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Antitrust and the Liberal Professions: The US Experience

In 2005 we celebrated the 30th anniversary of the Supreme Court's decision in *Goldfarb v Virginia State Bar*[1] holding that the antitrust laws apply to what we in the United States used to call the 'learned professions.' In the 30 years since that decision, the Supreme Court has decided eight antitrust cases involving the application of the antitrust laws to these professions. In this paper, I examine these decisions and the framework they have created for applying the antitrust laws to professional services.

As this review will show, the cases involving the application of the antitrust laws to the learned professions that have reached the Supreme Court have often involved direct restraints on price and output agreed among competing providers of professional services. The Court has consistently, and correctly, treated these as naked price-fixing agreements that are just as unlawful when adopted by lawyers and doctors as when adopted by trash haulers or road pavers. Another string of cases that has reached the Supreme Court has involved restrictions on the advertising of professional services, often in the name of preventing false or misleading advertising. Here, the Court has taken a more nuanced approach, condemning those advertising restrictions that deny consumers truthful information about the prices at which services are available, while showing more tolerance for restrictions that might serve a procompetitive objective by protecting consumers from false or misleading claims.

With that prelude, let us review the decisions. We will then close with a brief coda on whether the liberal professions should be entitled to special treatment under the antitrust laws. We conclude that they should not.

I. *Goldfarb v Virginia State Bar*

Lewis Goldfarb and his wife contracted to buy a home in Fairfax County, Virginia. The finance company demanded title insurance, which required a title examination that only a member of the Virginia State Bar could legally

* Wilmer Cutler Pickering Hale and Dorr LLP.

[1] *Goldfarb v Virginia State Bar* 421 US 773 (1975).

perform. When they contacted a lawyer, he quoted them a fee of 1% of the value of the property, which was the fee specified in a minimum-fee schedule published by the Fairfax County Bar Association. Trying to find a lawyer who would charge a lower fee, Mr Goldfarb wrote to 36 other Fairfax County lawyers, all of whom quoted the exact same fee. Goldfarb paid the fee, then filed a class action against both the State Bar and the County Bar alleging that the minimum fee schedule constituted price fixing in violation of Section 1 of the Sherman Act.

In defending their actions, the State and County Bars argued, first, that 'learned professions' such as law are not covered by the antitrust laws because they do not constitute 'trade or commerce.' The Supreme Court squarely rejected this argument. It held that the language of Section 1 contains no exception for professional services and that there is no other basis for exempting individuals who sell their services for money from the Sherman Act. The Court observed, however, that '[t]he 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 Sherman Act.'[2]

The Bars argued, second, that the state action doctrine protected their minimum fee schedule. The state action doctrine derives from a Supreme Court decision, *Parker v Brown*,[3] in which the Court held that the antitrust laws did not apply to a state-sanctioned California program that restricted competition among growers for the express purpose of restricting output and maintaining prices in the market for raisins. In *Goldfarb*, the Court held that the state action doctrine did not shield the defendant's minimum fee schedule because there was no Virginia statute authorizing the State or County Bar to promulgate minimum fees. While Virginia law authorized the State Supreme Court to regulate the legal profession, the Court's rules did not authorize the State or County Bar to set minimum fees. Therefore, even though the State Bar might be a state agency for some limited purposes, such as issuing ethical opinions, that status did not, the Court held, 'create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.'[4]

II. *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council*[5]

While not an antitrust case, *Virginia State Board*, decided just one year after *Goldfarb*, merits examination because it involves the closely related issue of to

[2] *Goldfarb v Virginia State Bar* 421 US 773 (1975), pp 788–89, no 17.
[3] 317 US 341 (1943).
[4] *Goldfarb*, pp 791–92.
[5] 425 US 748 (1976).

what extent the First Amendment limits the ability of the states themselves to regulate professional advertising. The First Amendment to the US Constitution is a key provision of our Bill of Rights. It provides that Congress and, by virtue of the Fourteenth Amendment, the states, 'shall make no law . . . abridging the freedom of speech.'

In *Virginia State Board*, the Supreme Court considered the validity under the First Amendment of a Virginia statute barring pharmacists from advertising the prices for prescription drugs. In holding the statute unconstitutional, the Court held for the first time that the First Amendment protects commercial, as well as political, speech. In reaching this conclusion, the Court cited the consumer welfare benefits of such speech, observing that 'commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system,' citing *FTC v Procter & Gamble (Clorox)*,[6] an antitrust case. The Court held, however, that the First Amendment would not protect affirmatively false or misleading commercial speech and that there might be other circumstances in which the state might be able to justify restrictions of commercial speech that would not be permitted in the case of purely political speech.

The Court proceeded to examine the justifications proffered by Virginia for prohibiting pharmacists from advertising prescription drug prices. Central to these were claims that the ban was essential to the maintenance of professionalism among licensed pharmacists. The state argued, among other things, that advertising would create price competition that might cause the pharmacist to economize at the customer's expense and would reduce the image of the pharmacist as a skilled and specialized craftsman, necessary to attract talent to the profession. The Court rejected these proffered justifications, noting the presence of a potent alternative to this highly paternalistic approach:

> That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interest if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.[7]

III. *Bates v State Bar of Arizona*[8]

The next case, *Bates v State Bar*, decided one year later, brings together strands of *Goldfarb* and *Virginia State Board*. In it, the Court held that restrictions on

[6] 386 US 568 (1967).
[7] *Virginia State Board Of Pharmacy* 425 US, 748 (1976) at 770.
[8] 433 US 350 (1977).

attorney advertising imposed by the Supreme Court of Arizona constituted state action not subject to attack under the Sherman Act, but that the restrictions violated the First Amendment insofar as they prohibited publication of a truthful advertisement concerning the availability and terms of routine legal services.

On state action, the critical difference between *Bates* and *Goldfarb* was that the advertising restrictions in *Bates* were contained in a disciplinary rule promulgated by the Arizona Supreme Court itself. The rules, therefore, satisfied both elements of what has since become the standard two-part test for state action: (1) they reflected 'a clear articulation of the State's policy with regard to professional behavior' and (2) they were subject to 'active state supervision.'[9]

The disciplinary rule at issue in *Bates* broadly prohibited lawyers from publicizing their services through advertisements of any kind. The advertisement at issue contained a simple listing of routine legal services, such as uncontested divorces and name changes, offered by the firm placing the advertisement and the fees the firm charged for those services. Following its decision in *Goldfarb*, the Court held that just as the First Amendment does not allow a state to prevent pharmacists from advertising prices for prescription drugs, so, too, does it bar a state from prohibiting lawyers advertising the availability and terms of routine legal services.

In so holding, the Court considered and rejected six possible justifications for the restrictions proffered by the state: the adverse effect on professionalism, the inherently misleading nature of attorney advertising, the adverse effect on the administration of justice, the undesirable economic effects of advertising, the adverse effect of advertising on the quality of service, and the difficulties of enforcement of more targeted restrictions. The Court was careful, however, to limit its ruling to the facts before it, noting in particular that it was not addressing 'the peculiar problems associated with advertising claims relating to the quality of legal services,' which 'under some circumstances, might well be deceptive or misleading to the public, or even false.'[10] The Court thus left the door open for regulation of professional advertising, both by the state and even, as we shall see, by private professional associations.

IV. *National Society of Professional Engineers v United States*[11]

The National Society of Professional Engineers is a professional association representing the more than 12,000 consulting engineers who perform services

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[9] 433 US 350 (1977), p 362.
[10] *Ibid*, p 366.
[11] 435 US 679 (1978).

in connection with the study, design, and construction of buildings and other structures. The Justice Department sought to enjoin the Society from enforcing a canon of ethics that prohibited competitive bidding by its members.

The Court accepted at the outset that engineering is 'an important and learned profession.'[12] The Society argued that the canon was a reasonable restraint of trade because 'competitive pressure to offer engineering services at the lowest possible price would adversely affect the quality of engineering' and thereby endanger public health and safety.[13] Construing this as an argument that 'competition among professional engineers was contrary to the public interest,' the Court rejected the argument out of hand. It held that '[t]he Sherman Act reflects a legislative judgment that ultimately competition will not only produce lower prices, but also better goods and services,' and that this 'statutory policy precludes inquiry into the question whether competition is good or bad.'[14]

As in *Goldfarb*, the Court again acknowledged that 'by their nature, professional services may differ significantly from other business services,' and that ethical norms designed 'to regulate and promote competition' for professional services might, therefore, survive scrutiny under the antitrust laws.[15] But the Court held that this could not save a total ban on competitive bidding. Responding to an argument that the ban was needed because otherwise professional engineers might be tempted to submit deceptively low bids, the Court agreed that 'the problem of professional deception is a proper subject of an ethical canon,' but held that a canon barring competitive bidding altogether was an overbroad means of pursuing that objective.

V. *Arizona v Maricopa County Medical Society*[16]

The Maricopa County Medical Society represented some 1,750 physicians, or about 70% of the practitioners in Maricopa County. The Society formed the Maricopa Foundation to perform three primary activities. The first was to establish a schedule of maximum fees that participating doctors agreed to accept as payment in full for medical services performed for patients insured under plans approved by the foundation. The second was to review the medical necessity and appropriateness of the treatment provided by its members to these patients. The third was to draw checks on insurance company accounts to pay doctors for services for covered patients. In performing these

[12] *Ibid*, p 679.
[13] *Ibid*, p 684.
[14] *Ibid*, p 695.
[15] *Ibid*.
[16] 457 US 332 (1982).

functions, the foundation was considered an 'insurance administrator' by the Director of the Arizona Department of Insurance.

The Arizona state attorney general brought an action alleging that the agreement among participating physicians as to the maximum fees they would accept was a *per se* violation of Section 1 of the Sherman Act. By a 4–3 vote, the Supreme Court agreed.

In reaching this result, the Court rejected arguments by defendants that the *per se* rule should not apply because the agreements at issue were among members of a profession, were in an industry with which the judiciary had little antitrust experience, and were alleged to serve procompetitive purposes. The Court's discussion of the first two arguments could best be discussed as peremptory. Citing *Goldfarb*, the Court again acknowledged that the public service aspect and other features of professions might permit some practices that might otherwise be unlawful under the antitrust laws, but reiterated that a price-fixing agreement could not be justified on either public service or ethical grounds. The Court also rejected the argument that it should not apply the *per se* rule because the judiciary had little experience in the health care industry, observing that requiring the *per se* rule to be 'rejustified for every industry that has not been subject to significant antitrust litigation' would undermine the rationale for having *per se* rules in the first place.[17]

Turning to the defendants' proffered procompetitive justifications, the Court held that while there might well be some benefit to knowing in advance what fees doctors would charge for their services, 'it is not necessary for the doctors to do the price fixing' and that insurance companies were capable of setting the maximum fees they would be willing to pay and obtaining binding agreements to those fees from individual physicians.[18] The court was careful to note, however, that the situation might be different if, for example, a clinic offered complete medical coverage for a flat fee because that would involve 'the type of partnership arrangement in which a price-fixing agreement among the doctors would be perfectly proper.'[19]

VI. *FTC v Indiana Federation of Dentists*[20]

Indiana Federation arose from efforts by insurers to require dentists to submit dental x-rays along with their insurance claims. In the early 1970s, the Indiana Dental Association, representing some 85% of the dentists in

[17] 457 US 332 (1982), p 349.
[18] *Ibid*, p 352.
[19] *Ibid*, p 357.
[20] 476 US 447(1986).

Indiana, enlisted member dentists not to submit x-rays. After the Association consented to an FTC order requiring it to cease and desist from this effort, a group of dentists formed the Indiana Federation of Dentists to carry on the fight. The federation's membership was very small—fewer than 100 dentists—but it succeeded in enlisting 100% of the dentists in one mid-sized city and 67% of the dentists in another to refuse to supply x-rays to insurers.

The Court began its analysis by noting that this policy resembled a 'group boycott' of the kind that is sometimes said to be *per se* illegal under the antitrust laws, but the Court declined to invoke the *per se* rule for two reasons. First, according to the Court, 'the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor,' a situation not present in this case.[21] Second, the Court observed that, 'we have been slow to condemn rules adopted by professional associations as unreasonable *per se*,' citing *Professional Engineers,* a somewhat questionable assertion after *Maricopa.*

The Court proceeded nevertheless to find the agreement by members of the Federation not to supply x-rays to insurers unlawful under a truncated rule of reason analysis. First, the Court found that such a refusal limits consumer choice and is, therefore, unlawful '[a]bsent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or provision of services.'[22] Second, the Court held that the Commission's failure to make detailed findings as to market definition was not fatal both because the dentists involved 'constituted heavy majorities of the practicing dentists in their communities and because "proof of actual detrimental effects, such as reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects."'[23]

Third, the Court held that it was not necessary for the Commission to prove that the refusal to supply x-rays made dental service more costly because a refusal to supply such information was 'likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices.'[24] Fourth, and finally, the court rejected the Federation's argument that x-rays, standing alone, are not adequate bases for diagnoses of dental problems. In the Court's view, arguing that giving customers access to information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices, was 'nothing less than a frontal assault on the basic policy of the Sherman Act.'[25]

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[21] *Ibid,* p 458.
[22] *Ibid,* p 459.
[23] *Ibid,* p 460.
[24] *Ibid,* p 461.
[25] *Ibid,* p 463.

VII. *FTC v Superior Court Trial Lawyers Association*[26]

Superior Court Trial Lawyers arose when a group of lawyers in Washington, DC conducted a highly publicized boycott, refusing to continue to represent indigent criminal defendants in the DC Superior Court until the District government increased the fees paid for such representation. (The fees at the time were capped at $30 an hour, less than 10% of what a lawyer in private practice might charge.) The case attracted particular interest because of the argument that the boycott was protected political activity, designed to encourage legislative reform.

The Supreme Court took a different view. The Court held that since the agreement among the lawyers was designed to obtain higher prices for their services, it was a *per se* unlawful naked restraint on price and output. In reaching this conclusion, the Court accepted that the boycott may well have served a worthwhile cause and that increased fees might well improve the quality of representation indigent defendants received, but held that '[t]he social justifications proffered for defendants' restraint of trade . . . do not make it any less unlawful.'[27]

VIII. *California Dental Association v FTC*[28]

The most recent, and in many ways most interesting, Supreme Court decision applying the antitrust laws to professional services is *California Dental Association*. Whereas the intervening decisions had all involved direct restraints on price and output competition, *California Dental* returned the Court to the subject of its two earliest forays into this area—professional advertising.

The California Dental Association ('CDA') is a voluntary non-profit association of local dental societies to which some 19,000 dentists belong, representing about 3/4 of the dentists practicing in California. The Association's code of ethics provided that while dentists may advertise, 'no dentist shall advertise . . . in a manner that is false or misleading in any material respect.'[29] Advisory opinions implementing this canon allowed dentists to advertise price discounts, but required that those advertisements disclose the non-

26 493 US 411(1990).
27 *Ibid*, p 424.
28 526 US 756(1999).
29 *Ibid*, p 760.

discounted price and the size and other terms of the discount. The advisory opinions also stated that claims as to quality of service were likely to be false or misleading because such claims 'are not susceptible to measurement or verification.'[30]

The FTC found both restrictions unlawful under the antitrust laws. The Commission treated the restrictions on discount advertising as *per se* unlawful price fixing. In the alternative, it held that the restrictions on both price and quality claims were unlawful using a highly truncated rule of reason analysis. The ninth Circuit Court of Appeals reversed the Commission with respect to its classification of the restrictions on discount advertising as *per se* unlawful, but otherwise affirmed the Commission's decision.

The Supreme Court reversed. The Court held that both the Commission and the Ninth Circuit had erred in truncating their rule of reason analysis in a manner that did not require the Commission to offer empirical evidence that CDA's advertising restrictions had an anticompetitive effect. The Court pointed out that the decisions in which it had found restraints unlawful through a similarly abbreviated analysis were all cases like *Professional Engineers* and *Indiana Federal* involving direct restraints on price or output. By contrast, the restrictions on advertising imposed by CDA did not 'present a situation in which the likelihood of anticompetitive effect is comparably obvious.'[31] As the Court explained, the restrictions adopted by CDA were, 'at least on their face, designed to avoid false or misleading advertising in a market characterized by striking disparities between the information available to the professional and the patient.'[32] *California Dental*, therefore, involved exactly the issue the Court had left open in its earliest decisions applying the antitrust laws to the liberal professions—namely, to what extent do the special characteristics of markets for professional services justify ethical restrictions on potentially false or misleading advertising.

This is an issue with which the Court had grappled repeatedly in the quarter century since *Goldfarb* and *Bates* in a series of cases involving the constitutionality under the First Amendment of state-imposed restrictions on professional advertising. These cases are catalogued and discussed in an article by outgoing FTC Chairman Tim Muris in an article published in 2000.[33] (Footnote 17 is the portion of the Court's opinion in *Goldfarb* in which the Court reserved the possibility that the special characteristics of the professions might justify ethical restraints not permitted in more prosaic industries, such as plumbing.)

As Chairman Muris' article shows, there were four cases between *Bates* and *Cal Dental* in which the Court applied the First Amendment to state-imposed

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[30] *Ibid*, p 761.
[31] *Ibid*, p 771.
[32] Ibid.
[33] T Muris, '*California Dental Association v Federal Trade Commission*: The Revenge of Footnote 17' (2000) 8 *Supreme Court Economic Review* 265.

restrictions on professional advertising. In three of these the Court struck down state bans on professional advertising. In *Shapero v Kentucky Bar Association*,[34] the Court held that a ban preventing lawyers 'from soliciting legal business for pecuniary gain by sending truthful and nondeceptive to clients known to face particular legal problems' violated the First Amendment. In *Peel v Attorney Registration and Disciplinary Commission*,[35] the Court held that the state had breached the First Amendment by censoring an attorney for violating an Illinois bar rule against advertising oneself as a specialist because he truthfully advertised on his stationary that he was certified in civil trial advocacy by the National Board of Trial Advocacy. And in *Edenfield v Fane*,[36] the Court struck down a Florida ban on certified public accountants soliciting business with letters to potential clients. In the fourth and most recent of these cases, *Florida Bar v Went For It, Inc*,[37] the Court reached the opposite result, upholding a Florida rule barring a lawyer from contacting or writing for 30 days to anyone who had been injured, or to relatives of those who had been injured or killed, in accidents.

It is apparent from these decisions that by the time it heard *California Dental*, the Court had substantial experience weighing the costs and benefits of professional advertising. This experience plainly informed the Court's decision in *California Dental*. The Court's opinion includes a thorough review of the economic literature dealing with professional advertising. As the court observed, that literature shows that the markets for professional services are 'characterized by striking disparities between the information available to the professional and the patient.'[38] In these markets, the resulting 'difficulty for customers or potential competitors to get and verify information about the price and availability of services magnifies the dangers to competition associated with misleading advertising.'[39] This problem is compounded because

> the quality of professional services tends to resist either calibration or monitoring by individual patients or clients, partly because of the specialized knowledge required to evaluate the services, and partly because of the difficulty in determining whether, and the degree to which, an outcome is attributable to the quality of services (like a poor job of tooth filling) or to something else (like a tough walnut).[40]

Personal relationships further complicate the picture. As antitrust officials and lawyers who often marvel at the poor choices clients make in picking lawyers to represent them before the agencies, we know whereof the Court was speaking.

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[34] 486 US 466 (1988).
[35] 496 US 91 (1990).
[36] 507 US 761 (1993).
[37] 515 US 618 (1995).
[38] *California Dental*, p 771.
[39] *Ibid*, p 772.
[40] *Ibid.*

Based on this reading of the economic literature, the Court concluded that

> The existence of such significant challenges to informed decisionmaking by the customer for professional services immediately suggests that advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment as obviously comparable to classic horizontal agreements to limit output or price competition.[41]

The Court held, therefore, that the FTC and Ninth Circuit should not have presumed, without empirical evidence, that CDA's efforts to regulate false or misleading advertising were anticompetitive, but should instead have engaged in a more detailed 'enquiry meet for the case,'[42] taking into account 'the countervailing, and at least equally plausible, suggestion that restricting difficult-to-verify claims about quality or patient comfort would have a procompetitive effect by preventing misleading or false claims that distort the market.'[43]

What is somewhat surprising is the vigor with which defenders of the FTC have criticized what appears on its face to be an eminently sensible decision by the Court to require that the agency be put to its proof. The Court's decision in *California Dental* is fully consistent with the general trend in antitrust jurisprudence, both in the United States and, more recently, in Europe, to challenge unproven theories and to demand more empirical evidence to support claims of anticompetitive harms.[44]

IX. Coda

In the 30 years since *Goldfarb*, we have moved from an industrial, largely domestic, economy to a truly global information economy. As part of this transformation, professional services of all kinds have come to play an increasingly central role, and the size of professional service organizations has grown accordingly. First accounting and now law firms have become truly global in scale, with several generating annual revenues in excess of $1 billion. In addition, many other kinds of services now require education equivalent to what was formerly required only of the 'liberal' or 'learned' professions. Business consultants, investment managers and bankers, real estate brokers, and many others now have as many or more years of education as lawyers or accountants. And many of these other service industries are at least as highly

[41] *Ibid*, p 773.
[42] *Ibid*, p 781.
[43] *Ibid*, p 778.
[44] See W Kolasky, '*California Dental Association v FTC*: The New Antitrust Empiricism' (1999) 14 *Antitrust* 68.

regulated as lawyers, doctors, dentists, and accountants. And it is at least an open question which of these professions is more deeply imbued with a sense of public service and public responsibility.

With all of these changes, there is something almost quaint, if not entirely archaic, in speaking of the liberal professions, or in suggesting that the antitrust rules that apply to these professions should be any different from those that apply to any other industry. In applying antitrust and competition laws to any industry, it is incumbent on the agencies and courts to take into account the particular characteristics of the markets involved, including any regulatory overlay to which that industry may be subject. As our Supreme Court wrote just this term in *Verizon Communications v Law Offices of Curtis v Trinko*,[45] 'Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation.'[46] That this is true of the liberal professions does not, in any way, differentiate them from any other industry.

In practice, the US antitrust agencies fully understand this. They have, therefore, endeavored to apply the antitrust laws to the learned professions in the same manner as they do to other industries, taking into account the special characteristics of the markets in which they operate. To quote our greatest President, Abraham Lincoln, 'it is altogether fitting and proper' that they should do so.

[45] 124 SCt 872 (2004).
[46] *Ibid*, p 880.