 U.S. 469, 486-501, 512 (1940); Board of Trade v. United States, 246 U.S. 231, 238 (1918); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 58 (1911).

[100] *See* 421 U.S. at 781-83, 786.

[101] *See* cases cited at note 104 *supra.*

[102] *See id.* at 786. This analysis of the Court's two-step "professional activities" approach to section 1 finds further support in the Court's statement that:

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

Id. at 787-88 n.17 (emphasis added).

[103] As used in this note, the term, "price advertising," encompasses activities in interstate commerce effecting the dissemination of information regarding price and type of services offered, and the name and location of the attorney, firm, or legal service making the advertisement. For examples of advertisements suggested for the legal profession, which go beyond mere price advertising, see J. Wilson, *Madison Avenue, Meet the Bar,* 61 A.B.A.J. 586, 586-87 (1975).

The price advertising restrictions may run afoul not only of the antitrust laws, but also of the First Amendment. Comment, *Solicitation by the Second Oldest Profession: Attorneys and Advertising,* 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 77, 85-91 (1973); Comment, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available,* 81 YALE L.J. 1181, 1185-91 (1972); Comment, *Controlling Lawyers by Bar Association and Courts,* 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 301, 348-78 (1970). First Amendment considerations are beyond the scope of this note.

Goldfarb to minimum fee schedules,[104] the fact that it applied section 1 of the Sherman Act to the legal profession has opened various other activities of the profession to antitrust scrutiny.[105] Moreover, in light of complaints recently filed to enjoin allegedly restrictive activities of professions other than the legal profession,[106] it appears likely that restrictive practices of the legal profession soon will undergo antitrust scrutiny in areas other than direct fee control.[107] One of the restrictions placed on the legal profession which warrants close scrutiny is that concerned with price advertising.[108]

The American Bar Association prohibits most forms of "commercial" advertising by members of the legal profession.[109] In the past, courts have assumed the validity of such advertising restrictions and have readily applied sanctions against attorneys who violate them.[110] Moreover, when forced to consider the validity of such restrictions, the courts generally have upheld them on the basis of the learned profession rationale—that attorneys practice a profession and not a trade, and thus may be treated differently than "ordinary" businesses.[111] However, the Supreme Court refused to make the profession/trade distinction dispositive of the validity of the bar associations' fee control activities in *Goldfarb*.[112] It is submitted that the distinction alone may no longer support the legal profession's price advertising restrictions, and that the validity of those restrictions now must be analyzed under the "professional activities" approach to section 1 provided by the Court in *Goldfarb*.[113] First, the question of whether the purpose or effect of the profession's price advertising restrictions would constitute a price fixing violation of section 1 if engaged in by "ordinary" businesses will be considered. Next, the question of whether the price advertising restrictions are sufficiently re-

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[104] 421 U.S. at 787-88 n.17.

[105] Axinn, *Warning to Lawyers in 'Goldfarb' Ruling*, 174 N.Y.L.J. 1 (1975); *see* Goldstein, *Advertising is Less of a Taboo Now in the Learned Professions*, N.Y. Times, Dec. 28, 1975, sec. 4 at 12, col. 3.

[106] *See* N.Y. Times, Dec. 28, 1975, sec. 4 at 12, col. 1; Wall Street Journal, Dec. 24, 1975, at 2, col. 3; Boston Globe, Dec. 23, 1975, at 2, col. 2; N.Y. Times, Nov. 25, 1975, at 2, col. 4; Wall Street Journal, Nov. 25, 1975, at 2, col. 3.

[107] *See* Goldstein, *Advertising Is Less of a Taboo Now in the Learned Professions, N.Y. Times, Dec. 28, 1975, sec. 4 at 12, col. 3.*

[108] *See id. See also* authorities cited at note 106 *supra.*

[109] ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101. *See id.* DR 2-102, DR 2-105.

[110] Libarian v. State Bar, 21 Cal. 2d 862, 863-66, 136 P.2d 321, 322-23 (1943); Mayer v. State Bar, 2 Cal.2d 71, 73-75, 39 P.2d 206, 207-08 (1934); *In re* Donovan, 43 S.D. 98, 102-05, 178 N.W. 143, 144-45 (1920); *In re* Neuman, 169 App. Div. 638, 639-41, 155 N.Y.S. 428, 429-31 (Sup. Ct. 1915).

[111] *See In re* Cohen, 261 Mass.484,487-88,159 N.E. 495,496-97 (1945); *In re* Kamp, 40 N.J. 588, 597-99, 194 A.2d 236, 241-42 (1963); *In re* Rothman, 12 N.J. 528, 547-53, 97 A.2d 621, 631-35 (1953); *In re* Schwarz, 175 App. Div. 335, 342-45, 161 N.Y.S. 1079, 1083-85 (Sup. Ct. 1916), *aff'd*, 231 N.Y. 642, 132 N.E. 921 (1921).

[112] 421 U.S. at 787.

[113] The "professional activities" approach is discussed in text at notes 97-108 *supra.*

lated to the profession's general goal of providing services necessary to the community to warrant exemption under section 1 will be analyzed.

In the leading price fixing case, *United States v. Socony-Vacuum Oil Co.*,[114] the Court found that an agreement among major oil companies to remove a portion of the gasoline supply from the retail market through the purchase of the surplus production of smaller, independent companies violated section 1.[115] The oil companies had not directly fixed the price of gasoline in *Socony-Vacuum* since no express agreement to sell at or above a specified price existed.[116] Nonetheless, the Court found that their agreement to purchase the surplus gasoline was a *per se* price fixing violation of the Sherman Act because it had both the purpose and the effect of "tampering" with the price structure of the industry.[117]

In *United States v. Gasoline Retailers Association, Inc.*,[118] the United States Court of Appeals for the Seventh Circuit held that an agreement by major and independent gasoline station operators to refrain from price advertising or premium distribution in conjunction with retail gasoline sales and to limit price advertising by major brand stations violated section 1.[119] The court found that the agreement amounted to price fixing and was therefore illegal *per se* under the Act.[120] The Seventh Circuit read *Socony-Vacuum* expansively for the proposition that "any concerted scheme *designed* to affect prices" is price fixing and hence unlawful *per se*.[121] Since the advertising restrictions proposed to eliminate price wars which had threatened the industry, the court found that the objective of the agreement was to limit price competition and thereby affect prices in the retail gasoline market.[122] Thus, under the Seventh Circuit's interpretation of *Socony-Vacuum*, a finding that the purpose of advertising restrictions is to limit price competition is sufficient to support a section 1 price fixing determination.[123]

The reasoning of the Seventh Circuit seems justified, since price advertising restrictions limit one form of the competition which the Sherman Act serves to foster.[124] Even where illegal effects of the re-

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[114] 310 U.S. 150 (1940).
[115] *Id.* at 210-24.
[116] *Id.* at 222-23.
[117] *See id.* at 222-24.
[118] 285 F.2d 688 (7th Cir. 1961).
[119] *Id.* at 689-91.
[120] *See id.* at 690-91.
[121] *Id.* at 691 (emphasis added).
[122] *Id.*
[123] *See id.*
[124] *See* United States v. Container Corp. of America, 393 U.S. 333, 337 (1969). *See generally* United States v. Topco Associates, Inc., 405 U.S. 596 (1970) where the Court stated that "the freedom guaranteed each and every business [under the antitrust laws] . . . is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." *Id.* at 610. *Cf.* Associated Press v. United States, 326 U.S. 1 (1945), where the Court stated that "[t]he Sherman Act was specifically intended

strictions are not shown, an illegal purpose alone should suffice to condemn the agreement because section 1 strikes down agreements in restraint of trade or commerce whether they are "wholly nascent or abortive on the one hand, or successful on the other."[125]

Gasoline Retailers was distinguished, however, in *Arizona v. Cook Paint & Varnish Co.*[126] There, the district court was confronted with a false advertising agreement among competitors to misrepresent the flammability characteristics of their products.[127] The court concurred in the Seventh Circuit's interpretation of *Socony-Vacuum,*[128] but refused to find the false advertising agreement a section 1 violation because there was no showing that an "actual purpose" of the agreement was to affect prices.[129] The court refused to "break new ground by recognizing a doctrine of constructive price fixing in cases where a natural and probable effect, thought [sic] not an actual purpose, of the conspiracy or combination is to affect prices [since] the range of conduct embraced by such a doctrine is almost limitless."[130]

The American Bar Association has stated that a purpose of the advertising restrictions placed on the legal profession is to preserve public confidence in the legal system "by strict, self-imposed controls over, rather than by unlimited, advertising."[131] However, the ABA's blanket proscriptions against nearly all forms of advertising,[132] rather than only abusive advertising,[133] suggest that it is competition and not merely abusive advertising at which the legal profession's advertising restrictions aim.

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to prohibit businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell things in which the groups compete." *Id.* at 15.

Of course, were theoretically "perfect" competition the rule there would be no need for advertising since consumers would have "perfect" knowledge of all market conditions. J. BACKMAN, ADVERTISING AND COMPETITION 34-36 (1967); W. McInnes, *The Economic Functions of Law and Advertising,* in F. QUINN, ETHICS, ADVERTISING AND RESPONSIBILITY 58-59 (1963).

[125] *See Socony-Vacuum,* 310 U.S. at 224-26 n.59.

[126] 391 F. Supp. 962, 966 (D. Ariz. 1975).

[127] *Id.* at 965.

[128] *See id.* at 966 n.2.

[129] *Id.* at 966. It should be noted that the courts have used various terminology, apparently interchangeably, to describe the "purpose" of an agreement. *See, e.g., Socony-Vacuum,* 310 U.S. at 216 ("direct purpose and aim"); American Column & Lumber Co. v. United States, 257 U.S. 377, 411 (1921) ("fundamental purpose"); National Macaroni Mfgs. Ass'n v. F.T.C., 345 F.2d 421, 426 (7th Cir. 1965) ("intended"); *Gasoline Retailers,* 285 F.2d at 691 ("basic objective").

[130] 391 F. Supp. at 966.

[131] ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-9.

[132] *Id.*

[133] The rationale underlying the purported purpose for which the ABA restricts advertising by the legal profession appears to lie in its fear of the deleterious effects advertising abuses in the legal service market would have upon public confidence in the legal system as a whole. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-9. The underlying rationale is twofold: with no advertising restrictions (1) attorneys "would be apt to publish the most extravagant and alluring material about themselves" thus misleading the public;

Nevertheless, a price fixing violation is not proved simply because a purpose of the agreement is to limit competition in general. Rather, it must be shown that a purpose is to limit *price* competition, thereby affecting prices.[134] In *Gasoline Retailers* the court inferred a purpose to affect prices among the Gasoline Retailer Association's members from its finding that the agreement had a purpose of limiting price competition.[135] It would appear that the legal profession's present, broad advertising restrictions are aimed at limiting price advertising and therefore price competition among members of the legal profession. Therefore, under the *Gasoline Retailers* rationale the legal profession's price advertising restrictions would constitute a Sherman 1 price fixing violation within the context of an ordinary business.

Consideration must still be given, however, to whether the relation between the advertising restrictions and the legal profession's general goal of providing services necessary to the community is sufficient to exempt the restrictions from section 1 under the limited "professional activities" approach developed in *Goldfarb.*[136] It is submitted that the price advertising restrictions not only are not sufficiently related to the provision of necessary legal services, but actually exist in contradiction to that goal. The advertising restrictions reduce "the flow of information to laymen concerning their legal rights, [and impair] their ability to choose a lawyer intelligently . . . ."[137] There would seem to be no better way for the legal profession to provide necessary services than to let the public know that the services exist by advertising the price and type of service, and the name and location of the attorney, firm, or legal service making the advertisement.

Moreover, the rationale used to support the blanket restriction on advertising by the legal profession[138]—prevention of abuse to ensure public confidence—will not serve as a justification for the price advertising restrictions. Abuse of advertising by attorneys, through the use of false or misleading advertising or through the use of "ill means,"[139] may be controlled in ways less restrictive than a blanket restriction on all advertising—for example, false advertising, by the Federal Trade Commission;[140] "ill means," by the criminal justice sys-

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ABA CODE OF PROFESSIONAL RESPONSIBILITY note 24 to EC 2-9 *quoting* from Hewitt, *Advertising by Lawyers*, 16 A.B.A.J. 116 (1929); *accord*, Jacksonville Bar Ass'n v. Wilson, 102 So.2d 292, 295 (Fla. 1958); (2) attorneys would assure success where it could not be realized, hence increasing "the temptation to use ill means to secure the end desired by the client." *Id. See In re* Ades, 6 F. Supp. 467, 474-75 (D. Md. 1934).

[134] *Gasoline Retailers*, 285 F.2d at 691.

[135] *See* text at note 122 *supra.*

[136] *See* text at notes 101-02 *supra.*

[137] R. POSNER, ECONOMIC ANALYSIS OF LAW 347 (1973). *See generally* McInnes, *The Economic Functions of Advertising*, in F. QUINN, ETHICS, ADVERTISING AND RESPONSIBILITY 8 (1963).

[138] *See* note 133 *supra.*

[139] *Id.*

[140] *See generally* 2 G. & P. ROSDEN, THE LAW OF ADVERTISING, §§ 17.01-17.04 (1973).

tem; or both by a Bar Association Advertising Review Board.[141] It appears quite anomalous for the legal profession to justify its own use of a blanket restriction through fear of its own abuse without that restriction.

CONCLUSION

It appears that the Supreme Court in *Goldfarb* has instituted an approach to determining the validity of professional activities which are alleged to violate section 1 of the Sherman Act different than that used in the ordinary business context. This "professional activities" approach to section 1 encompasses two steps. First, the Court determines whether the professional activities would constitute a *per se* violation of the Act under traditional business standards. Then, if it is found that the activities would constitute such a violation, the Court further determines whether the activities are sufficiently related to the general professional goal of providing services necessary to the community to warrant their exemption from the Act.

Application in *Goldfarb* of the two-step, "professional activities" approach to the respondents' minimum fee schedule activities led the Court to find a price fixing violation of section 1 of the Sherman Act. The Court determined that the respondents' activities constituted price fixing under its ordinary section 1 standards and then refused to exempt those activities since they were not sufficiently related to the general professional goal of providing services necessary to the community.

Application of the "professional activities" approach to the legal profession's price advertising restrictions indicates that they, too, violate section 1. First, it would seem that the restrictions have as an actual purpose the limitation of price competition, and hence constitute a *per se* violation of the Act under ordinary price fixing standards. Second, the restrictions do not appear to be sufficiently related to the general professional goal of providing services necessary to the community to exempt them from the Act. Therefore, the legal profession would do well to reconsider its blanket restrictions on competitive price advertising.[142]

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[141] *See generally id.* § 42.01 on the concept of self-regulation through advertising review boards.

[142] A special ABA committee recently proposed that attorneys be allowed to advertise so long as the information does not contain a "false, fraudulent, misleading, deceptive or unfair statement or claim." *See* Goldstein, *Advertising is Less of a Taboo Now in the Learned Professions,* N.Y. Times, Dec. 28, 1975, § 4 at 12, col. 3. It should be noted that the committee's proposal comports fully with the result reached through the application of the Court's "professional activities" approach to the legal profession's advertising restrictions. Even if the prohibition of false, fraudulent, misleading or deceptive advertising might constitute a *per se* violation of section 1 in the ordinary business context (e.g., if its purpose were to limit price competition), such a prohibition appears to be

exempt from section 1 since it would be sufficiently related to the profession's general goal of providing services necessary to the community. When voted upon by the ABA, however, the committee's proposal was not accepted. Rather, the ABA voted to change its ethical code so as to allow attorneys "to advertise in the Yellow Pages or in 'reputable law lists or legal directories' their office hours, legal education, credit terms and field of concentration." Boston Globe, Feb. 18, 1976, at 6, col. 5. It is submitted that this change, although a step in the right direction, is not sufficient to meet section 1 standards, since the restrictions remain too broad—encompassing non-abusive price advertising—to warrant their exemption from the Act.