The Professions and Noncommercial Purposes: Applicability of Per Se Rules Under the Sherman Act

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THE PROFESSIONS AND NONCOMMERCIAL PURPOSES: APPLICABILITY OF PER SE RULES UNDER THE SHERMAN ACT

Until the Supreme Court's decision in Goldfarb v. Virginia State Bar, invalidating a bar association's minimum fee schedules as an illegal price-fixing arrangement, it was generally thought that the so-called learned professions were exempt from the prohibitions of the Sherman Act. With the Court's sharp rejection of this view, it is clear that the associations established for professional self-regulation are answerable for violations of the antitrust laws. Yet to be resolved is whether the professions are to

2 Section I of the Sherman Act, 15 U.S.C. § 1 (1970), proscribes “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . .” Besides the requirements that the activity affect “trade or commerce,” the Act also requires that the challenged restraint involve interstate commerce. See note 3 infra.
3 Notwithstanding Goldfarb, significant areas of conduct by professions may still be exempt from Sherman Act prohibitions. Litigation has focused most frequently upon the following areas:


Intrastate Commerce. Jurisdiction under the Sherman Act requires that the alleged anticompetitive conduct affect "commerce among the several States," see note 2 supra. Consequently, activities that touch only upon intrastate commerce will be exempted. See, e.g., Hospital Bldg. Co. v. Trustees of the Rex Hosp., 425 U.S. 738 (1976).

be judged by the same antitrust standards as those applied to the conduct of profitmaking business entities.

Under current antitrust standards, certain recurring business practices have been deemed illegal per se under the Sherman Act. However, where a practice challenged under a per se rule is sufficiently germane to some legitimate self-regulatory purpose—such as the establishment of membership standards for private associations—per se concepts have generally been displaced by the rule of reason. Especially in litigation involving trade associations, the lack of a competitive relationship and the uniform operation of the particular restraint have removed the conduct from per se treatment. In effect, the noncommercial purpose of the particular restraint has caused it to fall outside the class of per se invalid restraints.

The remedies provided under the Sherman, Clayton, and FTC Acts are not mutually exclusive. Indeed, they are commonly regarded as providing a cumulative remedy. Sections 1-3 of the Sherman Act make violations punishable as felonies and provide for substantial fines and imprisonment within the discretion of the court. Authority to institute criminal proceedings is lodged in the Department of Justice. For an example of the stiff penalties imposed, see United States v. Leviton Mfg. Co., 4 TRADE REG. REP. (CCH) 45,007 (D. Conn. 1978), in which price-fixing convictions resulted in fines totalling over $800,000 and sentences of up to 30 months. While the Justice Department's policy is to institute criminal proceedings only for wilful violations, wilfulness will be presumed where a per se violation is shown. See The President's Commission on Law Enforcement and Administration of Justice, Crime and Its Impact, An Assessment 110 (1967). Asst. Attorney-General Donald Baker has urged stiffer jail sentences for antitrust violators and has recommended a flat 18 month sentence rule, with greater sentences in case of corporate recidivism. See N.Y. Times, Nov. 21, 1976, at 27, col. 1. The private treble damage remedy is authorized under § 4 of the Clayton Act, 15 U.S.C. § 15 (1970). Damages include amounts passed on to consumers, see Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968). But see Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (recovery limited to direct purchasers).

The classic statement of the per se theory is contained in Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5 (1958):

[There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. For a discussion of the per se and rule of reason theories, see text accompanying notes 7-15 infra.

The many discussions dealing with the doctrine of noncommercial purpose have generally concluded that to be illegal, a combination must be formed for the purpose and with the effect of restraining trade. See, e.g., Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847 (1955); Bauer, Professional Activities and the Antitrust Laws, 50 Notre Dame Law. 570 (1975); Coons, Non-Commercial Purpose as a Sherman Act
A profession is distinguishable from an ordinary commercial enterprise because of its preeminently noncommercial purpose and its extensive self-regulatory powers. The recent acceleration of antitrust litigation involving the professions has generated much confusion over the applicability of per se rules to professional defendants, particularly in the area of group boycott. Because a per se rule ordinarily eliminates the need for the antitrust plaintiff to prove the unreasonableness of the conduct, a defendant profession might be barred from introducing evidence of the challenged practice's noncommercial purpose.

This article will examine the doctrine of noncommercial purpose in the professional context and assess whether conduct undertaken by the professions conforms to the presumptions underlying the per se doctrine. It is the thesis of this article that the per se doctrine should not preclude inquiry into whether a valid noncommercial purpose justifies conduct undertaken in good faith by a profession to regulate its membership or to advance some other public interest. This article concludes that, with respect to professions, the goals of the Sherman Act are better served by inquiry into noncommercial purposes and application of the rule of reason than by rigid adherence to the per se doctrine.

I. Standards Under the Sherman Act

The literal language of the Sherman Act prohibits all business practices "in restraint of trade." Given that every business practice aims to restrain trade, however, courts have traditionally applied a rule of reason in


In United States v. National Soc'y of Prof. Eng's, 555 F.2d 978 (D.C. Cir. 1977), aff'd, 46 U.S.L.W. 4356 (1978), the District of Columbia Circuit Court recognized the viability of the doctrine of noncommercial purpose when "narrowly defined in terms of intended social benefits." 555 F.2d at 983. As another court concludes, "this adoption of a 'commercial/noncommercial' activity dividing line is perhaps just an application of the 'Rule of Reason'." United States v. Oregon State Bar, 385 F. Supp. 507, 517 (D. Ore. 1974). That is, conduct undertaken in good faith for a substantially noncommercial purpose arguably lacks the requisite anticompetitive purpose necessary for a Sherman Act violation.

* This article concentrates primarily upon group boycott activity by the professions because it is an area of intense legal activity concerning the doctrine of noncommercial purpose. The case law confirms that there is simply no clear definition of a group boycott. As one court has phrased it: "To state that the law concerning group boycotts and Section 1 of the Sherman Act lacks consistency would be to understate the truth by a wide margin." Cullum Elec. & Mechanical, Inc. v. Mechanical Contractors Ass'n of S. C., 436 F. Supp. 418, 429 (D.S.C. 1976), aff'd, 509 F.2d 821 (4th Cir. 1978). As used in this discussion, the term "group boycott" refers to collective conduct that is per se illegal under § 1 of the Sherman Act. Collective action that is not a per se offense may still be anticompetitive and illegal but is not a group boycott. A valid noncommercial purpose may remove the conduct from the group boycott definition, because only group conduct that is clearly anticompetitive constitutes a group boycott. See text accompanying note 34 infra.
judging anticompetitive practices under the Act. Under the standard of reasonableness, competing economic and social values can be proffered to justify the challenged activity. One of the benefits of the rule of reason is that it allows the court to consider economic and other evidence probative of industry conditions that would be excluded under the per se standard. Moreover, it arguably constitutes a closer approximation of the competition policy of the Act because only conduct that has been subjected to rigorous judicial scrutiny is ultimately condemned. The costs, of course, are those associated with any protracted undertaking: time and uncertainty.

The several per se rules were developed in response to the proliferation of antitrust cases involving similar practices that had predictably been proven unreasonable and therefore illegal. In a sense, per se rules "play

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7 Consider Judge Hand's commendation of the rule of reason in United States v. Associated Press, 52 F. Supp. 362 (S.D.N.Y. 1943), aff'd, 326 U.S. 1 (1945): [A]s everyone now agrees ... restriction alone is not enough to stamp a combination as illegal; it must be "unreasonable" in the sense that the common law understood that word; and that never has been, and indeed in the nature of things never can be, defined in general terms. Courts must proceed step by step, applying retroactively the standard proper for each situation as it comes up, just as they do in the case of negligence, reasonable notice, and the like.

8 Thus in Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918), Justice Brandeis pronounced that in determining the reasonableness of a particular restraint the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

9 Consider, for instance, the antitrust suit currently being litigated against IBM by the Justice Dept., a case that is not expected to be resolved until 1985. As of 1976, the Justice Department had already spent about $5 million on the case. An earlier suit brought by Control Data Corp. against IBM, which was settled in 1973, involved discovery of over 30 million documents and spawned Control Data's computer litigation service now subscribed to by a number of large corporations. Perhaps the longest antitrust suit to date was brought by the Government against El Paso Natural Gas Co. The Government finally won—16 years later. An interesting statistical summary of another large antitrust case involving the nation's leading investment banking firms may be found in an appendix to Judge Medina's 200 page opinion in Morgan v. United States, 118 F. Supp. 621, 829 (S.D.N.Y. 1953). As Judge Medina concluded: "[I]n my judgment, the only hope of cutting these conspiracy cases down to size lies in the exercise of a sound discretion by the Dept. of Justice." Id. at 827. See also Kohlmeier, Antitrust Litigation: It's Big Business, N.Y. Times, Nov. 21, 1976, § 3, at 2, col. 3.

10 The Supreme Court recently commented upon the rationale of per se rules in a case that put a stop to the much criticized per se treatment of vertical territorial restraints, specifically overruling the Court's earlier decision in United States v. Arnold, Schwinn & Co., 388 U.S.
the percentages"; per se conduct that is, in fact, reasonable is sufficiently rare that the gains of a per se rule outweigh the cost of an occasional unjustified result. Per se rules effectively shorten the process of judicial inquiry in cases involving per se restraints; antitrust plaintiffs need not prove the unreasonableness of the conduct once they show that it falls within one of the per se categories. Per se rules are perceived as promoting values not only of judicial economy but also of certainty and prophylaxis. Thus, the per se doctrine puts the business community on notice that certain practices will not be tolerated.

Several recent decisions in the federal courts reflect continuing unease with the per se doctrine, even in traditional areas of enforcement. One reason for this unease is the perceived value of certain restraints in creating market efficiencies that might result in benefits to the consumer. Indeed, respected authorities argue that the courts have overreached both the Act's economic and social goals in propagating the

365 (1967):
Per se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its pro-competitive consequences. Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.


Once established, per se rules tend to provide guidance to the business community and to minimize the burden on litigants and the judicial system of the more complex rule of reason trials . . . but those advantages are not sufficient in themselves to justify the creation of per se rules. If it were otherwise, all of antitrust law would be reduced to per se rules, thus introducing an unintended and undesired rigidity in the law.


13 For example, restrictions on the business activities of business partners require those partners to focus their efforts upon the partnership's business, and prevent nonproducing partners from enjoying a free ride. Similarly, mergers might create certain management efficiencies not otherwise possible where businesses operate independently. Among other efficiencies made possible by various vertical and horizontal restraints are stable relationships with resellers, larger scales of operations, reduction of selling costs, greater reseller expertise, and more accurate estimation of output required. See Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 75 YALE L.J. 373, 429-65 (1966). See also Brodley, Potential Competition Mergers: A Structural Synthesis, 87 YALE L. J. 1
various per se rules. Similarly, it is argued that overzealous protection of the small businessman is achieved at the cost of potentially higher prices and less uniform merchantability of goods, among other effects. Debate over the competition policy of the Sherman Act continues, and there are compelling arguments against converting the Act into a strict liability statute through expanded use of per se rules.

In spite of the need to use per se rules cautiously, many courts persist in applying them to conduct that does not fit the traditional per se mold. Per se rules reflect the courts' long experience with commercial antitrust defendants who invariably share the same primary purpose: profitmaking. This apparent predictability of purpose is not necessarily true in the professional setting, where courts have recognized self-regulation—a noncommercial purpose—as a legitimate justification for otherwise anti-competitive behavior. To facilitate discussion of the noncommercial purpose exception to per se illegality for the professions, it will be helpful to reconsider Goldfarb and the learned profession exemption.

14 See Bork, supra note 13, at 474 in which Professor Bork criticizes the tendency to oversimplify economic phenomena, to carry over rules of per se illegality, proper in the cartel contexts in which they evolved, to situations in which restriction of output was patently neither intended nor effected. This misuse of the per se concept destroys efficiency and hence misallocates resources. The overextension of the per se concept by the courts thus has the same sort of effect upon consumers as do cartel agreements. See also Bork, Legislative Intent and the Policy of the Sherman Act, 9 J. OF LAW & ECON. 7 (1966); Kauper, The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism, 67 Mich. L. Rev. 325, 334 (1968).


15 See, e.g., [1977] ANTITRUST & TRADE REG. REP. (BNA) No. 816 at A-12 (Economists at FTC conference criticize increased antitrust efforts in health care).
II. THE PROFESSIONS: NONCOMMERCIAL PURPOSES AND MARKET IMPACT

A. Origins of the Professions' Special Status

The learned profession exemption evolved long before the present era of massive consumer reliance upon professional services. In the few reported antitrust cases involving professions, lower courts seldom articulated their reasons for exempting professional conduct from antitrust scrutiny beyond formulaic expressions that the Sherman Act was ""tailored . . . for the business world"" and that the professions were distinct from the traditional class of antitrust defendants. This exemption came to be understood as involving jurisdictional defects, principally a lack of involvement with "trade or commerce." Goldfarb resolved the jurisdictional dispute by finding that legal services have a significant impact on interstate commerce. For purposes of future antitrust scrutiny, however, the Court noted a distinction between commercial and noncommercial activities of professions and specifically limited its consideration to the issues presented by the defendant's minimum fee schedules. Thus the Court's finding of classic price-fixing in Goldfarb, a practice that would

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16 The so-called learned profession exemption was judicially created, unlike the labor exemption to the Sherman Act provided by § 6 of the Clayton Act, 15 U.S.C. § 17 (1970), or the agricultural exemption in § 1 of the Capper-Volstead Act, 7 U.S.C. § 291 (1970), and § 5 of the Cooperative Marketing Act of 1926, 7 U.S.C. § 455 (1970). Although never directly passed on by the Supreme Court until Goldfarb, the learned profession exemption was recognized by many lower courts. See generally von Kalinowski, supra note 12, at § 79.04, and cases cited therein.

17 As an example of the market power wielded by industries involving professional services, the health industry has been said to be the third largest in the nation, accounting for 7.7% of the current GNP and employing more than 4.5 million individuals. Institute of Medicine, Controls on Health Care: Papers of the Conference on Regulation in the Health Industry 6 (1974).

18 Marjorie Webster Jr. College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc., 432 F.2d 650, 654 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970) (holding that exclusion of proprietary college from defendant association would be scrutinized under rule of reason). See also Atlantic Cleaners & Dyers v. United States, 286 U.S. 427 (1932); In re Nymph, 18 F. Cas. 506 (C.C.D. Me. 1834).


20 The Court thus commented, 421 U.S. at 788 n.17: 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 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.

While it cannot be said categorically that the Court had the per se doctrine in mind when it
normally invoke a per se rule, cannot be read as mandating the per­functory application of per se rules to all self-regulatory activities undertaken by the professions. 21

B. Noncommercial Purposes

It has long been recognized that the professions differ fundamentally from ordinary commercial businesses and, consequently, merit more liberal treatment under the antitrust laws. 22 Courts have generally assumed that the professions exist for reasons in addition to the profit motive. 23 The essence of the concept of "profession" is the power to self-regulate and to promote standards of practice that benefit the public at large as well as the individual practitioner. 24 Professional societies have traditionally operated as clearinghouses for the exchange of ideas and concerns among individual practitioners. Without this exchange, the impetus towards improved standards of practice and the dissemination of practical information and new developments might otherwise grind to a halt, and the profession would stagnate. Moreover, the sum of professionals acting in concert is greater than the sum of professionals individually; the power of numbers gives teeth to the ethical and social considerations that ultimately define professional practice. Of course there is equal potential for mischief under such an alignment, 25 but the benefits of higher standards, technological innovations, and greater appreciation of consumer needs have been substantial.

21 See, e.g., Bauer, supra note 5, at 592.
22 The professions, like certain other regulated industries, are natural monopolies. Since they contribute so substantially to the public welfare, it has been felt that trade restraints which necessarily accompany this monopoly power should be given greater deference by the courts. See, e.g., Feminist Women's Health Center, Inc. v. Mohammad, 415 F. Supp. 1258, 1263 (N.D. Fla. 1976).
23 In United States v. Oregon State Medical Soc'y, 343 U.S. 326, 336 (1952), Justice Jackson observed: [T]here are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters. This Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession. See also Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 612 (1935); Northern Cal. Pharm. Ass'n v. United States, 306 F.2d 379, 389 (9th Cir.), cert. denied, 371 U.S. 862 (1962); Bank Bldg. & Equip. Corp. v. N.C.A.R.B., [1975-1] TRADE CAS. (CCH) ¶ 60,108 (D.D.C. 1975); Levin v. Doctors Hosp., Inc., 233 F. Supp. 953 (D.D.C. 1964).
24 See, e.g., Button v. Day, 204 Va. 547, 132 S.E. 2d 292 (1963), cited by the Court in Goldfarb, which held that the state bar was authorized by the Virginia State Bar Act to promote reform in the law, to advance the science of jurisprudence, to facilitate the administration of justice, and generally to uphold the public interest.
25 Consider, for example, the action taken by the Michigan Psychological Association against a controversial psychologist who was accused of violating six of the association's
C. Self-Regulation and Market Impact

Besides the noncommercial aspects of the professional network described above, there exists a complementary self-regulatory aspect that differentiates the professions from the customary antitrust defendant. A professional society is ordinarily empowered, for example, to punish a member's egregious conduct in order to maintain the integrity of the profession and to assure consumers that its practitioners possess certain minimum levels of competence. Moreover, the standards against which an abuse is judged are often peculiarly within the expertise of the particular profession, making self-regulation more efficient than judicial enforcement. In this sense, per se rules overlook the burden that professional self-regulation has saved the courts. Internal control is less likely to continue if courts automatically impose liability upon the professions for good faith conduct taken in response to difficult questions of professional standards.

The presence of pervasive self-regulatory powers can have important consequences for market analysis of professional activities. First, restraints imposed by professional societies do not have the same impact upon competitive relations among practitioners as ordinary business restraints. In the traditional commercial setting, competitors vie for a share of the market, and ordinarily one person's gain is another person's loss. In the professional setting, however, all members of a particular profession voluntarily submit to the limitations imposed by that profession. An individual practitioner does not vie with a professional society for a share of the market in professional services; nor are ethical constraints or standards of competency aimed at one practitioner, but at the profession as a whole. Second, professional restraints do not necessarily have the same effects upon consumers as ordinary business restraints. For example, one familiar area of conflict between professionals and consumers concerns accreditation of professional schools. By limiting access to a

rules of conduct. A private hearing was held to determine whether the psychologist should have his license revoked. Specifically, it was alleged that he urged patients not to have contact with friends, colleagues, or even family members, and encouraged them to become excessively involved, both financially and personally, in therapy that often increased their stress. The psychologist has denied wrongdoing in his group therapy practice and has accused the association of ousting him after holding a kangaroo court. Detroit Free Press, Dec. 2, 1977, at 12D, col. 1.

26 Certain noncommercial purposes of professions are not strictly self-regulatory. Thus, a group of physicians who take action against an allegedly unsafe abortion clinic are arguably more concerned with protecting the public welfare than satisfying their duty of self-regulation. For a discussion of the case from which the above facts are drawn, see text accompanying notes 50-56 infra.

27 See, e.g., FLA. STAT. ANN. §§ 395.01 to .171 (1975 & West Supp. 1977), which authorizes the formation of hospital review committees to oversee the medical practices and standards of care being provided by hospitals.

28 See [1977] ANTITRUST & TRADE REG. REP. (BNA) No. 802 at A-4 (FTC criticizes AMA involvement in accreditation of medical schools); id. at No. 808 at A-6 (HEW advisory group rejects FTC criticism of medical school accreditation committee).
given profession, the national societies have clearly had an effect on the market in qualified professionals. It is not clear, however, that these actions are therefore anticompetitive, because accreditation is considered essential to establish and maintain the standards of professionalism upon which consumers rely. Indeed, creating greater access to professional practice may result in such a vastly changed service "product" that traditional understandings of market share and anticompetitive impact would be rendered less than helpful, if not wholly useless.\(^{29}\) In short, the difficulty of applying traditional market analyses to activities of professional societies is exacerbated by the important self-regulatory functions served by those societies.

Taken together, the professions' traditional exercise of extensive self-regulatory powers and the ambiguity of the economic effects of regulation suggest that a cautious approach be taken under the antitrust laws. Since the existence of an ostensible noncommercial purpose is essential to avoid per se illegality for many self-regulatory activities, the pertinent inquiry in determining the appropriate antitrust standard is to identify those noncommercial purposes important enough to compete with the substantial goals of the Sherman Act.

III. NONCOMMERCIAL PURPOSE AND THE PROFESSIONS: A DEFENSE TO SHERMAN ACT CHALLENGE

A. Noncommercial Purpose in Nonprofessional Contexts

In areas other than the professions, courts do not apply rules of per se illegality where the anticompetitive effect of group conduct is ancillary to a primary noncommercial purpose rationally related to the character of the particular defendant. In cases involving trade associations, for example, courts have condoned certain restraints in the nature of concerted refusals to deal where the conduct implements a uniform rule or standard whose restraining effect is universal.\(^{30}\) The common thread in these

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\(^{29}\) Proponents of greater access to professional training dispute the claim that such access results in greater incompetency, arguing that market forces will weed out the incompetents much as they determine the success of a commercial product. Such considerations are obviously beyond the scope of this discussion, but ought to be recognized as bearing upon the general issue of how far the professions can realistically be said to behave like traditional commercial enterprises.

\(^{30}\) See Hatley v. American Quarterhorse Ass'n, 552 F.2d 646, 653 (5th Cir. 1977) (rule of association limiting amount of white on horses eligible for registration with the Association held to be a legitimate tool in the Association's efforts to improve the breed and not in contravention of rule of reason); E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178 (5th Cir. 1972) (exclusion of plaintiff from listings circulated with defendant tour association's member airlines was justified where tour operator was not authorized to represent certain tourists concerns in the listings); Marjorie Webster Jr. College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc., 432 F.2d 650 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970) (exclusion of proprietary college from associa-
decisions is that the restraints were a byproduct of the legitimate exercise of self-regulatory powers designed to promote the purposes of the given association. To a lesser extent, several recent decisions involving organized sports demonstrate a similar tendency; the courts pulled back from strict per se treatment when presented with the unique purposes of those ventures. Finally, courts have avoided the per se doctrine when...

31 In none of these cases, however, was the restrained party prevented from competing in the marketplace. Where a competitor cannot perform services absent continued membership in a particular trade association, competition is clearly restrained and the anticompetitive effect is patent. Note that the group boycott definition includes practices that coerce third parties as well as exclude. Hence a trade association rule or practice which coerces the behavior of competitors will be deemed per se illegal. On the conceptual difficulty of distinguishing between a rule which coerces and one which merely regulates, compare Pomanowski v. Monmouth County Bd. of Realtors, 152 N.J. Super. 100, 377 A.2d 791 (1977) (rule requiring brokers to join county board of realtors in order to become members of board’s multiple listing service held to be unreasonable restraint) with Barrows v. Grand Rapids Real Estate Bd., 51 Mich. App. 74, 214 N.W.2d 532 (1974) (failure of real estate board to grant nonmembers access to multiple listing service operated for members held unreasonable).

32 The leading decision favoring use of a rule of reason in antitrust litigation involving sports enterprises is Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), in which the circuit court reversed a lower court finding of per se group boycott in the League’s exclusion of plaintiff under the so-called Rozelle Rule, which allowed NFL clubs to sign free agents only if able to reach an agreement with the player’s former team as to compensation. The circuit court suggested that the case “presents unusual circumstances rendering it inappropriate to declare the Rozelle Rule illegal per se without undertaking an inquiry into the purported justifications for the Rule.” Id. at 619. The court went on to conclude that the rule was significantly more restrictive than necessary to achieve the legitimate purposes for the rule claimed by the league. As to the doctrine of “less restrictive means,” see text accompanying notes 70-81 infra. Accord, Hennessey v. National Collegiate Athletic Ass’n, 564 F.2d 1136 (5th Cir. 1977); Alexander v. National Football League, [1977-2] TRADE CAS. (CCH) ¶ 61,730 (D. Minn. 1977); Erie Buffalo Tondas v. Amateur Hockey Ass’n, 438 F. Supp. 310 (W.D.N.Y. 1977); Jones v. National Collegiate Athletic Ass’n, 392 F. Supp. 295 (D. Mass. 1975); Kapp. v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974); College Athletic Placement Service, Inc. v. National Collegiate Athletic Ass’n, [1975-1] TRADE CAS. (CCH) ¶ 60,1117 (D. N.J. 1974), aff’d, 506 F.2d 1050 (3rd Cir. 1974) (without opinion). But see Smith v. Pro-Football, 420 F. Supp. 738 (D.D.C. 1976).

Notwithstanding the decision in Mackey, a number of courts have applied a test of per se illegality to the group boycott question in organized sports. The leading decision is undoubtedly Denver Rockets v. All-Pro Mgt., Inc., 325 F. Supp. 1049 (C.D. Cal. 1971), stay vacated, 401 U.S. 1204 (1971), in which professional basketball’s four-year college rule was successfully challenged as a per se group boycott on the grounds that it excluded players from the league without regard for special circumstances of individual players. Relying principally on Silver v. New York Stock Exchange, 373 U.S. 341 (1963), the district court concluded that the failure to provide a hearing for the excluded athlete would preclude...
confronted with nonexempt labor activities, opting instead for the more flexible balancing approach possible under the rule of reason.\textsuperscript{33}

Viewed broadly, the trade association and sports cases reflect the willingness of many modern courts to consider the noncommercial purposes of group conduct in assessing the conduct's anticompetitive impact. Recognition of a noncommercial purpose does not, however, necessarily render the conduct legal. Rather, it acts as a procedural touchstone from which a finding of reasonableness may eventually spring. The chief function of a noncommercial purpose is to expand the scope of the proceedings, thus avoiding a per se finding and allowing proof of reasonableness.

\textbf{B. Noncommercial Purpose Applied to the Professions}

It is but a short step from trade associations and organized sports to the professions, which not only embody more classic noncommercial purposes, but also exert far more extensive self-regulatory powers. As with trade associations, it is in the area of group boycott that the inadequacy of strict per se treatment of professions is most readily apparent. To constitute a per se invalid group boycott, collective action must conform to the definition of group boycott that has been generated by the courts. The essential requirement of that definition is that the group activity manifest an anticompetitive purpose.\textsuperscript{34} Collective conduct that has been undertak-

\textsuperscript{33} See, e.g., Consolidated Express, Inc. v. New York Shipping Ass'n, Inc., [1978] \textit{Antitrust & Trad Reg. Rep.} (BNA) No. 847 at E-7 (D. N.J. Jan. 19, 1978); "In this context, a finding of \textit{per se} antitrust liability seems fundamentally at odds with the Supreme Court's decision indicating that the policies of the antitrust acts must be balanced against those reflected in the labor laws.''

\textsuperscript{34} See, e.g., Hatley v. American Quarterhorse Ass'n, 552 F.2d 646 (5th Cir. 1977); E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee, 467 F.2d 178 (5th Cir. 1972), cert. denied, 409 U.S. 1109 (1973); Cartrade, Inc. v. Ford Dealers Advertising Ass'n, 446 F.2d 289 (9th Cir. 1971); Bridge Corp. of America v. American Contract Bridge League, Inc., 428 F.2d 1365 (9th Cir. 1970), cert. denied, 401 U.S. 940 (1971); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); Deeser v. Professional Golfer's Ass'n, 358 F.2d 165 (9th Cir.), cert. denied, 385 U.S. 846 (1966); Chastain v. AT&T, 401 F. Supp. 151 (D.D.C. 1975); Dalmo Sales Co. v. Tysons Corner Regional Shopping Center, 308 F. Supp. 988 (D.D.C. 1970), aff. sub nom. 429 F.2d 206 (D.C. Cir. 1976). A leading commentator has distinguished between collective action "intended to coerce conduct of third parties or to secure their removal from competition" from group conduct that involves "the acceptance of limitations on individual freedom to deal not intended to coerce action by third parties or to secure their removal from the market." See Barber, supra note 5, at 872-79. In the latter case, the group conduct would avoid per se treatment because of the lack of anticompetitive purpose. Note that this definition requires more than a general intent to do the act and to bring about the foreseeable
en for a valid noncommercial purpose arguably falls outside the definition because the activity lacks the essential anticompetitive animus upon which a finding of group boycott depends. Consequently, courts should not presume anticompetitive intent and condemn the activity as per se unreasonable where the professional defendant can show that the conduct was undertaken for an arguably valid self-regulatory or otherwise non-commercial purpose.

This article proposes a three-pronged test to determine whether certain professional conduct alleged to have been undertaken for noncommercial purposes should be excepted from per se treatment. The first requirement for such an exception is that the conduct arguably fall within the legitimate self-regulatory powers of the profession. If a professional society seeks to exclude an individual from practice on the basis of his religious beliefs, for example, it is doubtful that a court will permit such an action because it involves self-regulation, even though those religious beliefs in fact damage the profession and the restraints are motivated by fears of such damage. However, conduct arguably authorized by a profession’s legislative mandate should satisfy this requirement.

Secondly, the conduct must not primarily serve a predominantly profit-oriented or commercial purpose of the particular profession. The group boycott cases which follow suggest that refusals to deal that do not serve some bona fide noncommercial function should still be subject to per se treatment if the requisite anticompetitive purpose under the group boycott definition is also shown. Such an inference may be gathered from Goldfarb and its progeny, which indicate that some activities by professions, such as price-fixing, simply are devoid of any noncommercial purpose.

consequences of that act. Anticompetitive “purpose” is therefore to be interpreted as “motive” rather than mere “intent.” See also note 6 supra.

35 Many states empower the professions they regulate to refuse admission to or take disciplinary measures against persons who have engaged in conduct involving moral turpitude or simply immorality. See, e.g., CAL. BUS. & PROF. CODE § 1680 (1970); MICH. ST. BAR GRIEVANCE BD. R. 16.18. However, courts have limited the extent to which the professions may exercise such powers. See Konigsberg v. State Bar, 353 U.S. 252 (1957); Siegel v. Committee of Bar Examiners, 10 Cal. 3d 156, 110 Cal. Reptr. 15, 514 P.2d 967 (1973).

36 Indeed, there is nothing to indicate that the Supreme Court in Goldfarb was not applying a per se rule to the price-fixing arrangement in that case, and at least one federal court has so concluded. See United States v. National Soc’y of Prof. Engr’s, 404 F. Supp. 457 (D.D.C. 1975), aff’d, 46 U.S.L.W. 4356 (1978). In oral argument before the Court in Goldfarb, Solicitor General Bork in fact pointed up the commercial-noncommercial dichotomy: “One searches in vain for any connection between professional ethics and price-fixing, and one searches in vain for the principle that price-fixing is ethical.” 43 U.S.L.W. 3521, 3522 (1975).

It is arguable, at least, that the Court’s subsequent finding of classic price-fixing reflects an application of the per se test exclusively to commercial activity of the professional association. As the Court itself observed, “It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect.” 421 U.S. at 788. Similarly, one pre-Goldfarb court concluded, “[t]here is no more commercial element to the practice of law than the setting of fees. Thus, even the acceptance by this Court of the exemption of
Finally, the conduct must be undertaken in good faith, a test that focuses upon the reasonable man in the position of the professional defendant. In effect, the good faith test looks to the timing and sequence of events both leading up to and following the defendant's imposition of the particular restraint.

Analysis under this test begins with the problem of ascertaining the limits of a profession's powers of self-regulation. One approach for determining the proper scope of a profession's self-regulatory powers is to grant an exception to the group boycott per se rule where the industry structure requires self-regulation and where the collective action is essential to that self-regulation. This approach would recognize self-regulatory powers beyond those reflected in a specific legislative scheme. The "essentiality" test, however, simply does not adequately define what conduct is arguably valid self-regulation. On the one hand, self-regulatory power should not be limited to a narrow "but for" test of essentiality. On the other hand, self-regulatory powers having only a tenuous connection with delivery of professional services should not escape per se treatment simply because the relevant professional society finds the collective action to have some indirect effect upon professional practice. Moreover, proponents of the per se doctrine also have questioned whether any conduct the purpose of which can be achieved by less restrictive means should ever be valid self-regulation.


A current perception that a particular professional activity is a valid self-regulatory tool is no guarantee that the activity will be insulated from antitrust challenge. Before Goldfarb, minimum fee schedules were widely considered to be valid means of avoiding the evils of price competition among professionals and of maintaining the integrity of the profession as a whole. Similarly, advertising by professionals had been considered degrading to the professions, and professional societies commonly enjoined such activities. Judging from Bates v. Arizona State Bar, 433 U.S. 350 (1977), the Court appears not to have been persuaded by that argument. Bates and Goldfarb at least suggest that the line between legitimate non-commercial activity and illegal anticompetitive activity can be very fine.

37 See, e.g., Feminist Women's Health Center, Inc. v. Mohammad, 415 F. Supp. 1258, 1270 (N.D. Fla. 1976): "[T]he dictates and policies of the antitrust laws require that the standard be an objective one. That is, the test of good faith is whether or not a reasonable man in a position of the defendants would have acted as they did under the circumstances."

38 See Bird, supra note 11, at 291.

39 Such a liberal interpretation of the extent of legitimate self-regulation stems in part from language in Silver v. New York Stock Exch., 373 U.S. 341 (1963) that suggests a more flexible standard where the justification for the alleged per se conduct derives from a legislative mandate "or otherwise." Id. at 348-49. Just exactly what that phrase was intended to encompass is not clear. For one interpretation, see Note, Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason, 66 COLUM. L. REV. 1486, 1499 (1966) (includes justifications derived from "the need for self-regulation inherent in the industry"). The lack of specific governamental regulation of the professions, such as the SEC provides for the securities exchanges, has troubled more than a few commentators. See Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Laws, 49 N.Y.U. L. REV. 693, 706 (1974) ("The alternative to a per se rule is to leave the initial determination in the hands of private parties whose own self-interest will produce an..."
The proper test of whether a given professional activity is arguably valid self-regulation should be whether the conduct is germane to the purposes of the profession’s self-regulatory mandate. To an extent, this is simply a common sense inquiry. Whatever verbal formula is employed, any definition of the legitimate limits of self-regulation must take into account the fact that the crucial issues, as in most antitrust litigation, are most often factual. Whether a per se rule is properly applied to particular professional group conduct will be determined largely by how the trial court views the alleged justifications in connection with the totality of the circumstances surrounding the conduct: the character of the defendant, the nature of the restraint, and the probability that the defendant association acted in conformity with its stated purposes. No rule of law can tell the trial court whether a particular activity is somehow necessary for self-regulation. The rule of reason has traditionally accorded trial courts substantial deference in the arduous task of harmonizing new and as yet unchallenged means of doing business with the competition policy of the Sherman Act. Moreover, most states have codified the concept of self-regulation in the form of broad statutory powers conferred upon the specific professions. These enabling statutes generally have not attempted to outline the precise powers and duties of the various professional societies, but have left it to the professions themselves to define and enforce the applicable standards.

Consequently, if the profession can undesirable tendency to overvalue the alleged economic justifications and undervalue competition.”); Raynack, Restrictive Practices of Organized Medicine, 13 ANTITRUST BULL. 659 (1968) (“[T]here arises the possibility of an internal contradiction in the dual role of the professional organization as protector of society’s welfare through the regulation of quality and as defender of the economic interests of the members of the organization.”). See also Note, The Applicability of the Sherman Act to Legal Practice and Other “Non-commercial” Activities, 82 YALE L.J. 313, 333-34 (1972).

For a discussion of the effectiveness of professional self-regulation and whether a mandate of self-regulation impliedly repeals the Sherman Act as to that particular self-regulated industry, see, e.g., United States v. National Ass’n of Sec. Dealers, 422 U.S. 694 (1975); Gordon v. New York Stock Exch., 422 U.S. 659 (1975); Thill Sec. Corp. v. New York Stock Exch., 433 F.2d 264 (7th Cir. 1970), cert. denied, 401 U.S. 994 (1971). The question here is the far less drastic one of whether the trial court is to hear evidence as to the reasonableness of the alleged anticompetitive conduct. The fear expressed in the “implied repeal” cases that the competing jurisdiction of a governmental agency may prove inadequate in safeguarding the public interest simply does not arise where the jurisdiction of the antitrust trial court is not at issue.

See, e.g., N.Y. NOT-FOR-PROFIT CORP. LAW § 1406(d)(1970):

It shall be lawful for any county medical society in this state . . . to establish such rules and regulations, not inconsistent with the laws of the state, for the government of its members as such county society may deem fit, provided such action receives the sanction of the state medical society in which such county medical society is represented . . . .

establish an arguable nexus between its statutory mandate and the challenged action, the conduct ought to be regarded as self-regulatory.

A recent decision illustrates how this first test might be approached. In *Boddicker v. Arizona State Dental Association*, an Arizona dentist brought suit against a local dental association on grounds that conditioning participation in its programs upon membership in the related national association was a per se illegal tying arrangement. The dentist alleged that the membership requirement merely furthered the monopoly of the national association and harmed nonmember local practitioners who might otherwise take advantage of the local association's programs. The local association argued that the membership requirement was designed to promote the improvement of dental services through the funding and administration of dental aptitude tests, accreditation of dental programs, and publication and dissemination of professional journals.

The district court granted the local association's motion to dismiss on the ground that the conduct fell within the learned profession exemption. While reversing the district court on that point, the appellate court nevertheless intimated that the doctrine of noncommercial purpose could save the membership requirement, and that the association would be allowed at trial to prove facts in justification of the conduct:

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

The restraint involved in *Boddicker* is not unlike many trade association restraints: it applies uniformly to all members and is designed to further a fundamental noncommercial purpose of the association. Moreover, the dual membership requirement is essential in making the various dental programs possible. Establishing programs to improve standards of practice is within the power of the local societies. The dual membership requirement is arguably a necessary adjunct to that power and consequently falls within the scope of the profession's self-regulatory mandate. Most importantly, the closeness of the question in *Boddicker*, whether the membership requirement furthered a bona fide noncommer-

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41 *549 F.2d 626 (9th Cir.), cert. denied, 46 U.S.L.W. 3189 (1977).*
42 *549 F.2d at 629.* Actually, plaintiff argued alternatively that expulsion from the local societies for failure to pay the ADA membership dues would impair his ability to practice dentistry, and on the other hand that he would receive no benefit from dues paid to the ADA.
43 *Id. at 633.*
44 *Id. at 632 (footnote omitted).*
cial purpose of the association, suggests that the restraint is at least not so unambiguously anticompetitive as to warrant application of a per se rule. Under the second prong of the proposed test, the profession's primary purpose for its activity must be noncommercial if it is to avoid per se treatment. The critical question is whether trial courts can distinguish between conduct satisfying a legitimate noncommercial function and conduct having an anticompetitive purpose. In *United States Dental Institute v. American Association of Orthodontists*, for example, the USDI, a private, profitmaking educational institution providing postsecondary education in orthodontia, alleged that the defendant association had engaged in a group boycott by preventing practicing dentists otherwise unable to attain the requisite skills to practice orthodontia from participating in the USDI's educational programs. In effect, the USDI claimed that by refusing to recognize its programs the Association sought only to preserve its monopoly in the practice of orthodontia. The AAO defended on the grounds that it was acting to protect general practitioner dentists from the alleged substandard educational programs provided by the USDI.

As already suggested, accreditation of educational programs is a jealously guarded self-regulatory function directly affecting the standards of practice among practitioners. Since the AAO has the power to establish educational standards for its members, the first element of the proposed test would be satisfied. Admittedly, however, the fact that the restraint directly inhibits nonspecialists from competing in the market for orthodontic services makes the asserted noncommercial purpose somewhat more problematic than the situation in *Boddicker*. Unless the AAO can also prove that the goal of its conduct was predominantly noncommercial, and thus satisfy the second element of the test, application of a rule of reason would be inappropriate. To prove a primary noncommercial purpose, the AAO would first have to show that the dental education offered by the USDI is, in fact, substandard in comparison with the established standards of the orthodontic profession generally. Second, it would have to substantiate its claimed noncommercial purpose by means of correspondence, complaints against the Institute, and the like, and perhaps by emphasizing the proprietary nature of the USDI. Demonstrating that the USDI does not pose a significant economic threat to the AAO members

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46 Specifically, the USDI charged that the AAO acted improperly when it acted to have the school's license revoked, declared it unethical for a dentist to teach at the school, refused to publish listings of the school's journals in defendant's publication, and removed plaintiff from defendant's list of approved schools. *Id.* at 569.
47 See text accompanying notes 28-29 supra.
48 Tactically, emphasis upon the USDI's proprietary interest might induce the trier of fact to conclude that the USDI was challenging the AAO's actions for more selfish reasons than the desire to increase access to the practice of orthodontia. Needless to say, this tactic requires that the AAO have a reasonable basis for attacking the USDI on those grounds.
would help substantiate that claim. If it appears that the claimed non-commercial purpose is nonexistent, or merely ancillary to a commercial purpose, then the conduct should not be sustained under the noncommercial purpose doctrine. This burden of proof avoids the potential injustice under the proposed test that might result from mechanical yet difficult to disprove assertions of noncommercial purpose.

Finally, the proposed test requires that the conduct be undertaken in good faith as a reasonable response to a situation requiring professional self-regulation. Inquiry into good faith is neither as subjective nor unfocussed as some commentators fear. A useful example of the kind of inquiry into good faith that a court should undertake is suggested by Feminist Women's Health Center, Inc. v. Mohammad. There, the trial court was asked to determine whether the services provided by a local health clinic to its abortion patients were adequate, and, if inadequate, whether local physicians were justified in withdrawing their services from the clinic and discouraging nonlocal physicians from performing abortions there. The clinic alleged in its motion for preliminary injunction that the physicians' motive was to destroy the clinic's abortion services, which were significantly lower in cost than those offered by private physicians and therefore posed an economic threat to those practitioners. The court held that the defendants' good faith could be a defense to the allegation of anticompetitive conduct. Although the court denied the plaintiff's motion for a preliminary injunction, it also found that the defendants failed to meet their burden of establishing that they acted in good faith.

The Mohammad court looked particularly at the timing and sequence of events, especially the fact that the withdrawal of services came shortly after a newspaper article comparing the cost of abortions at the clinic with those performed by local physicians. Also, initial discussions among the defendant physicians concerning the clinic took place before defendants knew whether adequate care was in fact available. Finally, no clear standards for the allegedly substandard services had crystallized within

49 It would be useful, for example, to show that the AAO had taken similar action against substandard educational programs without any resulting antitrust challenge. A presumption of regularity would thus defeat the assumption that the AAO was motivated by vindictiveness or fear of upsetting the economic status quo.


51 Suit was brought against a group of physicians for conduct undertaken in their capacities as private practitioners. The state medical society was never involved in the boycott. One physician was absolved by the trial court of any wrongdoing. No liability was assessed against the remaining physicians because the court was responding to a motion for preliminary injunction.

52 According to an article published shortly before the restraint was instituted by the defendant physicians, the cost of an abortion at the Center was $150, compared to $400 if performed privately. Id. at 1264.

53 The court denied the injunction because the plaintiff failed to prove a sufficient likelihood of irreparable harm. Id. at 1271.

54 Interestingly, the district court found that the Center was operating "without substantial controversy" before the article appeared. Id. at 1269.
the medical community, and the defendants had not inquired very deeply into the nature of those services before instituting the restraint.\textsuperscript{55} Inasmuch as the district court was responding to a motion for preliminary injunction, its inquiry into noncommercial purpose was necessarily limited. Nevertheless, the evidence indicated a substantial likelihood that the Center would be successful on the merits.\textsuperscript{56}

The proposed test differs in one significant respect from the test recently propounded in \textit{Linseman v. World Hockey Association}\textsuperscript{57} which would exempt conduct from the group boycott per se rule if (1) there is a legislative mandate for self-regulation, (2) there is collective action intended to accomplish a goal consistent with the policy justifying self-regulation and related to that goal, and (3) there are procedural safeguards to prevent arbitrariness and furnish a basis for judicial review.\textsuperscript{58} The test proposed by this article substitutes a good faith test for the requirement of procedural safeguards, because the latter test is simply inconsistent with the theoretical underpinnings of the per se doctrine.\textsuperscript{59} Furthermore, the...
good faith test avoids summary condemnation of defendants under the antitrust laws for having engaged in conduct that, while failing to provide procedural safeguards, nevertheless responds to a specified self-regulatory need.\footnote{But see Note, \textit{Trade Association Exclusionary Practices}, supra note 39.}

Once a court has decided to apply a rule of reason, it must determine how such an ad hoc determination should proceed. In situations like \textit{Boddicker}, for example, whether the public service aspect of the conduct justifies the restraint depends upon the association's ability to substantiate its claim that the membership requirement contributes directly to the improvement of professional services. The importance of the \textit{Boddicker} case, however, is not whether the restraint is ultimately deemed reasonable. The court's decision is significant for its recognition of this public service aspect as a special factor calling for a different analysis in applying the rule of reason than that reserved for traditional antitrust defendants. This analysis allows courts to offset the greater anticompetitive effect of certain professional practices by the correspondingly greater public interest value of the particular restraint. In view of the substantial public interest values associated with the challenged membership requirement, such analysis best accommodates the conflicting interests of the antitrust laws and the dental profession.

Applying the analysis suggested by the \textit{Boddicker} case to the facts appearing in the opinion,\footnote{See text accompanying notes 41-43 \textit{supra}.} several arguments favoring the reasonableness of the membership requirement can be made. First, if the funds generated by the membership requirement were allocated to various dental programs as asserted, then participation in the local programs without payment to the national association may give nonparticipating dentists a free ride with respect to the local programs. At the very least, such use of the funds belies the argument that the arrangement is intended merely to strengthen the hegemony of the national association. Secondly, although the membership requirement affects the individual dentist economically, the crucial variable in the court's antitrust calculus should have been the public welfare: if the dental programs were rationally related to the consumers' need for improved dental services, the mandatory nature of the membership requirement should not trouble the court. Indeed, the membership cost will probably be passed on to the consumers.\footnote{Arguably the potential rise in the cost of dental services is the real anticompetitive effect. Therefore, in the course of the balancing approach proposed by this article, the trial court should ask whether the increment in the cost of professional services is justified by the asserted benefits flowing to consumers from the programs administered by the national association.}

The alternative to the balancing approach suggested here is potentially a harsh one: the per se doctrine disregards possible benefits flowing to the public and might subject the local association to treble damage liability.\footnote{Consider, for example, the brief submitted to the Supreme Court in \textit{United States v.}}
The per se doctrine is grounded in the notion that certain practices must be dealt with strongly because of their pernicious effect upon competitive relations. Restraints like those in *Boddicker*, however, are designed not to alter competitive relations but to raise standards of practice among dental practitioners. Indeed, the complaining dentists in *Boddicker* remained free to compete in the market for dental services.64

In cases like *USDJ*, application of a per se rule would similarly overlook the potential harms to the profession and the public arising from the possibly substandard education offered by the USDI. The asserted non-commercial purpose should be weighed in the balance particularly since the standards of practice out of which the restraint grew are so much within the expertise of the particular profession or specialization. Resorting to a per se rule in situations like *USDJ* would in effect rewrite the Sherman Act: a newly created educational institution could claim the right, according to a somewhat strained interpretation of the competition policy of the Act, to impose its own standards of practice upon an important profession and to collect treble damages where the primary right is violated. Clearly the Act was not intended to stand for such a proposition.

Application of a rule of reason does not necessarily constitute a windfall to the professional association. In a situation like *USDJ*, for example, a rule of reason will take into account whether the alleged abuse of educational standards could have been dealt with by less restrictive means. In effect, the court dealing with the professional defendant must ask whether there is some redeeming virtue in the collective action that outweighs the harm to members of a particular profession and, more importantly, to the public. The key to this balancing process, as the *Boddicker* court suggests, ought to be the public interest. Where professional conduct is "highly regulated by the state, and intimately concerns the public health and welfare," the rule of reason "best balances the policies of the antitrust laws with the public welfare burden" borne by the professions.68

*National Soc'y of Prof. Eng'rs.* The Society argued that its ban on competitive bidding was "indispensable to public safety and health," in that problems in engineering precluded realistic estimates on a particular job without the benefit of various reports and studies. Thus, the Society concluded that the imposition of a per se rule by the lower courts in that case had elevated "judicial administration to a higher priority than public safety." See [1978] *ANTITRUST & TRADE REG. REP.* (BNA) No. 847 at A-16.

64 Again, a different situation might arise if a physician were prevented from using local hospital facilities essential to his practice because of his refusal to join a national association. A rule of reason analysis would be unlikely to uncover a sufficient policy justification for the exclusion to offset the competition policy embodied in the Sherman Act.

65 See text accompanying notes 45-49 supra.

66 Mohammad, 415 F. Supp. at 1263.

67 Id.

68 The recent experience in Michigan of an attempt by the Michigan State Medical Society to boycott Michigan Blue Cross-Blue Shield, the state's largest health insurer, is a telling example of the dangers inherent in overreliance upon per se rules. The Society, a state
C. Challenges to a Rule of Reason for the Professions

Notwithstanding the substantive arguments against applying per se rules to the narrow range of professional activities satisfying the proposed test, courts and commentators have raised several criticisms of the rule of reason. These criticisms focus mainly upon the procedural difficulties of applying a rule of reason to the conduct embraced by the test and suggest that the administrative burdens would prove intolerable. For reasons discussed below, these fears appear to be largely illusory and point up the confusion that has characterized the courts' approaches to the use of per se rules.

Critics of the rule of reason argue that the timesaving benefits of per se rules will be lost by having courts hear evidence on noncommercial purpose since trial courts must first determine in plenary proceedings whether a particular practice somehow relates to some legitimate self-regulatory goal. Following the lead set by Justice Goldberg in Silver v. New York Stock Exchange, several courts have required that organizations excluding a third party in the name of self-regulation observe certain procedural safeguards in order to furnish a basis for judicial review and to prevent arbitrariness. Silver involved the termination by the Exchange of a nonmember's wire service in the belief that the broker-dealer had engaged in various abuses of the over-the-counter market. The reason for the termination was never communicated to the excluded trader, and no hearing was provided for him to respond to the undisclosed charges. The Supreme Court held that, while section 6 of the Securities Exchange Act mandated the Exchange to regulate the conduct of its members and

physician group, resolved to boycott a plan instituted by "the Blues" to sign up physicians for a new scheme of reimbursement for services, the effect of which is to enable participating physicians to earn substantially more than nonparticipating physicians. The Society opposes the plan because it is an unacceptable extension of control over the practice of physicians by "the Blues." Whether or not the Society's fears are valid—and following from that, whether or not the collective action was a legitimate exercise of the profession's self-regulatory powers—involves a complex range of economic and social issues that are best resolved in full plenary proceedings. If the insurer's plan results in a deepening schism between participating and nonparticipating physicians, the scheme might well engage the strong concern of the Society. See Detroit Free Press, Oct. 27, 1977, at 1A, col. 4; Id., Oct. 29, 1977, at 3A col. 2.

As ordinarily employed, a per se rule would exclude evidence of reasonableness altogether. Although the proposed test would allow such evidence to come before the court, it would not be necessary to consume trial time in order to review these proofs. See text accompanying note 81 infra.

impliedly that of nonmembers with whom members necessarily deal in the over-the-counter market, the Exchange’s failure to provide adequate procedural safeguards, without more, rendered its conduct unreasonable. The primary justification given by Justice Goldberg was that termination of a broker-dealer’s wire service without notice or hearing provides no mechanism to check arbitrary exclusions by the Exchange. A second justification was that lack of a hearing and consequential absence of a record make it virtually impossible for courts to determine whether a per se rule should apply at the onset without engaging in possibly protracted and unnecessary factfinding. According to Silver, a hearing requirement gives the trial court the alternative of looking to the hearing record in making its initial determination. 74

A hearing requirement is an unacceptable solution to the problem of providing the court with a basis for imposing a per se rule because the record generated by a private hearing may itself lack procedural safeguards. Unlike a court of law, a hearing is not likely to have a binding effect upon the parties and provides none of the discovery devices that often prove decisive in the antitrust context. In practice, an excluded party will seldom rest content with the suspect conclusion of an in-house panel that the exclusion was for a noncommercial purpose and therefore justified. Even a formal hearing will be hampered by an inability to get the facts out. Courts may ultimately find themselves policing the fairness of such hearings, thus swapping one administrative burden for another. 75

The hearing required by Silver is also an unacceptable solution to the problem of arbitrariness. As Silver has been interpreted by the courts, lack of procedural safeguards is ipso facto unreasonable under the Sherman Act. 76 This interpretation is perhaps intended to reflect the doctrine of less restrictive means, which focuses upon the antitrust defendant’s ability to achieve its declared noncommercial purpose by some less restrictive course of action. A hearing, therefore, would constitute the less restrictive means in the Silver example. By equating the lack of procedural safeguards with a finding of unreasonableness, however, the

74 373 U.S. at 362.

75 If, as some commentators suggest, the hearing requirement is really a kind of unwritten confrontation clause, such a confrontation is likely to be “full of sound and fury, signifying nothing.” Complainants the size of the USDI or Blue Cross will inevitably press their claims in court despite an adverse outcome at the hearing. Of course, antitrust complainants should not be subjected to the costs of litigation where a simple hearing or arbitration would suffice. Indeed, the desirability of self-regulation is based in part upon a need to relieve the courts of the burden of regulating the professions themselves. Ultimately, however, these institutional confrontations are going to wind up in the courts, and while litigiousness should not be encouraged, there is some sense in having the antitrust laws administered in courts of law rather than in isolated conference rooms.

76 See, e.g., Linseman v. World Hockey Ass’n, 439 F. Supp. 1315, 1322 (D. Conn. 1977). Ironically, Silver has also been read to say that a court may pull back from per se treatment, even though there is no express statutory mandate of self-regulation, when faced with some justification presented by the circumstances surrounding the conduct in question. In effect, this latter interpretation merely restates the traditional rule of reason. See, e.g., Note, Trade Association Exclusionary Practices, supra note 39, at 1500: “An identifiable public policy
Silver court inflated the theory of per se illegality to constitutional dimensions by engrafting concepts of due process onto the Sherman Act and subjecting antitrust defendants to treble damage liability for conduct that has not been proven anticompetitive.

Courts following the Silver rationale have sometimes spoken of a rule of reason exception to per se illegality where the conduct has been undertaken with the requisite procedural safeguards. Not only does this stand traditional antitrust analysis on its head, but, like Silver, penalizes the defendant who has arguably acted in good faith to deal with a particular abuse. The premise of per se illegality is that the proscribed conduct is clearly anticompetitive; yet in applying a per se test due to lack of a hearing, a court does not even reach the substance of the restraint. The better view is that lack of procedural safeguards should be relevant but not dispositive. As Justice Stewart asserts in his dissent to Silver, "[i]n cases in which the public interest would demand that at least preliminary disciplinary action be taken with swift effectiveness." As he understands the majority opinion, the Exchange’s exclusion without a hearing could not be defended by showing that the plaintiff was an unmitigated swindler, even if proof of that fact were available to an absolute certainty. He concludes that the Securities Exchange Act should be interpreted to remove antitrust liability for actions taken in good faith to effectuate an exchange’s statutory duty of self-regulation. While this article does not adopt Justice Stewart’s position that the Exchange Act impliedly repealed the Sherman Act with respect to such self-regulatory practices, it does contend that good faith self-regulatory conduct should receive more favorable consideration by the courts than the per se doctrine allows. The mainspring of the per se mechanism is not whether the favoring industry self-regulation need not, under the Silver rationale, find its inspiration in a statute, state or federal. The author nevertheless upholds Justice Goldberg’s “safeguards” analysis. The Silver court itself remarked, 373 U.S. at 360:

[T]he entire public policy of self-regulation, beginning with the idea that the Exchange may set up barriers to membership, contemplates that the Exchange will engage in restraints of trade which might well be unreasonable absent sanction by the Securities Exchange Act... Under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act.

See also Thill Sec. Corp. v. New York Stock Exch., 433 F.2d 264, 268 (7th Cir. 1970), cert. denied, 401 U.S. 994 (1971): “[T]he Court [in Silver] concluded that the proper approach is an analysis which reconciles the operation of both statutory schemes... with one another rather than holding one completely ousted.”


78 Cf. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58 n.26 1977, where the majority notes that while the location restriction used by Sylvania was neither “[t]he least nor the most restrictive provision that it could have used,” nevertheless, “a per se rule based on the nature of the restriction is, in general, undesirable.”

79 373 U.S. at 368. See also Robinson, supra note 12, at 231.

80 Significantly, the Mohammad court chose to implement a good faith defense which
defendant has done everything short of violating the Act, but whether the activity complained of is on its face so typical of the evils the Sherman Act was meant to proscribe that the court need not inquire any further. Lack of notice or hearing simply does not respond to this latter inquiry.

The doctrine of less restrictive means discussed above responds to the fear that, without strict due process requirements, professional societies will never be held accountable for abuse of their self-regulatory mandate. This fear is better alleviated by the traditional rule of reason, which errs only to the extent that it calls for a more protracted inquiry, than by the per se doctrine, which not only ignores defendant's justifications but imposes harsh penalties for possibly reasonable self-regulatory conduct. Moreover, applying the rule of reason need not be unusually burdensome: a profession's justification can be spelled out with particularity in the pleadings, supported by data, affidavits, or exhibits substantiating the claimed noncommercial purpose. Through discovery, the party alleging the group boycott can muster opposing evidence. Upon some minimum showing, the trial judge can make a pretrial determination that the rule of reason ought to apply. By this means, the expense of trying frivolous or bad faith claims of noncommercial purpose can be avoided. 81

Some commentators fear that under the approach advanced by this article trial courts will abuse their discretion in finding that particular group conduct was or was not prosecuted for self-regulatory or noncommercial reasons. They also make the broader criticism that trial courts are simply not competent to deal with the complex business and economic

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81 A recent example of the "fine line" analysis with which courts are likely to be confronted involves a suit by a group of small and medium sized accounting firms against the American Institute of Certified Public Accountants (AICPA), charging that the self-regulatory changes adopted recently by the organization will decrease competition within the accounting profession. Essentially, the changes create a new class of membership for accounting firms, as opposed to individual accountants, with separate sections for firms auditing publicly held and privately held corporations. Were the plaintiff firms, who are seeking injunctive relief, to bring an antitrust action alleging group boycott, the AICPA would have strong grounds for arguing that the changes, approved by the Institute's governing council, serve a distinctly noncommercial purpose in seeking to establish procedures for a public oversight board, sanctions against derelict firms and mandatory peer reviews. Indeed, it is maintained that the changes were made in response to congressional criticism of the accounting profession concerning laxity in auditing certain corporate clients. Conversely, since the changes were not subscribed to by the entire membership of the association, smaller accounting firms might well charge that the changes are a disguised power play on the part of the larger firms. At the very least, the situation suggests that there
matters presented to the court under this standard.\textsuperscript{82} Of course, appellate review is available where the trial court clearly abuses its discretion, although, as one court has observed in noting the trend away from the use of per se rules, "the law in Washington . . . is quite different from the law in the rest of the country."\textsuperscript{83} The competency issue is a two-edged sword, because a trial court that is considered too incompetent to apply the test proposed in this article ought to be considered equally incompetent to decide that certain conduct is clearly anticompetitive and therefore per se illegal.\textsuperscript{84} Regardless of their competency, trial courts are and will continue to rule upon complex issues in the absence of legislative answers to these problems.\textsuperscript{85} In the meantime, the implementation of a per se rule, which holds defendants liable for treble damages on the basis of greatly abbreviated proceedings, is a high price for avoiding trial court consideration of the economic and social realities of a given industry or activity.\textsuperscript{86}

Proponents of the per se test argue that by allowing professions to raise the argument of noncommercial purpose, the courts will invariably find themselves faced with professional societies intoning the talismanic concept of self-regulation only as a means of extending and solidifying their monopoly of the profession.\textsuperscript{87} This bubble of suspicion surrounding professional activities is not easily burst. Moreover, from an administrative standpoint, expanding the scope of judicial review might appear to give professions an added weapon in their arsenal of dilatory tactics. However, the test proposed by this article expands the scope of proceedings

\textsuperscript{82} See, e.g., Bird, supra note 11, at 279: "The rule of reason approach would call upon judges to decide cases based on nothing more convincing than their own set of values and policy preferences which may or may not be shared by the public at large or their elected representatives."


\textsuperscript{84} Consider, for example, Professor Areeda's observation that "judges and commentators don't really understand antitrust. They deal with it at the level of jargon. Past the jargon, the problem is a lack of consensus as to what does and does not pay off for the special good." N.Y. Times, Apr. 26, 1976, at 43, col. 6.

\textsuperscript{85} Cf. Kauper, supra note 14, at 330 (in which Professor Kauper disparages the tendency of trial courts to shun economic analyses). Another commentator has described the trial judge's responsibility as "the awesome task of continually creating and recreating the Sherman Act out of his understanding of economics and his conception of the requirements of the judicial process." Bork, supra note 14, at 48.

\textsuperscript{86} Justice Stevens has recently cautioned that "the Court should adhere to its settled policy of giving concrete meaning to the general language of the Sherman Act by a process of case-by-case adjudication of specific controversies." Cantor v. Detroit Edison Co., 428 U.S. 579, 603 (1975).

\textsuperscript{87} See Bird, supra note 11, at 281-82.
only for those professional activities that carry sufficient indicia of validity. Use of this test therefore avoids the problem of courts granting the professions too much deference.

In response to the suggested administrative problem, one discussion of the group boycott cases has attempted to formulate an extremely precise definition of "group boycott" that would serve as a flat rule for professional conduct. It is more likely, however, that the courts will continue to mark out the boundaries of group boycott on a case-by-case basis, perhaps because of the general intractability of anticompetitive purposes and effects. Initially, the costs of the test proposed by this article to professional activities may be considerable. However, the advantages of building a rational foundation for the application of per se rules to professional conduct, rather than importing the present rules of per se illegality wholecloth are more substantial. As Justice Blackmun has commented in another context:

No doubt such a rule of reason will crystallize, as it is applied, into various per se rules relating to certain kinds of state enactments, such as the regulation of the classic monopoly, the public utility. We should not shrink in our general approach, however, from what seems to me our constitutionally mandated task, one often set for us by conflicting federal and state laws, and that is the balancing of implicated federal and state interests with a view to assuring that when these are truly in conflict, the former prevail.

The same care in balancing the policy goals of the Sherman Act against state interests should be taken in the context of professional activities. Professional services provide important benefits for consumers among the states which could be jeopardized by overzealous use of the per se formulae.

In cases not involving group boycott, application of rules of per se illegality to certain professional activities may be desirable despite the costs resulting for the public or the particular profession. Price-fixing, tying arrangements, and other egregious activities should not escape per se condemnation simply because they enjoy the respectability of having been mandated by the ethical rules of a given profession. In these cases, courts should not hesitate to pierce the veil of professional self-regulation during their inquiries into noncommercial purpose.

Some guidance on this issue has been provided by the Supreme Court's recent decision in United States v. National Society of Professional Engineers, a case involving alleged price-fixing in the form of an absolute ban against competitive bidding by members of the Society. In

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affirming the district court's holding that the agreement constituted classic price-fixing, the Court discounted the Society's contention that the ban minimized the risk that competition would produce inferior engineering work and endanger the public safety, calling it a "fundamental misunderstanding" of the rule of reason. In discussing the rule of reason, the Court asserted that "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." To the extent that the ban on competitive bidding clearly suppressed competition, the Court deemed the agreement illegal "[o]n its face."

It is not clear that the Court thereby intended to mean that the ban on competitive bidding was a per se restraint. While the finding of illegality "on its face" connotes per se condemnation, the Court throughout its opinion speaks as though it was in fact undertaking the inquiry mandated by the Rule of Reason mentioned above. Thus while the Court acknowledges the cautionary footnote in Goldfarb and expresses the view that "professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary," the Court seemingly departs from that liberal view by then suggesting that only those professional practices that have no anticompetitive effect will be deemed to fall within the rule of reason. While the Court's language is certainly dictum, it suggests a retrenchment from the more optimistic forecast of the Goldfarb Court that certain professional restraints might be treated differently from traditional business practices. As Justice Blackmun concludes in his concurring opinion, "I am not at all certain that the Court leaves enough elbow room for realistic application of the Sherman Act to professional services." A different case might be presented if the bidding ban in NSPE was not such an absolute interdiction of price information and was "more closely confined to the legitimate objective of preventing deceptively low bids." As the circuit court

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91 404 F. Supp. 457 (D.D.C. 1975), remanded in part, 555 F.2d 978 (D.C. Cir. 1977). On remand from the Supreme Court for reconsideration in light of Goldfarb, the district court rejected the Society's contention that Goldfarb required application of the rule of reason. 404 F. Supp. at 460. The question presented to the Court on certiorari was whether the rule of reason should apply in an antitrust attack on a professional ethics rule governing solicitation by bidding.

92 46 U.S.L.W. at 4356.

93 Id. at 4359.

94 Id.

95 Id. at 4360.

96 In supporting its view that certain ethical restraints of professions may be justified, the Court used the analogy of "market restraints related to the safety of a product" which "have no anticompetitive effect and ... are reasonably ancillary to the seller's main purpose of protecting the public from harm or itself from product liability." Id. at n.22 (emphasis added).

97 Id. at 4361.

98 555 F.2d at 983.
concluded, "The issue is not one of mere semantics, it is one of accurate identification of a rule having regard to its language, purpose and effect."99 In view of the similarity of the price-fixing charge in NSPE to that in Goldfarb, it is not surprising that the Court chose not to use this case to carve an exception for arguably self-regulatory conduct out of the normal rules of per se illegality. The implications of some of the Court's language, however, go well beyond the facts of this particular case. Whether the Court's singular emphasis on competition in NSPE shall extend to all forms of professional self-regulation is a matter of speculation. The Court should attempt to illuminate further the commercial/noncommercial distinction it noted in Goldfarb with the aim of lending greater certainty to self-regulatory practices currently engaged in by the professions.

CONCLUSION

Although no firm consensus exists as to the social and economic goals of the Sherman Act, it is at least clear that per se rules arose out of the courts' experience with commercial activities whose purposes and anticompetitive effects differ significantly from those of the professions. The mechanical application of per se rules of illegality in the professional setting contradicts the basic rule that only unreasonable restraints are condemned by the Sherman Act. Since the courts are presently operating without the benefit of long experience with the professions in the antitrust arena, the conclusions garnered from traditional commercial practices should not be carried over unthinkingly to professional practices. The delay between the formulation of the rule of reason and the later adoption of the various per se rules reflects commendable caution on the part of the courts not to engage in antitrust overkill. That same spirit of caution should obtain where, as at present, enforcement of the antitrust laws is being carried out against complex and changing industries.

This article provides an approach to professional activities that does justice both to the theory of per se illegality under the Sherman Act and to those noncommercial purposes that are intrinsic to a profession. The proposed test is intended to provide a focus for determining whether conduct engaged in by professionals should be excepted from the application of per se rules. Under that test, a per se rule would not be applied to conduct that (1) is arguably within the self-regulatory powers of the given profession, (2) serves a predominantly noncommercial purpose of the profession, and (3) has been undertaken in good faith, that is, a reasonable man in the position of the defendant would have undertaken similar efforts at self-regulation under the circumstances. If the conduct is removed from the per se category, the public interest values served by the conduct should be determined in order to judge whether the anticompeti-

99 Id. at 984.
tive effect is outweighed by the benefits flowing to consumers of professional services.

Based upon the courts' experience with certain recurring professional practices, various per se rules may eventually emerge under the approach recommended by this article. However, until the "business and economic stuff" of a given profession's activities have been reduced to predictable patterns, ad hoc determinations as to the appropriateness of a claim of noncommercial purpose are preferable to the unchecked extension of per se rules into this new area of the courts' antitrust jurisdiction.

—Jonathan Cobb Dickey