Case Notes

ANTITRUST LAW—MINIMUM FEE SCHEDULE PUBLISHED BY THE COUNTY BAR ASSOCIATION AND ENFORCED BY THE VIRGINIA STATE BAR VIOLATES SECTION ONE OF THE SHERMAN ANTITRUST ACT.—*Goldfarb v. Virginia State Bar* (U.S. SUP. CT. 1975).

Petitioners contracted to buy a home in Fairfax County, Virginia. The lender financing the purchase required them to obtain title insurance. This requirement necessitated a title examination that could only be performed legally by a member of the Virginia State Bar.[1] Petitioners then price-shopped in an effort to find an attorney who would examine the title for less than the fee prescribed in a minimum fee schedule[2] published by the Fairfax County Bar Association and enforced by the Virginia State Bar.[3] Because their efforts to find an attorney who would charge less than the fee prescribed by the State Bar were futile, they had their title examined by the first attorney they had originally contacted. A class action suit was then initiated against the Fairfax County Bar Association[4] and the State Bar. The petitioners alleged that the operation of the minimum fee schedule and its enforcement mechanism, as applied to fees for legal services in connection with residential real estate transactions, constituted price-fixing in violation of section 1 of the Sherman Act.[5] The suit sought both injunctive relief and damages. Although holding the State Bar exempt from the Sherman Act, the district court granted judgment against the Fairfax County Bar Association and enjoined the publication of the fee schedule.[6] The

1. Unauthorized Practice of Law Opinion No. 17, August 5, 1942, Virginia State Bar-Opinions 239 (1965 ed.).

2. Minimum fee schedules are listings of minimum charges which have been recommended by the organized bar. Note, *A Critical Analysis of Bar Association Minimum Fee Schedules*, 85 HARV. L. REV. 971 (1972).

3. Virginia State Bar Committee on Legal Ethics, Opinion No. 98, June 1, 1960; Virginia State Bar Committee on Legal Ethics, Opinion No. 170, May 28, 1971. The latter opinion, the most recent, states: "evidence that an attorney habitually charges less than the suggested minimum fee schedule adopted by his local bar association raises a presumption that such lawyer is guilty of misconduct." Adherence to the fee schedule was obligatory because the State Bar is required by state statute to "investigate . . . and report . . . the violation of . . . rules and regulations adopted by the [Virginia supreme court] to a court of competent jurisdiction for such proceedings as may be necessary." VA. CODE § 54-49 (1972 Repl. Volume). These warnings by the State Bar meant that any lawyer who contemplated ignoring the minimum fee schedule must have been aware of the sanctions which attended violation, and that an enforcement mechanism existed to administer them.

4. Two additional county bar associations were originally named as defendants, but they agreed to a consent judgment under which they were directed to cancel their existing fee schedules. They were enjoined from adopting, publishing, or distributing any future schedules of minimum or suggested fees. Damage claims against these associations were then dismissed with prejudice. Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 492 (E.D. Va. 1973).

5. 15 U.S.C. § 1 (1974).

6. Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973).

United States Court of Appeals for the Fourth Circuit reversed,[7] holding that the State Bar's conduct was immune because of the "state action" exemption from the Sherman Act;[8] that the County Bar was immune on the ground that the practice of law was not "trade or commerce";[9] and that the practice of law was a "learned profession" impliedly exempt under the Sherman Act.[10] On certiorari to the United States Supreme Court, *held*, reversed and remanded, all participating justices agreeing.[11] The minimum fee schedule, as published by the Fairfax County Bar Association and enforced by the Virginia State Bar violates section 1 of the Sherman Antitrust Act. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

> Section 1 of the Sherman Antitrust Act provides in part:
> Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the States, or with foreign nations, is declared to be illegal. . . .[12]

The antitrust laws in general and the Sherman Act in particular have been referred to as "the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[13] Speaking of the breadth of section one of the Sherman Act, the Supreme Court has observed: "Language more comprehensive is difficult to conceive."[14] In passing the Sherman Act, Congress intended to exercise its power to the fullest.[15] To that end, the term "trade" and "commerce" have been interpreted broadly,[16] and the Act has been applied whenever an unreasonable restraint exists on the commercial marketing of goods and services.[17] Where price-fixing is involved, however, every activity of that nature has been brought within the ambit of the Sherman Act.[18]

The Goldfarbs alleged that the minimum fee schedule and its enforcement mechanism, as applied to fees for legal services relating to residential real estate transactions, constituted price-fixing. Price-fixing has been defined to include the establishment of uniform prices and any agreement which results in "raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate commerce."[19] This definition includes informal agreements to circulate

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7. Goldfarb v. Virginia State Bar, 497 F.2d 1 (4th Cir. 1974).
8. *See* Parker v. Brown, 317 U.S. 341 (1943).
9. A jurisdictional prerequisite to the applicability of the Sherman Act is that the restraint impinge on interstate commerce. 15 U.S.C. § 1 (1974).
10. Goldfarb v. Virginia State Bar, 497 F.2d 1, 13-15 (4th Cir. 1974).
11. Justice Louis Powell of Virginia took no part in the consideration or decision of the case because his former law firm was representing the Fairfax County Bar Association.
12. 15 U.S.C. § 1 (1974).
13. United States v. Topco Associates, 405 U.S. 596, 610 (1972).
14. United States v. South Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944).
15. Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 435 (1932).
16. United States v. Shubert, 348 U.S. 222, 226 (1955).
17. Apex Housing Co. v. Leader, 310 U.S. 469, 495 (1940).
18. United States v. McKesson & Robbins, Inc., 351 U.S. 305, 310 (1956).
19. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940). *See also* United States v. McKesson & Robbins, Inc., 351 U.S. 305, 310 (1956).

current price information[20] and is also applicable to agreements setting maximum prices.[21] The above definition of price-fixing would thus seem to encompass schedules establishing minimum fees for legal services. In defense, respondents asserted that the fee schedule was merely a list of recommended minimum prices for common legal services; that as a "learned profession" the practice of law is exempt from the Sherman Act; and that their actions were also exempt from the Act as state action.

The Supreme Court's analysis of the State Bar's initial claim that the schedules were merely advisory focused on the extent of adherence to the fees by the attorneys. The nature of professional discipline made the fee schedule virtually obligatory. Conformity was reinforced by the understanding that other attorneys would not compete by charging less for similar services. Moreover the consequences of the fee schedule on prices to the home buyer were too great to be ignored.[22] Since only an attorney licensed to practice in Virginia may legally examine a title and because a title examination is indispensable in the process of financing a real estate purchase, alternative sources for the necessary service were not available to the consumer. According to the Court, this pricing system which consumers could not realistically escape constituted a "classic illustration of price-fixing."[23]

With regard to the "learned profession" exemption, the Court first noted that Congress did not intend any sweeping exclusion from the Sherman Act. A title examination is a service, and the exchange of such a service for money is "commerce" in the common usage of that term.

Finally, the Court held that respondents' activities were not exempt from the Sherman Act as "state action" within the meaning of *Parker v. Brown*.[24] Neither the Virginia supreme court nor any Virginia statute required such activities. It is not enough that such conduct is prompted by state action. To be exempt, it must be compelled by the state, not voluntarily adhered to by the private sector.

The Court's opinion is significant insofar as (1) it marked the first time the Court applied the antitrust laws in the context of the legal profession while at the same time (2) it settled three questions, jurisdictional in nature, which courts have occasionally addressed, but never fully answered. In seeking to fasten the shackles of the Sherman Act around the legal profession a plaintiff faces three serious obstacles: (1) whether legal services are encompassed within the words "trade or commerce"; (2) whether lawyers engage in "interstate commerce" for purposes of the Sherman Act; and (3) whether there is implied immunity under the "state action" exception to the Sherman Act.

In considering whether legal services are "trade or commerce" under the

20. United States v. Container Corp., 393 U.S. 333 (1969).
21. Kiefer-Stewart & Co. v. Seagram and Sons, 340 U.S. 211 (1951).
22. United States v. Container Corp., 393 U.S. 333, 337, 339 (1969).
23. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).
24. Parker v. Brown, 317 U.S. 341 (1943).

Sherman Act, the Fourth Circuit ruled without the benefit of Supreme Court guidance. The "learned professions" have never been expressly exempted by statute from the scope of the federal antitrust laws. Yet, some activities entered into by these professions have been held to be immune. The reasons put forward in justifying this result vary, but the rationale seems to stem from the proposition that the learned professions do not constitute "trade or commerce" within the meaning of the antitrust laws.[25]

The court of appeals held that the legal profession was not "trade or commerce" for purposes of the Sherman Act and thus jurisdiction under the Act could not be sustained.[26] The source of the court's holding may be traced to dicta made in *The Schooner Nymph*,[27] a case involving commerical fishing. In holding that fishing was a trade within the Coasting and Fishing Act of 1793, Justice Story said that "the word 'trade' is often and indeed, generally used in a broader sense, as equivalent to occupation, employment, or business. Whenever 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 learned professions, it is customarily called a *trade*."[28] This casual remark left the implication for future generations to draw on that those in the legal profession fall outside the pale of the Sherman Act.[29]

The Supreme Court has acted inconsistently in interpreting Justice Story's remarks. In *Federal Baseball Club of Baltimore v. National League*,[30] the Court held unanimously that "personal effort, not related to production, is not a subject of commerce."[31] And, by way of illustration, the Court asserted that a law firm which sends one of its members to argue a case in another state is not engaged in such commerce.[32] Thus, the law, as a "learned profession" was impliedly construed as falling outside of the Act. Similarly, the Supreme Court specifically recognized, in 1931, that medical practitioners follow a profession, but as in the case of the law, not a trade.[33]

This concept was again addressed by the Court in *Atlantic Cleaners & Dyers, Inc. v. United States*.[34] In *Dyers*, the Court stated its belief that any

25. *See, e.g.*, United States v. AMA, 28 F. Supp. 752 (D.D.C. 1939).
26. Goldfarb v. Virginia State Bar, 497 F.2d 1, 13-15 (4th Cir. 1974).
27. 18 F. Cas. 506 (No. 10,388) (C.C.D. Me. 1834).
28. *Id.* at 507 (emphasis added).
29. The Supreme Court has taken cognizance of the above quoted remarks at least twice this century. Justice Story's remarks were brought to life by the Supreme Court in *Atlantic Cleaners & Dyers, Inc. v. United States*, wherein the Court held that a conspiracy to fix prices for cleaning, dyeing and renovating clothes was included within section three of the Sherman Act. Section 3 applies only to the District of Columbia, but for our purposes, the "trade or commerce" requirement for Sherman Act jurisdiction is the same. Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 436 (1932). In *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 490-91 (1950), the Supreme Court again reproduced the Story passage. In that case, the Court held that a conspiracy to fix real estate commissions was prohibited by the Sherman Act. In context then, the reference to "learned professions" must be construed as dicta by the High Court.
30. 259 U.S. 200 (1922).
31. *Id.* at 201.
32. *Id.*
33. FTC v. Raladam Co., 283 U.S. 643 (1931).
34. 286 U.S. 427 (1932).

business other than those in the learned professions and liberal arts would be considered a trade.[35] Yet the importance of the case lies in the fact that the Court also held that a business which deals in personal services could be considered a trade and be included within the coverage of the antitrust laws.[36]

In recent years, however, the Supreme Court has not been so restrictive in applying the antitrust laws to the learned professions, and it has seemed to do so without attempting to resolve the "trade or commerce" issue. In *American Medical Association v. United States*,[37] the Court applied section 3 of the Sherman Act to the AMA upon concluding that the conduct complained of affected trade or commerce.

Later cases have also avoided resolving this issue.[38] Instead, the courts have focused their attention on the conduct or activity comprising the alleged violation of the antitrust laws.

In this setting, the *Goldfarb* opinion took a significant step in bringing the legal profession under the umbrella of the antitrust laws. Acting consistently with prior cases holding that there is a heavy presumption against implicit exemptions,[39] the Court held that legal services, such as title examinations, are trade or commerce.[40] According to the Court, "[w]hatever else it may be, the examination of a land title is a service; the exchange of such a service for money is 'commerce' in the most common usage of that word."[41]

The Supreme Court's holding on this issue represents the first time the Court has applied the Sherman Antitrust Act in the context of the legal profession. The Court's ruling reflects the basic philosophy that the special status of the class has no bearing on an exemption from the Sherman Act.[42]

Having found that those engaged in learned professions are engaged in an activity that may be classified as "trade or commerce" for the purposes of the Act, a second hurdle looms as to the applicability of the Act. The Act imposes an additional jurisdictional prerequisite—the activity must come within the ambit of the commerce clause.[43]

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35. *Id.* at 430.
36. *Id.* *See also* United States v. National Ass'n of Real Estate Boards, 339 U.S. 485 (1950).
37. 317 U.S. 519 (1943).
38. *See, e.g.*, Friends of Animals, Inc. v. American Veterinary Medical Ass'n, 310 F. Supp. 1016 (S.D.N.Y. 1970); Northern California Pharmaceutical Ass'n v. United States, 306 F.2d 379 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962).
39. *See, e.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); California v. Federal Power Comm'n, 369 U.S. 482 (1962).
40. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).
41. *Id.*
42. United States v. National Ass'n of Real Estate Boards, 339 U.S. 485 (1950) (real estate brokers); AMA v. United States, 317 U.S. 519 (1943) (doctors); United States v. Utah Pharmaceutical Ass'n, 201 F. Supp. 29 (D. Utah), *aff'd*, 371 U.S. 24 (1962); and Northern California Pharmaceutical Ass'n v. United States, 306 F.2d 379 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962) (pharmacists); have all been held subject to the Sherman Act.
43. "Every contract . . . in restraint of trade or commerce among the several States." 15 U.S.C. § 1 (1974).

There are two approaches to satisfy the Sherman Act requirement of "commerce among the several states": "[B]y demonstrating that the alleged anticompetitive conduct occurred *in* interstate commerce, or by showing that the conduct, though wholly intrastate, had a substantial *effect* on interstate commerce."[44] The respondents argued that any effect on interstate commerce caused by the fee schedule was incidental and remote. In its view the legal services, which were performed wholly *intrastate*, are essentially local in nature and therefore a restraint with respect to them can not substantially affect *interstate* commerce.[45]

Addressing this issue, the Court held that since a significant amount of funds furnished for financing the purchase of homes in Fairfax County comes from outside the state, and since a title examination is an integral part of such transactions, interstate commerce was sufficiently affected.[46] The title examinations of the instate cases, an *intrastate* requirement, provide the nexus to an *interstate* housing market. Title examinations are necessary to assure the borrower of a valid lien. Since a significant portion of funds for purchasing of homes in Fairfax County come from without the state of Virginia,[47] and the title examination being inseparable from the interstate aspect of financing real estate transactions, the Supreme Court held that commerce among the states was impeded.[48] An effect on commerce must be practically viewed. It is well settled, however, that locality of the operation, which squeezes interstate commerce, is immaterial if the pinch is felt by interstate commerce.[49]

The proposition that consumers feel the brunt of a minimum fee or title services in connection with financing housing can conclusively be demonstrated by noting that many of those living in Fairfax County work in Washington, D.C.[50] To an average home buyer, the addition of a set fee of one percent[51] represents a serious impediment to the acquisition of a home in the Virginia sector of this interstate market. The impediment extends also to obtaining a loan to purchase the home in the financing market. The financing market is substantially interstate because of the foreign origin of the loan or its guarantee.[52] Title examinations could only be performed by a member of the Virginia State Bar,[53] the price for that examination, of course, being set under the minimum fee system promulgated by the State Bar. Therefore, the fees for title examination services required in connection with home purchasing inevitably

44. Hospital Bldg. Co. v. Trustees of Rex Hospital, 511 F.2d 678, 681 (4th Cir. 1975) (emphasis added).
45. *See* Burke v. Ford, 389 U.S. 320, 321 (1967).
46. Goldfarb v. Virginia State Bar, 421 U.S. 773, 783-85 (1975).
47. *See* Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 494, 497 (E.D. Va. 1973).
48. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).
49. United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 464 (1949).
50. Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 494 (E.D. Va. 1973).
51. *Id.* at 499.
52. *Id.* at 494.
53. Only a member of the Virginia State Bar could legally perform that service. Unauthorized Practice of Law Opinion No. 17, August 5, 1942, Virginia State Bar-Opinions 239 (1965 ed.).

raises the cost of closings; hence it serves to restrict the options of home buyers who may work in Washington but wish to live in a surrounding community, such as Fairfax County, Virginia. The facts, as noted by the district court[54] and not disturbed by the court of appeals,[55] suffice to show a restraint on interstate commerce "which, reaching across state boundaries, affects the people of more states than one."[56] As such, the Sherman Act's commerce requirement has successfully been met.

The third obstacle confronting the Court in this historic case stems from the doctrine established in *Parker v. Brown*,[57] wherein the Court held that an anticompetitive marketing program which "derived its authority and efficacy from the legislative command of the state" was not a violation of the Sherman Act. The ratio decidendi of the Court in *Parker* was that the Act was intended to regulate only private activities; therefore a state is not prohibited from imposing a restraint on the free market in its sovereign capacity.[58]

The Supreme Court, construing *Parker* for the first time in thirty-two years, first stated that the threshold question in determining if an anticompetitive activity is state action is whether the state requires the activity in its sovereign capacity. Furthermore, the Court noted that in analyzing the "state action" exception to the Sherman Act, it is essential to note that implied exemptions are heavily disfavored.[59] Exceptions are rarely granted since "the antitrust laws represent a fundamental national economic policy."[60]

Respondents argued that the state legislature authorized the Virginia supreme court to regulate the practice of law. That court adopted ethical codes which deal in part with fees. Therefore the State Bar, in issuing fee schedule reports and ethical opinions dealing with such schedules, was merely implementing the ethical codes set forth by the court.

Speaking for the Court, however, Chief Justice Berger concluded that the state action exemption did not apply. No Virginia statute required the establishment of anticompetitive fees. Indeed, the ethical codes established by the Supreme Court of Virginia explicitly warned lawyers not to be bound by the minimum fee schedule.[61] Although the supreme court's ethical codes men-

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54. Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 496-98 (E.D. Va. 1973).
55. Goldfarb v. Virginia State Bar, 497 F.2d 1, 4, 12, 13 (4th Cir. 1974). The court of appeals did not disturb the district court's findings of fact. It disagreed on the conclusion of law drawn therefrom. *Id.* at 4, 12-13.
56. United States v. South Eastern Underwriters Ass'n, 322 U.S. 533, 552 (1944).
57. 317 U.S. 341 (1943).
58. Parker v. Brown, 317 U.S. 341, 350-52 (1943). The most recent discussion of *Parker* is in *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974), wherein the court of appeals concluded that if a state itself is the named defendant in an antitrust suit dismissal is required pursuant to the "state action" exemption first pronounced in *Parker*; however, where the state is not the named defendant, the court is bound to examine the State Legislature's will to see whether the exemption is sanctioned by the state.
59. *See, e.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963).
60. Carnation Co. v. Pacific Westbound Conf., 383 U.S. 213, 218 (1966).
61. In 1938 the Supreme Court of Virginia adopted Rules for the Integration of the Virginia State Bar. Rule II, § 12 dealt with the procedure for setting a fee where "the customary charges of the Bar for similar services." The court also directed that "in

tioned advisory fee schedules they did not direct respondents to supply them, or require the type of price floor which arose from respondent's activities. Finally, according to the Court, while the State Bar is, for limited purposes a state agency,[62] it is not "every governmental act that points a path to an antitrust shelter."[63]

Goldfarb represents the first time the Sherman Act has been applied in the context of legal services. However novel this may seem, one should not be led to the conclusion that the Court intends to apply the Act to all aspects of the legal profession. Chief Justice Berger's opinion focused only on the commercial aspects of legal services. The question of whether the professional relationship of a lawyer and his client can be reached by the Sherman Act is left open.

A negative answer would seem to follow from several cases which indicate that a viable line might be drawn between the commercial and noncommercial aspects of a profession. This distinction was reached by implication in *United States v. Oregon Medical Society*,[64] wherein a prepaid medical care plan, rather than the individual medical service was emphasized. This distinction was more sharply drawn in a recent lower court decision, *Marjorie Webster Jr. College v. Middle States Association of College and Secondary Schools*.[65] In *Marjorie Webster*, the plaintiff alleged that refusal by the Association to accredit the college was tantamount to a restraint of trade. In declining to apply the antitrust laws, the circuit court for the District of Columbia adopted a "commercial-noncommercial distinction": the "proscription of the Sherman Act was tailored . . . for the business world, not for the noncommercial aspects of the learned professions."[66] The court concluded by observing that even some requirements of accreditation, if it could be shown to involve commercial motives, might bring the antitrust laws into play.[67]

Each expansion of the Sherman Act has been predicated upon the awareness that the determining factor in categorizing a course of conduct as within

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determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by the Bar Association, *but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fees.*" (emphasis added). Rules for Integration of the Bar, 171 Va. xxiii (1938). *See also* 211 Va. 295, 302 (1970).

62. VA. CODE § 54-49 (1972 Repl. Vol.), provides: "Organization and government of Virginia State Bar.—The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations of organizing and governing the association known as the Virginia State Bar, composed of the attorneys at law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under this article to a court of competent jurisdiction for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing."

63. Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1294 (1971), *cert. denied*, 404 U.S. 1047 (1972).

64. 343 U.S. 326 (1952).

65. 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

66. *Id.* at 654.

67. *Id.* at 654-55. *See also* Northern California Pharmaceutical Ass'n v. United States, 306 F.2d 379, 385 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962), in which the court stated that where restraints are imposed in the "area of enterpreneurial rather than professional activity" members of a profession are subject to liability for violation of the Sherman Act.

the Act is the degree of commercialism involved.[68] *Goldfarb* seems to approve the course taken by the appellate court in *Marjorie Webster*.[69] The opinion of the Supreme Court purports to reach the commercial practices of the profession and nothing more.[70] The narrowness of the Court's opinion, taken in conjunction with cases cited above,[71] mandates a conclusion that the direction of the law is toward validating judicial exemptions for noncommercial aspects of the professions.

The decision in *Goldfarb* is a sound one. It definitively settles the contention that the lawyer's status entitles him to an exemption from the Sherman Act. The decision represents what may be the phase of relaxing previous restrictions regarding competition among attorneys, the reason being that *Goldfarb* demonstrates that the federal courts have subject matter jurisdiction over the commercial activities of the professions. A senior official of the Justice Department has stated that bar associations holding firm to disciplinary rules prohibiting advertising could be subject to antitrust attack.[72] The fear that unrestricted advertising might be the norm is disputed by this official who says: "It seems highly unlikely that all restrictions on advertising by professions would be deemed illegal once balanced against the potential harm to society that certain forms of advertising could have."[73]

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68. Two lower court cases make the distinction between commercial and noncommercial aspects of the pharmaceutical profession. In *United States v. Utah Pharmaceutical Association*, the court found that although professional services, i.e., the noncommercial aspects, were included in a drug pricing schedule disseminated to association members, the principal element in price determination was in fact commercial. Thus where the balance was found to tip toward the entrepreneurial aspects of the profession, the fee schedule was struck down as an instance of price fixing. United States v. Utah Pharmaceutical Ass'n, 201 F. Supp. 29 (D. Utah), *aff'd per curiam*, 371 U.S. 24 (1962).

Northern California Pharmaceutical Association v. United States, 306 F.2d 379 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962) presented essentially the same problem. In this case, the court found the prescription drug price schedule of the association to be so deeply imbedded in the commercial aspects of the profession that no professional exemption could be granted. The significance of both of the foregoing cases lies in the fact that the court examined the dual scope of the price schedule, and determined that the commercial aspects of each predominated over the professional, and invoked the time honored rule that price fixing is a per se violation of the Sherman Act.

69. Marjorie Webster Jr. College v. Middle States Ass'n, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

70. The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the profession antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today. Goldfarb v. Virginia State Bar, 421 U.S. 773, 787-88, n.17 (1975).

71. *See* notes 73-78, *supra*.

72. 720 BNA ANTITRUST AND TRADE REG. REP. A-8 (1975).

73. *Id.* The least reprehensible form of advertising available to the lawyer in the near future may be the familiar Yellow Pages of phone books wherein name and speciality would be listable. One suit has already been filed seeking to restrain the New York City Bar Association from prohibiting a lawyer to advertise his specialties in the Yellow Pages and local newspapers. *Id.*

That certain forms of advertising by professional persons can be prohibited there is little doubt. *Sember v. Oregon State Board of Dental Examiners*[74] indicates that a state may invoke its police power to curtail the use of advertising by the professions.[75] In view of these facts, bar associations are under an obligation to relax disciplinary standards to the extent of premitting lawyers to list their specialties and limitations. One bar association is toying with the idea of publishing a directory including information on fees, areas of specialization and other specific information to guide consumers in shopping for legal services.[76] Their initiative in this area should be applauded. Because the profession of law is a self-regulating fraternity, the ripple of *Goldfarb* may convince some that that right is threatened by the government. Put into proper perspective, this fear is without plausible justification. *Goldfarb* deals with only a tiny, peripheral matter in the area of self-regulation. In no way does the Court diminish the right of the profession to regulate its own internal affairs. Implicit in the Court's ruling is the proposition that the legal profession has special obligations to the public which go beyond what may be the standard of conduct of ordinary businessmen. The Court's receptivity to that concept is pleasing.

Goldfarb's holding may be important for still another reason. The American Bar Association estimates that *70 percent* of the American people cannot obtain legal services.[77] The legal services market inherent in that great mass of citizens needs to be claimed via the tactic of more competitive prices. More competitive prices entails the maximum production of desired services at the lowest possible price. Hopefully, expanding the arena of the legal services market will be *Goldfarb's* most effective and lasting impact on our society. Universal access to the law by the public should be the goal by which our profession is guided.

DAVID DALE ELLIS

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74. 294 U.S. 608 (1935).

75. "It is within the authority of the State to estimate the baleful effects of such advertising and to protect the community not only against deception; but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry. . . ." *Id.* at 612.

76. 15 CALIF. L. REP. 1 (June 1975).

77. ABA, REVISED PRELIMINARY HANDBOOK ON PREPAID LEGAL SERVICES 2 (2d ed. 1972).