

complex litigation and proposed a reasonable method for resolving those issues. The Supreme Court should settle the controversy surrounding the availability of jury trials in complex litigation by examining and endorsing the Third Circuit's rationale and result.

ANTITRUST LAW—LIABILITY OF PROFESSIONS—PHYSICIANS' AGREEMENTS TO SET MAXIMUM FEES IN FOUNDATIONS FOR MEDICAL CARE ARE NOT PER SE VIOLATIONS OF THE SHERMAN ACT. *Arizona v. Maricopa County Medical Society*, [1980-1] Trade Cas. (CCH) ¶ 63,239 (9th Cir.). The State of Arizona brought an antitrust action in federal district court against two foundations for medical care (FMCs)¹ and a county medical society, alleging that the groups established fixed medical fees in violation of section 1 of the Sherman Act.² Arizona sought to enjoin the FMC physicians from setting maximum prices for their medical services. On a motion for summary judgment, the state argued that price-fixing agreements among competitors are per se³ illegal. The district court, denying the motion,⁴ ruled that the agreements were not price-fixing per se, and that rule of reason⁵ analysis should determine the legality of the agreement. On appeal⁶ the court affirmed, and *held*: Agreements among FMC physicians setting maximum prices for fees are not per se price-fixing arrangements, and a rule of reason analysis

1. FMCs are associations of physicians in traditional private practices. The associations are sponsored by county medical societies. FMCs have two basic purposes: (1) To provide prepaid health services to consumers, and (2) to control health care costs and improve the quality of medical services through peer review. FMCs approve and administer insurance plans underwritten by private insurance companies. Physicians directly bill the third-party insurer for the individual medical services provided to patient-policyholders.

One way that FMC physicians control costs is by collectively agreeing to set maximum prices that they will charge to FMC insurance plans for services. Price ceilings are periodically set by majority vote. FMCs also cut medical costs through review systems that weed out unnecessary medical procedures and hospital visits. *See generally* C. STEINWALD, AN INTRODUCTION TO FOUNDATIONS FOR MEDICAL CARE (1971); Egdahl, *Foundations for Medical Care*, 288 NEW ENG. J. MED. 491 (1973).

2. 15 U.S.C. § 1 (1976) in pertinent part provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

3. *See* notes 13-15 *infra* and accompanying text.

4. *See Arizona v. Maricopa County Medical Soc'y*, [1979-1] Trade Cas. (CCH) ¶ 62,694 (D. Ariz.), *interlocutory appeal aff'd*, [1980-1] Trade Cas. (CCH) ¶ 63,239 (9th Cir.).

5. *See* notes 10-12 *infra* and accompanying text.

6. Appeal was brought under 28 U.S.C. § 1292(b) (1976).

consistently unreasonable. Application of the protracted economic analysis required by the rule of reason is judicially wasteful. The per se rule avoids unnecessary analysis by declaring certain categories of conduct "intrinsically unreasonable."¹³ Once a court determines that a challenged practice falls within a per se category, the court will not entertain justifications for the conduct.¹⁴

The Supreme Court has established several categories of per se illegal conduct under the Sherman Act.¹⁵ One per se category is price-fixing—any horizontal or vertical agreement among competitors with the purpose or effect of setting prices.¹⁶ Both minimum¹⁷ and maximum price-fixing arrangements are included within this ban.¹⁸

13. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 65 (1911). Mr. Justice H. Black penned the classic definition of the per se rule in *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958):

[T]here are certain agreements or practices which because of their pernicious effect on competition 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. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

14. *See* *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 228 (1940). *See generally* Bork (pt. I), *supra* note 9, at 783-811.

15. *See, e.g.*, *United States v. Topco Assocs.*, 405 U.S. 596 (1972) (market divisions per se illegal); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (group boycotts per se illegal); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958) (tying arrangements per se illegal).

16. *See* *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) ("Under the Sherman Act, a combination formed for the purpose of and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal per se.").

While the force of this broad holding is unquestioned, there is a minority line of cases that approve trade restraints under the rule of reason that appear to be per se illegal price-fixing activities. *See, e.g.*, *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918). For a discussion of the importance of these decisions, see L. SULLIVAN, *HANDBOOK OF ANTITRUST LAW* 68 (1977) (cases are aberrant and do not reflect modern law); Bork, (pt. I), *supra* note 9, at 777 (cases reflect "divergent lines of authority which the courts have never satisfactorily reconciled").

17. *See* *Goldfarb v. Virginia State Bar*, 421 U.S. 773, *rehearing denied*, 423 U.S. 886 (1975); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

18. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (efforts by newspaper publisher to coerce distributor to adopt vertical maximum resale price agreement is per se illegal); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) (agreement between affiliated manufacturers to set maximum resale prices for wholesalers is per se illegal).

Kiefer-Stewart does not explicitly hold that horizontal agreements setting maximum prices are per se illegal because the two conspiring manufacturers were owned by the same company. The

Recently, however, the Court in *Broadcast Music, Inc. v. CBS*¹⁹ cautioned against artificial application of per se analysis to price-fixing. In *Broadcast Music* owners of copyrighted music issued blanket licenses for performance of their works. Licensees, mostly radio and television stations, paid a set fee for the right to use an entire collection of music. Overturning the lower court finding of per se price-fixing, the Court noted that price-fixing is a term of art, describing conduct that adversely affects competition. The Court argued that every agreement that fixes prices does not necessarily suppress competition.²⁰ The majority believed that courts should not automatically label unique arrangements, previously unexamined by the courts, as per se price-fixing unless the agreements clearly produce a prohibited effect on competition.²¹ In this instance, the Court found that the arrangement might be valid under a rule of reason analysis because the arrangement was the only economically feasible method for licensing the use of the music.²²

case, however, does not make sense unless the Court assumed the manufacturers independently determined prices. See Bork (pt. II), *supra* note 8, at 464. Because of the sweeping prohibition fashioned in the *Kiefer* case, it is generally agreed that horizontal agreements are banned as per se price-fixing. See L. SULLIVAN, *supra* note 16, at 210.

In prohibiting maximum price agreements the *Albrecht* Court reasoned that maximum prices would interfere with a seller's freedom to set a competitive price, and would inevitably cause the maximum price to become the uniform minimum price in an industry. The *Albrecht* Court found that businesses might limit prices to levels sufficiently low to prohibit market entry by new competitors. 390 U.S. at 152-53.

Some commentators have attacked the *Kiefer* and *Albrecht* decisions because the per se bans invoked were not the usual "culmination of a long series of rulings establishing that the challenged practice . . . [could] rarely, if ever, be justified and that the usual evidentiary inquiry into purpose, power and effect would be wasteful." Kallstrom, *Health Care Costs by Third Party Payors, Fee Schedules and the Sherman Act*, 1978 DUKE L.J. 645, 666-67.

19. 441 U.S. 1 (1979). Cf. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (location restrictions by manufacturer on sale of goods in franchise agreements, previously per se illegal, are to be analyzed under the rule of reason).

20. 441 U.S. at 9.

21. *Id.*

22. Individual licenses between the myriad of copyright owners and stations were cost prohibitive, and the blanket license evolved as a response to this problem. The licenses were, according to the Court, a market necessity. *Id.* at 20. The Court also pointed out that these nonexclusive licenses did not prohibit individual owners and stations from negotiating their own license price; thus, under the rule of reason, the practice might not be anticompetitive. *Id.* at 24.

The Court found that the blanket license could be considered an ancillary restraint on competition. See 91 HARV. L. REV. 448 (1977). See also Kallstrom, *supra* note 18, at 656. Ancillary restraints are combinations or integrations by competitors that result in overall economic efficiencies and thus are procompetitive under a rule of reason analysis. Price-fixing is banned because it generally constrains market price without producing a desirable economic effect. Bork (pt. II), *supra* note 8, at 386. Certain joint venture agreements involving price stabilization among com-

The normal rules of antitrust analysis, however, do not wholly apply to the "learned professions."²³ Courts historically distinguished professional services from normal profit-oriented "trade or commerce," and thus held professions beyond the scope of the Sherman Act.²⁴ Recognizing that professions served the public welfare, courts believed that self-imposed restraints on competition benefited the public by regulating ethical behavior and insuring quality standards of service.²⁵ Later, courts began to apply the Sherman Act to certain professional activities, realizing that many professional restraints serve only the commercial interests of the members of the profession.²⁶

In *Goldfarb v. Virginia State Bar*²⁷ the Supreme Court explicitly re-

petitors are condoned under the ancillary restraint doctrine. 91 HARV. L. REV. 488, 491 n.24 (1977).

23. The learned professions include medicine, law, engineering, etc. The distinction in American law between the "trade and commerce" of the business world and the conduct of the "learned professions" was first mentioned by Mr. Justice Story in *The Nymph*, 18 F. Cas. 506 (C.C.D. Me. 1834) (No. 10,388).

24. The United States Supreme Court never expressly exempted the professions from anti-trust legislation. The Court specifically refused to decide the issue in *AMA v. United States*, 317 U.S. 519, 528 (1943). However, dictum in *Federal Baseball Club v. National League*, 259 U.S. 200, 209 (1922) ("[A] firm of lawyers sending out a member to argue a case . . . does not engage in . . . commerce.") and *FTC v. Raladam Co.*, 283 U.S. 643, 653 (1931) ("They [doctors] follow a profession and not a trade . . .") led lower federal courts to create an exemption for the professions. See, e.g., *Rigall v. Washington County Medical Soc'y*, 249 F.2d 266 (8th Cir. 1957), cert. denied, 353 U.S. 954 (1958); *United States v. AMA*, 28 F. Supp. 752 (D.D.C.), rev'd on other grounds, 110 F.2d 703 (D.C. Cir.), cert. denied, 308 U.S. 599 (1939). See generally Bauer, *Professional Activities and the Antitrust Laws*, 50 NOTRE DAME LAW. 570 (1975).

25. See, e.g., *Button v. Day*, 204 Va. 547, 132 S.E.2d 292 (1963). Courts are sensitive to the distinctions between normal businesses and the health professions:

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.

United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952).

26. Many courts distinguish between noncommercial, public service purposes (e.g., standards of care, ethical behavior) and commercial, income-generating purposes when deciding whether a professional activity constituted "trade or commerce" under the Sherman Act. Professional activities of a commercial nature were included within the Sherman Act's jurisdiction. Compare *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools*, 432 F.2d 650 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970) (college accreditation a noncommercial activity) with *Northern Cal. Pharmaceutical Ass'n v. United States*, 306 F.2d 379 (9th Cir.), cert. denied, 371 U.S. 862 (1962) (price-fixing by pharmaceutical organization a commercial activity within the scope of the Sherman Act). See generally 16 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 49.02[1][b][ii] (1980).

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

jected a blanket learned profession exemption from the Sherman Act.²⁸ In *Goldfarb* the Court ruled that a county and state bar association committed a per se violation of the Act by establishing minimum legal fees for title examinations.²⁹ Although the Court recognized the important public service function of professions, it concluded that professions generated income and therefore were commercial enterprises.³⁰ The Court, however, cautioned against equating professional and business restraints under antitrust law.³¹ Public service considerations and other features of the professions distinguish restraints imposed by professional groups from those imposed by business entities. The Court deemed the rule of reason the appropriate means for weighing professional considerations against anticompetitive effects, but failed to state explicitly when rule of reason analysis should replace traditional per se review for professional associations.³²

In *National Society of Professional Engineers v. United States*³³ the Supreme Court again applied a per se analysis to declare a professional ban on competitive bidding illegal.³⁴ The Court reaffirmed the *Gold-*

28. *Id.* at 786-87.

29. "[H]ere a naked agreement was clearly shown, and the effect on prices plain." 421 U.S. at 782 (emphasis added) (footnote omitted). The commentators are in general agreement that *Goldfarb* employs the per se rule. See Branca & Steinberg, *Attorney Fee Schedules and Legal Advertising: The Implications of Goldfarb*, 24 U.C.L.A. L. REV. 475, 507 (1977); Comment, *Antitrust—Professions—Per Se Rule Applied to Ethical Canon Against Competitive Bidding*, 62 MARQ. L. REV. 260, 265 (1978); Note, *supra* note 12, at 399 n.36; Comment, *Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys*, 62 VA. L. REV. 1135, 1143-44 (1976); Comment, *Antitrust Law: Minimum Fee Schedules Violate the Sherman Act*, 15 WASHBURN L.J. 485, 487 n.29 (1976). But see *Price-Fixing, Advertising Bans, and Other Self-Regulation by Attorneys: What Future Under the Antitrust Laws?*, 12 COLUM. J.L. SOC. PROB. 531, 538-40 (1976).

30. See 421 U.S. at 788.

31. 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 anti-trust 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.* at 788 n.17.

32. See Note, *Antitrust—Professions—Per Se Rule Applied to Ethical Canon Against Competitive Bidding*, 62 MARQ. L. REV. 260, 265 (1978).

33. 435 U.S. 679 (1978).

34. Mr. Justice Stevens, writing for the majority, defined as per se illegal those "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish illegality." *Id.* at 692 (emphasis added). He then characterized the competitive bidding ban at issue in the case: "While this is not price fixing as such, no elaborate

farb distinction between professions and business, and stated that the rule of reason should be applied in accounting for this distinction.³⁵ The Court mentioned the enforcement of "ethical norms" as the type of professional conduct that might be upheld under the rule of reason,³⁶ but failed to provide guidance as to when rule of reason analysis should replace per se analysis in examinations of professional industries.

Several lower courts interpreted *Goldfarb* to require application of the per se rule to commercial professional restraints, while requiring application of the rule of reason to arrangements motivated by non-commercial concerns.³⁷ Other lower courts also have extended the analysis of *Goldfarb* and *Professional Engineers* to prepaid professional insurance plans. At least one court held that an alleged group professional boycott, normally per se illegal, should be scrutinized under the rule of reason.³⁸

industry analysis is required to demonstrate the anticompetitive effect of such an agreement. . . . On its face, this agreement restrains trade within the meaning of § 1 of the Sherman Act." *Id.* at 692-93 (emphasis added). *But cf.* Sullivan & Wiley, *supra* note 12, at 323 (*Professional Engineers* utilizes abbreviated rule of reason analysis because anticompetitive effect easily recognized).

35. 435 U.S. at 696.

36. *Id.*

37. *See* *Viezaga v. National Bd. of Respiratory Therapy*, [1977-1] Trade Cas. (CCH) ¶ 61,274 (N.D. Ill.). *Cf.* *Feminist Women's Health Center, Inc. v. Mohammad*, 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) (district court constructs rule that prima facie presumption of per se illegality exists when doctors' activity involves commercial purpose; physicians then have the burden of proving that the actions were motivated by a valid medical concern). *But cf.* *Boddicker v. Arizona State Dental Ass'n*, 549 F.2d 626 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977) (utilize rule of reason to decide antitrust cases involving professional activities).

Many noncommercial professional activities deserve scrutiny under antitrust law to weigh their competitive impact. The rule of reason is the proper analytical tool. For example, certification of practitioners and scholastic accreditation restrict the number of professionals and thus may inflate the price of professional fees. Yet professionals defend these practices as necessary to insure quality care to the public. *See* Horan & Nord, *Application of Antitrust Law to the Health Care Delivery System*, 9 CUM. L. REV. 685, 705 (1979).

38. *See* *Virginia Academy of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476 (4th Cir. 1980) (under rule of reason, Blue Shield violated Sherman Act by refusing to reimburse psychologists for their services unless they billed through physician).

Prior to *Goldfarb*, one prepaid drug insurance plan was banned as per se illegal, in part because pharmacists conspired with the state Blue Shield to implement uniform prices. *See* *Blue Cross v. Commonwealth*, 211 Va. 180, 176 S.E.2d 439 (1970). A United States Justice Department spokesman has stated that the Department will regard as per se price-fixing any drug plan in which pharmacists collectively establish fees. United States Department of Justice, *Antitrust Aspects of Prepaid Subscription Plans* (mimeograph), *quoted in* Oppenheim, *Antitrust Policy and Third-Party Prepaid Prescription Drug Plans*, 40 GEO. WASH. L. REV. 244, 260-62 (1971). Advisory guidelines, however, are not binding on any court. When maximum prices are established by independent

In *Arizona v. Maricopa County Medical Society* the court of appeals held that the uniqueness of both the medical fee arrangement and the characteristics of the medical profession required a rule of reason analysis.³⁹ The court reasoned that although the agreements appeared to fix prices, branding the agreements per se illegal would ignore their potentially beneficial effects and their potential for reduction of consumer medical costs.⁴⁰

The court found that the naturally monopolistic nature of the health professions and governmental subvention of medical costs caused the health care industry to possess inherently anticompetitive characteristics. Because a per se rule would superficially analogize the health industry to the normal supply and demand market, the rule of reason provided an appropriate method of scrutinizing the economic impact of health care price-fixing agreements.⁴¹ The court cited *Professional Engineers* to support the application of the rule of reason to the learned professions.⁴²

The dissent argued that maximum price-fixing arrangements are per se illegal under the Sherman Act. Neither the health professions, nor professions generally, warrant exemption from the per se rule.⁴³ The dissent interpreted *Goldfarb* and *Professional Engineers* as requiring application of the per se rule to this price-fixing agreement because the fee arrangement was wholly commercial and unrelated to any uniquely professional goals.⁴⁴ The dissent concluded that no further analysis

insurance companies, the threat of market-wide uniform prices may be diminished because individual companies compete with each other for lower fees to gain a greater share of the prepaid insurance market. Maximum prices unilaterally set by insurance companies may be legal ancillary restraints because they allow companies to accurately formulate premium costs, and thus promote financially sound prepaid insurance plans. See Kallstrom, *supra* note 18, at 670-73.

The ABA issued similar price-fixing warnings for prepaid legal services in which lawyers or bar associations collectively establish fees. ABA SPECIAL COMMITTEE ON PREPAID LEGAL SERVICES, COMPILATION OF REFERENCE MATERIALS ON PREPAID LEGAL SERVICES at i (1973). See also Meeks, *Antitrust Aspects of Prepaid Legal Service Plans*, 1976 AM. B. FOUNDATION RESEARCH J. 855, 874-82.

39. The court believed that closer scrutiny of the FMC agreements was necessary to weigh their overall impact on the entire medical insurance market. [1980-1] Trade Cas. (CCH) ¶ 63,239, at 78, 154-56 (9th Cir.).

40. *Id.* at 78,155. The court noted that physicians might effectively control costs for fear of government regulation of fees.

41. *Id.* at 78,154-55.

42. *Id.* at 78,157.

43. *Id.* at 78,160-61.

44. *Id.* at 78,161-62 (Larson, J., dissenting).

was necessary to find illegality under the Act.

The *Maricopa* decision supports the rule fashioned in *Broadcast Music*. When the competitive effects of arrangements, such as the FMC agreements, are unknown, use of the price-fixing label does not permit the comprehensive analysis allowed under the rule of reason. While the Sherman Act prohibits maximum price-fixing, the FMC arrangement is distinguishable from other price-fixing agreements. The FMC agreement is an ancillary restraint to a valid economic purpose.⁴⁵ Maximum price controls in the prepaid health insurance field are ancillary restraints that allocate and reduce the cost of medical services.⁴⁶ It is, however, arguable that competition within the medical profession will be adversely affected if doctors, as opposed to independent insurance companies, set prices.⁴⁷ A court should apply a rule of reason analysis to maximum price-fixing schedules, which a health care industry has drafted.

While the *Maricopa* court correctly applied a rule of reason analysis, the court's reliance on *Professional Engineers* expands the learned profession exemption beyond the holding of *Professional Engineers*. The court in *Maricopa* relied on *Professional Engineers* to support application of the rule of reason to the learned professions. Both *Goldfarb* and *Professional Engineers*, however, mandate rule of reason analysis when conduct within a learned profession relates to a legitimate professional concern. When agreements within the learned professions regulate commercial concerns, the rationale for shielding professions from per se analysis evaporates.⁴⁸

Because the FMC agreement in *Maricopa* did not regulate a peculiarly professional concern, the court's application of the professional exemption was incorrect. By misreading *Professional Engineers* the court held that rule of reason analysis is applicable to conduct within the learned professions even when the conduct relates solely to commercial goals.

The *Maricopa* decision reaffirms the appropriateness of applying a

45. See note 22 *supra*.

46. Price controls are preferred by insurance companies because they allow accurate formulation of costs and premiums. Price ceilings also may help physicians to control soaring medical costs. See note 38 *supra*. See also Meeks, *supra* note 38, at 883.

47. See, e.g., Havighurst, *Professional Restraints on Innovation in Health Care Financing*, 1978 DUKE L.J. 303, 377; Kallstrom, *supra* note 18, at 661-62.

48. See Note, *supra* note 12, at 396-416.

rule of reason analysis to practices that, although resembling per se illegal conduct, arguably promote an equitable allocation of costs and services. The *Maricopa* court's exemption of the health care industry from per se scrutiny should be limited to agreements that pertain to noncommercial activities of the medical profession.