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Goldfarb Fights the Bar

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it will be seen that this standard is too harsh or too difficult to follow and the real standard remains a complete, transactional immunity. A future case might so decide.

William P. Bivins, Jr.

Goldfarb Fights the Bar

On January 15, 1972, Lewis H. and Ruth S. Goldfarb, residents of Virginia, purchased a home in the Reston subdivision of Fairfax County, Virginia. They proceeded through the normal transactions of the purchase of their home, which included a title examination, for which a local attorney charged a fee calculated in accordance with the effective minimum fee schedule published by the local bar association. The Goldfarbs then brought suit under the Sherman Act¹ on their own behalf, and pursuant to rule 23(b)(2) and (3) of the Federal Rules of Civil Procedure, on behalf of all prospective homebuyers in the Washington, D. C. metropolitan area and all similarly situated residents of Reston, Virginia, against the Virginia State, Fairfax County, Alexandria, and Arlington County bar associations, complaining that the defendant's combined and conspired to raise, fix, and maintain the fees for legal services performed by members of the association. This conspiracy was allegedly accomplished by circulating and adhering to published and recommended fee schedules, by establishing local committees to investigate and enforce alleged violations of the fee schedule, and by subjecting any member who habitually failed to abide by the schedule to sanctions including revocation of the license to practice law. The Alexandria and Arlington County bar associations agreed to a consent judgment, and the district court dismissed them as defendants, requiring them to cancel their existing fee schedules and enjoining them from any further adoption, publication, or distribution of schedules of minimum or suggested fees. As to the remaining defendants, the court *held*: Minimum fee schedules propose a floor upon which professional fees should be set, and, therefore, constitute a form of price fixing which is inconsistent with the Sherman Act prohibitions against anticompetitive activities. *Goldfarb v. Virginia State Bar*, 355 F. Supp. 491 (E.D. Va. 1973).

I. THE SHERMAN ACT

A. *Judicial Interpretation of Congressional Intent*

The Sherman Act has been deemed to be the "Magna Carta of free enterprise"² and the protector of the public against "those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain."³ Since its enactment in 1890, the Act has undergone

¹ Sherman Antitrust Act, 15 U.S.C. § 1 (1970).

² *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

³ *United States v. American Linseed Oil Co.*, 262 U.S. 371, 388 (1923).

countless interpretations and applications.⁴ The Supreme Court has repeatedly affirmed that the design of Congress in enacting the Sherman Act was the preservation of free competition, by making unlawful those restraints of trade or commerce already condemned under the common law.⁵ In addition, most "business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services . . ."⁶ were made illegal as being characteristic of the common law restraints.⁷ Congress derived its authority for the Sherman Act from its power to regulate commerce among the states.⁸ Although Congress attempted to encompass all varieties of restraints on commerce,⁹ it remained for the courts to interpret what was rather vaguely articulated in the Act.¹⁰

B. *Judicial Regulation of Commerce Under the Sherman Act*

Several issues found in cases under the Sherman Act have been quite perplexing for the courts. Four issues arising in the interpretation of the Act are of particular importance to the determination of whether a violation has occurred. These are: (1) what activities are encompassed within the meaning of "trade or commerce" as the terms are used in the Act; (2) when is trade or commerce "among the several states," so as to bring such activities within the prohibitions of the Sherman Act; (3) which activities are per se violations of the Sherman Act and which require some inquiry as to their reasonableness or purpose; and (4) which activities are regulated or promoted by the states so as to be exempt from the Act under the rule of *Parker v. Brown*.¹¹

The Meaning of "Trade or Commerce." In determining whether a particular activity falls within the meaning of "trade" as used in section 1 of the Sherman Act, the court may be required to determine the economic or commercial nature of the activity.¹² A recent decision held the Act not applicable to the activity

⁴ In fact, the Supreme Court has admonished legal researchers to be wary of the general language in Sherman Act cases. "[E]ach case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts . . ." *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 579 (1925).

⁵ See *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904); *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). See also 1 I. TOULMIN, A TREATISE ON THE ANTITRUST LAWS OF THE UNITED STATES § 4.01 (1949).

⁶ *Apex Hosiery v. Leader*, 310 U.S. 469, 493 (1940).

⁷ See also *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904); *United States v. Addyston Pipe & Steel Co.*, 175 U.S. 211 (1899).

⁸ U.S. CONST. art. I, § 8. Pursuant to this constitutional grant of authority, § 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ." 15 U.S.C. § 1 (1970).

⁹ *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904).

¹⁰ Judicial interpretation of the broad terms of the Act allows the law to adapt to "the changing types of commercial production and distribution that have evolved since its passage." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 386 (1956). "[T]he courts have been given by Congress wide powers in monopoly regulation. The very broadness of terms such as restraint of trade, substantial competition and purpose to monopolize have placed upon courts the responsibility to . . . avoid the evils at which Congress aimed." *United States v. Columbia Steel Co.*, 334 U.S. 495, 526 (1948).

¹¹ 317 U.S. 341 (1943).

¹² The participation in lobbying for laws which would be injurious to competitors was

of college accreditations.¹³ The court there felt the design of Congress in enacting the Sherman Act was to restrain the business world rather than the non-commercial activities of the liberal arts and the learned professions. The Supreme Court, in providing baseball an exemption to the antitrust laws, said: "[P]ersonal effort, not related to production, is not a subject of commerce."¹⁴ In *FTC v. Raladam* the Court distinguished a profession from a trade and found the characteristics of a physician's "business" to exclude such a practice from the prohibitions of the antitrust laws.¹⁵

There is also an important distinction between the sale of personal and professional services and the sale of commodities by a professional, under section 1 of the Sherman Act. In *United States v. Utah Pharmaceutical Ass'n*¹⁶ the court held that a pharmacist who fixes the price of prescription drugs according to pricing schedules formulated by pharmaceutical associations, is not exempt from the Sherman Act, though he is engaged in the practice of a learned profession. Extending the application of the Act still further, the court in *Northern California Pharmaceutical Ass'n v. United States* said: "Although dispensed by one who requires special training for some aspects of his occupation, the prescription drug no less than the law book, the text on bacteriology, or the handbook on accounting, is an article of trade or commerce."¹⁷ Both courts declined to comment on the legality of price schedules for professional services while holding an agreement among learned professionals to fix commodity prices a violation of the Act.

In several cases the Supreme Court has had to determine whether the sale of personal services was included within the section 3 meaning of "trade or commerce." Congress enacted section 3¹⁸ to apply the Sherman Act's prohibitions to the District of Columbia. Under the Constitution, power is reserved to Congress to exercise "exclusive Legislation in all Cases whatsoever, over . . . the District of Columbia . . ."¹⁹ Therefore, section 3 is not inhibited by the interpretations of the commerce clause, as is section 1. In *Atlantic Cleaners & Dyers, Inc. v. United States*²⁰ the Supreme Court noted that "trade" often is used in a broader sense than allowed by the meaning of commerce under the Constitution. The Court adopted, for purposes of section 3 of the Act, the meaning attributed to "trade" by Justice Story in *The Nymph*²¹ where it

found not to be a violation of the Sherman Act in *Eastern R.R. Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). The Court held the "essential dissimilarity" of the railroads' activities to "agreements traditionally condemned" by § 1 of the Sherman Act protected them. *Id.* at 136.

¹³ *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc.*, 432 F.2d 650, 654 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

¹⁴ *Federal Baseball Club v. National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922). And in *Flood v. Kuhn*, 407 U.S. 258, 271 (1972), reaffirming baseball's exempt status, the Court noted that *Federal Baseball* has "been cited, not unfavorably, with respect to the practice of law . . ."

¹⁵ 283 U.S. 643 (1931). The Court held that "[medical practitioners] follow a profession and not a trade, and are not engaged in the business of making or vending remedies but in prescribing them." *Id.* at 653.

¹⁶ 201 F. Supp. 29 (D. Utah), *aff'd per curiam*, 371 U.S. 24 (1962).

¹⁷ 306 F.2d 379, 384 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962).

¹⁸ 15 U.S.C. § 3 (1970).

¹⁹ U.S. CONST. art. I, § 8.

²⁰ 286 U.S. 427 (1932).

²¹ 18 F. Cas. 506 (No. 10,388) (S.D.N.Y. 1863).

was held to mean "any occupation, employment, or business . . . carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions"²²

This broader meaning of "trade" under section 3, excluding the learned professions, was reaffirmed in *United States v. National Ass'n of Real Estate Boards*,²³ where the Court found the business of a real estate agent rendering personal services to be included within the scope of section 3. However, while noting that the court of appeals in *United States v. American Medical Ass'n* interpreted "trade" under section 3 as "all occupations in which men are engaged for a livelihood,"²⁴ the Supreme Court expressly withheld its opinion on the correctness of including the professions within this interpretation.²⁵ Two years later, in its opinion in *United States v. Oregon State Medical Soc'y*²⁶ the Supreme Court did indicate that the relationship between a physician and his patients involves ethical considerations quite different from those prevailing in ordinary commercial matters.²⁷

Thus, it is clear that the question of including professional services within the meaning of trade in section 1 or 3 of the Sherman Act can only be resolved by a court after thorough judicial analysis of these prior decisions.

Trade or Commerce "Among the Several States." The commerce clause of the Constitution both authorizes and limits the application of section 1 of the Sherman Act to any, and only, activities which encumber the free flow of interstate commerce.²⁸ Thus, a court may find this jurisdictional requirement satisfied by pure interstate commerce, or the court may be required to examine local activities which are alleged to restrain the flow of interstate commerce. Where the activity in question, viewed alone, is intrastate or local in nature, the courts apply two basic tests to determine whether the activity has a restraining effect on the flow of interstate commerce.²⁹ The "in commerce" or qualitative test allows local activity having even an insubstantial effect on the flow of commerce to be examined under the Sherman Act if the activity is

²² 286 U.S. at 36.

²³ 339 U.S. 485 (1950).

²⁴ 110 F.2d 703, 710 (D.C. Cir. 1940). See also *United States v. American Medical Ass'n*, 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943). The Supreme Court on review of the latter declined to comment on the lower court's inclusion of the professions within the § 3 meaning of "trade," as it was found to be irrelevant to the disposition of the case. The Court did hold the defendants liable as the purpose and effect of their conspiracy was to restrain competition outside of their organization. 317 U.S. 519 (1943). A contrary result was reached, however, when the practice of medicine was attacked under § 1 in *Riggall v. Washington County Med. Soc'y*, 249 F.2d 266 (8th Cir. 1957), where the court held: "The practice of . . . [medicine] is neither trade nor commerce within Section 1 of the Sherman Antitrust Act"

²⁵ 339 U.S. at 491-92.

²⁶ 343 U.S. 326 (1952).

²⁷ *Id.* at 336.

²⁸ The Sherman Act renders only restraints of trade "among the several states" illegal, but certain local activities within one state have been found to have an effect on this trade, and therefore are encompassed by the Act. See *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

²⁹ See *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954); *Kallen v. Nexus Corp.*, 353 F. Supp. 33 (N.D. Ill. 1973).

within the flow of interstate commerce.³⁰ Under the "affecting commerce" or quantitative test, local activity will violate the Act only if it substantially affects an interstate commerce market.³¹ Therefore, to sustain its jurisdiction in the absence of pure interstate commerce, the court must find minimally that the local activity is either within the flow of interstate commerce or significantly affecting it.³² While Congress exercised "all the power it possessed" in enacting the Sherman Act to restrain trust and monopoly agreements,³³ it has become the duty of the courts to determine whether the intrastate and local activities of each defendant exert an unlawful influence upon interstate commerce.³⁴

The Rule of Reason and the Per Se Violation. The Sherman Act has been referred to not only as a prohibition against certain activities, but as an actual congressional limitation of rights which need to be restrained due to their dangerous nature.³⁵ In *Standard Oil Co. v. United States*,³⁶ an early case in the history of the Sherman Act, the Supreme Court determined that Congress had merely defined the legal limits of possible interstate activities which should fall within the Act. The Court was thus left unburdened by precise definitions and could interpret particular restraints in light of their overall reasonableness. This pronouncement of a rule of reason as a test of legality of restraints on trade was further explained in *Chicago Board of Trade v. United States*,³⁷ where the Supreme Court held that the legality of an agreement could not be determined merely on the basis of whether it restrained trade. "Every agreement

³⁰ The Supreme Court indicated in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), that § 1 of the Sherman Act condemns the character of the restraint, not its effect, and, therefore, the amount of interstate commerce affected is immaterial. See *Montague & Co. v. Lowry*, 193 U.S. 38 (1904); *Patterson v. United States*, 222 F. 599 (6th Cir.), cert. denied, 238 U.S. 635 (1915); *Steers v. United States*, 192 F. 1 (6th Cir. 1911).

³¹ In considering its jurisdiction under the Sherman Act, the court in *Rosemount Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 469 F.2d 416 (5th Cir. 1972), determined that a violation of the Act would be inherent in the intrastate activities involved only if there was a "direct and substantial effect on interstate commerce." *Id.* at 418. See also *Elizabeth Hosp., Inc. v. Richardson*, 269 F.2d 167 (8th Cir.), cert. denied, 361 U.S. 884 (1959); *Hotel Phillips, Inc. v. Journeyman Barbers*, 195 F. Supp. 664 (W.D. Mo. 1961), aff'd, 301 F.2d 443 (8th Cir. 1962), and ABA ANTITRUST SECTION, ANTITRUST DEVELOPMENTS 1955-1968, at 38-39 (1968).

³² "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464 (1949).

³³ *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 435 (1932). See also *United States v. South-Eastern Underwriters*, 322 U.S. 533 (1944). But cf. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

³⁴ "In such legislation [regulating interstate commerce] Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act." *United States v. Darby*, 312 U.S. 100, 120 (1941).

³⁵ *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912).

³⁶ 221 U.S. 1, 63-64 (1911):

The merely generic enumeration which the statute makes of the acts to which it refers and the absence of any definition of restraint of trade as used in the statute leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the application of the act by precise definition, but while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statutes in every given case whether any particular act or contract was within the contemplation of the statute.

³⁷ 246 U.S. 231 (1918).

concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as . . . may suppress or even destroy competition."³⁸

However, the rule of reason is not applied in cases where the restraint consisted of price-fixing. In *United States v. Trenton Potteries Co.*³⁹ the Court held the Sherman Act prohibits price-fixing by those engaged in an interstate trade or business, without regard to the reasonableness of the agreement.⁴⁰ The Court observed that the necessity of determining the reasonableness of prices set by agreement would place an excessive burden on the Government in enforcing the law under changing economic conditions and would necessarily make the legality of many agreements contingent upon the imprecise choice of philosophies by the Court.⁴¹ But regardless of the burden of proof problems, "[p]rice is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition."⁴² Generally, the mere

³⁸ *Id.* at 238. In applying the test "the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." *Id.*

³⁹ 273 U.S. 392 (1927).

⁴⁰ *Id.* at 398. Thus, where the courts find evidence of price fixing, it will be deemed illegal without regard to the particular purpose of the agreement or the reasonableness of the prices. In an oft-quoted passage, Justice Black stated:

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves [is] price fixing . . .

Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). See also *United States v. Container Corp. of America*, 393 U.S. 333 (1969); *United States v. National Ass'n Real Estate Bds.*, 339 U.S. 485 (1950); 1 I. TOULMIN, A TREATISE ON THE ANTITRUST LAWS OF THE UNITED STATES §§ 13.26-35 (1949); E. HODGES, THE ANTITRUST ACT AND THE SUPREME COURT 16-22 (1941); Note, *Price Fixing and the Illegal Per Se Concept*, 5 U. RICH. L. REV. 422 (1971). However, in *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961), the district court found an exception to the per se illegality of tying arrangements as expressed in *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6 (1958), when viewing the unique circumstances of a new industry. The court said: "[W]hile the per se rule should be followed in almost all cases, the court must always be conscious of the fact that a case might arise in which the facts indicate that an injustice would be done by blindly accepting the per se rule." 187 F. Supp. at 556. The court therefore allowed testimony and argument on the issue of the reasonableness of the arrangement. See also 1 I. TOULMIN, *supra*, § 13.0; E. HODGES, *supra*, at 7-16; ANTITRUST DEVELOPMENTS 1955-1968, *supra* note 31, at 7-9.

⁴¹ 273 U.S. at 397-98. In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940), the Court held that "[u]nder 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 or foreign commerce is illegal per se."

⁴² *United States v. Container Corp. of America*, 393 U.S. 333, 338 (1969). However, in two separate opinions two Justices objected to the application of the per se rule to an exchange of price and market information. Justice Fortas concurred with the result of the case but preferred to make clear that "[a]bsent per se violation, proof is essential that the practise resulted in an unreasonable restraint of trade." *Id.* at 339. Justice Marshall dissented saying: "I do not believe that the agreement in the present case is so devoid of potential benefit or so inherently harmful that we are justified in condemning it without proof that it was entered for the purpose of restraining price competition or that it actually had that

exchange of price information necessarily tends to stabilize prices and thereby "chill the vigor of price competition."⁴³ Thus, the Supreme Court, having had considerable opportunity to review various types of price-fixing arrangements, generally considers them a *per se* violation and will not look to the purpose or effect for which they are intended.⁴⁴

The Parker v. Brown Exemption. Where the state authorizes a particular activity and proceeds actively to supervise or regulate that activity in order to protect the public's interests, the Sherman Act provisions are not applicable. It was held in *Parker v. Brown* that there is "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."⁴⁵ However, quasi-governmental agencies such as port authorities or boards of trade, which are created or sanctioned by state law, are generally found to be too far removed from the regulation of the sovereign to constitute arms of the state.⁴⁶ The Supreme Court in *Parker* upheld an agriculture proration program which both restricted the competition among raisin producers and maintained a minimum price level. The program was established and supervised under state legislative sanction. The Court said: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state control over its officers and agents is not lightly to be attributed to Congress."⁴⁷ In *Allstate Insurance Co. v. Lanier*⁴⁸ the Fourth Circuit upheld a North Carolina statute under which all automobile insurance companies were required to adhere to a schedule of rates and standards, promulgated by a rating bureau composed of all the insurance companies, as approved by the state insurance commissioner. Because the rating bureau was established and administered under the active supervision of the state, the Sherman Act provisions which condemn private anticompetitive activities were found by the court to be inapplicable.⁴⁹

II. GOLDFARB V. VIRGINIA STATE BAR

In *Goldfarb v. Virginia State Bar*, which concerned the Fairfax County and

effect. The agreement in this case was to supply, when requested, price data for identified customers." *Id.* at 341-42.

⁴³ *Belliston v. Texaco, Inc.*, 455 F.2d 175, 181 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972). *But cf.* the discussion note 42 *supra*.

⁴⁴ "[F]or over forty years this Court has consistently and without deviation adhered to the principle that price fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).

⁴⁵ 317 U.S. at 350.

⁴⁶ See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706 (1962); *Asheville Tobacco Bd. of Trade v. FTC*, 263 F.2d 502, 509 (4th Cir. 1959).

⁴⁷ 317 U.S. at 351.

⁴⁸ 361 F.2d 870 (4th Cir.), *cert. denied*, 385 U.S. 930 (1966), *aff'g* 242 F. Supp. 73 (E.D.N.C. 1965).

⁴⁹ The court stated: "The central question in both cases [*Parker* and *Allstate*] is whether a program of regulation established and actively supervised by a state is subject to the antitrust laws. Absent congressional action departing from the rule of *Parker v. Brown*, the North Carolina statutory plan is clearly valid." 361 F.2d at 872.

the Virginia state bar associations, it was necessary for the court to consider the basic requirements of the Sherman Act as they would relate to the alleged misconduct. To sustain its jurisdiction under the Act, the court was required to determine whether the practice of law was within the meaning of "trade" under section 1 of the Sherman Act, and whether the title examination by Goldfarb's attorney constituted sufficient trade or commerce among the several states to bring the activity within the regulations of the statute. Upon establishing the interstate nature of the activity and finding no exemption of the specific activity from the Act,⁵⁰ the court then considered whether there was in fact a restraint imposed on interstate commerce by the existence of the alleged conspiracy.

Were the Legal Services a Trade Under the Sherman Act? The applicability of sections 1 and 3 of the Sherman Act to a profession such as law had been impliedly questioned by the courts prior to *Goldfarb*.⁵¹ The court in *Goldfarb*, however, reasoned that professional legal services are within the meaning of "trade" in the Sherman Act because of the court's disbelief that a minimum fee schedule was in itself professional.⁵² Defendants contended that the rendering of professional legal services should be distinguished from the sale of commodities in the commercial avenues. However, to the court this appeared to be inconsistent with the defendants' position that a minimum fee schedule could properly be referred to by the professional in determining his fee. The court felt the existence of a fee schedule rendered meaningless the differences in "abilities, worth and energies" of those rendering the services, and allowed an attorney to charge a client more than his services were worth.⁵³ The fact that an attorney might charge more than he is "worth" by relying on a fee schedule is hardly an inherent evil within the schedules.⁵⁴ Congress, in enacting section 6 of the Clayton Act which exempts organized labor from the antitrust laws,⁵⁵ allows unions to fix the starting hourly pay of manual laborers, manufacturing employees, truck drivers, airline pilots, and other workers, without regard to

⁵⁰ The exemption could be by congressional action (*e.g.*, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 (1970)), or by congressional inaction (*e.g.*, the baseball exemption was continued by the Supreme Court partly due to this factor, *Flood v. Kuhn*, 407 U.S. 258 (1972)), or by implied judicial action (*e.g.*, the exemption of professional services up to 1973), or by state action (*e.g.*, *Parker v. Brown*, 317 U.S. 341 (1943)). As stated by the Court: "[T]he typical method adopted by Congress when it has lifted the ban of the Sherman Act is the scrutiny and approval of designated public representatives." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 227 n.60 (1940). See also *Seamans, First Aid to the Plaintiff*, 33 ABA ANTITRUST L.J. 48-55 (1967).

⁵¹ See notes 12-15, 22, 25, and 27 *supra*, and accompanying text with regard to previous implications concerning the application of the Sherman Act to the practice of law.

⁵² 355 F. Supp. at 495.

⁵³ *Id.*

⁵⁴ There are many instances where courts have recognized that though not bound by minimum fee schedules, the bar by promulgating such schedules does aid the court in determining a reasonable fee. See *Perlman v. Feldmann*, 160 F. Supp. 310 (D. Conn. 1958); *Krieger v. Colby*, 106 F. Supp. 124 (S.D. Cal. 1952); *Lucom v. Potter*, 131 So. 2d 724 (Fla. 1961); *Whittle v. Whittle*, 272 Ala. 32, 128 So. 2d 92 (1961).

⁵⁵ "The labor of a human being is not a commodity or article of commerce. . . . [N]or shall such [labor] organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U.S.C. § 17 (1970).

differences in "abilities, worth and energies."⁵⁶ Fee setting may be the "least 'learned' part of the profession";⁵⁷ however, where the activity is essentially non-commercial, its commercial aspects should not bring the activity within the scope of the Sherman Act.⁵⁸

Was Interstate Commerce Affected? The court did not find the title examination performed by Goldfarb's attorney to be "in the flow of interstate commerce." Rather, the court emphasized the fact that most lenders, prior to granting a loan, require such a title examination to be made, and as most of the home loans in this area of Virginia came from sources outside the state and were guaranteed by federal agencies located in Washington D.C., interstate commerce was sufficiently affected.⁵⁹ Of course some of the same arguments might have been raised in the *National Ass'n of Real Estate Boards* case involving the commissions of real estate agents acting as brokers in the sale, exchange, lease, and management of real property in the District of Columbia. But the Court there found: "The fact that no interstate commerce is involved is not a barrier to this suit."⁶⁰ This, of course, was because the action there was brought in the District of Columbia under section 3 of the Sherman Act which requires no interstate commerce for its application, but the inference as to the lack of any effect on such commerce by the same type of activities is clear.

Was the Parker v. Brown Exemption Available? Under its statutory authority to promulgate rules and regulations to govern the conduct of attorneys practicing law in Virginia, the Virginia Supreme Court empowered and required the Virginia State Bar to investigate violations of the standards of conduct of the court and the opinions of the bar on questions of ethics.⁶¹ It was to this authority that local bar associations looked for enforcement of their minimum fee schedules. Though accepting as fact that the defendant Fairfax County bar association had never taken any action against a member for failing to follow its minimum fee schedule, the court found the local bar association to be in violation of the Sherman Act. The court concluded that the rationale behind *Parker v. Brown* applied equally as well to a state's judicial actions and, therefore, in this case to the Virginia State Bar created by the Virginia Supreme Court under its statutory powers. The *Parker* exemption was held to include

⁵⁶ See *United States v. National Ass'n of Real Estate Bds.*, 84 F. Supp. 802 (D.D.C. 1949).

⁵⁷ 355 F. Supp. at 495.

⁵⁸ *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

⁵⁹ 355 F. Supp. at 494.

⁶⁰ 339 U.S. 485, 488 (1950).

⁶¹ In Virginia, the State Supreme Court of Appeals is authorized to "prescribe . . . rules and regulations organizing and governing . . . the Virginia State Bar, composed of the attorney 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 . . . to a court of competent jurisdiction for such proceedings as may be necessary . . ." VA. CODE ANN. § 54-49 (1972 repl. vol.).

only the state bar, as the county bar association was a private undertaking and not expressly empowered by the state supreme court.⁶²

Was the Minimum Fee Schedule a Restraint of Trade? The court in *Goldfarb* initially concluded that minimum fee schedules were a form of price-fixing and a per se violation of the Sherman Act. This conclusion seemed to be based on the presumption that the fee schedule was the sole criterion for setting a fee, and that such a schedule was unprofessional. However, the court may have overlooked the relevant economic realities of the pricing process by attorneys for their services.⁶³ A minimum fee schedule is intended to be mere evidence of the customary charges of the bar for similar services within a particular locality. As such, it was one of six factors to be considered in fixing the amount of the fee under the old ABA Canon 12,⁶⁴ and now, under the American Bar Association's Code of Professional Responsibility, a fee schedule is merely one of eight factors to be looked to under Ethical Consideration 2-18, and one of eight guides for the attorney under Disciplinary Rule 2-106(B).⁶⁵ In any event, the minimum fee schedule is not intended to be mandatory.⁶⁶

The Virginia State Bar, in Opinion No. 98, fully approved of the old ABA Canon 12 and of the circumstances in which an attorney would be justified in not following a suggested minimum fee schedule due to other ethical considerations.⁶⁷ Opinion No. 170 of the Virginia State Bar, however, stated that the state bar raised a presumption of misconduct on the part of any attorney who habitually failed to follow a minimum fee schedule.⁶⁸ The Fairfax County bar association relied on the state bar for any enforcement of its

⁶² 355 F. Supp. at 495-96.

⁶³ It has been noted that "the judicial convenience and ready predictability that are made possible by *per se* rules are not such overriding considerations in antitrust law as to justify their promulgation without careful prior consideration of the relevant economic realities in the light of the basic policy and goals of the Sherman Act." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 614 (1972) (Burger, C.J., dissenting).

⁶⁴ In 1969 the ABA Canons of Professional Ethics were restructured into the ABA Code of Professional Responsibility which has nine basic Canons, with Ethical Considerations and Disciplinary Rules pertaining to each Canon. Under this new Code, the Canons represent the general standard of conduct expected of all lawyers, the Ethical Considerations are "aspirational in character" and offer the practicing lawyer principles which he can look to in specific situations, and the Disciplinary Rules are intended to establish the minimum level of conduct expected of all lawyers, any of whom falling below this standard may be subject to disciplinary action. See ABA CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1970).

⁶⁵ According to Ethical Consideration 2-18, and Disciplinary Rule 2-106, an attorney may be in violation of his professional ethics and subject to sanctions, if, in fact, he follows only the minimum fee schedule. See ABA Formal Opinion 323, 56 A.B.A.J. 1087 (1970).

⁶⁶ In Formal Opinion 323 the Committee on Professional Ethics of the American Bar Association stated: "[T]he Committee has no hesitancy in holding that mere failure to follow a minimum fee schedule, even when habitual, cannot, standing alone and absent evidence of misconduct afford a basis for disciplinary action." 56 A.B.A.J. 1087 (1970). The Committee also noted its intention that any reference to disciplinary sanction, by a state or local bar, for an attorney failing to follow a minimum fee schedule should be discontinued.

⁶⁷ Virginia State Bar, Opinion No. 98 (1960). But the Opinion went on to censure such reductions in the customary charges of the bar for similar services, where such was done with the intent to solicit business in that manner.

⁶⁸ VIRGINIA STATE BAR, OPINION NO. 170 (1971). This was a direct departure from ABA Opinion 323 and makes the minimum fee schedules promulgated on the local levels in Virginia closer to a floor for prices of legal services than fee schedules in other states which are to be used by lawyers only as envisioned in Opinion 323 of the ABA.

fee schedule. Its adoption by the local bar was merely a service to the members and without any sanctions on the local level for its enforcement.

The Supreme Court has held that whether penalties are imposed for non-adherence is immaterial where a schedule fixing the prices of goods or services is found.⁶⁹ Therefore, the question is not whether the attorneys could be subject to discipline for not following the fee schedule or considering it as a factor in fixing their fees, but rather whether the minimum fee schedule, incorporated as it was within the Code of Professional Responsibility, constituted a form of pricefixing. The court in *Goldfarb* left no doubt as to the answer to this question. The court held that "[m]inimum fee schedules are a form of price fixing and therefore inconsistent with antitrust statutes prohibiting anti-competitive activities The minimum fee schedule actually proposes a floor upon which professional fees should be set."⁷⁰ Price-fixing by professionals has been considered prior to this case and found to be illegal under certain circumstances.⁷¹ Such an application of the Sherman Act to the professional occupations and any encouragement of businesslike competition has been considered by other courts and has been disapproved of.⁷²

III. CONCLUSION

It would seem a plausible conclusion that minimum fee schedules, when considered in their proper light as merely advisory schedules as to the "customary charges of the bar," are not per se violations of the Sherman Act. The fee schedules may, in fact, represent the minimum price attorneys will accept for some of their services; however, there are many factors which should not be overlooked in considering whether the schedules are proper. That such a price may represent the only reasonable and feasible fee which an attorney, young or old, could charge and still maintain a profitable enterprise in light of the education, experience, time, and effort required for the task is one practical consideration. The fact that courts must fix attorneys' fees based upon educated opinions and that attorneys are obligated in many instances to provide their services to indigent clients for a statutory fee would

⁶⁹ *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 489-90 (1950). See also *Plymouth Dealers' Ass'n v. United States*, 279 F.2d 128 (9th Cir. 1960), where the court rejected the auto dealers' contention that their agreed price list was lawful in the absence of proof that the list actually fixed prices. The court found the price list to be an agreed starting point for prices, and that such a list, where followed, restricted the dealers' judgment in pricing their cars and, therefore, was a per se violation of the antitrust laws. *Id.* at 132.

⁷⁰ 355 F. Supp. at 493.

⁷¹ "[T]here is no defense to *price-fixing* on the ground that it is reasonable or that it is being done by professionals We do not decide that every action of professionals is within the reach of the Sherman Act. We do decide that an agreement among professionals to fix a commodity price is." *Northern Cal. Pharmaceutical Ass'n v. United States*, 306 F.2d 379, 385-86 (9th Cir. 1962).

⁷² In *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 612 (1935), the Court said: "the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous." And in *United States v. Oregon Medical Soc'y*, 343 U.S. 326, 336 (1952), the court noted: "This Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession." The court in *Levin v. Doctors Hosp., Inc.*, 233 F. Supp. 953 (D.D.C. 1964), found efforts of a profession to raise its standards to be commendable though such efforts limited the practice of podiatrists in the hospital.