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Commerce - Restraint of Trade - Bar Minimum Fee Schedule Violates Sherman Act

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RECENT CASES

COMMERCE—RESTRAINT OF TRADE—BAR MINIMUM FEE SCHEDULE VIOLATES SHERMAN ACT.

In 1971, Ruth and Lewis Goldfarb attempted to find a lawyer in Fairfax County, Virginia, who would conduct a title examination for a home they wished to purchase, for less than the price suggested in the minimum fee schedule of the Fairfax County Bar Association.[1] When they were unsuccessful in finding *any* attorney who would examine the title for less than the suggested price, the Goldfarbs brought a class action suit in federal district court[2] against the County Bar Association and the State Bar Association[3] for injunctive relief and damages, alleging that the minimum fee schedule violated Section One of the Sherman Anti-Trust Act.[4] The district court, after trial on the issue of liability alone, held that the minimum fee schedule was a form of price fixing and therefore was an anti-competitive activity in violation of the Sherman Act.[5] The court held, however, that the actions of the State Bar Association were exempt from the Act[6] because the State Bar Association was an administrative agency of the Virginia Supreme Court,[7] and therefore, its actions were exempt under the "state action" exemp-

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1. The recommended fee for a title examination on the Minimum Fee Schedule of the Fairfax Bar Association was practically identical to that suggested by the Virginia State Bar in 1969. In its Minimum Fee Schedule Report, the State Bar recommended a fee of one percent (1%) of the first $50,000.00 of the amount of the loan or purchase price and ½ of one percent (.5%) of the loan amount or purchase price from $50,000.00 to $250,000.00. Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 499 (E.D. Va. 1973).

2. *Id.* at 491.

3. Two other defendants, the Alexandria Bar Association and the Arlington County Bar Association agreed to enter into consent judgments under which they were ordered to cancel their existing minimum fee schedules and were enjoined from publishing or distributing any future schedules of minimum or *suggested* fees. Goldfarb v. Virginia State Bar, 421 U.S. 773, 778 n.7 (1975).

4. Ch. 647, 69 Stat. 282. Section One of the Sherman Act provides in part:

> 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).

5. 355 F. Supp. at 496.

6. *Id.*

7. The district court based its decision that the State Bar Association was an administrative agency of the Virginia Supreme Court on VA. CODE ANN. § 54-49 (1974 Repl. Vol.), which provides:

> The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of 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

tion from the Sherman Act established in *Parker v. Brown*.[8] The adoption of the schedule by the County Bar Association, however, was found to be a purely private undertaking and thus its activities were not exempt from the Act.[9] The court of appeals, while recognizing that the minimum fee schedule and its method of enforcement substantially restrained the competition among attorneys, nevertheless reversed as to the liability of the Fairfax County Bar Association.[10] The court discussed a "learned profession" exemption[11] to the Sherman Act, and held that the practice of law, being a "learned profession," is neither trade nor commerce within the meaning of the Act.[12]

On appeal to the United States Supreme Court, the decision was reversed, the Court *holding*: (1) that the schedule and its enforcement mechanism constituted price fixing because, in fact, there was a fixed and rigid price level set; (2) that a significant amount of funds for home loans came from outside the state and that a title examination was an essential part of these interstate transactions so that interstate commerce was sufficiently affected; (3) that Congress never intended any broad "learned profession" exemption from the Sherman Act; and (4) that the activities of the State Bar Association were not exempt as state action because they were not "compelled" by the sovereign state, but were, in effect, a private anti-competitive activity. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

Not all restraints on trade are violative of the Act, but only those that unduly restrain interstate commerce.[13] Since *Standard*

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the Court under this article for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing.

8. 317 U.S. 341 (1943). This case held that the Sherman Act was never intended to apply to state action.

9. 355 F. Supp. at 495.

10. Goldfarb v. Virginia State Bar, 497 F.2d 1, 20 (4th Cir. 1974).

11. *Id.* at 13. The court stated:

> Throughout the development of federal anti-trust law there has been judicial recognition of a limited exclusion of "learned professions" from the scope of the anti-trust laws. This exclusion is not a favor bestowed upon professionals by the courts as a "professional courtesy"; the exclusion arises from the language of the statutes and the peculiar nature of the services rendered.

12. *Id.* at 14. The court stated:

> In view of the special form of regulation already imposed upon those in the legal profession the courts have been reluctant to super-impose upon the profession the sanctions of the antitrust laws, many of which are in direct contravention of existing legal and ethical restrictions.

In addition, the court of appeals decided that there was no jurisdiction over the activity of title examinations because that service was local in character and did not have the required effect on interstate commerce to give the district court jurisdiction. *Id.* at 18. This decision was made in spite of the fact that a considerable portion of the money for mortgages for home loans in Fairfax County came from out of state. Furthermore, the United States Veterans Administration and the United States Department of Housing and Urban Development guaranteed over $128 million in home loans in the county in fiscal year 1972. *See* 355 F. Supp. at 497.

13. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

Oil Co. v. United States,[14] there have developed two theories which are used in determining if a restraint is undue or not, the "rule of reason" theory and the "per se" theory.[15]

The "rule of reason" theory was first articulated in *Standard Oil*.[16] Under this approach the Court takes a broad look at the restraint to see if it, in fact, restrains trade. The purposes and circumstances behind the restraint become important. Courts will normally not find an antitrust violation except in those cases where the "public interest is unreasonably prejudiced."[17]

In *Goldfarb*, the Court appears to have applied the rule of reason approach to the minimum fee schedule at issue. The Court looked at the effect of the schedule as the most important element in its decision.[18] Before authorizing a real estate mortgage, examination of title was made a prerequisite by the lenders.[19] Only licensed attorneys could, by law, perform this service. The minimum fee schedule, it was found, set the price for the service, and compliance with the schedule was enforced by the threat of discipline from the State Bar Association.[20] The Court noted that "a naked agreement was clearly shown and the effect on prices is plain."[21]

Section One of the Sherman Act[22] applies only where the contract, combination, or conspiracy is in restraint of "interstate" or "foreign" trade or commerce.[23] The district court, in the case at bar, found that because a significant amount of funds for home loans was furnished by out of state lenders, and because these lenders required an examination of the title as a condition precedent

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14. *Id.*

15. Note, *The Antitrust Division v. The Professions—"No Bidding" Clauses and Fee Schedules*, 48 NOTRE DAME LAWYER 966, 970 (1973). Under the "per se" approach, once it is established that there has been an agreement to fix prices in restraint of interstate commerce, the court looks no further. United States v. Trenton Potteries Co., 273 U.S. 392, 401 (1927). The Court applied the "per se" theory in United States v. National Ass'n of Real Estate Bds., 339 U.S. 495 (1950). The complaint in that case charged that members of the Washington Board had conspired to fix commission rates for their services as brokers. The Board had adopted standard rates of commissions for its members and had a code of ethics stating that rates should not be charged that were lower than those set. The Court held that a worthy purpose on the part of the Board made no difference since price fixing was "per se" an unreasonable restraint of trade. *Id.* at 489.

16. 221 U.S. at 60.

17. Comment, *Minimum Fee Schedules v. Antitrust: The Goldfarb Affair*, 45 MISS. L.J. 162, 164 (1974).

18. 421 U.S. at 781.

19. 355 F. Supp. at 494.

20. 421 U.S. at 777-78. The Court stated:
> The most recent opinion [referring to the Virginia State Bar Committee on Legal Ethics, Opinion No. 170, May 28, 1971] states that "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. . . ."

21. *Id.* at 782.

22. 15 U.S.C. § 1 (1970).

23. Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940). *See generally* J. VAN CISE, THE FEDERAL ANTITRUST LAWS 7 (1962).

for each loan, interstate commerce was sufficiently affected to give the court jurisdiction under the Sherman Act.[24]

The Supreme Court in dealing with this question reached a similar conclusion, finding that a title examination was "an intergral part of an interstate transaction."[25] The "substantiality" of the commerce and the "inseparability" of the legal service from the "interstate aspects of real estate transaction" was enough to have the requisite effect on interstate commerce to give federal courts jurisdiction over the activity.[26]

In discussing the "learned profession" exemption[27] and its applicability to the County Bar Association, the court of appeals had reasoned that the Sherman Act was directed to trade or commerce; since the practice of law was neither trade nor commerce, the activities of the County Bar Association which restrained competition among attorneys were exempt from the Act.[28] The court noted that the special ethical standards of a profession would be subject to serious erosion if it were expected to conduct itself in the same manner as the normal business community.[29]

In declining to accept the court of appeals' characterization of the legal profession as exempt from the Act, the Supreme Court attacked the precedents relied upon by the County Bar Association as showing the existence of a "learned profession" exemption, and declared that any language in its decisions which implied such an exemption until the time of *Goldfarb* was purely dicta. The Court declared that it had never decided whether the practice of a learned profession fell within Section One of the Sherman Act.[30]

In *Federal Baseball Club v. National League*,[31] the Court held that the profession of baseball was exempt from the Sherman Act because it involved personal effort not related to production, and therefore was not a subject of commerce.[32] In a later case, *Radovich v. National Football League*,[33] a professional football player

24. 355 F. Supp. at 494. The court of appeals disagreed, holding the practice of law was basically an intrastate activity. It felt that the mere coincidence of providing a legal service for a borrower who was getting his money out of state was not enough to make those services an interstate activity. 497 F.2d at 17. The court maintained that in this case any restraint caused by the fee schedule was too incidental or remote from interstate commerce to grant jurisdiction. The court of appeals decision has been aptly criticized. *See* Recent Development, *Minimum Fee Schedules—The Battle and The War: Goldfarb at the Fourth Circuit*, 60 VA. L. REV. 1415 (1974).

25. 421 U.S. at 784.

26. *Id.* at 785. The Court added, however, that not *all* legal services would necessarily have this connection with interstate commerce and therefore those services would be beyond the reach of the Sherman Act.

27. See note 11 *supra*.

28. 497 F.2d at 13-15. For a discussion in support of a professional exemption, *see* Note, *Goldfarb Fights the Bar*, 27 Sw. L.J. 524 (1973).

29. 497 F.2d at 14.

30. 421 U.S. at 786 n.15.

31. 259 U.S. 200 (1922).

32. *Id.* at 209.

33. 352 U.S. 445 (1957).

brought an action under the antitrust laws alleging a conspiracy by the league to monopolize and control organized football. Although it did not overturn *Federal Baseball Club*, the Court declared that it would limit baseball's exemption to that sport alone, and implied that if the baseball case were brought before it today, the result would be different.[34]

In *Federal Trade Commission v. Raladam Co.*,[35] a case involving an unfair competition charge brought by the Federal Trade Commission against a manufacturer of obesity cures, the Court noted in dicta that medical practitioners "follow a profession and not a trade."[36] However, in *American Medical Association v. United States*,[37] the Supreme Court refused to decide if the medical profession was a trade under Section Three of the Sherman Act.[38]

On the basis of these decisions, the Court concluded in the present case that it was free, unrestrained by stare decisis, to determine whether the activity of the legal profession in this case fell within the scope of the Act. The Court felt that there was no way to avoid the fact that examination of a land title was a service and that an exchange of money for such a service was commerce under the Sherman Act.[39] The Court was careful to limit its decision, however, by stating that it would be unrealistic to apply antitrust concepts, applicable to the business community as a whole, to all aspects of professional activities. Situations might arise, the Court noted, in which a certain restraint, practiced by one not engaged in a profession, might be violative of the Sherman Act, while the same activity, if carried on in a profession, might not violate the Act.[40]

The Virginia State Bar Association had argued successfully at both lower court levels that the Sherman Act did not apply to its activities concerning minimum fee schedules because they were exempt as state action under *Parker v. Brown*.[41] Under the state action doctrine, immunity from the antitrust laws is said to exist where the state itself engages in anti-competitive activities or com-

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34. *Id.* at 452. The Court stated:

> If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, . . . that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the Act. No other business claiming such coverage of those cases has such an adjudication. We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision.

35. 283 U.S. 643 (1931).

36. *Id.* at 653.

37. 317 U.S. 519 (1943).

38. *Id.* at 528. 15 U.S.C. § 3 (1970) is similar to Section One of the Act, but applies to territories of the United States and the District of Columbia.

39. 421 U.S. at 787.

40. *Id.* at 787 n.17.

41. 317 U.S. 341 (1943). See note 8 *supra*.

mands private parties to engage in such activities.[42] In *Parker*, a producer and packer of raisins in California brought suit to enjoin state officials from enforcing the California Agricultural Prorate Act[43] against him. The Prorate Act implemented a raisin marketing program designed to stabilize the sagging raisin industry. The Supreme Court held that the Sherman Act was never intended to restrain legitimate state action,[44] and thus refused to enjoin enforcement of the state agricultural proration program.

The State Bar Association in *Goldfarb* argued that its minimum schedule was in essence state action, because the Virginia state legislature had authorized the state supreme court to regulate the practice of law,[45] and that the implementation of fee schedules was authorized by the fee provisions of the established ethical codes.[46] The Supreme Court, however, decided that if an activity is to be exempt from antitrust laws under the state action doctrine of *Parker*

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42. Recent Development, *Minimum Fee Schedules—The Battle and the War: Goldfarb at the Fourth Circuit*, 60 VA. L. REV. 1415, 1417 (1974).

43. Act of June 5, 1933, ch. 754 [1933] STAT. OF CAL. 1969, *as amended by* ch. 471 and 743 [1935] 1526, 2087, ch. 6 [1938] Extra Session 39, chs. 363, 548, and 894 [1939] 1702, 1947, 2485, and chs. 603, 1150, and 1186 [1941] 2050, 2858, 2943.

44. 317 U.S. at 350-51. The Court concluded:

> But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. 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's control over its officers and agents is not lightly to be attributed to Congress.

For a detailed discussion of the "state immunity" doctrine, *see* Teply, *Antitrust Immunity of State and Local Government Action*, 48 TUL. L. REV. 272 (1974).

45. VA. CODE ANN. § 54-48 (1974 Repl. Vol.) provides:

> *Rules and regulations defining practice of law prescribing procedure for practice by law students, codes of ethics, and disciplinary procedure.*—The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:
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> (a) Defining the practice of law.
>
> (a1) Prescribing procedure for limited practice by law by third-year law students.
>
> (b) Prescribing a code of ethics governing the professional conduct of attorneys-at-law or patent law through professional law corporations, professional associations, and partnerships, and a code of judicial ethics.
>
> (c) Prescribing procedure for disciplining, suspending, and disbarring attorneys-at-law.

46. Canon 12 of the Canons of Ethics and EC 2-18 of the VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY promulgated by the Virginia Supreme Court can be found in 355 F. Supp. at 499-500. Canon 12 includes, as one relevant consideration in determining the proper fee to charge, the customary charges of the bar for similar circumstances. However, it also states:

> In 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 a 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 fee.

[emphasis added]. And in EC 2-18 of the VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY:

> Suggested fee schedules and economic reports of state and local bar associations provide *some* guidance on the subject of reasonable fees.

[emphasis added].

v. Brown,[47] it must be "required" and "compelled" by the state, acting as sovereign.[48] The Court concluded that the minimum fee schedules in Virginia were not required or compelled. Thus, the Court, while reaffirming the "state action" exemption to the Sherman Act, found that the State Bar Association had "voluntarily joined" in a "private anti-competitive activity," and that therefore the Sherman Act was applicable to its actions.[49]

There has been a plethora of literature debating the pros and cons of fee schedules.[50] One of the most common reasons given in support of schedules is that uniformity of prices is desirable to prevent "shopping" and uncontrolled price competition which would degrade the practice of law.[51] A common complaint against fee schedules is that they often provide for highly unreasonable fees.[52] The Executive Committee of the North Dakota State Bar Association, although recognizing that fee schedules had some favorable aspects, abolished the state's Advisory Fee Schedule totally in November, 1973, in response to the first *Goldfarb* decision.[53]

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47. 317 U.S. 341 (1943).

48. 421 U.S. at 790-91.

49. *Id.* at 792.

50. *See, e.g.*, Arnould & Corley, *Fee Schedules Should Be Abolished*, 57 A.B.A.J. 655 (1971); Miller & Weil, *Let's Improve, Not Kill, Fee Schedules*, 58 A.B.A.J. 31 (1972); Morgan, *Where Do We Go from Here with Fee Schedules?* 59 A.B.A.J. 1403 (1973); Note, *A Critical Analysis of Bar Association Minimum Fee Schedules*, 85 HARV. L. REV. 971 (1972).

51. Arnould & Corley, *supra* note 50, at 656. Other reasons in support of schedules given by the authors are: (1) to provide the proper tools and a satisfactory standard of living for lawyers; (2) to assist the public in determining what is considered a reasonable fee; (3) to assist the judiciary in determining what is a reasonable fee; (4) to assist lawyers and particularly the young practitioners in determining the value of their services; and (5) to provide for differences in competition among attorneys by fixing a fee for reasonable competency in the performance of designated services.

52. *Id.* at 657-62. Other reasons given in opposition to schedules are: (1) the differences between fee schedules cannot be justified by differing economic conditions; (2) fee schedules are not based on "time" as they purport to be; (3) they are inconsistent with the professional status of lawyers; (4) the existence of fee schedules is not supported by their use; and (5) possible antitrust violations.

In view of the Goldfarb decision, of course, the last reason will, no doubt, be compelling in almost all cases where the value of a bar keeping its fee schedule is being considered. There might, however, be the possibility of having a schedule which would not violate the antitrust laws. Whether a bar association would want to run this risk would be another matter.

53. The Gavel, Dec., 1973 at 2, col. 1 (published by State Bar Ass'n of N.D.). Alan Warcup, President of the State Bar Association of North Dakota at that time, stated:

> The Executive Committee in the November meeting, . . . voted to rescind the Advisory Fee Schedule in accordance with my recommendation. This action was not taken without a great deal of thought and has been considered by the Committee for almost a year. . . . We have received comments from some of the members, both for and against the action taken by the Executive Committee. . . . However, it appears that the time has come to make a decision and the decision of the Executive Committee was to rescind.

In June, 1970, the North Dakota State Bar Association had published the Advisory Fee Schedule which had been prepared by the Legal Economics Committee of the State Bar. This schedule was to supersede the Minimum Fee Schedule (First Revision) which had been adopted on June 25, 1965. The 1970 Fee Schedule made it clear that it was to be an "advisory," and not a "minimum" schedule.

The schedule was based on the unit system with each unit equal to $10.00, and a particular service listed as so many suggested units. For example, the suggested value for an examination of title for real estate was listed as four (4) units. One unit was to

Goldfarb may have possible repercussions in other areas in which competition among lawyers has been restrained, such as the traditional ban on advertising,[54] or the restrictions placed on the use of credit card plans.[55] Such a development might not have as big an impact in North Dakota, because of its small population and many single-lawyer communities, as it would in other more populous states where the competition among attorneys might be more keen. Nevertheless, with the increasing number of young lawyers entering the job market each year, demands for less stringent bar regulations on competitive activities can be expected to increase. However, it should be noted that despite its decision, the Court in *Goldfarb* did recognize that the states continue to have a "compelling interest" in regulating the practice of professions.[56]

Even under the *Goldfarb* decision, reasonable fee schedules might be developed through means which are outside the application of the antitrust laws. For example, statistical averaging of fees *actually* charged might be used as a guideline. This information would simply be historical data, and thus presumably would escape many of the pitfalls encountered in *Goldfarb*. Additionally, a commission might be organized which would inquire into what really are "reasonable fees."[57]

Much of the real worth of fee schedules is directed towards the young, sole practitioner who genuinely needs some guidance in setting his fees. In a rural state like North Dakota, with its many single lawyer communities, a young attorney on his own needs to know the reasonable value for his services. Doing away with fee schedules will not, of course, eliminate excessive charges for routine tasks which are all too often the "gravy" of the practicing attorney. But at least those charges will not be made under the guise of institutionalized, ethical authorization.

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be added to each additional $10,000.00 or fraction thereof over $25,000.00. Many of the rationales for fee schedules were given, such as contributing to the public welfare by attracting and keeping high caliber men in the profession.

54. *See* Morgan, *supra* note 50, at 1404. On February 17, 1976, the ABA authorized attorneys to advertise limited information about services and fees in telephone book Yellow Pages and in certain ABA-approved publications. The Washington Post, Feb. 18, 1976, at 1, col. 8. The ethical code change permits the advertising of office hours, legal education, credit terms and field of concentration. *Id.* at 8, col. 8.

55. ABA *Opinion No.* 338 (1974). The use of credit cards for payment of legal services is authorized by the committee, but subject to severe restraints. For example, all publicity or advertising relating to any credit card plan has to have the prior approval of the proper bar committee having jurisdiction over the ethical conduct of the lawyers concerned.

56. 421 U.S. at 792. The interests of the state in regulating lawyers, specifically, was recognized as "especially great."

57. Morgan, *supra* note 50, at 1405.