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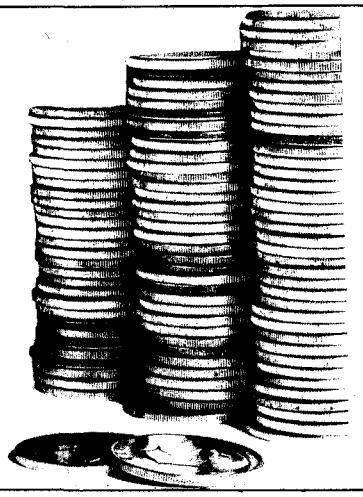
Case Note: Goldfarb v. Virginia State Bar - Lawyers and the Free Enterprise System

Lindsay Schlottman

Lawyers and The Free Enterprise System

by Lindsay Schlottman



In October 1971, Lewis and Ruth Goldfarb wished to purchase a home in Reston, Virginia. The lender who financed the purchase required the Goldfarbs to obtain title insurance. A title examination can only be performed by a member of the State Bar in Virginia (all Virginia attorneys are required to be members of the State Bar). The Goldfarbs discovered that all the attorneys they contacted charged exactly the same fee for the title examination: the fee established by the Fairfax County Bar Association Minimum Fee Schedule, which was closely modeled after the State Bar's Schedule, and enforced by the State Bar Association. The Goldfarbs never found a lawyer who would charge a fee lower than the dictated fee; they therefore brought an individual and class action under the Sherman Act** against the State Bar and the County Bar alleging that restraint of trade or commerce results from the establishment and enforcement of minimum fee schedules. *Goldfarb et al., v. Virginia State Bar, et al.,* 355 F. Supp. 491 (1973); 497 F. 2d 1 (1974); 43 L.W. 4723 (June 16, 1975). (Two other county bar associations were sued by the Goldfarbs, but they agreed to a consent judgment under which they cancelled their fee schedules and were enjoined from establishing fee schedules in the future).

The District Court found the State Bar not liable but the County Bar liable under the Sherman Act. The basis of this liability was found as follows: The District Court stated that the mere existence of the minimum fee schedule restricts competition of attorneys by price fixing, and that price fixing is one method of restraining trade prohibited by the Sherman Act. However, this price fixing would only be proscribed if it substantially affects interstate commerce, if the acts of the lawyers in following minimum fee schedules fall within the "trade" category," and if these acts are not excepted from Sherman Act liability under *Parker v. Brown,* 317 U.S. 341 (1943). The District concluded that interstate commerce is sufficiently affected to sustain jurisdiction under the Sherman Act since a significant portion of home financing funds comes from without the State of Virginia and most of the lenders require a title examination and title insurance. The Court further concluded that the existence itself of a minimum fee schedule places attorneys' services within the "trade" category of the Act. *Parker v. Brown* was analyzed to determine if the acts of the County of State Bar would be excepted from Sherman Act liability. In *Parker,* an agricultural proration program for the raisin industry was established by the state legislature to insure stability in the marketing of state agricultural commodities. The U. S. Supreme Court held that the program was permissible, even assuming that had the program been adopted by private individuals (i.e. no legislative mandate) it would have violated the Sherman Act. In other words, the Court stressed that the Sherman Act does not prohibit state action, only private action. In the present case, the District Court found that the State Bar is engaged in state action under *Parker* for the following reasons: the state legislature authorized the state Supreme Court to regulate the conduct of attorneys and the operation of the state Bar; and the State Bar is statutority required to investigate and discipline violators of the standards of conduct mandated by the state Supreme Court. The County Bar, however, is a private undertaking. It does not derive any authority or efficacy from the state legislature or the state Supreme Court. Hence, under *Park,* the County Bar's actions are not state actions. The County Bar's establishment of a minimum fee schedule is a violation of the Sherman Act held the Court; the State Bar's role as potential enforcer of the County Bar's schedule is not a violation. The Court gave another season for freeing the State Bar from liability. The State Bar has only a minor role in the fee schedule matter. It does have judicial and legislative commands to render opinions about and enforce violations of ethical conduct; and it has in effect stated in two opinions that it is unethical for an attorney to habitually charge fees below its minimum fee schedule, but the State Bar has never disciplined an attorney for violating a minimum fee schedule.

The County Bar and the Goldfarbs appealed the District Court's decision and these appeals were consolidated before the U. S. Court of Appeals for the Fourth Circuit. The Fourth Circuit agreed with the District Court that the State Bar was immune from Sherman Act liability under *Parker.* However, it also found that the County Bar was immune based not on *Parker* but on two other factors: the "learned profession" exemption from the Sherman Act and the lack of interstate commerce restraint.

The Fourth Circuit readily agreed that "...the fee schedule and the enforcement mechanism supporting it acts as a substantial restraint upon competition among attorneys practicing in Fairfax County." *Goldfarb,* 497 F. 2d 1, 13 (1974). Yet the Court stated strongly that the practice of a learned profession is neither trade nor commerce; therefore

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**The Sherman Act provides in part at 15 U.S.C. 1, "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..."

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restraints upon the practice of law are not illegal *per se*. It held that the fee schedules are valid insofar as their effect is to restrain competition among attorneys.

Although the Fourth Circuit accepted the District Court's findings of fact in reference to home financing and title examinations, it reached a conclusion of law opposite to that of the District Court. Intersate commerce was held to be not affected directly and substantially by the activities of the County and State Bars because law practice is considered an intrastate activity and borrowing purchase money from an out-of-state lender "...makes neither the selling of the house nor the supplying of incidental legal services an interstate activity." *Goldfarb*, 497 F.2d 1, 17 (1974). Thus the impact of minimum fee schedules upon interstate is merely incidental to the Bars' intrastate activities.

The Goldfarbs appealed the Fourth Circuit's decision to the U.S. Supreme Court. The Supreme Court reiterated that minimum fee schedules constitute price fixing. Thus the Court was squarely faced with the issue of whether the minimum fee schedule for lawyers as published by the County Bar and enforced by the State Bar violates the Sherman Act.

The decision of the Fourth Circuit that interstate commerce was not sufficiently affected by the fee schedules was refuted by the Supreme Court. The Court pointed out that in a practical sense title exams are a necessity in real estate transactions, that indeed many purchase loans are secured from-out-of-state lenders, and that a substantial volume of commerce is involved. "Where, as a matter of law or practical necessity, legal services are an integral part of an interstate transaction, a restraint on those services may substantially affect commerce for Sherman Act purposes." *Goldfarb*, 43 L.W. 4723, 4727.

The Supreme Court dismissed the Fourth Circuit's absolute statement that the learned profession is exempted from Sherman Act liability by declaring that the nature of the legal occupation along does not provide sanctuary from the Act. The Sherman Act attempts to prevent interstate restraints on commerce by "...every person engaged in business whose activities might restrain or monopolize commercial intercourse among the States." *U.S. v. Southeastern Underwriters Association*, 322 U.S. 533, 553 (1944), cited in *Goldfarb*, 43 L.W. 4723, 4728. The practice of law does have this business aspect, although the Court in a footnote pointed out that the fact that a restraint operates upon a profession — as distinguished from a business — is relevant in determining Sherman Act liability.

Parker was cited by the Supreme Court as support for its decision that the County Bar's and the State Bar's activities are not exempted from Sherman Act liability. The minimum fee schedules were not authorized specifically by the state legislature or the state Supreme Court. *Parker* exemption occurs only when anti-competitive conduct is "compelled by direction of the State acting as a sovereign." *Goldfarb*, 43 L.W. 4723, 4729. The Court found that the State Bar is a state agency for limited purposes only and that when the State Bar established disciplinary measures for violators of minimum fee schedules it was engaged in private anticompetitive activity.

The result of the decision in *Goldfarb* is that minimum fee schedules established and enforced by bar associations which restrain interstate commerce are invalid under the Sherman Act. This decision will not affect the legal profession drastically. Many state bar associations, including Maryland's, have abandoned these schedules; others never had fee schedules. The distinction between the business and the professional aspects of the practice of law somewhat limits this Sherman Act liability. The Supreme Court specifically stated that the holding that certain anticompetitive conduct by lawyers results in Sherman Act liability is not intended to diminish the state's authority to regulate its professions. Thus, future decisions are necessary to determine whether other aspects of the practice of law, such as prohibitions against advertising and solicitation, are within the scope of the Sherman Act.

1975 Law Day Project Honored

former Secretary of the Governor's Commission on the Rights of the Handicapped completed the panel. Michael Steinhardt, author of a definitive *University of Baltimore Law Review* article on educational rights of the handicapped served ably as moderator of the discussion.

Concepts and preparation were coordinated by Committee Chairperson Anthony Gallagher. The panel members were informed in advance by the Chairperson of the questions to be presented, ostensibly to avoid surprise or embarrassment. However, it was the interplay created by the responses to these queries that was designed to reveal important issues and problems that had not been previously aired.

The budget for the 1975 Project was $450.00 of Student Bar Association funds. However, the Chairperson was able to elicit technical and broadcast support from WBAL television's Community Affairs Director Sidney King and none of the allocated monies were utilized. The expenses of videotaping on 17 April, and broadcast on 1 May were absorbed by WBAL.

Grateful appreciation is extended to all who participated in the 1975 project. Through their cooperation the desired mass media impact was accomplished and Law Day 1975 became a true community involvement experience. The quality and success of the production is evidenced by the First Place Award extended by the American Bar Association.

(Details of the 1976 Law Day Project will be submitted for publication in the next edition of THE FORUM.)