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## Antitrust Law-Bar Associations' Minimum Fee Schedules Held Not to Violate the Sherman Antitrust Act

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# RECENT DECISIONS

**Antitrust Law—BAR ASSOCIATIONS' MINIMUM FEE SCHEDULES HELD NOT TO VIOLATE THE SHERMAN ANTITRUST ACT—*Goldfarb v. Virginia State Bar*, 497 F.2d 1 (4th Cir. 1974).**

The Sherman Antitrust Act<sup>1</sup> attempted to eliminate all price fixing and to establish free competition as the cornerstone of this nation's economic policy.<sup>2</sup> Nevertheless, Congress soon excluded farm and labor organizations from the Act's operation,<sup>3</sup> and judicially created exclusions were established, such as the state action exemption<sup>4</sup> and the learned profession exemption.<sup>5</sup> Today antitrust exemptions are numerous<sup>6</sup> and involve a considerable portion of the economy.<sup>7</sup>

Price fixing, in the form of bar association minimum fee schedules, dates

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1. Act of July 2, 1890, ch. 647, 26 Stat. 209, as amended 15 U.S.C. §§ 1-7 (1970).

2. In *United States v. Trenton Potteries*, 273 U.S. 392 (1927), Justice Stone stated: "[W]hatever difference of opinion there may be . . . it cannot be doubted that the Sherman Law and judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition." *Id.* at 397.

3. Clayton Act, ch. 323, 38 Stat. 730 (1914), as amended 15 U.S.C. §§ 12-27, 44; 29 U.S.C. §§ 52-53 (1970).

4. The state action exemption originated in *Parker v. Brown*, 317 U.S. 341 (1943), where the Supreme Court held that a state was not a person within the meaning of the Act. "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." *Id.* at 350-51. See Bachelder, *State-Approved Transactions*, 33 A.B.A. ANTITRUST L. PROCEEDINGS 99 (1967).

5. The learned profession exemption excludes certain professions, such as law and medicine, from the purview of the Sherman Act because the practice of these professions is not trade or commerce within the Act's meaning. The major impetus for this exemption comes from Justice Story's definition of trade: "[T]he word 'trade' is often and, indeed, generally used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Whenever any occupation, employment, or business is carried on for the purpose of profit or gain, or livelihood, not in the liberal arts or learned professions, it is constantly called a *trade*." *The Schooner Nymph*, 18 F. Cas. 506 (No. 10,388) (C.C. Me. 1834). Justice Sutherland quoted this as authoritative during his discussion of "restraint of trade" under § 3 of the Sherman Act in *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 436 (1932). See Coleman, *Learned Professions*, 33 A.B.A. ANTITRUST L. PROCEEDINGS 48 (1967).

6. For a list of exemptions to the Sherman Act see Pogue, *The Rationale of Exemptions from Antitrust*, 19 A.B.A. ANTITRUST L. PROCEEDINGS 313, 330 (1961). See also Orrick, *The Recent Erosion of Certain Antitrust Exemptions*, 10 ANTITRUST BULL. 667 (1965).

7. Some commentators have estimated that close to 20% of the economy is exempt from the Sherman Act. See Pogue, note 6 *supra* at 314 & n.5.

back to 1795.<sup>8</sup> Despite their history and current widespread use,<sup>9</sup> such schedules have been the subject of considerable controversy.<sup>10</sup>

The recent case of *Goldfarb v. Virginia State Bar*<sup>11</sup> renewed this controversy when the minimum fee schedules of the Fairfax County Bar Association and the Virginia State Bar were assailed as violative of the Sherman Antitrust Act.<sup>12</sup> Unable to find an attorney to perform a title examination for less than the amount suggested in the Fairfax County Bar Association Minimum Fee Schedule,<sup>13</sup> the Goldfarbs brought an action against the Virginia State Bar and the Fairfax County Bar Association,<sup>14</sup> alleging that these organizations had "conspired to restrain interstate commerce through the use of fixed fees."<sup>15</sup> Applying the state action exemption, the

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8. A 1795 resolution of the Providence County, Rhode Island, Bar Association stated: "[N]o member shall give any opinion or advice upon any law question for a less sum than \$1.00." This historical note is found in Maxwell, *Bar Association Minimum Fee Bills: Their Impact Upon C.L.L.A. Practices*, 71 *COM. L.J.* 278 (1966).

9. At the present, minimum fee schedules are employed by approximately 30 state and 600 local bar associations. See Comment, *Minimum Fee Schedules v. Antitrust: The Goldfarb Affair*, 45 *MISS. L.J.* 162 (1974). For a note as to the effect of the district court's decision upon the use of minimum fee schedules see *id.* at n.2.

10. Opponents of minimum fee schedules feel that such schedules maintain the cost of legal services at an artificially high level. They contend that these artificial rates effectively deprive those in the working class of legal counsel because they are not wealthy enough to afford the rates nor poor enough to qualify for legal aid. They also assert that the schedules allow for overcompensation of inexperienced or incompetent attorneys.

Those who support minimum fee schedules argue that their abolishment would open the door to undesirable competition among attorneys. They feel that without schedules, unscrupulous lawyers would attract clients by charging extremely low fees. Then price rather than confidence in, or the qualifications would become the main consideration in choosing an attorney, and this would debase the entire profession.

See Arnould & Corley, *Fee Schedules Should Be Abolished*, 57 *A.B.A.J.* 655 (1971); Ferren & Snyder, *Antitrust & Ethical Aspects of Lawyers' Minimum Fee Schedules*, 7 *REAL PROP., PROBATE & TRUST J.* 726 (1972); Morgan, *Where Do We Go From Here with Minimum Fee Schedules?* 59 *A.B.A.J.* 1403 (1973).

11. 497 F.2d 1 (4th Cir. 1974).

12. *Id.* at 3-4. Such an attack upon minimum fee schedules was not unexpected. The Justice Department has been investigating bar association fee schedules, see 48 *NOTRE DAME LAWYER* 966 (1973), and there have been warnings of such action from within the profession. See Morgan, note 8 *supra*.

13. The mortgagee required the Goldfarbs to get title insurance which necessitated a title search by a Virginia attorney. 497 F.2d at 3. The title examination fee involved was "1% of the first \$50,000 of the purchase price plus ½% of all over \$50,000." *Goldfarb v. Virginia State Bar*, 355 F. Supp. 491, 493 n.3 (E.D. Va. 1973).

14. The Arlington County Bar Association and the Alexandria Bar Association were originally named as codefendants, but they cancelled their fee schedules and agreed to a consent judgment. 355 F. Supp. at 492 n.1.

15. 497 F.2d at 4.

district court held for the State Bar,<sup>16</sup> but against the County Association,<sup>17</sup> finding its schedule to have a direct and substantial effect upon interstate commerce.<sup>18</sup> The Court of Appeals for the Fourth Circuit affirmed the lower court's finding with respect to the State Bar,<sup>19</sup> but reversed with respect to the County Association,<sup>20</sup> placing it under the learned profession exemption<sup>21</sup> and finding no direct or substantial effect of its schedule on interstate commerce.<sup>22</sup>

Although courts have generally not found concrete standards in the state action exemption<sup>23</sup> as it first appeared in *Parker v. Brown*,<sup>24</sup> the Fourth Circuit Court of Appeals has developed three requirements which a program must meet to successfully claim the exemption.<sup>25</sup> To qualify, a program must be: (1) instituted pursuant to authority vested by legislation; (2) initiated primarily for the public benefit; and (3) sufficiently supervised by the state.<sup>26</sup>

Applying these criteria, the fourth circuit found that since the State Bar, which promulgated a minimum fee schedule as part of its Code of Professional Responsibility,<sup>27</sup> was created by the Virginia General Assembly to

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16. *Goldfarb v. Virginia State Bar*, 355 F. Supp. 491 (E.D. Va. 1973).

17. *Id.* at 496.

18. *Id.* at 494.

19. 497 F.2d at 20.

20. *Id.*

21. The court held that the practice of law is not trade or commerce, and therefore, the County Association qualified for the exemption. "Restraints upon the practice of law are not illegal *per se* because that which is restrained (i.e., the practice of a 'learned profession') is neither trade nor commerce." *Id.* at 13.

22. *Id.* at 18.

23. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *Woods Exploration & Producing Co. v. Aluminium Co. of America*, 284 F. Supp. 582 (S.D. Tex. 1968). See also Poch, *State Action Exemption from the Antitrust Laws*, 50 *BOSTON U. L. REV.* 393 (1970).

24. 317 U.S. 341 (1943). The Supreme Court held that the price fixing involved in a California program instituted to stabilize the price of raisins sold within the state did not violate the Sherman Act because a state is not a person within the meaning of the Act. *Id.* at 350-51.

25. See *Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248 (4th Cir. 1971) (holding that Virginia's regulation scheme for public utilities qualified for the state action exemption); *Allstate Ins. Co. v. Lanier*, 361 F.2d 879 (4th Cir. 1966) (holding that a North Carolina automobile rating bureau qualified for the state action exemption); *Asheville Tobacco Bd. of Trade, Inc. v. F.T.C.*, 263 F.2d 502 (4th Cir. 1959) (holding that the legislative approval of a pre-existing warehouse regulation scheme did not qualify for the state action exemption).

26. 497 F.2d at 6.

27. The State Bar promulgated the Virginia Code of Professional Responsibility under the auspices of the Virginia Supreme Court pursuant to VA. CODE ANN. § 54-48(b) (Repl. Vol.

assist the Virginia Supreme Court in regulating the practice of law,<sup>28</sup> it satisfied the requirement of legislative authority.<sup>29</sup> Examining the language of the Code of Professional Responsibility,<sup>30</sup> the court concluded that its "*primary* functions are to protect rights and interests of clients and to instill public confidence in the legal profession and our system of justice."<sup>31</sup> Through this finding the requirement of being primarily for the public benefit was fulfilled.<sup>32</sup>

1972). This Code is based upon nine Canons which are "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers." There are advisory Ethical Considerations and mandatory Disciplinary Rules under each Canon. DR 2-106 of the Code refers to the "Minimum or customary fee charged in the locality." 497 F.2d at 9-10.

28. VA. CODE ANN. § 54-48 (Repl. Vol. 1972) provides:

The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:

- (a) Defining the practice of law.
- (b) Prescribing a code of ethics governing the professional conduct of attorneys at law. . . .
- (c) Prescribing procedure for disciplining, suspending and disbaring attorneys at law.

VA. CODE ANN. § 54-49 (Cum. Supp. 1973) provides:

The Supreme Court of Appeals may . . . prescribe . . . rules and regulations organizing and governing the association known as the Virginia State Bar . . . 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 under this article. . . and requiring all persons practicing law in this State to be members thereof in good standing.

29. The court found the requirement of legislative authority was fulfilled by the fact that the State Bar was created by the legislature in VA. CODE ANN. § 54-49 (Cum. Supp. 1973), and the Code of Professional Responsibility was promulgated pursuant to VA. CODE ANN. § 54-48(b) (Repl. Vol. 1972). 497 F.2d at 12.

30. The court's conclusion that the Code of Professional Responsibility was instituted for the benefit of the public was based principally upon a reading of the nine Canons which form the basis of the Code. They are:

- (1) A lawyer should assist in maintaining the integrity and competence of the legal profession.
- (2) A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.
- (3) A lawyer should assist in preventing the unauthorized practice of law.
- (4) A lawyer should preserve the confidences and secrets of a client.
- (5) A lawyer should exercise independent professional judgment on behalf of a client.
- (6) A lawyer should represent a client completely.
- (7) A lawyer should represent a client zealously within the bounds of the law.
- (8) A lawyer should assist in improving the legal system.
- (9) A lawyer should avoid even the appearance of professional impropriety.

*Va. Code of Professional Responsibility quoted in 497 F.2d at 9-10.*

31. 497 F.2d at 9.

32. The court reasoned that the fact that attorneys may receive some benefit from the Code of Professional Responsibility did not negate the obvious public benefit of the Code. *Id.* at 9-10.

The fourth circuit had previously held<sup>33</sup> that a program administered by a body of regulated individuals could satisfy the final requirement of sufficient state supervision if actively supervised by an independent state agency or official.<sup>34</sup> Therefore, in considering whether the State Bar met this requirement, the court had to determine whether the State Bar, which is staffed by licensed attorneys,<sup>35</sup> was actively supervised by the Virginia Supreme Court. Following another previous holding<sup>36</sup> that administrative silence cannot be construed as a failure to supervise,<sup>37</sup> the court found sufficient state supervision despite the Virginia Supreme Court's silence concerning the State Bar's minimum fee schedule.<sup>38</sup> Thus, the court concluded that the State Bar's minimum fee schedule qualified for the state action exemption.<sup>39</sup>

Although the court held that the state action exemption did apply to the State Bar, it determined that the County Association, a private agency not subject to direct supervision by the Virginia Supreme Court,<sup>40</sup> could not qualify because it did not meet the requirements of legislative authority or state supervision.<sup>41</sup> The majority, however, found that the County Asso-

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33. *Asheville Tobacco Bd. of Trade, Inc. v. F.T.C.*, 263 F.2d 502 (4th Cir. 1959). The court declined to apply the state action exemption to the legislative approval of a pre-existing regulatory scheme for tobacco warehouses.

34. "When a state has a public policy against free competition in an industry important to it, the state may regulate that industry in order to . . . eliminate competition. It may even permit persons subject to such control to participate in the regulation provided their activities are adequately supervised by independent state officials." *Id.* at 509.

35. 497 F.2d at 8-9.

36. *Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248 (4th Cir. 1971). The court applied the state action exemption to the regulation of public utilities by the Virginia State Corporation Commission.

37. "[B]ut the conclusion is not inevitable unless one equates administrative silence with abandonment of administrative duty. It is just as sensible to infer that silence means consent, i.e. approval." *Id.* at 252.

38. The court found that the Virginia Supreme Court's silence did not indicate a lack of supervision or approval. In fact, the court found an indication of the Virginia Supreme Court's active approval and supervision of the State Bar's minimum fee schedule in two facts: (1) the Virginia Supreme Court specifically authorized the State Bar to issue minimum fee schedules; (2) and the Virginia Supreme Court has given the State Bar the authority to issue official opinions and reports dealing with minimum fee schedules. 497 F.2d at 9.

39. *Id.* at 8-12.

40. The court held that since the County Association was a voluntary organization and the state had no control over it, the County Association could not meet the adequate state supervision requirement. *Id.* at 12.

41. The court also rejected the County Association's argument that it met the legislative authority requirement for the state action exemption because it had published its "Minimum Fee Schedule" in compliance with the State Bar's "Minimum Fee Schedule Report," and in reliance upon State Bar Opinions 98 and 170. The State Bar's "Minimum Fee Schedule

ciation did come under the learned profession exemption,<sup>42</sup> which is based on the proposition that "personal effort, not related to production" is not a trade.<sup>43</sup> It is worthwhile to note that the Supreme Court has never specifically commented upon the validity of this exemption<sup>44</sup> and has only suggested that doctors and lawyers "follow a profession and not a trade."<sup>45</sup> The court further reasoned that the practice of law was validly exempted from the Sherman Antitrust Act because competition of the sort which the Act was created to preserve came into direct conflict with ethical considerations of the profession;<sup>46</sup> however, the court noted that the exemption was limited to the professional activities of attorneys.<sup>47</sup>

Even though the practice of law involved in *Goldfarb* was carried on entirely within Virginia,<sup>48</sup> and the fourth circuit held that the learned profession exemption applied, the County Association's fee schedule would still violate the Sherman Antitrust Act if it had a direct and substantial

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Report" urged local bar associations to issue minimum fee schedules, and the State Bar Opinions 98 and 170 threatened disciplinary action against any attorney failing to comply with such schedules. *Id.* at 12-13.

42. *Id.* at 14-15. *Contra*, 497 F.2d 20, 23 (dissenting opinion); 355 F. Supp. 491, 494 (E.D. Va. 1973).

43. *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922) (dictum).

44. *See United States v. National Ass'n of Real Estate Brokers*, 399 U.S. 485 (1950). In discussing the meaning of "trade," the court stated: "We do not intimate an opinion on the correctness of the application of the term trade to the professions." *Id.* at 491-92. *Accord*, *American Medical Ass'n v. United States*, 317 U.S. 519 (1943).

45. *F.T.C. v. Raladam Co.*, 283 U.S. 643, 653 (1931) (dictum).

46. The court in *Goldfarb* reasoned that the legal profession should be exempted from the purview of the Sherman Act because "[a]dvertising and other forms of solicitation of business common to trade and commerce are criminal acts when utilized by lawyers. In view of the special form of regulation already imposed upon those in the legal profession the courts have been reluctant to superimpose upon the profession the sanctions of the antitrust laws, many of which are in direct contravention of existing legal and ethical restrictions." 497 F.2d at 14. The Supreme Court recognized in *United States v. Oregon State Medical Soc'y*, 343 U.S. 326 (1952), a similar consideration with respect to the medical profession:

We might observe in passing, however, that there are ethical considerations where the historic, direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters. This Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession. *Id.* at 336.

47. "The 'learned profession' exemption is a defense to a Sherman Act violation only where the restraint is upon the learned profession itself. That exemption is applicable only to those matters with respect to which an accord must be reached between the necessities of professional regulation and the dictates of the antitrust laws." 497 F.2d at 15. *Accord*, *Northern Calif. Pharmaceutical Ass'n v. United States*, 306 F.2d 379 (9th Cir. 1962); *United States v. Utah Pharmaceutical Ass'n*, 201 F. Supp. 29 (D.C. Utah 1962).

48. 497 F.2d at 16.

effect on interstate commerce.<sup>49</sup> The fourth circuit, after examining the factors of considerable out-of-state financing, the many homeowners working out of state, and a significant number of federally guaranteed loans,<sup>50</sup> found that these connections between the schedule and interstate commerce were merely incidental.<sup>51</sup> The court held that the most important factor was the essential intrastate nature of the practice of law and that these connections did not constitute a direct and substantial effect on interstate commerce.<sup>52</sup>

As the most recent opinion of the fourth circuit analyzing the state action exemption, *Goldfarb* refined and sharpened the criteria used in applying this exemption. It is also significant because the fourth circuit became one of only three circuits which have recognized the learned profession exemption,<sup>53</sup> and its justification is well reasoned and convincing. Although the court's upholding of minimum fee schedules surprised many observers,<sup>54</sup> it is hard to say how *Goldfarb* will fare upon appeal. The outcome depends upon whether the Supreme Court will hold the learned profession exemption valid and whether it will find the schedule had a direct and substantial effect on interstate commerce.<sup>55</sup>

J. G. M.

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49. *Id. Accord*, *United States v. Oregon State Medical Soc'y*, 343 U.S. 326 (1952); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); *American Medical Ass'n v. United States*, 317 U.S. 519 (1943).

50. The district court's finding that the County Association's "Minimum Fee Schedule" had a direct and substantial effect on interstate commerce was based upon three facts. 1) A considerable portion of the funds used in financing homes in Fairfax County, Virginia, come from lending agencies outside the state, and most of these agencies require title insurance. 2) A large percentage of homeowners in the county work outside the state. 3) The Veteran's Administration and Department of Housing and Urban Development guarantee a significant amount of the mortgages in the county. 355 F. Supp. at 494 (E.D. Va. 1973).

51. 497 F.2d at 16-18.

52. *Id.* at 16. *Accord*, *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969); *Kallen v. Nexus Corp.*, 353 F. Supp. 33 (N.D. Ill. 1973).

53. Two other circuits have explicitly recognized the learned profession exemption. *See 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); *Riggall v. Washington County Medical Soc'y*, 249 F.2d 266 (8th Cir. 1957).

54. Many commentators believed that the district court's decision signaled the death knell of minimum fee schedules. *See Comment, Minimum Fee Schedules v. Antitrust: The Goldfarb Affair*, 45 Miss. L.J. 162 (1974); 27 Sw. L.J. 524 (1973); 48 Tul. L. Rev. 682 (1974).

55. As of the writing of this article, the Supreme Court has granted certiorari, limiting the arguments to two issues. 1) Are the minimum fee schedules of state bar associations exempt from the antitrust laws' prohibitions on price-fixing because they restrain competition in a "learned profession"? 2) Did the fixing of fees for title examinations on homes in Northern Virginia constitute a substantial effect upon interstate commerce? 43 U.S.L.W. 3246 (Oct. 29, 1974) (No. 74-70). The Supreme Court has also denied the motion of the State Bar to be dismissed as a party respondent. 43 U.S.L.W. 3279 (Nov. 12, 1974).