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I. Antitrust

FOURTH CIRCUIT REVIEW

I. ANTITRUST

A. Attorneys' Minimum Fee Schedules Do Not Violate Antitrust Laws—*Goldfarb v. Virginia State Bar*, 497 F.2d 1 (4th Cir. 1974), *cert. granted*, 42 U.S.L.W. 3426 (Oct. 29, 1974) (No. 74-70).

Perhaps the most significant decision rendered by the Fourth Circuit in the past year was *Goldfarb v. Virginia State Bar*.[1] The case arose when plaintiffs, in need of a title search, contacted numerous attorneys in the Northern Virginia area to secure legal services at the lowest possible cost. Plaintiffs, however, were unable to secure these services for less than the cost prescribed in a Minimum Fee Schedule,[2] which had been promulgated by the Fairfax County Bar Association pursuant to guidelines set forth by the Virginia State Bar. Contending that the State Bar and the Fairfax County Bar Association were violating the Sherman Antitrust Act[3] in promulgating[4] and adopting the fee schedule, plaintiffs instituted a class action for treble damages on behalf of themselves and other homeowners in their community.[5]

The Review acknowledges the contribution of research in the preparation of this Comment by Killis T. Howard, student at the Washington & Lee School of Law.

[1] 497 F.2d 1 (4th Cir. 1974), *cert. granted*, 42 U.S.L.W. 3246 (Oct. 29, 1974) (No. 74-70). For a discussion of the issues presented in *Goldfarb*, see Note, *Minimum Fee Schedules v. Antitrust: The Goldfarb Affair*, 45 MISS. L.J. 162 (1974); Note, *Minimum Fee Schedules: An Antitrust Problem*, 48 TUL. L. REV. 682 (1974); Note, *Goldfarb Fights the Bar*, 27 SW. L.J. 524 (1973); Note, *Trade Regulation—Attorneys' Minimum Fee Schedules—A Violation of the Sherman Act*, 9 WAKE FOREST L. REV. 616 (1973).

[2] The "Minimum Fee Schedule" was described as being "advisory" only. However, the schedule states that "consistent and intentional violation of the suggested minimum fee schedule for the purposes of increasing business can, under given circumstances constitute solicitation" and can result in disciplinary action. 497 F.2d at 4.

[3] Specifically, it was asserted that the promulgation and adoption of the Minimum Fee Schedule were in violation of § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1973). This section provides in pertinent 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 . . . ."

[4] In addition to setting forth general guidelines for a Minimum Fee Schedule, the Virginia State Bar stated that consistent violation of such a schedule might warrant disciplinary action as a breach of the State's code of ethics. On May 28, 1971, the State Bar reaffirmed its right to bring such disciplinary action. At the time of the suit, however, no such action had ever been brought. 497 F.2d at 4 (4th Cir. 1974).

[5] Clayton Antitrust Act § 4, 15 U.S.C. § 15 (1973) provides in pertinent part: "Any person who shall be injured in his business or property by reason of anything forbidden

The district court held that the Minimum Fee Schedules constituted a form of price fixing.[6] The court also noted that since price fixing was *per se* an unreasonable restraint of trade, the fee schedule was in violation of the Sherman Act unless some recognized exemption was applicable to the present defendants. In rendering a judgment for the defendant State Bar, the court held that it was exempt from the application of the Sherman Act because its participation in connection with the fee schedule was a form of "state action."[7] However, the district court held that the Fairfax County Bar Association was not so exempted and thus was guilty of a violation of the Sherman Act.[8]

On appeal, the Fourth Circuit affirmed the district court's holding as it applied to the Virginia Bar, but reversed the lower court's holding that the local bar association was guilty of a Sherman Act violation. In affirming the judgment in favor of the State Bar, the circuit court considered the scope of the state action exemption to the Sherman Act.[9] The court noted that such an exemption was sanctioned by the United States Supreme Court in *Parker v. Brown.*[10] In that case the court stated that the Sherman Act applied only to actions of private individuals and not to actions of any of the states, whether judicial or legislative.[11] The Fourth Circuit construed *Parker* as holding that three factors must be satisfied in order for the state action exemption to be applicable. Specifically, the court held that a pro-

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in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

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

[7] For a discussion of the state action doctrine as an antitrust defense, see note 9 *infra.*

[8] 355 F. Supp. at 495.

[9] The state action defense is based upon the fact that Congress did not specifically make the provisions of the Sherman Act applicable to the states and their officers and agents. Parker v. Brown, 317 U.S. 341, 350-52 (1943). As pointed out in *Parker,* no constitutional barrier exists to Congress extending the Sherman Act so as to eliminate the defense. *Id.* For a recent discussion of the state action doctrine as a defense to antitrust suits, see Simmons and Fornaciari, *State Regulation As An Antitrust Defense: An Analysis of the Parker v. Brown Doctrine,* 42 U. CIN. L. REV. 61 (1974). See also Kinter and Kaufman, *The State Action Antitrust Immunity Defense,* 23 AM. U. L. REV. 527 (1974).

[10] 317 U.S. 341 (1943).

[11] *Parker* involved a California state marketing program enacted for the declared purpose of conserving the agricultural wealth of the State and preventing economic waste. In effect, the program regulated and restricted competition among the growers so as to maintain prices. The controversy in *Parker* focused on this practical effect as the plaintiff, a producer-packer, contended that the program was a violation of the Sherman Act. In rejecting plaintiff's contention, the Supreme Court set forth the state action defense. 317 U.S. at 350-52.

gram, allegedly valid as a form of state action, must be of public benefit, must be actively supervised by the state, and must receive its efficacy from some legislative command. The court in *Goldfarb* held that since the three requirements were satisfied as to the State Bar's connection with the fee schedule, it was exempt from the application of the Sherman Act.

The Fourth Circuit noted that the State Bar's principal involvement with the Minimum Fee Schedule consisted of its threat, contained in various advisory opinions, to discipline anyone who consistently violated the fee schedule, on the ground that such a practice was a breach of the state's code of ethics.[12] The court further noted that the code of ethics, while benefitting lawyers, was designed primarily "to protect the rights and interests of clients and to instill public confidence in the legal profession and our system of justice."[13] Thus the court concluded that the first requirement set forth in *Parker* was satisfied. The Fourth Circuit then considered whether the State Bar's involvement with the fee schedule was authorized by legislative command. The court found this requirement also to be satisfied by a statute which gave the Virginia Supreme Court the power to restrict competition among those in the legal profession.[14] The third requirement of *Parker,* that the program be actively supervised by independent state officials, posed a more troublesome problem. The court, however, relied on the Fourth Circuit case of *Asheville Tobacco Board of Trade, Inc. v. FTC*[15] and found that independent state supervision over the State Bar's activities did exist. The court read *Asheville* for the proposition that a state could allow those persons subject to controls to participate in the regulation, provided their activity was adequately supervised by independent officials. Thus the court dismissed as insignificant the fact that the State Bar was composed of those to be regulated. The Fourth Circuit found that since the Virginia Supreme Court has the authority to regulate and supervise the State Bar,[16] the required independant supervision was present. Consequently, the court held that the State Bar was exempt from the Sherman Act in the present case.

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[12] *See* note 4 *supra.*

[13] 497 F.2d at 9.

[14] Va. Code Ann. § 54-59 (1974) authorizes the Supreme Court of Virginia to "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 . . . ."

[15] 263 F.2d 502 (4th Cir. 1959). In *Asheville,* the court refused to apply the *Parker* exemption to local tobacco boards of trade. *Id.* at 509.

[16] *See* note 14 *supra.*

Addressing the allegations against the Fairfax County Bar Association, the Fourth Circuit noted that although the Minimum Fee Schedule benefitted the public generally, there was no state supervision or legislative command to bring the local bar association within the *Parker* exemption.[17] The court thus found it necessary to consider the Association's contention that it was not subject to the federal anti-trust laws by virtue of its being a "learned profession."[18]

The court in *Goldfarb* declared that the learned profession exemption was based on two Supreme Court cases[19] which stand for the proposition that one engaged in a learned profession is not engaged in a trade and thus not engaged in commerce. Noting that recent decisions of the Supreme Court refused to address the current validity of the learned profession exemption,[20] the Fourth Circuit still found no reason to hold that the exemption should not apply in appropriate cases.[21] Thus, the learned profession exemption was held to be applicable to the local bar. However, the court further held that the exemption was applicable only insofar as the association's actions affected a restraint of trade among attorneys.[22] Any restraint of competition extending beyond the learned profession would constitute a violation of the Sherman Act. As to the legality of the effect that the Minimum Fee Schedule had on the public generally, the court fo-

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[17] 497 F.2d 1, 12 (4th Cir. 1974).

[18] In describing the learned profession exemption, the Fourth Circuit stated:

> Throughout the development of federal antitrust law there has been judicial recognition of a limited exclusion of "learned professions" from the scope of the antitrust 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.

Id. at 13.

[19] FTC v. Raladam Co., 283 U.S. 643 (1931) (construing Federal Trade Commission Act § 4, 15 U.S.C. § 45 with reference to the Sherman Act, 15 U.S.C. §§ 1-7, and the Clayton Act, 15 U.S.C. §§ 12 et. seq.); Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).

[20] For this proposition, the court cited American Medical Ass'n v. United States, 317 U.S. 519 (1943) in which the Supreme Court stated: "Much argument has been addressed to the question whether a physician's practice of his profession constitutes trade under § 3 of the Sherman Act . . . . [W]e need not consider or decide this question." *Id.* at 528. The court in *Goldfarb* also cited United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950) wherein the Supreme Court stated: "We do not intimate an opinion on the correctness of the application of the term [trade] to the professions." *Id.* at 491.

[21] *Id.* at 14. The Fourth Circuit cited several lower courts which recognized and applied the learned profession exemption.

[22] The court cited no authority for limiting the learned profession defense to the profession itself.