Volume 8 | Number 4 Article 6

12-1-1977

Advertising Restrictions on Licensed Occupations: An Antitrust Approach.

ADVERTISING RESTRICTIONS ON LICENSED OCCUPATIONS: AN ANTITRUST APPROACH

ROBERT G. BOOMER,* JAMES R. CHAMBERLAIN,**
JAN M. HORN,*** STEVEN E. WEART,****
AND JOEL WINSTON*****

Considerable controversy and litigation have developed recently over restrictions placed on advertising by licensed occupations, particularly, the professions. Physicians, lawyers, pharmacists, dentists, and optometrists are all subject to various advertising limitations differing in source and scope.[1] Previous attempts to invalidate such restrictions, generally based on due process arguments, have been largely unsuccessful. Two recent cases, *Goldfarb v. Virginia State Bar*[2] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[3] may, however, jointly provide the framework for a new approach to this issue. Currently involved in litigation are numerous challenges grounded on the anticompetitive aspects of advertising restrictions and the first amendment right of citizens to receive information.[4]

The opinions expressed herein are those of the authors and not those of the Federal Trade Commission.

* Robert G. Boomer, B.S., Ithaca College; M.B.A., Boston University; J.D., Seton Hall University. Member of State Bar of New Jersey. Staff of Federal Trade Commission, Dallas Regional Office.

** James R. Chamberlain, B.A., M.S., University of Wisconsin; J.D., Southern Methodist University. Member of State Bar of Texas. Staff of Federal Trade Commission, Dallas Regional Office.

*** Jan M. Horn, B.A., Texas Tech University; J.D., Southern Methodist University. Member of State Bar of Texas. Staff of Federal Trade Commission, Dallas Regional Office.

**** Steven E. Weart, B.A., J.D., University of Texas. Member of State Bar of Texas. Staff of Federal Trade Commission, Dallas Regional Office.

***** Joel Winston, B.A., J.D., University of Michigan. Member of State Bar of Michigan. Staff of Federal Trade Commission, Dallas Regional Office.

1. Restrictions may emanate directly from a state statute (*e.g.*, dentists in Texas); from a state agency or board pursuant to statutory delegation of authority (*e.g.*, Texas veterinarians); or from a private trade association or professional code (*e.g.*, the American Institute of Certified Public Accountants). The significance of each of these will be seen below. Total advertising bans can be contrasted to merely time, place, and manner restrictions of various kinds. The importance of this distinction will be developed below.

2. 421 U.S. 773 (1975).

3. — U.S. —, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).

4. *E.g., In re* Bates, 555 P.2d 640 (Ariz.) (ban on lawyer advertising upheld

This article attempts to briefly survey some existing restrictions on professional advertising. Past constitutional attacks are contrasted with the reasoning of *Virginia Pharmacy* and *Goldfarb* to reveal the present trend of the law. Although the importance of constitutional theories cannot be minimized, the emphasis of this article centers on the use of the antitrust laws to challenge these restrictions. In addition, the economic effects of removing these restrictions are considered along with efforts of the Federal Trade Commission (FTC) to deal with this problem by balancing the legal and economic consequences involved. Finally, this paper presents an analysis of legal and economic issues that identify possible methods by which professional advertising restrictions might be successfully challenged. Throughout this article, it will be stressed that the source of a restriction, and the extent of its restrictiveness, are the crucial variables for determining its legality.

SURVEY OF EXISTING ADVERTISING RESTRICTIONS

Pervasity of Restrictions

A survey of licensed occupations reveals the pervasity of advertising restrictions. A few examples will serve to demonstrate this phenomenon. An FTC study indicates that twenty-four states totally prohibit advertising by pharmacists of prices for prescription drugs, eleven other states severely restrict price advertisements, and several others have at least some kind of limitation.[5] According to another FTC survey, price

against antitrust and first amendment attacks), *prob. juris. noted sub nom.*, Bates v. State Bar, 97 S. Ct. 53 (1976); Consumers Union of United States, Inc. v. American Bar Ass'n, No. 75-0105 (E.D. Va. Dec. 15, 1976) (three-judge panel, on first amendment grounds invalidated rules of the Virginia Supreme Court precluding publication of a consumer pamphlet describing available legal services); Health Sys. Agency v. Virginia State Bd. of Medicine, No. 76-37-A (E.D. Va. Nov. 4, 1976) (ban on physician advertising held unconstitutional under first amendment); Ferdnand v. Alaska Bd. of Dispensing Opticians, No. F-76-35 (D. Alas., filed Oct. 28, 1976) (first amendment challenge to state prohibition on advertising of ophthalmic goods); Texas State Bd. of Pharmacy v. Page Drugs, Inc., No. 76-6217-F, Dist. Ct. of Dallas County, 116th Judicial Dist. of Texas, July 9, 1976, *appeal docketed*, No. 5689 (Tex. Civ. App.—Waco, Sept. 3, 1976) (challenge to state limitations on prescription drug advertising). The federal antitrust statutes relied on in some of the suits mentioned above include: The Sherman Act, 15 U.S.C. §§ 1-7 (1970 & Supp. V 1975), and the Clayton Act, *id.* §§ 12-27. The Clayton Act is not applicable to this topic. Also, the Federal Trade Commission (FTC) Act, *id.* §§ 41-58, while technically not an antitrust statute, enforces the above mentioned Acts, and further proscribes other unfair methods of competition.

5. STAFF REPORT TO THE FEDERAL TRADE COMMISSION, PRESCRIPTION DRUG PRICE DISCLOSURES 33-38 (1975). Examples of states totally prohibiting drug price advertising are Florida, New Jersey, Minnesota, and New York. States with severe restrictions, such as bans on advertisements for "controlled substances," include Illinois, Missouri, and Pennsylvania. Lesser limitations, such as bans on advertising "discount" or "cut-rate" prices, exist in Michigan and New Mexico, among others.

advertising by optometrists is restricted, at least to some extent, in all fifty states and the District of Columbia. Forty-five states have restrictions promulgated by a governmental unit (forty of which are total prohibitions), while in six states the limitations are found in the codes of ethics of private state optometric associations. In addition, twenty-four states totally prohibit the advertising of prices by opticians, and other states have partial bans.[6] Funeral directors are either prohibited from or severely limited in price advertising for their services in several states. Such restrictions are initiated by statute or through regulations of a licensing board. Also, some boards discourage advertising through their power to revoke or suspend licenses.[7]

Dentists, lawyers, and physicians are all subject to extensive advertising regulation in most states. The American Dental, Bar, and Medical Associations have all promulgated restrictions for their members. In most states, these or other restrictions have been adopted by various state bodies (the legislature, a state board, or the state supreme court), state trade associations, or both.[8] Professionals must obey these restrictions to avoid losing their licenses.

Generally, many other professions and licensed occupations are subject to various kinds of advertising restrictions in virtually every state. The members of at least ten occupations in Texas are either limited to professional announcements or totally prohibited from advertising. At least six additional groups are limited in the time, place, or manner in which they can advertise. At least two groups are prohibited only from deceptive or misleading advertising.[9]

6. Staff Report to the Federal Trade Commission, Advertising of Ophthalmic Goods and Services 13-25 (1976). Prohibitions on price advertising in codes of ethics of optometric associations can be found in Arizona, Colorado, the District of Columbia, Iowa, Maryland, and South Dakota. These entities do not have governmental restrictions. States totally prohibiting price advertising by opticians include Florida, New Jersey, and New York. Partial restrictions on opticians exist, for example, in Georgia and Virginia.

7. For example, the South Dakota State Board of Funeral Service has said that price advertising "is generally not done as it is considered unethical." Staff Memorandum to the Federal Trade Commission, Funeral Industry Practices 87 (1975). Statutory prohibitions are found in, among others, Massachusetts and Nebraska, while state board restrictions exist, for example, in Missouri, Oregon, and Virginia.

8. ABA Code of Professional Responsibility, Disciplinary Rules 2-101, -102 (1976); American Dental Association, Principles of Ethics §§ 12, 13 (1972), *reprinted in* 92 J.A.D.A. 608-13 (1976); American Medical Association, Principles of Medical Ethics § 5 (1957), *reprinted in* 164 J.A.M.A. 1484 (1957). Virtually every state has restrictions on dentist and lawyer price advertising, while somewhat fewer limit physicians.

9. Occupations with complete bans include dentists, veterinarians, doctors, architects, optometrists, pharmacists, physical therapists, lawyers, psychologists, and account-

Sources of Restrictions

The authors' survey revealed four ways by which advertising restrictions may arise: state statutes, rules promulgated by state licensing boards, regulations initiated by private associations and adopted by the State, and rules made and enforced solely by private associations. Identifying the source of a particular advertising restriction is crucial to an assessment of its legality under the antitrust laws.

Statutory restrictions on advertising are often incorporated in legislation providing for the licensing of a particular occupation. This is the most prevalent source of advertising restrictions in Texas, particularly in the health field.[10] A licensed practitioner, such as a dentist, who advertises is generally subject to revocation of his license.[11] While such proscriptions are passed by the legislature, a model bill is usually drawn up and submitted by the interested private association. Thus, many of these restrictions can be viewed as private agreements which have received legislative approval.

Advertising restrictions may also be promulgated by state licensing boards, agencies, or commissions. These bodies are usually granted the power to make rules and regulations necessary to effectuate provisions of their enabling statutes. State licensing boards generally may revoke or suspend licenses for various reasons. Among these reasons is unprofessional conduct, which usually includes certain types of advertising. An example of this restriction source in Texas is the collection of advertising restraints in the rules established by the State Board of Veterinary Medical Examiners.[12] Private influence may exist at two different points in the regulatory process. First, Board members may receive input from private associations regarding the rules. Next, industry members may actually constitute all, or a majority, of the

---

ants. Occupations with time, place, or manner restrictions include engineers, barbers, chiropractors, opticians, podiatrists, and public surveyors. Occupations with restrictions only against deceptive and misleading advertising include morticians and hearing aid dispensers.

10. Examples in Texas include doctors, optometrists, pharmacists, physical therapists, psychologists, and veterinarians.

11. TEX. REV. CIV. STAT. ANN. art. 4548g (1976) states:

> It shall be unlawful for any person . . . to engage in or be guilty of any unprofessional conduct in the practice of dentistry, directly or indirectly. Any 'unprofessional conduct,' as used herein, means and includes any one or more of the following acts, to wit: . . . .
>
> . . . .
>
> (g) Advertising prices for professional services . . . .

12. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS RULES OF PROFESSIONAL CONDUCT § 23 (1967).

board's membership. Most state licensing bodies in Texas are composed largely of members of the industry purportedly being regulated. The degree of private influence is significant in determining the antitrust consequences of advertising restrictions.

A third source of advertising restriction is initiated by private trade associations, with subsequent adoption or approval by the state. The Code of Professional Responsibility for lawyers provides an example. Provisions of the Code are drawn up by the American Bar Association and submitted to the Texas State Bar. Upon approval by the state bar, the provisions are submitted to the Supreme Court of Texas for adoption, and then formally adopted by the state bar.[13]

Finally, advertising may be governed by rules of private associations.[14] Such organizations frequently produce ethical codes which limit, among other things, the use of advertising. If an individual is found to have violated a code, he may be subject to adverse publicity, admonishment, suspension, or expulsion. The American Institute of Certified Public Accountants, for instance, prohibits soliciting and advertising.[15] Its rules are enforced by a trial board authorized to expel violators.[16]

Types of Restrictions

In addition to source, a second variable in assessing the legality of advertising limitations is the degree of restrictiveness. Rules may contain a complete ban; may govern the time, place, or manner of advertising; or may merely prohibit deceptive or misleading advertising. As explained below, the more restrictive the rule, the less probable its legality.

The Texas Pharmacy Act[17] contains a nearly complete ban on adver-

13. State Bar of Texas, Rules and Code of Professional Responsibility, Disciplinary Rules 2-101, -102 (1976). These rules, which limit lawyer advertising to telephone books and business cards, are presently being challenged by the United States Justice Department. United States v. American Bar Ass'n, No. 76-1182 (D.D.C., filed June 25, 1976).

14. More than 50 national associations have codes of ethics which contain advertising restrictions. *See generally* J. CLAPP, PROFESSIONAL ETHICS AND INSIGNIA (1974).

15. AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, CODE OF PROFESSIONAL ETHICS § 502 (1975) (effective Mar. 1, 1973). TEXAS SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS, CODE OF PROFESSIONAL ETHICS art. 3.01 (1973) does not permit announcements in public print. Such announcements *are* allowed by the State Board. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY, RULES OF PROFESSIONAL CONDUCT, Rule 9(a) (1976) (effective July 16, 1970).

16. *See* D. CAUZEY, DUTIES AND LIABILITIES OF THE CPA 75 (rev. ed. 1976).

17. TEX. REV. CIV. STAT. ANN. art. 4542a (1976).

tising. The Act specifies the manner in which prescription drug information may be made available to the public.[18] Pharmacists are required to list the one hundred most-prescribed drugs and the maximum charge for each on a poster in public view in the dispensing area. All other advertising is prohibited.[19] While this is arguably a time, place, or manner restriction, the effect is to preclude the consumer from obtaining information or making meaningful comparisons unless he visits every pharmacy in the area.

Several professional groups are limited to "dignified" announcements in telephone books, professional directories, cards, and through the mail. Information which may be given is often limited to name, address, phone number, office hours, or practice limitations. Similar to the pharmacy example, this type of restriction effectively constitutes a total ban.

Some statutes and rules allow advertising, but limit its time, place, or manner. For example, the code of ethics for public surveyors does not permit registrants "[t]o advertise in self-laudatory language, or in any other manner derogatory to the dignity of the profession."[20] Also, the regulations of the State Board of Barber Examiners prohibit barber schools and colleges from advertising free haircuts.[21] Another type of manner restriction allows advertising, but requires the advertiser to disclose certain information. Potentially, this may act as a total ban because it may cause advertising costs to become prohibitive.[22]

A third type of restriction prohibits false, deceptive, or misleading advertising. Such rules are generally valid, if enforced fairly, since they are narrowly drawn to protect consumers and permit dissemination of truthful information. This type of restriction is included in the Texas statute governing the hearing aid industry, which has a history of bait advertising and other deceptive practices.[23]

18. *Id.* § 20A II.

19. *Id.* § 20A. Even when this public posting is utilized by the consumer, it is of dubious value. Many pharmacists post a uniform, unrealistic maximum price (such as one thousand dollars) for each drug listed. *See* Texas State Bd. of Pharmacy v. Page Drugs, Inc., No. 76-6217-F, Dist. Ct. of Dallas County, 116th Judicial Dist. of Texas, July 9, 1976 (Finding of Fact No. 10), *appeal docketed*, No. 5689 (Tex. Civ. App.—Waco, Sept. 3, 1976).

20. TEXAS STATE BOARD OF REGISTRATION FOR PUBLIC SURVEYORS § 7 (1975).

21. TEXAS STATE BOARD OF BARBER EXAMINERS §§ 378.01.05.002, .003 (1976).

22. *E.g.*, N.M. STAT. ANN. § 54-6-37(C) (Supp. 1975). *See also* Note, *Retail Drug Advertising Bans Are Bad Medicine for Consumers—Is There a Sherman Act Prescription?*, 15 ARIZ. L. REV. 117, 121 (1973).

23. TEX. REV. CIV. STAT. ANN. art. 4566-1.10 (1976).

ECONOMIC ANALYSIS

This survey indicates the existence of a substantial number and variety of advertising restrictions. An examination reveals that such restrictions, while ostensibly enacted to protect the public welfare, often act to the detriment of consumer economic interests. Such economic effects are of great importance in assessing the legality of advertising restrictions under the antitrust laws.

The most significant effect of prohibiting professional advertising is that consumers are effectively precluded from obtaining the information that they need to intelligently select competent practitioners. Purchasers today rely on advertising as their major source of information.[24] When allowed, advertising informs buyers about professional fees, qualifications, and specialization. Without advertising, such knowledge is often unavailable, or can only be obtained inefficiently or at substantial cost.

Professionals typically refuse to give fee information over the telephone.[25] Consumers can make trips to numerous professional offices to obtain the necessary information, but this procedure is expensive and its use is limited. Neighbors and friends occasionally share their evaluations of particular practitioners, but such input is ad hoc and may be unreliable.[26] Moreover, such evaluations are unavailable to new arrivals in a community. Referral programs and professional directories may also provide consumers with some information; these aids, however, are either unknown or unavailable to many buyers.[27] Lacking essential information, potential purchasers of services may take several alternative courses of action.

Nonselection. Some persons simply forego the professional services they initially sought.[28] For example, legitimate legal claims and the

---

24. *See* Note, *Bar Restrictions on Dissemination of Information About Legal Services*, 22 U.C.L.A. L. REV. 483, 500 (1974).

25. *See generally* Note, *Retail Drug Advertising Bans Are Bad Medicine for Consumers—Is There a Sherman Act Prescription?*, 15 ARIZ. L. REV. 117 (1973). *See also* STAFF MEMORANDUM TO THE FEDERAL TRADE COMMISSION, FUNERAL INDUSTRY PRACTICES 59-62 (1975).

26. Hobbs, *Lawyer Advertising: A Good Beginning But Not Enough*, 62 A.B.A.J. 735, 736 (1976). *See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Considerations 2-7, 2-8.

27. Hobbs, *Lawyer Advertising: A Good Beginning But Not Enough*, 62 A.B.A.J. 735, 736 (1976).

28. Agate, *Legal Advertising and the Public Interest*, 50 LOS ANGELES B. BULL. 209 (1975); Rigler, *Professional Codes of Conduct After Goldfarb: A Proposed Method of Antitrust Analysis*, 29 ARK. L. REV. 185 (1975); Comment, *Advertising of*

public benefit derived therefrom may remain unasserted.[29] Similarly, advertising bans on physicians that are designed to improve overall public health may, instead, defeat this goal by producing increased self-diagnosis and home remedies.[30]

Postponed Selection. A second course of action is theoretically available to consumers who, due to advertising restrictions, lack the information needed to make intelligent selections of professionals. A selection can often be postponed until information is obtained elsewhere. Studies indicate that persons choosing this alternative are few.[31] Consumers who have an immediate need for professional services cannot afford to delay their selection and are forced to choose randomly. Consumers who are able to postpone their selection may choose, instead, to forego the services entirely.

Random Selection. Consumer reluctance to seek needed information because of high search costs and inconvenience produces a third course of action. Consumers with insufficient information may randomly choose a practitioner from telephone yellow page listings or employ some similar random procedure. The practitioner so chosen may be inexperienced, poorly trained, inefficient, overextended, or even incompetent. Alternatively, the professional could be a specialist on other matters, thus necessitating further phone calls and increased search costs. Regarding prescription drug price information one author

---

Professional Fees: Does the Consumer Have a Right to Know?, 21 S.D.L. REV. 310, 328-29 (1976). In Note, *Bar Restrictions on Dissemination of Information About Legal Services*, 22 U.C.L.A. L. REV. 483 (1974), it was noted:

> [L]ack of knowledge and familiarity with available legal services, as well as fear and mistrust of lawyers and the law, prevents people from responding to this growing need for legal assistance; thus, the gap between the need for legal services and its satisfaction grows.

Id. at 484.

29. This result is seemingly contrary to the ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 1-1 (1976) which reads:

> A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence . . . .

Similarly, *id.*, Ethical Considerations 2-1 reads:

> The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal servives fully available.

(footnotes omitted).

30. *See* Kessel, *The A.M.A. and the Supply of Physicians*, 35 LAW & CONTEMP. PROB. 267, 272 (1970).

31. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 221-22 (1961).

wrote: "The inconvenience and the expense involved in checking prices of different pharmacies combined with the immediacy of the customer's desire to get well militate against such comparison shopping."[32] Regarding legal services, another author stated: "To expect people to pursue a completely self-reliant course in seeking out and securing the services of lawyers may be asking too much, particularly with respect to 'preventive legal services.' "[33] High search costs resulting from restricted advertising make random selection a commonly chosen course of action.

Price Consequences of Random Selection. Random selection for professional services may cause consumers, unable to easily identify the lower-priced practitioners, to pay more than is necessary. Studies have identified two price effects stemming from this phenomenon.[34] First, advertising restrictions foster substantial price dispersion, characterized by wide variation between high and low market prices and the absence of any strong tendency of prices to cluster around an average.[35] Second, higher average price levels than those that would prevail with the existence of more information are encouraged.[36] Since purchasers are unlikely to comparison-shop, practitioners can raise prices with little fear that consumers or competitive pressures or both of them will force prices down.[37] Professionals, therefore, have little incentive to engage in price competition.

32. Note, *Retail Drug Advertising Bans Are Bad Medicine for Consumers—Is There A Sherman Act Prescription?*, 15 ARIZ. L. REV. 117, 123 (1973).

33. Note, *Bar Restrictions on Dissemination of Information About Legal Services*, 22 U.C.L.A. L. REV. 483, 500 (1974).

34. Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J. LAW & ECON. 337, 338-39 (1972); *cf.* Maurizi, *The Effect of Laws Against Price Advertising: The Case of Retail Gasoline*, 10 W. ECON. J. 321, 321-22 (1972). *See generally* Steele, *An Economic Analysis of Recent Attempts to Alter the Laws Regulating the Prescription Drug Industry: The Canadian Investigation and Its Relevance for the United States*, 6 HOUS. L. REV. 666 (1969); Comment, *Prescription Drug Pricing in California: An Analysis of Statutory Causes and Effects*, 49 CALIF. L. REV. 340 (1961); Note, *Constitutional Law: The Constitutionality of a Statute Prohibiting Advertising of Prescription Drug Prices*, 28 OKLA. L. REV. 350 (1975). *See also* STAFF REPORT TO THE FEDERAL TRADE COMMISSION, ADVERTISING OF OPHTHALMIC GOODS AND SERVICES (1976); STAFF REPORT TO THE FEDERAL TRADE COMMISSION, PRESCRIPTION DRUG PRICE DISCLOSURES (1975).

35. *See* G. STIGLER, THE ORGANIZATION OF INDUSTRY, ch. 16 (1968). *See also* Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J. LAW & ECON. 337, 338 (1972); Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1971).

36. STAFF REPORT TO THE FEDERAL TRADE COMMISSION, PRESCRIPTION DRUG PRICE DISCLOSURES 115-53 (1975).

37. *See* G. STIGLER, THE ORGANIZATION OF INDUSTRY, ch. 16, at 175 (1968); Maurizi, *The Effect of Laws Against Price Advertising: The Case of Retail Gasoline*, 10 W. ECON. J. 321, 321-22 (1972). Consumer ignorance also contributes to the ability

The hardship such effects impose on consumers is manifest. Professional advertising restrictions result in an aggregate overcharge to consumers of up to an estimated one billion dollars annually.[38] The United States Supreme Court noted in *Virginia Pharmacy* that price dispersion and higher average price levels are hard on "the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are least able to learn . . . where their scarce dollars are best spent."[39]

Random Selection and the Effect on Efficiency. Lack of price competition is responsible for another condition: the protection of inefficiency.[40] If consumers were aware alternative suppliers were offering nearly identical services at different prices, they would naturally gravitate to the lowest price.[41] Consequently, suppliers would price their goods competitively in order to attract additional business. Competition would encourage suppliers to find innovative techniques and more efficient methods of operation. Lower costs derived therefrom would permit lower prices with no loss in profits.[42] Inefficient suppliers would

---

of professionals to avoid price competition. In addition to advertising restrictions, other factors contribute to consumer ignorance. For example, ignorance of prescription drug prices is also caused by: (1) infrequent use of prescription drugs; (2) large number of drugs available; (3) complexity of drug nomenclature; and (4) frequent nondisclosure of prescribed drug names.

38. Note, *Retail Drug Advertising Bans are Bad Medicine for Consumers—Is There a Sherman Act Prescription?*, 15 ARIZ. L. REV. 117, 118 n.10 (1973).

39. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., — U.S. —, —, 96 S. Ct. 1817, 1826, 48 L. Ed. 2d 346, 359 (1976).

40. *See* M. FRIEDMAN, CAPITALISM AND FREEDOM 137-60 (1962); Agate, *Legal Advertising and the Public Interest*, 50 LOS ANGELES B. BULL. 209, 242 (1975); Barron, *Business and Professional Licensing—California, A Representative Example*, 18 STAN. L. REV. 640, 641 (1966); Kessel, *The A.M.A. and the Supply of Physicians*, 35 LAW & CONTEMP. PROB. 267, 272 (1970).

41. A. ALCHIAN & W. ALLEN, UNIVERSITY ECONOMICS 111 (3d ed. 1972). This assumes all other factors are nearly equal (*i.e.*, quality of services, relative convenience, etc.).

42. The case of *In Re* Bates, 555 P.2d 640 (Ariz.), *prob. juris. noted sub nom.*, Bates v. State Bar, 97 S. Ct. 53 (1976), presently before the United States Supreme Court, involves the effort of two Phoenix lawyers to combine price advertising with innovative techniques, enabling them to lower prices. Their jurisdictional statement to the Court reads:

> Practicing as a 'legal clinic,' appellants have minimized the fees charged for their services by designing systems which permit paralegal personnel to perform work commonly performed by attorneys, by specializing and largely confining their practice to cases lending themselves to systemization, and by realizing a very low profit on each case. The economic viability of their clinic consequently depends upon a relatively high volume of business. That volume in turn depends on widespread dissemination of information concerning their clinic to a portion of the populace not generally familiar with lawyers or their fees. For that reason, appellants concluded that it was necessary to advertise.

Brief for Appellants at 2, Bates v. State Bar, *prob. juris. noted*, 97 S. Ct. 53 (1976) be driven from business by their inability to simultaneously cut prices and produce profits. Thus, the present absence of advertising might allow inefficient professionals to remain in the market.

By way of contrast, elimination of advertising restrictions within licensed occupations is likely to produce consequences beneficial to consumers. Most scholars agree advertising would increase the demand for professional products and services.[43] Increased consumer knowledge of the availability of professional services and the resultant decrease in price would theoretically cause the increase in demand. An increase in volume should promote efficiency through economies of scale.[44] Contrary to the court's opinion in *Urowsky v. Board of Regents*,[45] however, price competition would not necessarily mean the automatic demise of small scale operations. Professionals offering unique services or desirable locations could maintain their own small markets.[46] When these consequences are considered in light of the survey of advertising restrictions, it can be seen that such restraints have a significant impact on the American economy. As the restrictions become more absolute and more pervasive, economic injury to consumers increases.

Regardless of the existence of sound economic theory in support of elimination, various justifications have been advanced to support the existence of advertising limitations. Protection of the public welfare from the alleged ill effects caused by unrestrained advertising is empha-

(incorporated by reference). *See* Note, *Supreme Court Will Hear Lawyers' Advertising Case from Arizona*, 62 A.B.A.J. 1422 (1976).

43. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 347 (1972). The American Bar Association believes advertising will increase case volume, but fears this will overburden the courts and encourage useless litigation. This assumes that litigation of legal claims is not desirable, and that judges could not separate out and sanction frivolous claims. Hobbs, *Lawyer Advertising: A Good Beginning But Not Enough*, 62 A.B.A.J. 735 (1976).

Regarding advertising prescription drug prices, several courts also predict increased purchase volume. Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc., 311 A.2d 242, 246 (Md. 1973); *see* Urowsky v. Board of Regents, 379 N.Y.S.2d 815 (1975). *Contra*, Terry v. California State Bd. of Pharmacy, 395 F. Supp. 94, 105 (N.D. Cal. 1975), *aff'd mem.*, — U.S. —, 96 S. Ct. 2617, 49 L. Ed. 2d 368 (1976). Some courts expressed fear, however, that such increased demand would generate an atmosphere conducive to drug abuse, and would prevent pharmacists from monitoring their customers. *See* Note, *Constitutional Law: The Constitutionality of a Statute Prohibiting Advertising of Prescription Drug Prices*, 28 OKLA. L. REV. 350, 353 (1975).

44. *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW (1972). Thus, lawyers could refine efficient techniques for handling certain legal procedures of a repetitive nature. *See* Brief for Appellants at 10, 11, Bates v. Arizona State Bar, *prob. juris. noted*, 97 S. Ct. 53 (1976).

45. 379 N.Y.S.2d 815 (1975).

46. *See* 4 HOFSTRA L. REV. 867, 874-76 (1976).

sized in such justifications. In determining the legality of restrictions, justifications must be weighed against detrimental effects.

LEGAL ANALYSIS

Review of Constitutional Case Law

Historically, antitrust theory has been infrequently utilized as a tool to attack restrictions on professional advertising. Prior to *Goldfarb*, the state action immunity from the antitrust laws, as enunciated in *Parker v. Brown*,[47] in conjunction with the "learned profession exemption" was generally thought to present an insuperable barrier to such an approach.[48] Challenges, therefore, were usually based on constitutional theories.

Most frequently advanced was a due process theory under the fourteenth amendment. The Supreme Court, however, in *Semler v. Oregon State Board of Dental Examiners*,[49] rejected a due process attack on a state statute prohibiting dental price advertising. The Court held that such restrictions were not an unreasonable use of the state's police power and thus did not arbitrarily interfere with plaintiff's right to carry on a lawful business.[50] A number of state and federal courts have also rejected due process arguments in a variety of professional advertising cases.[51]

In establishing a rational basis for regulation, a state can present various police power, health, and safety justifications. Such limitations on advertising are said to prevent charlatans and the unscrupulous from deceiving the public about services vital to their well-being. As the

---

47. 317 U.S. 341, 351 (1943).

48. The learned profession exemption, as first recognized in Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200, 209 (1922), holds that internal regulation of the professions is not subject to the antitrust laws, since professions are not "trade or commerce." *Goldfarb*, in holding that "exchange of such a service [a title search] for money is 'commerce' in the most common usage of that word," may have eliminated this exemption for all practical purposes. Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975). Parker v. Brown, 317 U.S. 341 (1943), exempts anticompetitive activity engaged in or mandated by a state from federal antitrust attack. The continued viability of this doctrine, in light of *Goldfarb* and later cases, will be discussed *infra*.

49. 294 U.S. 608, 611 (1935).

50. *Id.* at 611; *accord*, Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424, 429 (1963); Williamson v. Lee Optical, Inc., 348 U.S. 483, 489-90 (1955) (advertising restrictions on optometrists and opticians upheld).

51. Johnston v. Board of Dental Examiners, 134 F.2d 9, 12-13 (D.C. Cir.), *cert. denied*, 319 U.S. 758 (1943) (dentists); Craven v. Bierring, 269 N.W. 801, 804-05 (Iowa 1936) (dentists); *see* Bedno v. Fast, 95 N.W.2d 396 (Wisc. 1959) (optometrists).

Court recognized in *Goldfarb*, a state may also restrain competition in some instances when necessary to maintain professional ethical standards.[52]

Each profession also offers its own justifications for regulation. It has been suggested that advertising by lawyers would lead to the assertion of fraudulent claims, corruption of public officials, loss of confidence in the profession, and general over-commercialization.[53] Those in favor of restrictions argue that advertising by pharmacists could make monitoring of their customers' drug use impossible, encourage small retailers to buy overlarge quantities to cut costs and thereby risk spoilage, and increase drug abuse as a result of the increased publicity.[54]

These arguments have proved successful in shielding advertising restrictions from due process attacks. As *Goldfarb* and *Virginia Pharmacy* indicate, however, these justifications may now be insufficient under first amendment and antitrust theories.

The equal protection clause of the fourteenth amendment has also been advanced in attempts to invalidate advertising restrictions. *Semler* held, however, that a state was not obligated to treat all professions equally, but could deal with different professions according to the public need for regulation of each.[55] Numerous state courts have followed this reasoning.[56]

The theory that professional advertising restrictions unreasonably interfere with interstate commerce, and are thus preempted, was rejected by the Supreme Court in *Head v. New Mexico Board of Examiners in Optometry*.[57] The Court upheld an injunction prohibiting a New Mexico newspaper and radio station from publishing a Texas optometrist's advertisement, which violated New Mexico law. Interference with commerce was found minimal and reasonable.[58]

While the due process and equal protection arguments have generally failed, *Virginia Pharmacy* has opened new avenues of attack via the first

52. Goldfarb v. Virginia State Bar, 421 U.S. 773, 789-90 (1975).

53. Comment, *Occupational Licensing: An Antitrust Analysis*, 41 Mo. L. Rev. 66 (1976).

54. *Id.*; *see* Note, *Retail Drug Advertising Bans Are Bad Medicine for Consumers—Is There a Sherman Act Prescription?*, 15 Ariz. L. Rev. 117, 123 (1973).

55. Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 610 (1935).

56. *See, e.g.*, Donohue v. Rosenthal, 34 P.2d 316 (Ore. 1934); Sherman v. State Bd. of Dental Examiners, 116 S.W.2d 843, 846 (Tex. Civ. App.—San Antonio 1938, writ ref'd); Goe v. Gifford, 191 S.E. 783, 785 (Va. 1937).

57. 374 U.S. 424 (1963).

58. *Id.* at 428-29; *accord*, Supermarkets Gen. Corp. v. Sills, 225 A.2d 728, 738 (N.J. Super. Ct. 1966).

amendment. In the past most courts failed to recognize either the professional's right to speak through advertising or the public's right to receive such information. The Supreme Court in *Virginia Pharmacy* nevertheless upheld the validity of the latter right, at least under certain circumstances.[59]

The Virginia Pharmacy Case

In *Virginia Pharmacy* a state statute declared as unprofessional conduct the advertising of prices by pharmacists. The Court held this statute unconstitutional under the first amendment free speech clause.[60] Justice Blackmun, writing for the majority, recognized that both the advertiser and particularly the receiving public are protected by the first amendment. Protection exists even though price advertising is "commercial speech," heretofore thought to be outside the ambit of the first amendment. The Court utilized a balancing test and found the consumers' need for price information outweighed the state's regulatory justifications.[61]

The Court stated that eliminating bans on advertising would not result in overconsumption of prescription drugs, because physicians prescribe only the quantities needed. There would be no significant decrease in customer "monitoring," since few pharmacists actually perform this service. The general claim that advertising would compromise high professional standards was refuted since pharmacists are already subject to close regulation designed to maintain those standards. Any risk of spoilage, caused by the tendencies of pharmacists to buy larger quantities, could be obviated by quality control regulation. In general, the Court rejected the long-held "paternalistic" assumption that consumers will fall prey to charlatans and sacrifice quality for a lower price: "[The] alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than close them."[62]

While *Virginia Pharmacy* is not grounded on antitrust theory, it is an important case in attempting to discern the Court's general attitude toward state restrictions on price advertising. In particular, close scruti-

59. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., — U.S. —, —, 96 S. Ct. 1817, 1823, 48 L. Ed. 2d 346, 355 (1976).
60. *Id.* at —, 96 S. Ct. at 1820, 48 L. Ed. 2d at 351.
61. *Id.* at —, 96 S. Ct. at 1827, 48 L. Ed. 2d at 360.
62. *Id.* at —, 96 S. Ct. at 1829, 48 L. Ed. 2d at 363.

ny of proffered state justifications may portend a similar case-by-case approach in determining whether this kind of restriction is necessary to protect valid state regulatory interests. It is important to note, however, the caveats stressed in the *Virginia Pharmacy* decision. First, the facts dealt only with a *total* ban on advertising, not a time, place, or manner restriction. The Court pointedly contrasted the regulation of untruthful, deceptive, or misleading advertising. Thus, some restrictions are probably still valid. Second, the possibility remains that *Virginia Pharmacy* will be narrowly construed so as to apply only to pharmacists. As the court warned:

> We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.[63]

The uncertainty concerning the scope of *Virginia Pharmacy's* result and reasoning should soon be cleared up by the cases pending before the Supreme Court. In any event, it is now clear that first amendment theory should be part of any attack on price advertising restrictions. At the same time, recent cases may now permit the use of federal antitrust law to overturn these limitations.[64]

An Antitrust Approach to Advertising Restrictions

The Sherman Act, passed in 1890, is the cornerstone of federal antitrust legislation.[65] Section 1 of the Act provides that: "Every

63. *Id.* at —, 96 S. Ct. at 1831 n.25, 48 L. Ed. 2d at 365 n.25. The Court seemed to be indicating that pharmacy is only a quasi-profession, since it deals in goods as well as services. Justice Blackmun noted: "And this case concerns the retail sale by the pharmacist more than it does his professional standards." *Id.* at —, 96 S. Ct. at 1829, 48 L. Ed. 2d at 362.

64. *See* cases cited note 4 *supra.*

65. The scope and purpose of the Sherman Act was well stated in Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), where the Court said:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It 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.

contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is . . . illegal."[66]

The Federal Trade Commission Act (FTC Act) of 1914 reaches conduct forbidden by the Sherman and Clayton Acts, as well as activity similar to, but falling short of, violations of those Acts.[67] By enacting the FTC Act, Congress sought to supplement the judicial enforcement of the antitrust laws through the administrative process. The pertinent section of the FTC Act, section 5, states: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."[68]

Not all restraints of trade are automatically antitrust violations. In *Standard Oil Co. of New Jersey v. United States*[69] the Supreme Court established a "rule of reason" test under the Sherman Act. This test requires a determination of the reasonableness of the restraint in light of surrounding practical and economic factors.[70] On the other hand, it has always been recognized under the antitrust laws that certain kinds of restraints (*e.g.*, price-fixing) are so patently inconsistent with a free competitive system, that no considerations of reasonableness can be accepted in justification. These restraints are illegal or unreasonable per se.[71]

In *Goldfarb* the Supreme Court applied section 1 of the Sherman Act to the legal profession. The Fairfax County, Virginia, Bar Association had established a suggested minimum fee schedule. The schedule was enforced by the State Bar, the administrative agency through which the State Supreme Court regulates the practice of law in Virginia. Complainants alleged that this fee schedule constituted illegal price-fixing.

The Supreme Court in a unanimous opinion found both the County Bar Association and the State Bar in violation of the Sherman Act. The Court rejected defendants' contention that the "learned professions" are not "trade or commerce" and thereby exempt from the antitrust laws. The Court stated:

> It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect, and § 1 of the Sher-

66. 15 U.S.C. § 1 (1970 & Supp. V 1975).

67. FTC v. Motion Picture Advertising Serv. Co., 344 U.S 392, 394-95 (1953); *see* FTC v. Brown Shoe Co., 384 U.S. 316, 321-22 (1966); FTC v. Cement Inst., 333 U.S. 683, 690, 708 (1948). As discussed previously, the FTC Act is technically not an antitrust law. See discussion note 4 *supra*.

68. 15 U.S.C. § 45(a) (Supp. V 1975) (amending 15 U.S.C. § 45(a) (1914)).

69. 221 U.S. 1 (1911).

70. *Id.*

71. United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927).

> man Act '[o]n its face . . . shows a carefully studied attempt to bring within the Act every person engaged in . . . commercial intercourse among the states.'[72]

Thus, the Court held that "certain anticompetitive conduct by lawyers is within the reach of the Sherman Act."[73] *Goldfarb* indicates a closer antitrust scrutiny of the legitimacy of various professional anticompetitive devices. Advertising restrictions may now be vulnerable to attack as forms of price-fixing or other anticompetitive activity, under the Sherman and FTC Acts.

The State Action Exemption

Advertising restrictions, by limiting one form of competition, are in restraint of trade. When examining advertising restrictions, whether under the rule of reason or the per se approach, the threshold problem encountered in any antitrust attack is the possibility of state action exemption as first formulated by the United States Supreme Court in *Parker v. Brown.*[74]

The complainant in *Parker,* alleging conspiratorial price-fixing by state administrators and California raisin growers, challenged the California Agriculture Prorate Act as violative of section 1 of the Sherman Act. The California statute established a commission partially responsible for the protection of the state raisin industry. Pursuant to this directive the Commission, acting on proposals of industry members, established a comprehensive program of regulation designed to restrict the marketing of raisins. This resulted naturally in an artificially high price. In rejecting complainant's arguments, the Court carved out an antitrust exemption for anticompetitive activities engaged in or mandated by a state. The California statute was held not to be preempted by the Sherman Act.[75]

Later interpretations by the Court, however, have indicated that mere state involvement in the anticompetitive activity does not automatically confer immunity.[76] The exemption will lie only when a state legislature compels an alternative to competition based on its finding that competition in a particular industry is not in the public interest.

72. Goldfarb v. Virginia State Bar, 421 U.S. 773, 787-88 (1975).
73. *Id.* at 793.
74. 317 U.S. 341 (1943).
75. *Id.* at 352.
76. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (footnote omitted); *cf.* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) (foreign governmental involvement).

The *Goldfarb* Court held that neither the County Bar nor the State Bar was immune from the price-fixing charge by virtue of the *Parker* state action exemption.[77] Anticompetitive activity engaged in or mandated by a state is immune from Sherman Act challenge. The Court, however, examined the relation between both Bar Associations and the State of Virginia and found no statute or ethical code which mandated the minimum fee. While the Virginia Supreme Court had granted the State Bar the power to issue ethical opinions, it did not approve them. Thus, the Court held that "certain anticompetitive conduct by lawyers is within the reach of the Sherman Act."[78]

Goldfarb thus elaborates on the degree and kind of state involvement needed to achieve state immunity, stating:

> It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.
>
> The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.[79]

The most recent definitive statement on the limits of *Parker* is *Cantor v. Detroit Edison Co.*[80] Defendant electric utility was found to have used its monopoly power to restrain competition in the distribution of light bulbs. As a part of its tariff, free light bulbs were distributed to its customers. Neither approval of the tariff by the Michigan Public Service Commission, nor the fact that it could not be terminated without the Commission's approval conferred antitrust immunity on the utility. Justice Stevens, in the plurality opinion, stated: "The Court has already decided that the state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity."[81]

The Court stressed that Michigan had left the option with Edison whether or not to adopt a free light bulb program. The defendant thus failed to satisfy the *Goldfarb* requirement for immunity, *i.e.*, activity *compelled* by the state as a sovereign. The Court reasoned that the lack of state compulsion obviated any conflict between the state and federal antitrust laws so that no state exemption was necessary. Where no

77. Goldfarb v. Virginia State Bar, 421 U.S. 773, 790 (1975).
78. *Id.* at 793.
79. *Id.* at 791 (footnote omitted).
80. — U.S. —, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976).
81. *Id.* at —, 96 S. Ct. at 3118, 49 L. Ed. 2d at 1150-51.

compulsion exists, it is not unfair to hold private parties liable for their input into a mixed public-private decision.[82]

Even if a conflict between federal and state antitrust laws exists, the antitrust laws are only subordinated to the minimum extent necessary to effectuate the state regulatory scheme. In *Cantor* the abolition of the light bulb program would not have rendered ineffective the state's regulation of electricity. Thus, even when the state compels the activity, if that activity is not "necessary in order to make the regulatory act work," no exemption will arise.[83] While the Court failed to distinguish between legislation and agency regulations, it is likely that both forms of state action must meet this test of regulatory necessity.

The very purpose of *Parker* immunity is to obviate state and federal conflict. It is obvious that any advertising restriction, regardless of source, with its consequent restraint on trade is in conflict with federal antitrust law. This is not, however, the conflict that necessitates an exemption under *Parker*. Rather, it is the conflict that may arise between state and federal legal *systems*. It is not, therefore, the conflict between individual laws (antitrust and advertising restrictions), but the conflict between entire systems that results in an exemption. If the restriction does not come from the state legislature or it does not do what the state wishes for it to do, there is less chance that invalidations under the antitrust laws will interfere with a state's activities. Federal law conflicts with the individual restriction but not the states' jurisprudential system. Federal antitrust laws, therefore, may be used to attack the statute with no fear of undue encroachment into the state's province.

An analysis of *Parker* and its progeny discloses a three-part test for determining the existence of a state action exemption. The state, (a) acting as a sovereign, (b) must mandate the anticompetitive activity, (c) in the public interest. Within each part of this test, numerous factors must be considered. Only if all three parts of the test are satisfied will an exemption arise.

State Acting as a Sovereign. First, setting aside the sovereignty issue, it is necessary to define the "state." The legislative, executive, and judicial branches and all agencies, boards, and commissions established thereunder are included within the definition of "state." Local govern-

82. *See id.* at —, 96 S. Ct. at 3121, 49 L. Ed. 2d at 1155.
83. *Id.* at —, 96 S. Ct. at 3120, 49 L. Ed. 2d at 1153.

mental units, however, such as counties and cities, may not be so defined, except when carrying out the dictates of the state itself.[84] The reason for this distinction is the recognition that local public bodies, far removed from the legislature, may grant exemptions totally unrelated to federal or state policy.

Even when there is state action, such action must be of a sovereign nature. Central to this issue is the degree of private, as opposed to public, involvement in the decision-making process. This is an important factor at every level of the regulatory scheme. The further the encroachment of the private sector into a state's sphere of responsibility, the less likely it is that an exemption will lie.[85]

At the initial legislative stage, extensive special interest influence may conceivably negate any immunity. Thus, substantial industry lobbying efforts could indicate that a state is not acting in its sovereign capacity for *Parker* purposes.[86] Private activity masquerading as state action is not protected from antitrust scrutiny.[87] It should be noted, however, that the courts will be reluctant to characterize purely legislative activity as not being in a sovereign capacity.

The degree of private involvement should be examined at a second stage. Where the legislature delegates broad authority to a board or agency, which then promulgates the anticompetitive regulation pursuant to that delegation, immunity may not arise if the regulation is primarily a product of private interests. Activity by a subordinate state body, further removed from the overall policy-making of the state, is less likely to be sovereign. Criteria for evaluating the extent of private interest in

84. City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976), *petition for cert. filed,* No. 76-864 (Dec. 22, 1976); Duke & Co. v. Foerster, 521 F.2d 1277, 1280-81 (3d Cir. 1975); City of Fairfax v. Fairfax Hosp. Ass'n, [1976] 2 TRADE REG. REP. (CCH) ¶ 999, at 69,424 (E.D. Va. 1976).

85. *See* Rigler, *Professional Codes of Conduct After Goldfarb: A Proposed Method of Antitrust Analysis,* 29 ARK. L. REV. 185 (1975); Note, *Retail Drug Bans Are Bad Medicine for Consumers—Is There a Sherman Act Prescription?,* 15 ARIZ. L. REV. 117, 139 (1973); Comment, *Occupational Licensing: An Antitrust Analysis,* 41 MO. L. REV. 66 (1976); Note, *The Sherman Act and the American Bar Association's Ban on Advertising: Madison Avenue Will Have to Wait,* 10 SUFFOLK U.L. REV. 557, 577-78 (1976); Note, *The FTC Proposed Regulation of Prescription Drug Price Disclosure by Retail Pharmacists,* 43 U. CHI. L. REV. 401 (1976).

86. It must be stressed that, even assuming *Parker* immunity is avoided, industry lobbying cannot be used to prove the concerted activity necessary for a § 1 Sherman Act violation. This is the well-established *Noerr-Pennington* doctrine, which will be discussed below. United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965); Eastern R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961).

87. Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502, 509 (4th Cir. 1959).

board or agency activity initially includes the input by the industry into regulations affecting it. For example, where a private industry group proposes regulations that are merely rubberstamped by the board, these actions might not be considered sovereign. Second, examine the make-up of the board membership—do industry members or state officials predominate? Finally, consider the enforcement of agency regulations. Enforcement by a trade association of the regulated industry may indicate lack of sovereignty.[88]

Mandates. It is clear that only anticompetitive activity actually compelled by the state can be exempted under *Parker*. As *Cantor* states, mere state condonation, approval, encouragement, or participation is insufficient.[89] For example, if a state explicitly establishes fixed prices within an industry, the mandate test is satisfied. If, however, the state merely condones or approves a private price-fixing program, a different result would ensue.

In the Public Interest. As was stated in *Cantor*, if the particular anticompetitive regulation is not necessary to effectuate the overall statutory scheme, no *Parker* immunity will be found.[90] It is probable this applies both to state agency regulation and legislative action. It is logical to assume, however, that a statute passed by a legislature which *establishes* state policies is more likely to effectuate a particular policy, and thus conflict with federal law, than administrative action. It is the existence of this conflict that necessitates the exemption.

Considerations discussed above must be thoroughly analyzed in applying *Parker* to professional price advertising restrictions. If such restrictions are enacted and enforced by clearly identifiable state bodies, without significant influence from the private sector, and if such restrictions are mandated and in the public interest (considered in light of the reasoning of the Supreme Court in *Virginia Pharmacy*), then *Parker* immunity arises.

---

88. *See generally* Note, *Retail Drug Advertising Bans Are Bad Medicine for Consumers—Is There a Sherman Act Prescription?*, 15 ARIZ. L. REV. 117 (1973); Comment, *Occupational Licensing: An Antitrust Analysis*, 41 MO. L. REV. 66 (1976); Note, *The Sherman Act and the American Bar Association's Ban on Advertising: Madison Avenue Will Have to Wait*, 10 SUFFOLK U.L. REV. 557 (1976); Note, *FTC Proposed Regulation of Prescription Drug Price Disclosure by Retail Pharmacists*, 43 U. CHI. L. REV. 401 (1976).

89. Cantor v. Detroit Edison Co., — U.S. —, —, 96 S. Ct. 3110, 3118, 49 L. Ed. 2d 1141, 1150-51 (1976).

90. *Id.* at —, 96 S. Ct. 3120, 49 L. Ed. 2d 1153.

It is suggested that satisfaction of the mandate and sovereignty parts of the *Parker* test are dependent upon the source of the advertising restrictions. For example, when the state mandates advertising restrictions *by statute,* a *Parker* exemption will probably arise unless it is shown that the statute is not in the public interest. If a *state board, commission, or agency* mandates the restrictions pursuant to broad statutory authority, the sovereignty element may not be satisfied. Analysis of the enactment, decision-making, and enforcement process may disclose significant private involvement, thus obviating any claim that the state acted as a sovereign. Additionally, advertising restrictions promulgated by *private trade associations with approval by a state* are unlikely to receive *Parker* protection. Not only has the state failed to mandate, but there may have been no action of a sovereign in the decision-making process. Finally, restrictions established *solely by private associations without state approval or authorization* are completely outside *Parker's* ambit.[91]

Even where the *Parker* mandate and sovereignty requirements for immunity have been satisfied, the regulation must still be in the public interest. Here, state justification for the particular regulation is considered, and the *Virginia Pharmacy* type balancing test may be applicable. *Virginia Pharmacy,* of course, concerned first amendment rights, and its test is therefore only analogous to the *Parker-Cantor* justification test.

Cantor and *Virginia Pharmacy* require that the state adequately justify the anticompetitive regulation in question as necessary to effectuate the purposes of the entire regulatory scheme. The state, concomitant with its police power, may regulate a profession in order to maintain high standards and prevent public deception. It is questionable, however, whether the state can justify price advertising restrictions as significantly contributing to these goals. The Court in *Virginia Pharmacy* did not find the state justifications for restrictions on pharmacists to be compelling in light of the first amendment. Similarly, these justifications may not be sufficient to outweigh valid federal antitrust policy objectives, thus foreclosing any *Parker* exemption. Clearly, this kind of test requires a case-by-case analysis, as no general principle can be articulated.

91. *See* United States v. Gasoline Retailers Ass'n, 285 F.2d 688, 691 (7th Cir. 1961).

To summarize, an antitrust challenge to advertising restrictions must avoid *Parker* immunity whenever state action is involved. It must be shown that either the restrictions have not been compelled by the state, that undue private interest in the promulgation or mechanics of the restrictions is involved, or that the restraints cannot be justified as necessary to effectuate the overall state policy in the area.

It has been suggested that the *Parker* exemption only applies to Sherman Act actions and has no relation to the Federal Trade Commission Act.[92] Such a distinction is based upon a number of factors. First, the Supreme Court, in *Parker* or elsewhere, has never indicated that state immunity exists from other than the Sherman and Clayton Acts. Next, in contrast to the Sherman Act, the FTC Act contains no criminal or treble damage sanctions. Application of such sanctions to a state would be of dubious propriety under the eleventh amendment.[93] Finally, as opposed to the Sherman Act, the FTC Act has no provision for private enforcement. Allowing FTC jurisdiction, therefore, would not expose the state to numerous, vexatious suits.

On the other hand, the two lower courts that have considered the question have concluded that no distinction between the Sherman and FTC Acts is warranted.[94] While the Supreme Court has never precluded such a distinction, it has also never given any indication that one may exist. Therefore, any prediction as to the eventual determination of this issue would be mere speculation.

Sherman Act Analysis

Subsequent to *Goldfarb*, the learned profession exemption has been extremely limited. The professions retain some measure of protection, but it is clear they are now subject to the antitrust laws.[95]

92. Note, *The FTC Proposed Regulation of Prescription Drug Price Disclosure by Retail Pharmacists*, 43 U. CHI. L. REV. 401 (1976).

93. New Mexico v. America Petrofina, Inc., 501 F.2d 363, 367 (9th Cir. 1974).

94. Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502, 509 (4th Cir. 1959); California *ex rel.* Christensen v. FTC, 1974-2 Trade Cas. ¶ 75,328, at 98,039 (N.D. Cal. 1974).

95. This is not to say that the learned professions are subject to the antitrust laws in all circumstances. The Court, in both *Goldfarb* and *Virginia Pharmacy*, indicated that the service aspect of some professions (*e.g.*, law and medicine) may still entitle them to a special status. The exact limits of this status, in particular its applicability to advertising restrictions, has yet to be delineated. The Court stated in *Goldfarb*:

> 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.

Goldfarb v. Virginia State Bar, 421 U.S. 773, 787-88 n.17 (1975). In *Virginia Pharmacy*, the Court stated:

Therefore, if *Parker* immunity can be avoided, price advertising restrictions can be attacked as violations of section 1 of the Sherman Act and section 5 of the FTC Act.

Under the Sherman Act, the question arises whether the courts will apply a per se or rule of reason approach. Advertising restrictions may constitute price-fixing schemes, which have been held illegal per se under the antitrust laws. This approach was successfully utilized in *United States v. Gasoline Retailers Association*,[96] where the defendant gasoline retailers agreed among themselves to limit advertising. On the other hand, state involvement in advertising restrictions may motivate the courts to scrutinize proffered state justifications and thereby utilize a reasonableness balancing test.

To constitute price-fixing it is not necessary that the alleged combination or conspiracy actually peg prices at a particular level.[97] Rather, any concerted action designed to affect prices will qualify as a per se illegal restraint of trade.[98] Traditionally, courts have required three elements to sustain unlawful price-fixing: concerted activity, intent, and effect.[99] Apparently, however, it is no longer necessary that both intent to affect prices and an actual market effect be shown. Since *United States v. Socony-Vacuum Oil Co.*,[100] unlawful price-fixing has been found upon the mere showing of unlawful intent and no effect on the market need be shown. Additionally, the Supreme Court in *United*

> We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., — U.S. —, —, 96 S. Ct. 1817, 1831 n.25, 48 L. Ed. 2d 346, 365 n.25 (1976). *See also id.* at —, 96 S. Ct. 1831-32, 38 L. Ed. 2d 365-66 (Burger, C.J., concurring); Rigler, *Professional Codes of Conduct After Goldfarb: A Proposed Method of Antitrust Analysis*, 29 ARK. L. REV. 185 (1975); Wilson, *Madison Avenue, Meet the Bar*, 61 A.B.A.J. 586, 587 (1975); Note, *Professional Price Advertising Set Free? Consumers' "Right to Know" in Prescription Drug Price Advertising*, 8 CONN. L. REV. 108 (1976).

96. 285 F.2d 688 (7th Cir. 1961).

97. *See* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951).

98. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940). The Court stated: "Any combination which tampers with price structures is engaged in an unlawful activity." *Id.* at 221. The Court also stated: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*" *Id.* at 223.

99. *Id.* at 223.

100. 310 U.S. 150 (1940).

States v. Container Corp. of America,[101] by failing to address the issue of intent, may have indicated that unlawful intent is presumed upon the showing of market effect.[102] Thus, it appears that either intent or effect, but not both, must be proven to demonstrate price-fixing. On the other hand, the Court may not have intended to overrule the well-established principle that unlawful intent, when not evident, may be *inferred* from the effect of the concerted activity on prices.[103] If this is the rule, intent will not be automatically found upon a demonstration of effect, but must be proven if valid rebuttal evidence is offered.

Assuming courts adopt a price-fixing-per se test, the elements of price-fixing—concerted activity, intent, and effect—must be analyzed in relation to restrictions on professional advertising.

Concerted Activity for Per Se Violations. Section 1 of the Sherman Act is a viable tool for attacking restrictions promulgated solely by private associations. The actions of such groups are clearly combinations of competitors.

The Sherman Act may have limited applicability to restrictions promulgated by state legislatures. Aside from any *Parker* ramifications, it is difficult to characterize legislative action as conspiratorial. Legislators, acting as legislators, are probably not involved in the type of concerted activity condemned by the Act. Under the *Noerr-Pennington* doctrine bona fide lobbying is beyond the antitrust purview.[104] Therefore, such lobbying may foreclose attempts to establish the existence of concerted activity between industry lobbyists and a state legislature.

Restrictions developed by state boards or commissions may be the result of illegal combinations or conspiracies. The issue, as in *Parker*, is the degree and nature of private involvement in the promulgation of the advertising restrictions. Again, the *Noerr-Pennington* doctrine may obviate proof of conspiracy through lobbying efforts. However, composition of the board by industry members or actions taken in unison

101. 393 U.S. 333 (1969).

102. *Container Corp.* dealt with an exchange of price information among oligopolists, leading to fixed prices. These facts may be distinguished from other price-fixing cases. Thus, actual intent may need to be demonstrated in other fact situations. *See* J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATIONS § 77.02[2][a] (1975).

103. *See* Gray v. Shell Oil Co., 469 F.2d 742, 747 (9th Cir. 1972); Clabault, *Practicalities in Competitors Exchanging Price Information*, 12 ANTITRUST BULL. 49, 58 (1967).

104. Thus, lobbyists cannot be found, by reason of their lobbying efforts, to have engaged in concerted action under § 1.

with nonmembers of the board may exceed the limits of *Noerr-Pennington* lobbying protection.

Intent and Per Se Violations. An illegal restraint of trade may be found without a showing of actual intent. Following the Court's decision in *Container Corp.*, however, it is not clear whether intent will now be automatically *presumed* or whether it is merely *inferable* from the existence of certain circumstances. If automatic presumption is the rule, then the existence of price-fixing in conjunction with the requisite market effect will constitute a violation without any intent being demonstrated. If inference is the rule, a violation can be avoided by rebutting the inference of intent with evidence of actual motivation other than to fix prices.

If intent is to be automatically presumed, then there will be little difficulty in establishing this particular element for advertising restrictions, irrespective of their source (legislature, board, or association). Given the peculiar nature (*i.e.*, state involvement) of this type of price-fixing, however, it is more reasonable to assume the courts will require a rebuttable inference test for intent. If the legislature enacts the advertising restrictions for legitimate purposes (no matter how misconceived) and not to fix prices, it would be difficult to infer any wrongful intent. While substantial industry lobbying may indicate that the proffered state justifications are not the real motivations, a factual determination of the true impetus for advertising limitations will be required.[105] Obviously, the greater the private involvement the more likely it is that a court will infer price-fixing intent.

Such is also the case when restrictions are promulgated by state boards or commissions. The degree of private involvement may necessitate a determination of the true intent of the state agency. When private trade associations adopt advertising restrictions, it will be very difficult, given the private interest in the obvious anticompetitive effects, to rebut the inference that the members intended to interfere with the prices set by a free market.

Effect of Illegal Per Se Violations. Even assuming that a finding of effect on market prices is required under the *Socony-Vacuum* decision,

105. In this situation, while the *Noerr-Pennington* doctrine may act so as to preclude the existence of an unlawful combination, it has no relevance to the determination of wrongful intent. Industry lobbying is not the offense under attack; rather, it only serves to indicate that state motivations may not be as they appear (*i.e.*, to fix prices, not to protect the public welfare). Of course, this would also necessitate a showing that the purpose of the industry lobbying, as well as the state's action, was to fix prices.

this element should not present a problem. Numerous studies have demonstrated the direct causal link between advertising restrictions and higher average prices.[106] Further, the Court in *Gasoline Retailers* found that an agreement to limit price advertising resulted in higher gasoline prices. Regardless of the source of the restrictions, any required effect on prices can be easily demonstrated.

If advertising restraints are thus characterized as per se illegal price-fixing, problems will be encountered in some cases in demonstrating concerted action and intent. Success under the per se theory would seem to depend upon the source of the advertising restriction, the degree of private involvement, and the extent of restrictiveness.

Reasonableness as an Alternative to Per Se Findings of Illegality. Alternatively, advertising restrictions can be viewed under section 1 as unreasonable contracts, combinations, or conspiracies in restraint of trade other than price-fixing.[107] Such a theory would necessitate a rule of reason analysis rather than a per se approach.[108] A rule of reason-balancing test may be required for professional advertising restrictions in light of the Supreme Court opinions in *Goldfarb* and *Virginia Pharmacy*. While the professions are now subject to the antitrust laws, the Court implied in both cases that their service aspect might require a broad analysis of the reasonableness of the state justifications for the anticompetitive restrictions. *Gasoline Retailers*, which applied a per se approach, can be distinguished on the facts: neither professionals nor the state were involved in that case.

Under the reasonableness test, as in the per se test, the existence of the three essential elements—combination, intent, and effect—must first be established. State justifications for advertising limitations must then be assessed to determine their validity and weighed against their anti-competitive effects. If the justifications counterbalance the adverse

106. STAFF REPORT TO THE FEDERAL TRADE COMMISSION, ADVERTISING OF OPHTHALMIC GOODS AND SERVICES 42-43 (1976); STAFF REPORT TO THE FEDERAL TRADE COMMISSION, PRESCRIPTION DRUG PRICE DISCLOSURES 119-27 (1975); Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J. LAW & ECON. 337, 338-39 (1972); Benham & Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J. LAW & ECON. 421, 423 (1975).

107. Wisconsin v. National Funeral Directors Ass'n of the United States, 1967 Trade Cas. ¶ 72,289 (Wis. Cir. Ct. Milwaukee County, 1967). In this case, the Wisconsin court rejected a per se approach under state antitrust law, to a trade association prohibition of price advertising by funeral directors. Instead, the propriety of such a restraint was judged and held to be illegal under the rule of reason test.

108. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

effects, then the restrictions are not unreasonable restraints of trade under section 1. Thus, the only significant difference between the per se and rule of reason tests, as applied to advertising restrictions, lies in the requisite weighing of the various state justifications.[109]

A total prohibition on advertising is likely to be held unreasonable even when the justifications, such as the prevention of charlatans, are valid. A total ban is an overbroad means for dealing with the problems that the ban is designed to solve. For example, charlatans can be controlled by prohibiting only false and deceptive advertising. In addition, any positive effects would be outweighed by the substantial consumer injury resulting from a total elimination of information. It is thus unlikely that total advertising prohibitions will be upheld.

On the other hand, certain types of restrictions falling short of total bans may withstand attack. Time, place, or manner restrictions, apparently approved by the Supreme Court in the first amendment situation, may prove reasonable under the Sherman Act.[110] Such restrictions are not only a more narrowly drawn means for dealing with the problems caused by advertising, but also the harmful effects resulting from the elimination of information are less. Even under a per se approach, such restrictions will probably be upheld since the inference of intent can be rebutted. Nevertheless, mere labeling of advertising limitations as time, place, or manner restrictions will not be sufficient. Care must be taken that the restrictions do not actually foreclose the dissemination of all information.

Bona fide attempts to limit deceptive and misleading advertising are probably legal under either a per se or rule of reason test. This was indicated by the Court in *Virginia Pharmacy*: "Nor is there any claim that prescription drug price advertisements are forbidden because they are false or misleading in any way. . . . We foresee no obstacle to a State's dealing effectively with this problem."[111] Under a per se test such a restraint is legal due to the lack of illicit intent. Furthermore, under the rule of reason test this is a reasonable means of dealing with a serious problem without unduly restricting the flow of information to consumers.

Therefore, even when *Parker* state action immunity can be circumvented, it is problematic whether the state restrictions can be reached via

109. *See* notes 47-59 *supra* and accompanying text.

110. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., — U.S. —, —, 96 S. Ct. 1817, 1830, 48 L. Ed. 2d 346, 363-64 (1976).

111. *Id.* at —, 96 S. Ct. at 1830, 48 L. Ed. 2d at 364 (1976) (footnote omitted).

the Sherman Act. It must be noted that the above analysis is largely speculative. Until now, the *Parker* exemption has foreclosed the raising of these antitrust considerations. *Cantor*, however, may now force the courts to resolve these issues.[112]

FTC Act Analysis

Wholly apart from any Sherman Act elements, the Federal Trade Commission can attack advertising restrictions as unfair methods of competition under section 5 of the FTC Act.[113] As noted above, the FTC Act not only encompasses the Sherman and Clayton Acts, it also proscribes other related unfair methods of competition. The Supreme Court, in *FTC v. Sperry & Hutchinson Co.*,[114] broadly (if indeterminately) interpreted the FTC's power to consider public values, similar to a court of equity, when defining fairness.[115] The FTC has challenged drug price advertising restrictions as unfair because their economic and social utility are substantially less than their disutility.[116]

It should also be noted that the FTC Act, in proscribing unfair methods of competition, has no requirement of concerted activity. Thus, the concerted action problems encountered in a Sherman Act approach, due to state involvement, can be circumvented. This is, however, of limited value to private parties, who do not enjoy a right of action under the FTC Act.[117]

FEDERAL TRADE COMMISSION INVOLVEMENT

It was seen in previous sections that a private litigant faces numerous barriers in a Sherman Act challenge to advertising restrictions. Only

112. — U.S. —, —, 96 S. Ct. 3110, 3117-21, 49 L. Ed. 2d 1141, 1150-54 (1976).

113. 15 U.S.C. § 45(a) (1970 & Supp. V 1975).

114. 405 U.S. 233 (1972).

115. The Court cited, with apparent approval, three relevant factors used by the FTC in determining unfairness:

> '(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise . . . ; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).'

Id. at 244-45 n.5.

116. STAFF REPORT TO THE FEDERAL TRADE COMMISSION, PRESCRIPTION DRUG PRICE DISCLOSURES (1975).

117. A third method for challenging advertising restrictions is through enforcement of state antitrust statutes. *E.g.*, Wisconsin v. National Funeral Directors Ass'n of the United States, 1967 Trade Cas. ¶ 72,289 (Wis. Cir. Ct. Milwaukee County), *explained in* note 106 *supra*. These state statutes, for the most part, closely parallel the Sherman or FTC Acts. Therefore, the anaylsis of possible violations under state law is essentially the same as that of the federal statutes.

with the recent holdings by the Supreme Court in *Goldfarb, Virginia Pharmacy*, and *Cantor* does such a challenge appear possible.

In contrast, during the past two years, the Federal Trade Commission has been involved in several challenges to professional advertising restraints.[118] Provisions of three proposed industry-wide trade regulation rules address the subject; two formal complaints have been issued; and two amicus curiae briefs have been filed in private actions. Moreover, as part of a Commission study of state occupational licensing, several other investigations of advertising bans are currently pending.

Proposed Trade Regulation Rules

The FTC has broad quasi-legislative discretion to define what acts and practices are unfair within section 5 of the FTC Act.[119] Pursuant to this authority, the Commission staff has proposed trade regulation rules, which have the full effect of federal law, to cover funeral industry practices,[120] prescription drug price nondisclosures,[121] and advertising of ophthalmic goods and services.[122]

Funeral Industry Practices. In a memorandum prepared to explain the proposed funeral industry trade regulation rule (hereinafter TRR), staff from the Commission's Bureau of Consumer Protection stated that price advertising by funeral directors is virtually nonexistent.[123] This

118. Address by Stephanie Kanwit, Regional Director for the FTC's Chicago Office, at a seminar entitled "Professions in the Changing World of Antitrust Law," sponsored by the Illinois Institute for Continuing Legal Education, in Chicago, November 20, 1976.

119. *See* 15 U.S.C. §§ 41-58 (1970 & Supp. V 1975). The 1975 amendment was entitled the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (Supp. V 1975). *See also* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974); Note, *The State Action Exemption and Antitrust Enforcement Under the FTC Act*, 89 HARV. L. REV. 715 (1976); Note, *The FTC Proposed Regulation of Prescription Drug Price Disclosure by Retail Pharmacists*, 43 U. CHI. L. REV. 401 (1976).

120. The rule for the funeral industry followed an extensive Commission study begun in July 1973, the preliminary stages of which produced the useful FEDERAL TRADE COMMISSION SURVEY OF FUNERAL PRICING IN THE DISTRICT OF COLUMBIA (1974).

121. 40 Fed. Reg. 24,031 (1975).

122. Advertising of Ophthalmic Goods and Services, 16 C.F.R. 456.1-.3 (1976); FTC News Release, *FTC Announces Investigation of Price Advertising in the Prescription Eyeglass Industry* (Sept. 23, 1975); FTC News Release, *Commission Proposes Rule on Ophthalmic Goods and Services* (Dec. 23, 1975).

123. STAFF MEMORANDUM TO THE FEDERAL TRADE COMMISSION, FUNERAL INDUSTRY PRACTICES (1975). Other studies have reached similar conclusions. *See* Fulton, *The Funeral and the Funeral Director: A Contemporary Analysis*, in STUDIES OF ATTITUDES TOWARDS DEATH, FUNERALS AND FUNERAL DIRECTORS 39 (1967); G. Kissel, An Analysis of the Market Performance of the Funeral Home Industry in Pennsylvania (1970) (unpublished Wharton School of Business M.B.A. thesis).

absence is encouraged by state statute and licensing board prohibitions, as well as the ethical codes and moral suasion of trade associations.[124] Moreover, funeral directors generally refuse to disclose price information in other ways.[125] In response, the proposed TRR on Funeral Industry Practices declares it an unfair and deceptive action to "prohibit, hinder or restrict the disclosure of accurate price information regarding funeral merchandise or services."[126] Failure to disclose prices by telephone, to furnish casket price lists and information, and to label display caskets are also made violations of section 5 of the FTC Act.[127]

Following extensive hearings during 1976, the Commission staff is presently preparing a memorandum supporting approval of the TRR by the five-member Federal Trade Commission. The Commission is likely to act on the proposed rule during 1977.[128]

Prescription Drug Price Disclosures. While the TRR on Funeral Industry Practices principally concerns private activity, the proposed Trade Regulation Rule on the disclosure of retail prices for prescription drugs would have preempted state laws banning price advertising, as well as prohibited private restrictions.[129] The application of the *Parker* antitrust exemption to the FTC Act was therefore directly raised by the proposed Rule.[130] In preparation for public hearings on this issue, an extensive report was prepared by the staff.[131] Prior to the hearings, however, the Supreme Court rendered the *Virginia Pharmacy* decision. Since prescription drug advertising prohibitions are now unconstitutional, the drug price disclosure rule may no longer be necessary. Therefore, further action on the TRR has been postponed indefinitely.

---

124. STAFF MEMORANDUM TO THE FEDERAL TRADE COMMISSION, FUNERAL INDUSTRY PRACTICES 86-89 (1975).

125. *Id.* at 59-62.

126. FTC Funeral Industry Practices, Trade Regulation Proceeding, 16 C.F.R. 453.1-.7 (1975).

127. *Id.* § 453.5(a), (b), and (c) respectively.

128. The Justice Department and at least one state have already challenged prohibitions against price advertising by funeral directors. United States v. National Funeral Directors Ass'n of the United States, 1968 Trade Cas. ¶ 72,529 (E.D. Wis. 1968); Wisconsin v. National Funeral Directors Ass'n of the United States, 1967 Trade Cas. ¶ 72,289 (Wis. Cir. Ct. Milwaukee County, 1967).

129. Note, *The FTC Proposed Regulation of Prescription Drug Price Disclosure by Retail Pharmacists*, 43 U. CHI. L. REV. 401 (1976).

130. Note, *The State Action Exemption and Antitrust Enforcement Under the Federal Trade Commission Act*, 89 HARV. L. REV. 715 (1976). *See also* STAFF REPORT TO THE FEDERAL TRADE COMMISSION, PRESCRIPTION DRUG PRICE DISCLOSURES (1975). This report relied heavily on theoretical works by Stigler, Benham, and Maurizi. See notes 34 and 35 *supra*.

131. STAFF REPORT TO THE FEDERAL TRADE COMMISSION, PRESCRIPTION DRUG PRICE DISCLOSURES (1975).

Ophthalmic Goods and Services. A third proposed TRR, concerning the advertising of ophthalmic goods and services, declares unfair any activity by private parties which imposes private impediments to the dissemination of information by retail sellers or providers of ophthalmic goods or services. Additionally,

> The Rule creates a duty on the part of sellers not to be influenced, *inter alia*, by state laws, regulations of state boards, or professional association codes of ethics in making decisions on whether and how to disseminate information pertaining to the sale or offer for sale of ophthalmic goods or services.[132]

This latter section, like the proposed drug price disclosure TRR, forces a conflict between the FTC Act and state law. It provides sellers who wish to advertise with a valid federal defense to formal or informal actions brought against them under color of nonfederal laws, regulations, or restraints. Public hearings were held on the Rule during the summer of 1976, and final approval is currently pending.

Formal Complaints

On December 19, 1975, the FTC issued a complaint against the American Medical Association, the Connecticut State Medical Society, and the New Haven County Medical Association, Inc. The complaint alleged that the respondents had agreed to prevent or hinder advertising in violation of section 5 of the FTC Act.[133] Specifically, the complaint charged that the respondents circulated their agreement in a publication called *Principles of Medical Ethics* and that they forced state physicians to adhere to the terms of the agreement. As a result, prices of physician services have allegedly been stabilized, fixed, or otherwise interfered with; competition between medical doctors in the provision of such services has allegedly been hindered, foreclosed, and frustrated; and consumers have allegedly been deprived of information pertinent to the selection of a physician and of the benefit of competition.[134] Trial of this matter is tentatively set for June 1977.

Also, the FTC filed a complaint against the American Dental Association on January 4, 1977. The Commission charged that the Association restricts advertising of prices for dental services through publication and enforcement of its Principles of Ethics. The complaint further

132. Advertising of Ophthalmic Goods and Services, 16 C.F.R. 456.1-.3 (1976). STAFF REPORT TO THE FEDERAL TRADE COMMISSION, PRESCRIPTION DRUG PRICE DISCLOSURES 83 (1975).
133. FTC v. American Medical Ass'n, No. 9064 (FTC, filed Dec. 19, 1975).
134. *Id.*

alleged that the Association in conjunction with state dental associations in Indiana and Virginia has restrained competition and fixed or otherwise interfered with prices by depriving consumers of pertinent information.[135]

Amicus Curiae Briefs

Aside from those proceedings in which it is a party, the FTC has also submitted amicus curiae briefs in *Brown v. Stackler*[136] and *Eckerd Optical Centers v. Florida State Board of Dispensing Opticians*,[137] cases involving challenges to state statutes prohibiting the advertising of prescription eyeglass prices. The briefs attempted to inform the courts of the economic and social impact of statutory prohibitions against price advertising. It was emphasized that advertising bans, by restricting consumer information, produce price dispersion and higher overall average prices. It was suggested that even if health, safety, and welfare justifications existed for such state restrictions, they did not outweigh the economic harm to consumers.

Current Investigations

Several investigations are currently being conducted by various units of the FTC which address, or touch upon, advertising restrictions by other professions. Several of these investigations are part of a national study of state occupational licensing, commenced by the Commission's Bureau of Consumer Protection in February 1976.[138] The Denver Regional Office and The Bureau of Economics are looking at advertising limitations on veterinarians. Attorneys at the Bureau of Consumer Protection in Washington are also considering actions against real estate brokers and dental laboratories.[139]

Thus, although private challenges to advertising restrictions are of questionable viability under the antitrust laws, the FTC has commenced considerable activity in this area.

CONCLUSION

A determination of the legality of price advertising restrictions on licensed occupations must begin with an examination of the two crucial

135. FTC v. American Dental Ass'n, No. 9093 (FTC, filed Jan. 4, 1977).
136. No. 75C 1686 (N.D. Ill., filed May 23, 1975).
137. No. 75-368 (Fla. Cir. Ct. Leon County, Jan. 12, 1976).
138. 745 ANTITRUST & TRADE REG. REP. (BNA) A-6 (Jan. 6, 1976).
139. See note 118 *supra.*

variables: the source of the restriction and the extent of its restrictiveness. The greater the degree of private as opposed to state involvement in the promulgation and execution of a restraint and the more absolute its prohibition, the greater the possibility that such a restraint will be held illegal under antitrust laws. An absolute ban, for example, that is promulgated by or under the influence of private interests will not withstand challenge. Conversely, a state statute that reasonably regulates the time, place, and manner of advertising should be upheld.

These two variables are determinative of legality at different stages in the antitrust analysis. First, in determining the existence of a *Parker* exemption, the courts are now closely scrutinizing the source and extent of advertising limitations. Only restrictions truly mandated by the state acting as a sovereign are immune. Furthermore, the degree of restrictiveness is a factor in determining whether particular restrictions are necessary to effectuate overall state policy.

Second, under the Sherman Act source and extent of limitations are relevant in ascertaining the existence of those elements necessary to establish a violation. Actions of private individuals are more likely to constitute concerted action than those of state officials. Intent to restrain trade will be more readily inferred when the prohibitions are absolute and the actors are further removed from the state. Effect on the market directly depends on the extent of the limitation. As prohibitions become more restrictive, information becomes more difficult to obtain thereby discouraging price comparisons. Competition is lessened and average prices are higher, resulting in an aggregate overcharge to consumers of approximately one billion dollars annually. Finally, under the rule of reason test narrowly drawn restrictions promulgated by a state are more likely to be "reasonable" than sweeping prohibitions initiated by private interests.

Since this subject is of major consumer interest, continuing private and FTC efforts are likely to foster significant developments in the law.