CASE COMMENTS

PROFESSIONAL ASSOCIATION PERMITTED TO RAISE PUBLIC WELFARE JUSTIFICATION IN DEFENSE OF GROUP BOYCOTT

Wilk v. AMA, No. 76 C 3777 (N.D. Ill. Jan. 30, 1981), *appeal docketed*, No. 81-1331 (7th Cir. Feb. 26, 1981)

In *Wilk v. AMA*[1] the District Court for the Northern District of Illinois[2] clarified the proper level of judicial scrutiny in antitrust actions against professional organizations[3] by allowing a defendant professional organization to prove some public benefit from the alleged violations to avoid a finding of prima facie liability.[4]

Five licensed chiropractors brought suit against the American Medical Association[5] and several state and local medical organizations,[6] al-

1. No. 76 C 3777 (N.D. Ill. Jan. 30, 1981), *appeal docketed,* No. 81-1331 (7th Cir. Feb. 26, 1981). The full name of the suit is Dr. Chester A. Wilk, D.C.; Dr. James W. Bryden, D.C.; Dr. Patricia B. Arthur, D.C.; Dr. Steven G. Lumsden, D.C.; and Dr. Michael D. Pedigo, D.C. v. American Medical Ass'n; American Hospital Ass'n; American College of Surgeons; American College of Physicians; Joint Comm'n on Accreditation of Hosps.; American College of Radiology; American Academy of Orthopedic Surgeons; American Osteopathic Ass'n; American Academy of Physical Medicine and Rehabilitation; Illinois State Medical Soc'y; Chicago Medical Soc'y; The Medical Soc'y of Cook County; H. Doyl Taylor; Dr. Joseph A. Sabatier, Jr., M.D.; Dr. H. Thomas Ballantine, M.D.; and Dr. James H. Sammons, M.D. Plaintiffs alleged that each defendant participated in a group boycott initiated by the AMA against the chiropractic profession. *See* Complaint at 1-8, Wilk v. AMA, No. 76 C 3777 (N.D. Ill., filed Sept. 2, 1976).

2. A jury trial resulted in a verdict for the defendants on January 30, 1981. Wilk v. AMA, No. 76 C 3777 (N.D. Ill. Jan. 30, 1981), *appeal docketed,* No. 81-1331 (7th Cir. Feb. 21, 1981). Judge Nicholas J. Bua gave the jury instructions consistent with the test endorsed at notes 41-44 *infra* and accompanying text. Instructions to Jury at 7136-40, Wilk v. AMA, No. 76 C 3777 (N.D. Ill., Jan. 29, 1981) (on file with the *Washington University Law Quarterly*) [hereinafter cited as Instructions to Jury].

3. Although no court has attempted to present a precise definition of the learned professions, courts have consistently treated professions such as law, medicine, and engineering different than other professions under the antitrust laws. *See, e.g.,* National Soc'y of Eng'rs v. United States, 435 U.S. 679, 684 (1978) (engineers); Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 n.7 (1975) (lawyers); Arizona v. Maricopa County Medical Soc'y, 643 F.2d 553, 556 (9th Cir. 1980) (doctors). *See also* Note, *The Antitrust Liability of Professional Associations After* Goldfarb*: Reformulating the Learned Professions Exemption in the Lower Courts,* 1977 DUKE L.J. 1047, 1057 n.60.

4. *See* notes 14-20 *infra* and accompanying text.

5. The AMA is the largest medical association in the United States. Approximately 80% of all physicians in the country are members. *See* Complaint at 4, Wilk v. AMA, No. 76 C 3777 (N.D. Ill., filed Sept. 2, 1976); Comment, *The American Medical Association: Power, Purpose and Politics in Organized Medicine,* 63 YALE L.J. 938, 939 (1954). The AMA sets national policies on

leging violations of sections 1 and 2 of the Sherman Antitrust Act.[7] Specifically, the plaintiffs alleged that the defendants had conspired to monopolize health care services[8] by engaging in a group boycott[9] to eliminate competition from chiropractors. In its instructions to the

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health care, influences actions of individual physicians, determines educational requirements in medical schools, and controls practice conditions, including access to hospital staffs and facilities. Kaplin, *Professional Power and Judicial Review: An Overview,* 44 GEO. WASH. L. REV. 710, 710-12, 720 (1976); Comment, *supra* at 1018. *See also* Complaint at 16-25; Wilk v. AMA, No. 76 C 3777 (N.D. Ill., filed Sept. 2, 1976).

6. *See* note 1 *supra.*

7. 15 U.S.C. §§ 1-7 (1976). *See* 21 CONG. REC. 2455-68 (1890). Senator Sherman, the sponsor of the first antitrust statutes, viewed antitrust statutes as a codification of the common law of unreasonable restraints on trade. *Id.* at 2456. In Standard Oil Co. v. United States, 221 U.S. 1 (1911), the Supreme Court recognized the evils that trusts perpetrated.

> [T]he main cause which led to the [Sherman Act] was the thought that it was required by the economic conditions of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.

Id. at 50. The Court in Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), described the purpose of the antitrust laws:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition . . . [and] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Id. at 4. *See also* United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1971) (antitrust laws are as important to the presentation of economic freedom as the Bill of Rights is to our personal freedom). *See generally* P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 401 (1978); Bork, *Legislative Intent and the Policy of the Sherman Act,* 9 J. LAW & ECON. 7, 10 (1966); Letwin, *Congress and the Sherman Antitrust Law: 1887-1890,* 23 U. CHI. L. REV. 221 (1956).

15 U.S.C. § 1 (1976) provides in pertinent part: "Every contract, combination in the form of a 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. § 2 (1976) provides in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ."

8. Complaint at 11, Wilk v. AMA, No. 76 C 3777 (N.D. Ill., filed Sept. 2, 1976).

9. *Id.* The plaintiffs alleged that the group boycott involved a ban on referrals to or from chiropractors; a refusal to allow chiropractors access to AMA-controlled hospitals; a ban on professional or scholarly association between phyisicians and chiropractors; and an endorsement and sponsorship of antichiropractic research by the AMA. *Id.* at 17-19. The defendants alleged that the effects of this group boycott were the limitation of medical knowledge; impairment of quality patient care; loss of income to chiropractors; and limited access of chiropractors to hospital facilities and staff. *Id.* at 26-28.

jury,[10] the District Court *held*: A jury may consider a professional association's public welfare justification for an alleged per se violation of the antitrust laws.[11]

The antitrust laws attempt to eliminate anticompetitive business practices by facilitating free market competition.[12] Section 1 of the Sherman Act prohibits every contract, trust, or conspiracy in restraint of trade or commerce.[13] Courts originally adopted a literal interpretation of section 1 and consequently held every restraint illegal per se regardless of its reasonableness or public benefit.[14] The dogmatism of

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10. Instructions to Jury, *supra* note 2.

11. *Id.* at 7138-40. District Court Judge Bua instructed the jury:

> In judging whether a particular professional standard in operation produces an unreasonable restraint of trade, it is necessary to consider the genuineness of the justification advanced in support of the standard, the reasonableness of the standard itself, the manner of its enforcement, and the effects of it on the relevant area of trade or commerce.
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> The fact that an ethical standard which affects the conduct of one profession, such as medical doctors, may also have an indirect effect on the activities of another profession, such as chiropractors, does not alone mean that it amounts to an unreasonable restraint of trade. Rather, the determination to be made is whether, as a consequence of the operation of that standard, there has been a cognizable adverse effect on the public interest in the sense that the opportunity of chiropractors to provide services they are licensed to provide and the opportunity of the public to receive those services has been unreasonably impaired or obstructed.
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> . . . .
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> It is a different question, however, whether members of the medical profession may limit their own relationships with chiropractors for the purpose of practicing their own profession according to standards they consider necessary or desirable for the proper practice of medicine.

Id. *See* notes 55-58 *infra* and accompanying text.

12. *See* note 7 *supra* and accompanying text. *See also* 21 CONG. REC. 2455-68 (1890). As Senator Sherman stated, monopolies

> control the market, raise(s) or lower(s) prices, as will best promote its selfish interests . . . and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer.

Id. at 2457. *See also* Standard Oil Co. v. United States, 221 U.S. 1, 49-62 (1910); Bork, *supra* note 7, at 10.

13. 15 U.S.C. § 1 (1976). *See* note 7 *supra* and accompanying text.

14. At common law, only those restraints that unreasonably restrained trade were illegal. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 327-29 (1897). The *Trans-Missouri* case is a classic example of the early strict interpretation of the Sherman Act. Justice Peckham, refusing to accept a "reasonableness" standard not indicated by the language of the Act, stated:

> [The Court is] asked to read into the Act by way of judicial legislation an exception not placed there by the lawmaking branch of the government . . . . [We cannot] interpolate an exception into the language of the act, and to thus materially alter its meaning and effect. . . . If the act ought to be read (to authorize reasonable restraints), Congress is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable.

this strict interpretation soon prompted adoption of a rule of reason analysis. Under the rule of reason, only unreasonable restraints violate the Sherman Act.[15] The rule of reason allows courts to consider the circumstances surrounding each alleged violation while remaining loyal to the Sherman Act's goal of promoting an efficient, competitive marketplace.[16]

As courts applied the rule of reason, they consistently found that certain restraints were unreasonable and therefore violative of the Sherman Act.[17] Courts subsequently have maintained a bifurcated system

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Id. at 340. *But see* notes 15-20 *infra* and accompanying text.

15. Standard Oil Co. v. United States, 221 U.S. 1 (1911) is the source of the rule of reason. In *Standard Oil,* the Court rejected the myopic literal interpretation of the Sherman Act. "[U]naided by the light of reason, it is impossible to understand how the [Sherman Act] may in the future be enforced and the public policy which it establishes be made efficacious." *Id.* at 68. The *Standard Oil* Court asked whether the challenged acts were *"unreasonably* restrictive of competitive conditions." *Id.* at 58 (emphasis added). Unreasonableness may arise from the nature or character of the restraint or the surrounding circumstances giving rise to the inference that they were intended to restrain trade. *Id.*

For a discussion of the early development of the rule of reason, see Raymond, *The Standard Oil and Tobacco Cases,* 25 HARV. L. REV. 31 (1911).

The Supreme Court elaborated on the justification for the rule of reason in Chicago Board of Trade v. United States, 246 U.S. 231 (1918):

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id. at 238. *Accord,* White Motor Co. v. United States, 372 U.S. 253, 263 (1963); Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

16. *See* notes 7 & 15 *supra* and accompanying text.

17. Justice Black in Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), articulated the rationale for a return to the per se rule:

> [T]here are certain agreements or practices which because of their pernicious effect on competiton and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. [The per se rule] . . . avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved. . . .

Id. at 5. *See generally* McCormick, *Group Boycotts—Per Se or Not Per Se, That is the Question,* 7 SETON HALL L. REV. 703 (1976); Van Cise, *The Future of Per Se in Antitrust Law,* 50 VA. L. REV.

of antitrust analysis.[18] Restraints that perniciously affect competition and lack redeeming social value are illegal per se.[19] Other alleged violations, which lack the indicia of per se illegality, require rule of reason

1165 (1964); von Kalinowski, *The Per Se Doctrine—An Emerging Philosophy of Antitrust Law,* 11 U.C.L.A. L. REV. 569 (1964).

Courts have both praised the per se rule for its certainty and criticized it for its myopia. *Compare* United States v. Topco Assocs., Inc., 405 U.S. 596, 609 n.10 (1972) (without per se rule it is impossible to know limits of Sherman Act) *with* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210 (1940) (per se precludes justifications for the restraint).

18. *See* notes 19-20 *infra* and accompanying text. The Supreme Court in White Motor Co. v. United States, 372 U.S. 253 (1963), justified the dual existence of the per se rule and the rule of reason:

> We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain [if the actions in question trigger per se analysis] . . . . [T]hey may be allowable protections . . . and within the "rule of reason." We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack . . . any redeeming virtue" . . . and therefore should be classified as per se violations of the Sherman Act.

Id. at 263 (quoting Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958)).

The two standards of analysis, although seemingly confusing and even paradoxical, are consistent. If the alleged restraint has no redeeming social value and is of the type that judicial experience has shown to be consistently violative of the Sherman Act, the per se rule is used. If the alleged restraint may have some redeeming social value and is not regularly found violative of the Act, the rule of reason analysis will be implemented. Thus, consistency in applying judicial scrutiny harmonizes with the necessity of considering the peculiarities of a particular restraint. *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978). *See generally* L. SULLIVAN, LAW OF ANTITRUST 165-97 (1977); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* 74 YALE L.J. 775 (1965).

19. Restraints that are illegal pe se include price fixing, division of markets, tying arrangements, and group boycotts. *See* United States v. General Motors Corp., 384 U.S. 127 (1966) (group boycott); Silver v. New York Stock Exch., 373 U.S. 341 (1963) (same); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (same); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (same); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) (tying arrangements); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) (group boycott); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (division of markets); International Salt Co. v. United States, 332 U.S. 392 (1947) (tying arrangements); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941) (group boycott); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price fixing); Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) (same); United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (same); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898) (division of markets), *aff'd,* 175 U.S. 211 (1899). *See also* von Kalinowski, *supra* note 17, at 571-79.

The plaintiffs in *Wilk v. AMA* alleged that the defendants had participated in a group boycott. *See* note 1 *supra*. A group boycott is a refusal to deal, or an inducement of others not to deal or to have business relationships, with a tradesman. Worthen Bank & Trust Co. v. National Bank-Americard Inc., 485 F.2d 119, 124-25 (8th Cir. 1973), *cert. denied,* 415 U.S. 918 (1974).

For a discussion of the group boycott allegations in the *Wilk* case, see note 9 *supra* and accompanying text.

analysis.[20]

Courts prior to the passage of the Sherman Act treated professions differently than businesses. In his 1834 opinion in *The Nymph*,[21] Justice Story first formulated the distinction between the trade and commerce of business and the public service goals of professions. Justice Story reasoned that professions were not engaged in trade or commerce because their goal was public service rather than profit.[22] This distinction formed the basis of the so-called learned profession exemption from the antitrust laws, which absolves professions from antitrust liability if they do not affect trade or commerce.[23]

In *AMA v. United States*[24] the Supreme Court blurred the distinction between business and the professions. The Court declared that the actions of the AMA were the actions of a business for purposes of the antitrust laws.[25] Although the Court did not expressly eliminate the learned profession exemption,[26] it did cast doubt on the continuing validity of that exemption.

The source of recent confusion regarding the antitrust laws and the learned professions is *Goldfarb v. Virginia State Bar Association*.[27] In *Goldfarb*, the Supreme Court emphasized that no occupation is automatically exempt from the antitrust laws.[28] The *Goldfarb* Court did not clearly indicate, however, whether a per se or rule of reason analysis was proper in cases involving professions.[29] Although the Court found

20. *See* von Kalinowski, *supra* note 17, at 575-76.

21. 18 F. Cas. 506 (C.C.D. Me. 1834).

22. *Id.* at 507. In *The Nymph,* Justice Story's definition of a "trade" excludes professions: "Wherever any occupation, employment or business is carried on for the purpose of profit, or gain, or a livelihood, *not in the liberal arts or learned professions*, it is constantly called a trade." *Id.* (emphasis added). The distinction between trades and profession thus precedes the passage of the Sherman Act. *See* notes 26 & 29 *infra* and accompanying text.

23. *See* notes 24-26 & 28 *infra* and accompanying text.

24. 317 U.S. 519 (1943). In *AMA,* the Court found that the AMA violated the Sherman Act in improperly interfering with the business of a prepaid health organization by threatening to discipline AMA doctors who participated in the plan. *See* note 25 *infra* and accompanying text.

25. The Supreme Court found that participation by doctors in a prepaid health organization was irrelevant because § 3 of the Sherman Act prohibits "every person" from restraining trade and because the private aspects of the medical group's plan "does not remove its activities from the sphere of business." AMA v. United States, 317 U.S. 519, 528-29 (1943).

26. In Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975), the Supreme Court expressly eliminated the learned professions exemption. *See* note 28 *infra* and accompanying text.

27. 421 U.S. 773 (1975).

28. *Id.* at 787.

29. *Id.* at 788 n.17. Chief Justice Burger suggested that professions should receive different treatment under the antitrust laws but refused to specify what type of treatment he had in mind:

the defendant bar association guilty of price-fixing,[30] normally a per se violation,[31] it acknowledged the relevance of public service by professionals.[32] The Court's consideration of this factor is consistent with a rule of reason analysis[33] and not with a finding of a per se violation. This inconsistency has been a source of confusion.[34]

The first notable attempt to interpret the *Goldfarb* decision was *Feminist Women's Health Center, Inc. v. Mohammed*.[35] In *Feminist* the dis-

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> The 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. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

Id. The *Goldfarb* Court's refusal to set down any guidelines was the source of confusion in the lower courts. *Compare* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 696 (1977) (*Goldfarb* authorizes no broad exemption for professions) *and* Feminist Women's Health Center, Inc. v. Mohammed, 415 F. Supp. 1258, 1269-70 (N.D. Fla. 1976) (*Goldfarb* authorizes good faith defense), *aff'd in part and rev'd in part,* 586 F.2d 530 (5th Cir. 1978), *cert. denied,* 444 U.S. 924 (1979) *with* Arizona v. Maricopa County Medical Soc'y, 643 F.2d 553, 560 (9th Cir. 1980) (*Goldfarb* authorizes rule of reason even when professional goals commercial), *cert. granted,* 450 U.S. 979 (1981) *and* Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626, 630-32 (9th Cir.) (*Goldfarb* authorizes per se rule for commercial goals and rule of reason for noncommercial goals), *cert. denied,* 434 U.S. 825 (1977).

30. 421 U.S. 773, 782 (1975). Chief Justice Burger stated, "This is not merely a case of an agreement that may be inferred from an exchange of price information, for here a naked agreement was clearly shown, and the effect on prices is plain." *Id.* (citations omitted).

31. *See* note 19 *supra* and accompanying text; note 35 *infra* and accompanying text.

32. 421 U.S. at 787.

33. *See* note 15 *supra* and accompanying text.

34. *Compare Price-Fixing, Advertising Bans, and Others Self-Regulation by Lawyers: What Future Under Antitrust Laws?,* 12 COLUM. J. L. SOC. PROB. 531, 538-40 (1976) *Goldfarb* did not use per se analysis; Martyn, *Lawyer Advertising: The Unique Relationship Between First Amendment and Antitrust Protections,* 23 WAYNE L. REV.. 167, 183 (1976) (same) *and* Note, *supra* note 3, at 1050 (*Goldfarb* incorporates a version of the rule of reason) *with* Branca & Steinberg, *Attorney Fee Schedules and Legal Advertising: The Implications of* Goldfarb, 24 U.C.L.A. L. REV. 475, 507 (1977) (*Goldfarb* used per se rule) *and* Comment, *Sherman Act Scrutiny of Bar Restraints on Advertising by Attorneys,* 62 VA. L. REV. 1135, 1143-44 (1976) (same). *See* note 29 *supra* and accompanying text.

35. 415 F. Supp. 1258 (N.D. Fla. 1976), *aff'd in part and rev'd in part,* 586 F.2d 530 (5th Cir. 1978), *cert. denied,* 444 U.S. 924 (1979). *Feminist* involved alleged economic boycotting and price-fixing by a medical association and individual doctors against an abortion clinic. Such actions are per se illegal under the Sherman Act. "[A]n economic boycott . . . carried out by members of the medical profession is no less antithetical to free competition than is an economic boycott carried out by nonprofessionals." *Id.* at 1263. *See* note 61 *infra* and accompanying text. But group boycotts do not trigger per se analysis in every case. Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119, 125 (8th Cir. 1973), *cert. denied,* 415 U.S. 918 (1974). *See also*

trict court balanced the policies of the antitrust laws against the public welfare concerns of the professions and proposed a modified per se analysis for cases involving professional organizations.[36] The *Feminist* court held that the defendant could escape per se liability[37] if it could prove that it had engaged in the alleged per se violations in good faith and for the public welfare.[38]

In *Mackey v. NFL*,[39] a case involving the physical rather than the learned professions, the Eighth Circuit impliedly proposed an alternative interpretation of *Goldfarb*. The *Mackey* court rejected the district court's use of the per se rule and adopted a two-pronged rule of reason analysis. Focusing on the commercial effect of the alleged restraint, the court first asked whether the restraint in question was essential to maintaining a competitive balance. The court then determined whether the restraint was the least restrictive means possible.[40]

McCormick, *supra* note 17, at 737-64; Comment, *Boycott: A Specific Definition Limits the Applicability of a Per Se Rule,* 71 NW. U.L. REV. 818, 819-21 (1977).

Individuals have a right to choose with whom they will do business as long as there is no monopolistic or commercial motive. Simpson v. Union Oil Co., 377 U.S. 13 (1974). *Accord,* United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941); United States v. Colgate & Co., 250 U.S. 300 (1919). As the *Worthen* court noted, "The term 'group boycott' . . . is in reality a very broad label for divergent types of concerted activity. To outlaw certain types of business conduct merely by attaching the 'group boycott' and 'per se' labels obviously invites the chance that certain types of reasonable concerted activity will be proscribed." 485 F.2d at 125.

36. 415 F. Supp. 1258, 1263 (N.D. Fla. 1976), *aff'd in part and rev'd in part on other grounds,* 586 F.2d 530 (5th Cir. 1978), *cert. denied,* 444 U.S. 924 (1979). *See* note 38 *infra* and accompanying text.

37. 415 F. Supp. at 1262, 1269-70.

38. *Id.* at 1263. The *Feminist* court phrased this "good-faith" defense in terms of "whether the defendants were motivated by a bona fide concern over medical or ethical standards rather than by anticompetitive animus." *Id.* at 1269. Although the *Feminist* "good faith" test is workable, its consistency with the legislative intent and judicial interpretations of the Sherman Act is questionable. *See* 21 CONG. REC. 2456-57 (1890) (comments of Sen. Sherman). As Justice Brandeis stated in Chicago Bd. of Trade v. United States, 246 U.S. 231 (1917), even under the rule of reason, a good intention will not save an otherwise objectionable regulation. *Id.* at 238.

39. 543 F.2d 606 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977). In *Mackey,* plaintiff challenged the Rozelle Rule, an NFL rule that required a club signing a free agent to compensate the free agent's former club. Although the subject matter of *Mackey* was fundamentally different from the learned profession cases, the *Mackey* court proposed an analytical method that may be applied in the learned profession context. *See* note 40 *infra* and accompanying text.

40. The *Mackey* court, finding less restrictive means were available in the case at bar, found the defendant guilty of violating the Sherman Act under this rule of reason analysis. 543 F.2d at 621. The court offered a possible interpretation to the ambiguities left by the *Goldfarb* Court regarding the learned professions. *See* notes 27-34 *supra* and accompanying text.

Applying the two-prong *Mackey* test to the learned professions properly focuses on the com-

In *Boddicker v. Arizona State Dental Association*[41] the Ninth Circuit read *Goldfarb* as requiring a professional association's alleged per se restraint to contribute directly to improving public service in order to escape per se analysis.[42] The *Boddicker* court reasoned that restraints suppressing only professional competition deserve per se analysis.[43] The court stated, however, that ad hoc rule of reason analysis was required if the restraint directly aided the public and thus served the intended purpose of the professions.[44]

The Supreme Court in *National Society of Professional Engineers v. United States*[45] attempted to clarify its vague *Goldfarb* opinion[46] by prescribing per se analysis whenever per se violations were alleged against professional organizations.[47] The Court held that a profes-

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mercial effect of the alleged restraint rather than allowing unwarranted good faith defenses as in *Feminists*. *See* note 38 *supra*. When the pernicious effect of the alleged per se restraint is unclear, the *Mackey* essential or least restrictive means test flows logically from antitrust precedent, 543 F.2d at 621, but it could lead to an across the board application of the rule of reason when professions are involved. Professional expertise may make the pernicious effects of the alleged restraint uncertain. *See, e.g.*, Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (Court gives great deference to opinions of state medical boards). *See also* Kaplin, *supra* note 5.

41. 549 F.2d 626 (9th Cir.), *cert. denied,* 434 U.S. 825 (1977).

42. In *Boddicker* the court was concerned with membership in a state dental association that was a prerequisite to the practice of dentistry in Arizona. Plaintiffs alleged violations of both § 1 and § 2 of the Sherman Act. *Id.* at 628.

43. The *Boddicker* court found justification for its approach in the Supreme Court's *Goldfarb* opinion:

> As we interpret . . . [*Goldfarb*], to survive a Sherman Act challenge a particular practice, rule, or regulation of a profession, whether rooted in tradition or the pronouncements of its organizations, must serve the purpose for which it exists, *viz.* to serve the public. That is, it must contribute directly to improving service to the public. Those which only suppress competition between practitioners will fail to survive the challenge. This interpretation permits a harmonization of the ends that both the professions and the Sherman Act serve.

549 F.2d at 632. The *Boddicker* court implied that a restraint imposed by a professional organization which suppresses competition but does not serve the public is subject to cursory per se analysis. *Id.*

44. Under the *Boddicker* test, if the profession's alleged per se violation serves no public interest, it is clearly commercial in nature and will receive per se analysis. If, however, a public service function may be logically established, the balancing of public benefits against anticompetitive evils is made under rule of reason analysis. 549 F.2d at 632. Thus, *Boddicker* properly focuses on the restraint's public benefits without resorting to across the board rule of reason analysis inconsistent with judicial interpretations of the Sherman Act. *See* notes 15-16 *supra* and accompanying text; notes 59-63 *infra* and accompanying text.

45. 435 U.S. 679 (1978).

46. *See* notes 27-34 *supra* and accompanying text.

47. 435 U.S. at 695.

sional society's ban on competitive bidding was a per se price fixing violation under the Sherman Act.[48] The Court in making its determination, however, referred to both the rule of reason and the per se rule. This reasoning has cast doubt on the precedential value of the case[49] and lower courts consequently remained in doubt as to the proper level of scrutiny.[50]

The Ninth Circuit's opinion in *Arizona v. Maricopa County Medical Association*[51] exhibited the confusion that has characterized decisions after *National Engineers*. The court held that only if a per se violation by a professional association does not relate solely to a commercial purpose will the courts implement a rule of reason analysis.[52] The *Maricopa* court cited the *National Engineers* opinion[53] for support of this rule of reason analysis, although the *National Engineers* Court espoused a per se analysis.[54]

In *Wilk v. AMA*[55] the District Court for the Northern District of Illinois instructed the jury that it was to determine whether the AMA's alleged per se violations had an adverse impact upon the public interest.[56] Judge Bua stated that reasonable actions by the AMA not aimed at preventing chiropractors from practicing within the limits allowed by state license were lawful if they did not significantly or unnecessarily

48. *Id.* The Court found that the ban had a blatantly pernicious impact on the engineering profession. *Id. But see* note 49 *infra*.

49. The Court considered the public benefit of the alleged restraint and its noncommercial nature, 435 U.S. at 695, as required by *Boddicker*. *See* note 44 *supra*. But the Court gave conflicting signals regarding what type of analysis it had used. *Compare* 435 U.S. at 693 ("*on its face,* this agreement restrains trade within the meaning of § 1 of the Sherman Act") (emphasis added) *with id.* at 696 ("the *rule of reason* does not support a defense . . . that competition is unreasonable.") (emphasis added). *See generally* 58 WASH. U.L.Q. 1065, 1070-71 (1980); notes 51-54 *infra* and accompanying text.

50. *See, e.g.,* Arizona v. Maricopa County Medical Soc'y, 643 F.2d 553, 555-56 (9th Cir. 1980), *cert. granted,* 450 U.S. 979 (1981); Virginia Academy of Clinical Psychologists v. Blue Shield, 624 F.2d 476, 485 (4th Cir. 1980), *cert. denied,* 101 S.Ct. 1360 (1981).

51. Arizona v. Maricopa County Medical Soc'y, 643 F.2d 553 (9th Cir. 1980), *cert. granted,* 450 U.S. 979 (1981).

52. *Id.* at 560.

53. *Id.*

54. The question whether the *National Engineers* Court used a per se or rule of reason analysis is unclear. *See* notes 45-49 *supra* and accompanying text.

55. No. 76 C 3777 (N.D. Ill. Jan. 30, 1981), *appeal docketed,* No. 81-1331 (7th Cir. Feb. 26, 1981).

56. Instructions to Jury, *supra* note 2, at 7138-40.

affect the chiropractors' ability to carry on their trade.[57] The court instructed the jury that in determining liability it should consider four factors: the genuineness of the defendant's justification advanced in support of the restraint, the manner of enforcing the restraint, the reasonableness of the restraint, and the resulting effect on trade or commerce.[58]

The *Wilk* instructions strike the proper balance between the certainty of per se analysis[59] and the need to consider the public service aspect of professions.[60] The court properly focused on the public benefit aspect of the alleged per se restraint[61] without causing confusion as to the proper scope of scrutiny in antitrust cases involving professions. Judge Bua's instructions adhere to the concerns of the *Goldfarb* Court[62] by acknowledging that the actions of a professional organization may require rule of reason analysis even when a per se violation is alleged.[63]

Although the *Feminist* court proposed an adequate balancing test,[64] its inclusion of a good faith requirement[65] conflicts with both the legislative intent of the Sherman Act[66] and antitrust precedent.[67] Similarly, the *Mackey*[68] court's essential restraint or least restrictive means test[69] fails to strike a proper balance. The *Mackey* test, if applied to restraints imposed by a learned profession, would mandate an across-the-board rule of reason analysis because professional expertise requires an inquiry into whether the restraint is essential to a competitive balance. Finally, the *National Engineers*[70] and *Maricopa*[71] opinions fail to account for the legitimate public interest concerns of professional organizations.

57. *Id.*
58. *Id.*
59. *See* note 14 *supra* and accompanying text.
60. *See* notes 15-16 & 30-32 *supra* and accompanying text.
61. Instructions to Jury, *supra* note 2, at 7138-40.
62. *See* notes 27-34 *supra* and accompanying text.
63. Instructions to Jury, *supra* note 2, at 7138-40.
64. *See* notes 35-38 *supra* and accompanying text.
65. *See* note 38 *supra*.
66. *Id.*
67. *Id.*
68. *See* notes 39-40 *supra* and accompanying text.
69. *Id.*
70. *See* notes 45-50 *supra* and accompanying text.
71. *See* notes 51-54 *supra* and accompanying text.

The *Wilk* court adopted a standard[72] consistent with the *Boddicker* test.[73] Courts in the future should follow the lead of *Wilk* and *Boddicker* in order to clarify an unsettled area of antitrust analysis.

R.K.N.

72. *See* notes 55-58 *supra* and accompanying text.
73. *See* notes 41-44 *supra* and accompanying text.