

Antitrust: Professions: Per Se Rule Applied to Ethical Canon Against Competitive Bidding. (National Society of Professional Engineers v. United States)

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NOTES

ANTITRUST—Professions—Per Se Rule Applied to Ethical Canon Against Competitive Bidding. *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). In *National Society of Professional Engineers v. United States*¹ the Supreme Court strictly applied Section 1 of the Sherman Antitrust Act² to a learned profession. The Court refused to provide an exemption for an ethical canon which purported to foster professional ethics at the expense of competition. The *National Society* decision gave some indication of how the Court will treat professional ethical canons that have antitrust implications, but also raised serious questions about what types of canons are still permissible.

The case involved an ethical canon of the National Society of Professional Engineers which prohibited competitive bidding. In 1972 the United States instituted a civil antitrust action to enjoin members of the Society from adhering to the ethical canon.³ Similar actions had been brought against groups of civil engineers,⁴ architects⁵ and certified public accountants,⁶ but injunctions had been entered pursuant to consent decrees.⁷ Up until 1975 and the decision in *Goldfarb v. Virginia State Bar*⁸ it was unclear whether the Sherman Act was even to apply to the professions.⁹ Consequently, *National Society* is one of the few cases, other than *Goldfarb*, which discusses the extent to which the Sherman Act will apply to the learned professions in the future.

1. 435 U.S. 679 (1978).

2. "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 (1976).

3. 435 U.S. at 683 n.3.

4. *United States v. American Soc'y of Civil Eng'rs*, 1972 TRADE CASES (CCH) ¶ 73,950 (S.D.N.Y. June 1, 1972).

5. *United States v. American Inst. of Architects*, 1972 TRADE CASES (CCH) ¶ 73,981 (D.D.C. June 19, 1972).

6. *United States v. American Inst. of Certified Pub. Accountants, Inc.*, 1972 TRADE CASES (CCH) ¶ 74,007 (D.D.C. July 6, 1972).

7. See generally 48 NOTRE DAME LAW. 966 (1973).

8. 421 U.S. 773 (1975).

9. See Branca & Steinberg, *Attorney Fee Schedules and Legal Advertising: The Implications of Goldfarb*, 24 U.C.L.A. L. REV. 475, 475-76 n.5 (1977) [hereinafter cited as Branca & Steinberg]; Coleman, *The Learned Professions*, 33 A.B.A. ANTITRUST L.J. 48 (1967).

I. DEMISE OF IMMUNITY FOR THE PROFESSIONS

There are several reasons why the professions originally were thought to be exempt from the Sherman Act. Section 1 of the Act only applies to contracts, combinations and conspiracies which are "in restraint of trade or commerce among the several States."¹⁰ For several years it was unclear whether professional activities constituted "trade or commerce" within the meaning of the Act and whether they were local in nature and did not affect interstate commerce "among the several states." Finally, there was a question whether state-regulated professional conduct came within the state action exemption to the Sherman Act.¹¹

A. "Trade or Commerce"

The uncertainty surrounding the application of the Sherman Act to the professions began with the case of *Federal Baseball Club v. National League*.¹² In that case Justice Holmes stated that, "[P]ersonal effort, not related to production, is not a subject of commerce,"¹³ and that the exhibition of baseball games "although made for money would not be called trade or commerce in the commonly accepted use of those words."¹⁴ He cited to the legal profession as an example of "[t]hat which in its consummation is not commerce."¹⁵ Thus, the decision seemed to suggest that any rendition of services "not related to production" would not constitute "trade or commerce" covered by the Sherman Act.¹⁶

Although a more expansive definition of the word "trade" was subsequently adopted, the Supreme Court was reluctant to include the learned professions within the provisions of the Sherman Act. For example, in applying the Sherman Act to a cleaning business in *Atlantic Cleaners & Dyers, Inc. v. United States*,¹⁷ the Supreme Court stated that, "Wherever any occu-

10. 15 U.S.C. § 1 (1976).

11. See Bauer, *Professional Activities and the Antitrust Laws*, 50 NOTRE DAME LAW. 570, 570-71 (1974-1975) [hereinafter cited as Bauer].

12. 259 U.S. 200 (1922).

13. *Id.* at 209.

14. *Id.*

15. *Id.*

16. Bauer, *supra* note 11, at 573. Cf. *FTC v. Raladam Co.*, 283 U.S. 643, 653 (1931) (decided under the Federal Trade Commission Act) (noting that doctors are not in competition with drug manufacturers because, "They follow a profession and not a trade"). See Bauer, *supra* note 11, at 574.

17. 286 U.S. 427 (1932).

pation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a *trade*.'"¹⁸ Similarly, in *United States v. National Association of Real Estate Boards*¹⁹ the Court included real estate brokerage within the same broad definition of "trade," but explicitly declined to comment on the application of antitrust laws to professions.²⁰

In the interim between *Atlantic Cleaners* and *Real Estate Boards*, the Supreme Court had indicated a significant shift in its approach to the professions and the Sherman Act. In *American Medical Association v. United States*²¹ the Court held that the Association could not prevent individual doctors from working on a salaried basis for a corporation providing medical services. Although the Court did not decide whether the medical profession was a "trade," it did find that any purported exemption of professions did not apply where the object of the restraint was engaged in "commerce."²² Since that time the lower federal and state court decisions have offered no further help in deciding whether the professions are exempt from the Sherman Act.²³

It was not until *Goldfarb v. Virginia State Bar*²⁴ that the Supreme Court finally decided that the professions did constitute "trade or commerce" within the meaning of that phrase in Section 1 of the Sherman Act. Holding that bar association fee schedules did violate the Act, the Court noted that "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."²⁵

Rejecting any notion of a professional exemption, the Court stated that, "We cannot find support for the proposition that Congress intended any such sweeping exclusion. The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act"²⁶ Thus, *Goldfarb* eliminated any

18. *Id.* at 436 (quoting *The Nymph*, 18 F. Cas. 506, 507 (C.C.D. Me. 1834) (No. 10,388)) (emphasis in original).

19. 339 U.S. 485, 490-91 (1950).

20. *Id.* at 490-92.

21. 317 U.S. 519 (1943).

22. *Id.* at 529.

23. See Bauer, *supra* note 11, at 578-84.

24. 421 U.S. 773 (1975).

25. *Id.* at 787-88.

26. *Id.* at 787 (citing *Associated Press v. United States*, 326 U.S. 1, 7 (1949) (which dealt with a joint venture of several newspaper companies)).

doubt that the professions constituted "trade or commerce" covered by the Sherman Act.

B. "Among the Several States"

The issue of whether or not the professions involved trade or commerce "among the states" underwent a similar history. In his opinion in *Federal Baseball* mentioned earlier, Justice Holmes noted that interstate travel does not transform activity not covered by the Sherman Act into "commerce." By way of illustration, he specifically referred to the legal profession, saying that, "A firm of lawyers sending out a member to argue a case . . . does not engage in such [interstate] commerce because the lawyer . . . goes to another State."²⁷ Thus, the Court seemed to indicate that professions in general, and the legal profession in particular, were not subject to the Sherman Act, not only because they were not engaged in "trade or commerce," but also because the activities they engaged in were not interstate in character.

However, since the *Federal Baseball* decision, the Supreme Court has greatly expanded the meaning of the term "interstate commerce."²⁸ The Court now applies the Sherman Act both to activity actually in interstate commerce and to activity which substantially affects interstate commerce.²⁹ This includes nearly all of the activities of professional groups organized on a national basis.³⁰

The minimum fee schedule of the Virginia State Bar in *Goldfarb* was found to have sufficient effect on interstate commerce to warrant coverage under the Sherman Act. However, the Court did suggest that "there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act."³¹ Although it is theoretically possible that an anticompetitive ethical canon might be permitted to stand because it dealt solely with intrastate activities, in practice such a canon would have little utility in light of the broad interpretation of the Sherman Act's interstate

27. 259 U.S. at 209.

28. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

29. See *Burke v. Ford*, 389 U.S. 320, 321 (1967). See also *Bauer*, *supra* note 11, at 595.

30. Rigler, *Professional Codes of Conduct after Goldfarb: A Proposed Method of Antitrust Analysis*, 29 ARK. L. REV. 185, 188 (1975) [hereinafter cited as Rigler].

31. 421 U.S. at 785-86.

commerce requirement.³² In effect, *Goldfarb* laid to rest both of the arguments suggested in *Federal Baseball* for exempting the professions from the Sherman Act.

C. State Action

A third reason why the professions were thought to be exempt from the application of the Sherman Act had its origins in the case of *Parker v. Brown*.³³ In that case the Supreme Court upheld state regulation of an agricultural market on the grounds that the Sherman Act does not apply to the actions of states or state officials.³⁴ Thus, it is argued in *Goldfarb* that professions subject to state regulation should not be held accountable under antitrust law.

However, the *Goldfarb* Court held that in order to be within the state action exemption, an activity must be required, not merely authorized, by the regulating state.³⁵ Thus, for example, in *Bates v. State Bar of Arizona*³⁶ the Supreme Court found that the Sherman Act did not apply to a disciplinary rule promulgated by the Arizona Supreme Court which prohibited lawyer advertising.³⁷ However, most of the professions are not regulated so directly by the states. Therefore, the *Goldfarb* decision effectively subjected the vast majority of professional organizations to scrutiny under the Sherman Act. However, the decision was unclear about exactly how the Sherman Act should apply in these cases.

II. THE PROFESSIONS UNDER THE SHERMAN ACT

The *Goldfarb* decision did not specify whether the Sherman Act would apply to the professions in the same way it had been applied to other business. The Court suggested that different, less vigorous standards might apply to the professions. Under traditional analysis the legality of various business activities is determined under the related standards of the rule of reason and the per se doctrine.³⁸

32. See Branca & Steinberg, *supra* note 9, at 479.

33. 317 U.S. 341 (1943).

34. *Id.* at 352.

35. 421 U.S. at 790. See also Bauer, *supra* note 11, at 598-601; Branca & Steinberg, *supra* note 9, at 480-82; 22 N.Y.L. SCH. L. REV. 699, 723-30 (1976-1977).

36. 433 U.S. 350 (1977).

37. *Id.* at 360. However, the Supreme Court held that the Arizona disciplinary rule violated the first amendment of the Constitution.

38. See generally L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 165-97 (1977) [hereinafter cited as SULLIVAN]; Bork, *The Rule of Reason and the Per Se Concept*:

The rule of reason was developed in response to the broad sweep of the language in Section 1 of the Sherman Act. That section purports to prohibit "[e]very contract, combination . . . or conspiracy, in restraint of trade." It cannot be applied literally; otherwise, normal contracts between buyers and sellers would be illegal.³⁹

Consequently, in *Standard Oil Co. v. United States*⁴⁰ the Supreme Court instituted the rule of reason, under which particular restraints of trade are held to violate Section 1 of the Sherman Act only if they restrict competition to a degree considered undue.⁴¹ The focus of the inquiry is not whether the restraint is desirable, but whether it restricts competition unreasonably. The enunciation of the rule of reason in *Chicago Board of Trade v. United States*⁴² has been widely accepted as the definitive description of the test: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."⁴³

However, certain types of conduct are considered to be so blatantly anticompetitive that they have been held to be illegal per se. For example, pricing fixing⁴⁴ and the horizontal division of markets⁴⁵ have been found to be within the per se doctrine.⁴⁶ No elaborate balancing of the effects on competition under the rule of reason is needed to determine the legality of restraints which are illegal per se.

The *Goldfarb* decision did not make clear exactly how those rules would be applied to the professions. Although the Court found the minimum fee schedules in that case to be price fixing which is illegal per se, the Court limited its holding with the following footnote:

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 Sher-

Price Fixing and Market Division, 74 YALE L.J. 775 (1965).

39. *National Soc'y*, 435 U.S. at 688 n.10.

40. 221 U.S. 1 (1911).

41. *Id.* at 62.

42. 246 U.S. 231 (1918).

43. *Id.* at 238.

44. See *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

45. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972).

46. See also *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (group boycotts); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958) (tying arrangements).

man Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.⁴⁷

This footnote gave no definite guidance because it was unclear.⁴⁸ Furthermore, it did not indicate whether factors other than the impact on competition could be taken into account in determining the legality of restraints upon the professions. It could have meant that the per se doctrine was to give way to the rule of reason approach in all cases where professions were involved. It could also have meant that factors other than the ultimate impact upon competition could be taken into consideration when the rule of reason was applied to professions. In either event a defense based on the reasonableness of the restraint involved might prove successful.⁴⁹

Consequently, in *National Society* the Society attempted to justify its ethical canon prohibiting competitive bidding on factors other than the ultimate impact of its canon on competition among professional engineers.⁵⁰ The Society claimed that it was often easier and less expensive for an engineer to design less efficient structures and specify more costly methods of construction. Thus, it argued that, although in a given case competitive bidding might reduce the price of engineering services, it might also reduce the quality of those services and increase the overall cost of the project.⁵¹ If factors other than the impact on competition could be considered, this argument based on the public welfare and safety ramifications of the ethical canon could succeed.

47. 421 U.S. at 788 n.17.

48. See 22 N.Y.L. Sch. L. Rev. 699, 721.

49. Tyler, *Goldfarb v. Virginia State Bar: The Professions are Subject to the Sherman Act*, 41 Mo. L. Rev. 1, 11 (1976).

50. It should be noted that the Supreme Court vacated the original district court decision against the Society, *United States v. National Soc'y of Professional Eng'rs*, 389 F. Supp. 1193 (D.D.C. 1974), and remanded the case to be reconsidered in light of *Goldfarb*, 422 U.S. 1031 (1975). Upon remand the district court reaffirmed its original judgment, 404 F. Supp. 457 (D.D.C. 1975), and the court of appeals affirmed in part, 555 F.2d 978 (D.C. Cir. 1977).

51. 435 U.S. at 693 (quoting the Society's answer).

However, the Supreme Court rejected both the Society's argument and the implication that factors other than the effect of a particular restraint on competition could be considered in determining its legality under the Sherman Act. "[T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry."⁵² The Court noted that,

[T]he cautionary footnote in *Goldfarb* . . . cannot be read as fashioning a broad exemption under the Rule of Reason for learned professions. We adhere to the view expressed in *Goldfarb* that, by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason. . . . [T]he equation of competition with deception . . . is simply too broad; we may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition.⁵³

Consequently, the Court applied the traditional analysis and held that the Society's canon against competitive bidding violated Section 1 of the Sherman Act. Relying on past decisions dealing with nonprofessional restraints, the Court emphasized that "price is the 'central nervous system of the economy,'"⁵⁴ and that "an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face."⁵⁵ The Court found that, while the Society's canon was "not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."⁵⁶ Thus, the Court applied the traditional per se doctrine to the Society's professional ethical canon, foreclosing any fur-

52. *Id.* at 692. *But cf. id.* at 700 n.* (concurring opinion) ("This Court has not always applied the Rule of Reason with such rigor . . ."). *See also* SULLIVAN, *supra* note 38, at 175-82, 186-89.

53. 435 U.S. at 696.

54. *Id.* at 692 (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940)).

55. 435 U.S. at 692 (quoting *United States v. Container Corp.*, 393 U.S. 333, 337 (1969)).

56. 435 U.S. at 692.

ther inquiry into justifications for the restraint under the rule of reason.⁵⁷

The Court's refusal to apply more lenient standards to the professions is understandable. Several changes have taken place since *Federal Baseball* when the Supreme Court was content to let the professions regulate themselves. For one thing the term "professional" no longer applies solely to doctors and lawyers. Furthermore, all of the professions have taken on more of the attributes of business. The *Goldfarb* Court specifically recognized that the legal profession has a business aspect.⁵⁸ More importantly, however, the public service aspect of the professions has become diluted in many cases.⁵⁹ This latter development is especially crucial because the theory that the professions should be protected from competition "assumes either that high quality of product and minimization of price are always consistent with the economic self-interest of the specialist, or that in the case of conflict the specialist will unselfishly serve the public."⁶⁰ Thus, in subjecting the professions to scrutiny under the Sherman Act the Supreme Court may have been merely responding to changes that have taken place within the professions themselves.

However, perhaps the traditional competition-oriented Sherman Act analysis is not entirely appropriate for the professions. As Justice Blackmun noted in his concurring opinion, "there may be ethical rules which have more than *de minimis* anticompetitive effect and yet are important in a profession's proper ordering."⁶¹ For example, the imposition of minimum standards for licensing reduces the number of available competitors, but also protects the public against unqualified practitioners.⁶² The Supreme Court itself has suggested that a proscription against advertising fees for nonroutine legal services

57. The Court's reference to the Society's canon as "not price fixing as such" may be misleading. Although it did not constitute an outright agreement to fix the price of engineering services, the canon still fell within the broad class of agreements having the "effect of raising, depressing, fixing, pegging, or stabilizing" prices which have been held to be illegal *per se* under the Sherman Act. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). See also SULLIVAN, *supra* note 38, at 198-203.

58. 421 U.S. at 788.

59. 82 YALE L.J. 313, 333 (1972).

60. *Id.*

61. 435 U.S. at 700.

62. *Id.* at 700-01.

might be necessary to prevent misleading consumers.⁶³ Thus, Justice Blackmun concluded that a more flexible approach was appropriate.

I would not, at least for the moment, reach as far as the Court appears to me to do in intimating . . . that any ethical rule with an overall anticompetitive effect promulgated by a professional society is forbidden under the Sherman Act. In my view, the decision in *Goldfarb v. Virginia State Bar* . . . properly left to the Court some flexibility in considering how to apply traditional Sherman Act concepts to professions long consigned to self-regulation.⁶⁴

The majority certainly appeared to adopt the traditional competition-oriented approach in applying the Sherman Act to the profession in *National Society*. However, the Court continued to distinguish between the professions and other businesses in applying the Sherman Act. Although the Court rigorously applied the *per se* rule to the Society's ethical canon in this case, the references to the strict application of the rule of reason were dicta. Thus, it is possible that the Court will still display the flexibility suggested in the *Goldfarb* footnote in applying the rule of reason less restrictively to the professions.

In 1975 one authority suggested the following approach which comports with the result reached in *National Society*:

In applying the rule of reason to non *per se* type ethical prohibitions, the effect of the prohibition on the public as contrasted with its effect upon the economics of the profession has emerged as an important element to be evaluated. . . .

Stated differently, ethical sanctions designed to protect the public from abuses by members of the profession presumptively are reasonable, and any restraints which may be imposed upon the profession likely will be considered reasonably ancillary to a legitimate purpose. Sanctions designed to protect professionals only from each other, however, have the effect of insulating the service market of that profession from competition, thereby conflicting with the basic antitrust philosophy that restraints on competition impose added costs of the service on the public.⁶⁵

Under this approach an ethical rule which was not illegal *per se* would be judged under a less traditional rule of reason which

63. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 372 (1977).

64. 435 U.S. at 699 (citations omitted).

65. Rigler, *supra* note 30, at 197-98.

would take the interests of the public into consideration. "Anticompetitive" canons which serve to protect the public and not the professions would be more likely to be accepted.⁶⁶ The ethical rules that were the subject of Justice Blackmun's concern would probably fall into this category. Thus, competition within the professions would still be preserved, but not at the expense of sacrificing the integrity of the professions.

III. CONCLUSION

Strict Sherman Act scrutiny for the professions represents a marked shift from the presumed antitrust exemption of the *Federal Baseball* era. While it is clear after *Goldfarb* and *National Society* that no such blanket exemption exists, it is unclear whether the Court will always apply traditional Sherman Act analysis to the professions. The *Goldfarb* opinion indicated that restraints on professions might be treated differently in some cases. However, the Court did not appear to observe any distinction between the professions and other businesses in *National Society* where the restraint on the professional was illegal per se.

If there is to be any flexibility in the Court's application of the Sherman Act to the professions it will probably be in its treatment of professional restraints which are not illegal per se. Especially in analyzing professional ethical canons which are imposed to protect the public, the Court may be willing to consider factors other than the impact on competition in some cases. This approach would promote the high professional standards society deserves while preserving the competitive environment the Sherman Act requires.

JAMES H. GORMLEY, JR.

CIVIL PROCEDURE—Right to Jury Trial—Congress Intended to Grant Right to Jury Trial in Actions Under the Age Discrimination in Employment Act. *Lorillard v. Pons*, 434 U.S. 575 (1978). In *Lorillard v. Pons*¹ the United States

66. Cf. *Friedman v. Rogers*, 47 U.S.L.W. 4151 (1979) (where the Supreme Court upheld some state regulation of optometrists against a first amendment challenge on the grounds that it was needed for the protection of the public).

1. 434 U.S. 575 (1978).