10-1974

Goldfarb v. Virginia State Bar

Lewis F. Powell Jr.

CARD 1

No. 74-70-CFX	TITLE	Lewis H. GOLDFARB, et ux., Petitioners, v. Virginia State Bar, et al.

DOCKETED	COURT
August 5, 1974	U. S. Court of Appeals for the Fourth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for petitioners: Alan B. Morrison
	Counsel for respondents: Stuart H. Dunn, John H. Shenefield
Aug. 5, 1974	Petition for writ of certiorari filed. Also record filed.
Aug. 10, 1974	Order extending time to file response to petition until Sept. 18, 1974.
Aug. 19, 1974	Order extending time to file response to petition until Sept. 18, 1974.
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Sept. 18, 1974	Motion of Virginia State Bar to be dismissed as a party respondent filed.
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Sept. 27, 1974	Petitioners' reply brief filed.
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Oct. 18, 1974	Brief, amicus curiae, of the U.S. filed. (D)
Oct. 29, 1974	Motion of Clark C. Havighurst for leave to file brief, amicus curiae, GRANTED.
Oct. 29, 1974	Petition GRANTED. Powell, J., OUT.

Nov. 4, 1974	Motion of Virginia State Bar to be dismissed as a party respondent REDISTRIBUTED.
Nov. 11, 1974	Above motion DENIED. Powell, J., OUT.
Dec. 9, 1974	Order extending time to file petitioners' brief on the merits and appendix until Dec. 20, 1974.
Dec. 20, 1974	Motion of The Association of the Bar of the City of New York for leave to file a brief, as amicus curiae, (and brief) filed.
Dec. 20, 1974	Brief for petitioners filed.
Dec. 20, 1974	Appendix filed.

(over)

NO. 74-70-CFX	TITLE	Lewis H. GOLDFARB, et ux., Petitioners, v. Virginia State Bar, et al.

DOCKETED	COURT

DATE	PROCEEDINGS AND ORDERS
Feb. 24, 1975	Motion of District of Columbia for reconsideration of motion for leave to file brief, amicus curiae, DENIED. Motion of Assn. of Bar of City of New York for reconsideration of motion for leave to file brief, amicus curiae, GRANTED. Douglas, Marshall and Powell, JJJ, OUT.
Feb. 27, 1975	CIRCULATED.
Mar. 14, 1975	Reply brief for petitioners filed. (D)
Mar. 25, 1975	ARGUED.
June 16, 1975	Adjudged to be REVERSED AND REMANDED.
July 11, 1975	Petition for rehearing filed.
July 11, 1975	Application to stay issuance of judgment and order granting same (Burger, CJ, 7-14-75).
July 31, 1975	Rehearing DISTRIBUTED. SL9P4
Oct. 6, 1975	Rehearing DENIED. Powell, J., OUT.

Letter to Mr Rodak
10/17/74
ww

OUT

Preliminary Memo

October 25, 1974 Conference
List 1, Sheet 3

No. 74-70

GOLDFARB	Cert to CA 4 (Boreman, Field; Craven, concurring and dissenting)	Timely
v.		
VIRGINIA STATE BAR	Federal/Civil	

Joel: Recusal?

Out? H-W is representing Fairfax Bar? One of the reps.

JK

1. Petrs seek review of the CA decision affirming the USDC (E.D. Va.) (Bryan) in its conclusion that the Virginia State Bar was not liable under § 1 of the Sherman Act, 15 U.S.C. § 1, for price-fixing through the use of a minimum-fee schedule, but reversing the DC on its holding that the Fairfax County Bar Association was liable under the price-fixing theory.

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Petrs initially brought this action against the local bar associations for Arlington County and for Alexandria also, but these two parties agreed to a consent judgment with petrs which directed them to cancel their minimum-fee schedules and which enjoined them from publishing such schedules in the future. The action against the remaining defendants was divided into liability and damages phases. At the close of the liability phase the DC ruled that the Fairfax Association, but not the State Bar, was liable for price-fixing under § 1 of the Sherman Act. It concluded that the minimum-fee schedule provided a floor upon which fees could be set. The DC found jurisdiction under the federal antitrust laws by the interstate commerce which was affected by the actions challenged. A significant portion of the funds used for house-financing came from outside the State, and virtually all the lenders making such loans

The CA agreed with the DC that Parker v. Brown, supra, covered the State Bar in this case. The primary benefits from the regulation of attorneys through minimum-fee schedules accrued to the public; the supervision of the State Bar by the Virginia Supreme Court provided the necessary active supervision by independent state officials required by Parker (with the CA rejecting the notion that the inactivity of the court was to be taken to be abandonment of authority); and the program of regulation involved in the minimum-fee system did result from legislative command, since the legislature provided the machinery for regulation. The CA also found, as had the DC, that the Fairfax Association did not fall under Parker. That group's activities were not commanded by legislation, and it was not subject to active independent state supervision. With respect to petrs' claim that the minimum-fee system restrained trade among attorneys, the CA held that a "learned profession" exception applied to the resps because the activities restrained were not trade or commerce. Federal Trade Comm'n v. Raladam, 283 U.S. 643, 653 (1931); Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200, 209 (1922). Cf. American Medical Ass'n v. United States, 317 U.S. 519, 528 (1943); United States v. National Ass'n of Real Estate Boards, 339 U.S. 485, 491-492 (1950). The reason for the exemption is that commercial types of competition may be destructive of ethics in the profession. See United States v. Oregon State Medical Society, 343 U.S. 326, 336 (1952). With respect to petrs' charge that the minimum-fee system restrained

majority that the Fairfax Association did not fall under Parker, but he disagreed with the majority's holdings on the absence of an effect on interstate commerce and on the applicability of the "learned profession" rule. He concluded that the DC's findings were not clearly erroneous and showed that an agreement to fix the fees composing a part of the cost of housing had a sufficient impact on interstate commerce to invoke the Sherman Act. He also found that this Court had never held that there is a "learned profession" exception to the antitrust laws. Part of the purpose of practicing law was to earn an income, and to that extent the practice fell within the coverage of the Sherman Act. Hence Judge Craven would have affirmed the DC decision.

On September 16, 1974, after petrs had filed their petition for certiorari here, the Fairfax Bar Association adopted a resolution rescinding its 1969 minimum-fee schedule and expressing its intention not to reinstitute such a schedule.

3. CONTENTIONS:

a. Petrs contend that the situation here is indistinguishable from American Medical Ass'n v. United States, supra, with respect to the "learned profession" exception. See also United States v. Oregon State Medical Society, supra; United States v. National Ass'n of Real Estate Boards, supra. The CA erred in failing to realize that resps were not regulating the way in which legal services were provided. The restraint here involved entrepreneurial activity.

support for the position the CA 9's decision in Copp Paving Co. v. Gulf Oil Co., 487 F.2d 202 (1973), No. 73-1012, in which cert has been granted here. Petrs argue that no decision of this Court since the era following Wickard v. Filburn, 317 U.S. 111 (1942), supports the CA's view of the reach of the Sherman Act, and the theory adopted below would undermine Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964).

Resp Fairfax Ass'n argues that all the transactions and all the legal services occurred within the State. The practice of real estate law is basically a local matter, and the fact that it is incidental to the transaction of interstate business by the consumer does not turn it into an interstate matter. Burke v. Ford, supra, is distinguishable in that there the product that was subject to the restraint moved in interstate commerce. Doctors, Inc. v. Blue Cross of Greater Philadelphia, supra, is distinguishable on its facts. In this area, each case turns upon its unique facts. Other cases involving minimum-fee schedules may include a substantial interstate element.

c. Petrs argue that Parker v. Brown, supra, was wrongly applied below, since there is no indication of a legislative command in this case to eliminate competition in the legal profession. The decision is in conflict with decisions by this Court in analogous areas of preemption of antitrust laws. See Silver v. New York Stock Exchange, 373 U.S. 341, 361 (1963); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). It is also

d. The State Bar also argues that, as a state agency, it is protected by the Eleventh Amendment. In addition, any judgment of damages against it would have to be paid from the State Treasury. Petrs have not addressed this point.

e. Resp Fairfax Association argues that its recent decision to rescind its minimum-fee schedule and its express intention not to reinstitute such a schedule has mooted this case. First, any decision finding antitrust liability here would have to be limited to prospective application, under Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). It would overturn past precedent as to the "learned profession" exception and the reasonable expectations of the profession based upon it. Until very recently, the Justice Department had never brought a suit challenging a minimum-fee schedule, and in 1961 and 1965 the antitrust division indicated that it viewed such systems as not being subject to antitrust attack. Requiring resp to pay damages would not be necessary to enforce the new antitrust rule, since any holding that such systems were subject to the antitrust laws would sufficiently deter their use. In this case, prospective relief is also unnecessary since resp has already rescinded its schedule and has said that it would not use one again. Hence there is no likelihood of recurring violation. See United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). Even if this case were not moot, there would be no need for injunctive relief. See id.

with a public interest in having the legality of the practices settled, militates against a mootness conclusion." United States v. W.T. Grant Co., supra, 345 U.S., at 632 (footnote omitted). Petrs have a substantial basis from which to suggest that until the liability question is finally resolved, the question of the appropriate relief to redress the wrong cannot be faced. If the CA decision remains the law of this case, the unilateral action of resp Fairfax Association in rescinding and expressing the intention never to reintroduce the minimum-fee schedule would not provide strong protection for the interests of the class which petrs represent. If liability is found, then the issue of relief can be considered in the second phase of this litigation. See id., at 634.

The question of the applicability of the federal antitrust laws to the use of minimum-fee schedules appears to be one which will be much litigated in the near future. The Justice Department has recently filed a suit challenging the use of such fee schedules in Oregon. United States v. Oregon State Bar, Civ. No. 74-362 (D. Ore., filed May 9, 1974). There is also congressional interest in the issue. See "Legal Fees," Hearings Before the Subcommittee on Representation of Citizen Interests of the Committee on the Judiciary, United States Senate, 93rd Cong., 1st Sess., Part 1, pp. 1-243 (1973). One would expect that generally litigation on this question would present the same complex of questions presented in this case: the sufficiency of the effect on interstate commerce for

Conference 11-8-74

Court ..... *Voted on*....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 74-70

Submitted ....., 19... *Announced* ....., 19...

GOLDFARB

vs.

VIRGINIA STATE BAR

OUT!
L.F.P.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
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Blackmun, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Marshall, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
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SUITE 1000
TELEPHONE (202) 833-1600

January 20, 1975

FILE NO. 273-732-2

Mr. Michael Rodak, Jr., Clerk
United States Supreme Court
Office of the Clerk
Washington, D.C. 20543

Goldfarb et al. v. Virginia State Bar
and Fairfax County Bar Association,
No. 74-70

Dear Mr. Rodak:

This is to advise you that Respondent Fairfax Bar County Association does not object to the Motion for Expedited Consideration and Argument in Tandem with Goldfarb v. Virginia State Bar et al., filed by National Society of Professional Engineers, appellant in National Society of Professional Engineers v. United States (appeal filed January 16, 1975), on the condition that:

(1) time allocated to Respondents in Goldfarb for oral argument is not thereby decreased; and

(2) the hearing of Goldfarb is not thereby delayed.

The Motion filed by the National Society of Professional Engineers asserts that the Solicitor General intends to move for leave to argue orally as an amicus in the Goldfarb case. Respondent Fairfax County Bar Association does oppose that motion, if filed. In the event the motion is granted, Respondent Fairfax County Bar Association requests that it be allotted additional time for oral argument to respond to the combined arguments of the Petitioners and the Solicitor General.

Finally, in any event, pursuant to Rule 44(4) of the Rules of the Supreme Court, Respondent Fairfax County Bar

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 3, 1975

RE: No. 74-70 Goldfarb v. Virginia State Bar Assn.

Dear Chief:

I agree.

Sincerely,

Bill

The Chief Justice

cc: The Conference

June 4, 1975

No. 74-70 Goldfarb v. Virginia State Bar

Dear Chief:

Please note at the end of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 6, 1975

Re: No. 74-70 - Goldfarb v. Virginia State Bar

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to the Conference

CARD 1

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DOCKETED	COURT
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	Counsel for respondents: Stuart H. Dunn, John H. Shenefield
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GOLDFARB

vs.

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January 20, 1975

FILE NO. 273-732-2

Mr. Michael Rodak, Jr., Clerk
United States Supreme Court
Office of the Clerk
Washington, D.C. 20543

Goldfarb et al. v. Virginia State Bar
and Fairfax County Bar Association,
No. 74-70

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Finally, in any event, pursuant to Rule 44(4) of the Rules of the Supreme Court, Respondent Fairfax County Bar

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 3, 1975

RE: No. 74-70 Goldfarb v. Virginia State Bar Assn.

Dear Chief:

I agree.

Sincerely,

Bill

The Chief Justice

cc: The Conference

June 4, 1975

No. 74-70 Goldfarb v. Virginia State Bar

Dear Chief:

Please note at the end of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 6, 1975

Re: No. 74-70 - Goldfarb v. Virginia State Bar

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to the Conference