The Burger Court Opinion Writing Database

Goldfarb v. Virginia State Bar

421 U.S. 773 (1975)

Paul J. Wahlbeck, George Washington University
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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 24, 1975

Re: 74-70 - Goldfarb v. Virginia State Bar

MEMORANDUM TO THE CONFERENCE:

I have been concerned over the sentiment expressed at Conference that we should give our holding in this case prospective effect only. After reflection I conclude that if damages are to be allowed, the Sherman Act requires there be no "prospective-only" limitation.

All retroactivity questions are not the same. Different considerations apply in different cases, Lemon v. Kurtzman, 411 U.S. 192, 199 (1973). In Sherman Act litigation we have been, and should be, most reluctant to resort to the prospective-only device. [1] See Carnation Co. v. Pacific Conference, 383 U.S. 213, 217-22 (1966); Simpson v. Union Oil Co., 396 U.S. 13, 14 (1969); Hanover Shoe v. United Shoe Mach., 392 U.S. 481, 495-502 (1968). The Sherman Act provides an enhanced damage remedy designed to make the injured party whole, and at the same time to punish the one causing the injury. Congress fashioned the remedy to protect competition by encouraging individuals (and perhaps lawyers) to bring antitrust actions. Fortner Enterprises v. U.S. Steel, 394 U.S. 495, 502; cf., Nashville Milk Co. v. Carnation Co., U.S. 495, 355 U.S. 373, 383 (Douglas, J., dissenting). If we hold that damages may be avoided in antitrust cases the congressional purpose may be avoided too. Litigants, and lawyers, may not attack novel anticompetitive practices because they fear defendants will merely be ordered to cease the activity. Prospective plaintiffs will have no assurance of recovering their litigation costs

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1/ Perhaps the Sherman Act would be easier to administer if treble damages were not mandatory; however, Congress has not seen fit to change the damage provision although discretionary damages have been suggested. See, Stanton v. Texaco, 289 F. Supp. 884, 889 (D.R.I., 1968); Areeda, Antitrust Analysis, sec. 1-C, ¶ 159 (b) (1974).

provided in part for that purpose, to say nothing of sharing in the "profit" of a treble damage remedy. On the other side of the fence, prospective defendants will be less reluctant to engage in novel anticompetitive practices if they feel the worst that can happen is that they will be subject only to a cease and desist command to stop breaking the law.

Even if private actions somehow are not affected by our embrace of the prospectivity doctrine, we can be certain that individual antitrust actions will be lengthened by defendants arguing that they should not be held liable for damages because they relied on their own view of previous law. We all know antitrust actions are already far too long and complex.

Respondent Fairfax Bar Association makes that argument. It should not suffer "potentially ruinous treble damages," the Bar Association claims, since it relied upon intimations in some previous cases that bar association fee schedules, for one reason or another, are exempt from the antitrust laws. That has some appeal but I do not understand that any "estoppel" concepts apply here. First, in holding that fee schedules violate the Sherman Act we will certainly acknowledge the possibility that petitioners very likely have been damaged, see, 355 F. Supp. at 494, and it is surely anomalous for us to declare, in the next breath, that petitioners shall not be made whole, provided they can show damage and are willing to take on the burden of proving a host of essentially "small claims."

Second, the foundation for respondent Bar Association's reliance is not very solid. Statements in our cases that the practice of law is not included in the term "trade" were, as I read them, recitals of the traditional attitudes and not necessarily relevant to a statute such as we now have. The cases, e.g., FTC v. Raladam Co., 283 U.S. 643, 653 (1931), cannot fairly be read to support so broad an exemption in an area where we have consistently looked with disfavor upon exemptions. United States v. Philadelphia National Bank, 374 U.S. 321, 350-51. Moreover, other cases surely cast doubt upon the present vitality of those references. American Medical Ass'n v. United States, 317 U.S. 519 (1943); United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 496 (1950) (Jackson, J., dissenting). It is important, too, that the practice at issue here is not one on which reasonable men may differ as to whether it is anticompetitive, whatever else we may say about it. We deal here with a price-floor, the most obvious anticompetitive practice. Anyone who engages in that practice must be sure of his exempt status. Given evolution of antitrust concepts, bar associations could not be so assured. Indeed, the parties view this case as one of first impression, and in the context of present Sherman Act principles the result we will reach can scarcely be called "an avulsive change which [will] cause the current of the law thereafter to flow between new banks." Hanover Shoe, supra, at 499.

Third, the Bar Association claim that its fee schedule did not affect commerce is undercut by the District Court's findings of fact, see 355 F. Supp., at 497. We are not dealing with a fee schedule which applies only to the drafting of wills or some similarly local work done by a lawyer. The fee schedule here sets a price floor for real estate transactions involving potentially large amounts of mortgage money supplied from outside Virginia, and government insurance from outside Virginia. If Virginia did not require lawyers to examine titles, and a group of title companies had entered into a "price fix," I doubt that their activities would be found not to "affect commerce." Lawyers cannot close their eyes to economic reality and then claim "justifiable reliance" when they are brought to task.[2/] Part of their problem is that they stopped acting like a profession and adopted a shoddy "tradesmens'" practice.

My aversion for the prospective-only device is not based solely on the issue of bar association fee schedules; the facts of this case too suggest that a prospective-only remedy is unwarranted. The District Court severed the matter of damages. Thus for us to order prospective-only relief we would have to reach out and take an issue not yet resolved by the federal courts.[3/] Respondent will be entitled to try to show that the fee schedules

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2/ Respondent Fairfax Bar also claims it comes under the Parker v. Brown exemption for state activities; however, the argument is so weak that even the Bar does not press it very seriously. Neither the Court of Appeals nor the District Court accepted it. Indeed, the Court of Appeals made it clear that the Fairfax Bar "is a private organization and does not derive its authority or efficacy from the State." Were we to hold Parker v. Brown gave the Fairfax Bar justification for its actions there would be few businesses regulated by the states which would not claim that exemption.

3/ Apparently the Fairfax Bar never made its prospectivity argument until the District Court had ruled against it on the merits. Since the prospectivity argument is not jurisdictional, contrast, Edelman v. Jordan, 415 U.S. 651, petitioners argue it should have been raised earlier, as any other affirmative defense, F.R.Civ.P. 8(c), so they could have responded to it at trial. I do not necessarily agree with them, but their contention is another reason to pause before we reach out and give the Fairfax Bar immunity from damages in this case. Moreover, if we give the Fairfax Bar a form of relief it requested in a post hoc fashion, we run the risk of creating an unwelcome procedural precedent.

did not artificially increase prices, and thus inflicted no damages. Notably petitioners have asked that they be allowed to submit evidence to the trial court of the lack of justifiable reliance on respondent's part. Reply brief for petitioners, at 23. It seems to me both sides ought to be put to their proof on the matter. It is possible that this case might just wither away at that point because proving these damages is not going to be easy.

Another reason for not opting for prospective relief here is the nature of the price fix. The facts show that the fee schedule published by the Fairfax Bar was not merely an advisory one that would constitute one consideration for a lawyer in setting a fee. Petitioners sent 36 letters to members of respondent Bar asking what fee would be charged to search the title of their home. No lawyer, of the 19 who responded, asked further information on which to make an individualized fee decision, although the Code of Professional Responsibility, which has been adopted in Virginia, requires a fee determination based on "all relevant circumstances." EC 2-18; DR 2-106. Indeed, the "fee customarily charged in the locality" is only one of eight suggested factors. DR 2-106. All lawyers who responded said they would adhere to the schedule. Another striking fact is that the record does not show that any lawyer who responded indicated that he would charge more than the schedule if unusual conditions developed. That gives rise to the suspicion that the minimum fee was more than a generous one. A bar association which issued a fee schedule that was truly advisory, as envisioned by the Code of Professional Responsibility, would be in a far better position than the Fairfax Bar to argue for a prospective-only remedy.

One final consideration is worth noting. If we reach out and protect lawyers from accrued damages, it may well seem that we are "protecting our own." 4/ I do not think this factor should be given much weight in a case where substantial justice requires a prospective-only remedy but, as I have indicated, I do not view this case as of that type. A prospective-only remedy would risk pulling the teeth from the Sherman Act and, for me, would be inappropriate on the facts here. I suggest that we remand for

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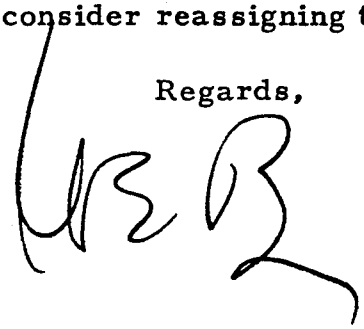
4/ That the respondent association consists of lawyers is another reason why it should not have operated on the periphery of the law and relied upon a tenuous exemption.

proceedings on the damage issue, and let the chips fall where they may. Compare, Simpson v. Union Oil Co., 377 U.S. 13, and Simpson v. Union Oil Co., 392 U.S. 13.

If a majority disagrees on this issue, it may be I can have a Part I and Part II -- or perhaps I should consider reassigning the case.

Regards,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 2, 1975

Re: No. 74-70 - Goldfarb v. Virginia State Bar

MEMORANDUM TO THE CONFERENCE:

Again, in view of the date, I enclose a typed draft of an opinion in the above case in an earlier "stage" than usual.

I call attention to the treatment of the State Bar. I found no escape for it since it is the source of the "threat" of disciplinary action for lawyers who violate local bar standards.

I welcome comments.

Regards,

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From:

Circulated: JUN 2 1975

Recirculated:

Goldfarb v. Virginia State Bar Association, No. 74-70

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a minimum fee schedule for lawyers published by the Fairfax County Bar Association and enforced by the Virginia State Bar violates Section 1 of the Sherman Act, 15 U. S. C. § 1. The Court of Appeals held that, although the fee schedule and enforcement mechanism substantially restrained competition among lawyers, publication of the schedule by the County Bar was outside the scope of the Act because the practice of law is not "trade or commerce," and enforcement of the schedule by the State Bar was exempt from the Sherman Act as state action as defined in Parker v. Brown, 317 U. S. 341 (1943).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 5, 1975

Re: 74-70 - Goldfarb v. Virginia State Bar

MEMORANDUM TO THE CONFERENCE:

A suggestion from within the Court leads me to add the following, as a footnote, after the word "aspect" on line 3, page 15.

_/ "The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today."

This makes explicit what was opaquely implicit.

Regards,

WEB

changes marked info

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

Circulated: _____

Recirculated JUN 9 1975

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-70

Lewis H. Goldfarb et al., Petitioners, *v.* Virginia State Bar et al. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June —, 1975]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a minimum fee schedule for lawyers published by the Fairfax County Bar Association and enforced by the Virginia State Bar violates § 1 of the Sherman Act, 15 U. S. C. § 1. The Court of Appeals held that, although the fee schedule and enforcement mechanism substantially restrained competition among lawyers, publication of the schedule by the County Bar was outside the scope of the Act because the practice of law is not "trade or commerce," and enforcement of the schedule by the State Bar was exempt from the Sherman Act as state action as defined in *Parker* v. *Brown*, 317 U. S. 341 (1943).

I

In 1971 petitioners, husband and wife, contracted to buy a home in Fairfax County, Virginia. The financing agency required them to secure title insurance; this required a title examination, and only a member of the Virginia State Bar could legally perform that service.[1]

[1] Unauthorized Practice of Law Opinion No. 17, August 5, 1942, Virginia State Bar—Opinions 239 (1965 ed.).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1975

Re: 74-70 - Goldfarb v. Virginia State Bar Association

MEMORANDUM TO THE CONFERENCE:

I have slightly amended n. 22. It now reads:

22 / The State Bar also contends that it is protected by the Eleventh Amendment. See Edelman v. Jordan, 415 U. S. 651 (1974). Petitioners dispute this contention, and the District Court had no occasion to reach it in view of its holding. Given the record before us we intimate no view on the issue, leaving it for the District Court on remand.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 12, 1975

Re: 74-70 - Goldfarb v. Virginia State Bar

MEMORANDUM TO THE CONFERENCE:

In view of Harry's vote in the above I propose to announce the opinion on Monday, absent dissent.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 17, 1975

Re: 74-872 - National Society of Professional Engineers v. United States, p. 1
Held for 74-70 - Goldfarb v. Virginia State Bar

MEMORANDUM TO THE CONFERENCE:

This is an Expediting Act appeal from the USDC for DC (Smith) in a Sherman Act § 1 action brought by the government. Appellant NPSE is a national organization of engineers and § 11 of its Code declares that an engineer competes unfairly "by attempting to gain employment . . . by competitive bidding . . . ." In other words, a customer must select an engineer and discuss his project before fee negotiations can commence. If the customer is dissatisfied at that point he may select another engineer and start over, however, § 11 does seem to limit price competition. The section appears to be vigorously enforced through repeated publications, issuance of ethical opinions applying it, letters to clients suspected of seeking competitive bidding, and coordination of investigations with state societies in cases of suspected violations.

The DC held that § 11 and its enforcement mechanism violate Section I of the Sherman Act. The decision is consistent with our decision in Goldfarb to the extent it holds that there is no across-the-board exemption for "learned professions," and that any restraint by a private organization does not qualify for the state-action exemption as defined in Parker v. Brown, 317 U.S. 341 (1943).

The decision is not consistent with Goldfarb, in my view, concerning the substantive violation alleged. The DC concluded that § 11 constituted price fixing; and since price fixing is a per se violation of the Sherman Act the DC refused to consider NPSE's evidence that § 11 was reasonable in the context of professional engineering. NPSE had contended at trial that § 11 promotes safer design because no engineer can know what a project will require before he has performed substantial portions of it, and to require earlier estimates would invite shoddy work and bait and switch tactics. There was uncontested evidence from the principal insurer of professional engineers showing that deficient engineering is more likely to occur when competitive bidding is

utilized. Moreover, the federal government apparently has long exempted professional engineering services from competitive bidding.

Goldfarb, it seems to me, left room for professional societies to show why certain practices are necessary, and I think it is reasonably read to say that trial courts should listen to the evidence they present. See slip op., at 14, n. 17. The opinion carefully avoided calling the fee schedule there a per se violation, and also inquired to some extent as to whether the effect of the fee schedule was damaging. Slip op., at 8-9. Such an inquiry would have been irrelevant if per se treatment was involved.

Since the NPSE case does not involve a price floor of the type found in Goldfarb, and more important, since the DC refused even to consider NPSE's justifications for § 11, I am reluctant to affirm this decision summarily. I will vote to vacate and remand in light of Goldfarb. We may be compelled to hear this case later but in the present situation we may be aided by having the District Court re-examine it.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 10, 1975

Re: No. 74-70, Goldfarb v. Virginia State Bar

Dear Chief:

Please join me.

Sincerely,

WILLIAM O. DOUGLAS

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 25, 1975

RE: No. 74-70 Goldfarb v. Virginia State Bar

Dear Chief:

I agree with your view and would vote against a "prospective-only" limitation.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 3, 1975

RE: No. 74-70 Goldfarb v. Virginia State Bar Assn.

Dear Chief:

I agree.

Sincerely,

Bill

The Chief Justice

cc: The Conference

June 4, 1975

No. 74-70, Goldfarb v. Virginia State Bar

Dear Chief,

I think this is basically a fine opinion and anticipate being able to join it in its final "stage." Its present form, however, gives me one serious concern:

It seems to me that Part II C on pages 12-15 of the present typewritten draft is written so stringently that it might well be read to render many long accepted ethical standards of the legal profession violations of the Sherman Act. I have in mind such standards as those that forbid lawyers from advertising and soliciting business. Agreements among businessmen that imposed such prohibitions would, I suppose clearly run afoul of the antitrust laws, and your discussion in II C seems to make no distinction between businessmen and lawyers for Sherman Act purposes.

I would hope that in its final stage your opinion would make clear that members of the legal profession and, indeed, of other professions, can agree to impose restrictions on themselves -- in the form of standards of ethical conduct enforceable by disciplinary sanctions -- that would be antitrust violations if self-imposed by tradesmen or manufacturers.

In Part III of the present draft you do recognize the power of the States to impose such ethical standards. But this, it seems to me, is quite different from recognizing the right of the members of the profession to impose such standards upon themselves.

Sincerely yours,

P. S.

The Chief Justice

bcc: Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 6, 1975

No. 74-70, Goldfarb v. Virginia State Bar

Dear Chief,

Upon the understanding that the additional footnote set out in your memorandum of today will be incorporated, I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 3, 1975

Re: No. 74-70 - Goldfarb v. Virginia State Bar Association

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 5, 1975

Re: No. 74-70, Goldfarb v. Virginia State Bar Association

Dear Chief:

Please join me.

Sincerely,

T. M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JSTICE HARRY A. BLACKMUN

June 12, 1975

Re: No. 74-70 - Goldfarb v. Virginia State Bar

Dear Chief:

Please join me.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 4, 1975

No. 74-70 Goldfarb v. Virginia State Bar

Dear Chief:

Please note at the end of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 25, 1975

Re: No. 74-70 -- Goldfarb v. Virginia State Bar

Dear Chief:

I am wholeheartedly in accord with the sentiments expressed in your letter of April 24th about the possibility of "prospective only" application of our decision in this case.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 6, 1975

Re: No. 74-70 - Goldfarb v. Virginia State Bar

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 10, 1975

Re: No. 74-70 - Goldfarb v. Virginia State Bar

Dear Chief:

I am writing this shortly after our telephone conversation about the deletion of the citation to Edelman v. Jordan, 415 U.S. 651, in footnote 22 on page 18 of the second draft of your opinion. I was complaining about the deletion of Edelman, but the more I reflect on it I do not think that complaint expresses my precise concern. While I do think Edelman should remain in if the footnote retains its present text, I would like to elaborate a little more on the Eleventh Amendment point.

The Eleventh Amendment does not merely prevent a federal court from entertaining an action for damages against a state, but by its terms and as interpreted in Hans v. Louisiana, 134 U.S. 1 (1890) prevents "any suit in law or equity" against a state. Relying on Hagood v. Southern, 117 U.S. 52 (1886) and In re Ayers, 123 U.S. 443 (1887), we stated in Edelman, supra, that equitable relief as well as damages against the state would be barred by the Eleventh Amendment. 415 U.S. 666-667.

The present language of footnote 22 suggests, at least to me, that even though a state had an Eleventh Amendment defense it could be retained in the action during the liability phase of the case and only dismissed at the conclusion of the hearing

on damages. I don't think this sort of an approach would benefit anyone, and I don't think it is consistent with the language in the Amendment. I think the really debatable question in connection with the contention of the state bar is whether or not it is sufficiently like the state, and whether an award of damges against it would eventually be paid out of the public treasury, so as to be entitled to invoke the Eleventh Amendment. We certainly do not want to decide that issue here, and it makes very good sense to follow the suggestion in the footnote that it be considered at the same time as the damages issue, simply because that will be the first opportunity that the District Court has to address the question. Could the footnote be reworded to read along the following lines:

> "The State Bar also contends that it is protected by the Eleventh Amendment. That contention is more appropriately considered by the District Court in the first instance, and since we remand to that court for proceedings on the issue of damages, that court may likewise then address respondent's Eleventh Amendment contention."

Sincerely,

WHR

The Chief Justice