Department of Justice

PROFESSIONS: A GROWING TARGET OF ANTITRUST SCRUTINY

Remarks by

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Justice Benjamin Cardozo once observed:

> "The greatest tides and currents which engulf the rest of men do not turn aside in their course, and pass the judges idly by."

Neither do these tides and currents pass idly by the Antitrust Division. We in Washington are aware of growing public concern with inflation, resentment over timid treatment of white collar offenders, and frustration and alienation because of the widely perceived rip-off of consumers by some big businesses and some professions. The Antitrust Division intends to respond to these concerns.

Price fixing prosecutions will continue to be a crucial element of the Division's enforcement efforts. At present, we are running over 100 grand juries. We are increasing their efficiency through the use of complex computer aids. In the first half of this fiscal year, the Division instituted 21 criminal price fixing prosecutions, and six of those were felony indictments.

As most of you know, the 1974 Antitrust Procedures and Penalties Act made Sherman Act violations felonies. It raised the maximum punishment for individuals to three years imprisonment and a $100,000 fine. Corporate felons

can be fined $1 million. A growing number of the Division's grand jury investigations are reaching conduct post-dating the new law, and thus, a corresponding growth in felony indictments can be expected.

The Division's commitment to rooting out price fixing of all types does not rest on a desire to make esoteric points of antitrust law. Rather, it rests on the palpable injury price fixers inflict on ordinary men and women. It seems undeniable that most price fixing artificially inflates prices. Title search fees fell dramatically after the Goldfarb decision. It has been estimated that SEC elimination of fixed commissions in May, 1975, saved investors $485 million in brokerage fees. A decade-old Federal Trade Commission study shows bread prices up by 12 percent in Seattle as a result of an antitrust conspiracy. The Division is not seeking jurisprudential tidiness but broad public benefits in its crackdown on price fixers.

This brings me to the matter of sentencing. The Division recently issued guidelines calling for 18-month prison terms for individuals in the average felony case brought under the Sherman Act. The 18-month base period may be adjusted up or down, depending on the presence of aggravating or mitigating circumstances. Stiff sentences

equal deterrence. To paraphrase Sam Johnson, nothing will so wonderfully concentrate the businessman's mind on avoiding price fixing as the knowledge that it will bring him substantial jail time.

This is not idle speculation. Harper Brown, President of Container Corp. of America, was recently sentenced to a 60-day prison term for participation in a folding carton price fixing conspiracy.[1/] Thereafter, Business Week reported that the paper industry's enthusiasm for raising prices had decreased. One paper company manager observed: "You can't throw somebody like Harper Brown in jail without having some impact." [2/]

In sum, observers of the tides and currents of anti-trust enforcement can expect a widespread attack on price fixing, more felony indictments, and stiffer sentences. The rewards will flow to businessmen in the form of fair competition, and to consumers in the form of lower prices.

The Antitrust Division will also continue its broad interest in the professions. Because many of you have

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1/ Sentence was later reduced to a 15-day work release program.

2/ "How Slow Growth is Remaking the Paper Industry," Business Week, p. 57, May 2, 1977.

known me only as an advocate in this area, I think it would be well to spend a few moments on this topic.

The Goldfarb decision [3] authoritatively ended any controversy as to whether the learned professions are entitled to any wholesale immunity from the antitrust laws. The new antitrust battleground regarding the professions will be occupied largely with two issues: first, precisely how antitrust principles will be applied to various practices; and second, the scope of the antitrust immunity conferred by the "state action" doctrine as most recently explicated in Cantor v. Detroit Edison Co. [4] Before examining this legal landscape, however, it may be helpful to sketch briefly the varied and substantial pressures for changes in the traditional methods of professional self-regulation.

Professional services are a rapidly growing part of the Nation's economy, deriving perhaps over $200 billion in revenues annually. These services, far from being a luxury, are a necessity for most people. As the costs of these services have risen, public confidence in the professions has faltered. Increasingly, the ethics,

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3/ 421 U.S. 773 (1975).

4/ 96 S. Ct. 3110 (1976).

competence, and integrity of professional groups has been called into question. Demands for change in many aspects of professional self-regulation are coming from consumers, legislators, prosecutors, and the courts.

The Nation is shifting its perception of professions from a public interest model to a business model, with little weight given to self-serving claims that their primary concern is public service. The developing anti-trust rules applicable to professions will undoubtedly be suffused with this new business model theme.

The Goldfarb decision unanimously condemned the use of minimum fee schedules by lawyers and held that price fixing by professionals is a per se violation of the Sherman Act. Now that the legal rules are clear, the Divisions will not hesitate to indict professionals who continue to engage in this type of activity. As an example of this pattern at work, look at real estate commission rate fixing. After several civil cases had made clear our view of the law, the Division has recently obtained indictments for similar conduct in Syracuse, New York, and Montgomery County, Maryland.

Goldfarb did, of course, leave a glimmer of hope for anticompetitive professional practices other than price fixing. In a footnote, the Court did not preclude the possibility that under the rule of reason the public service aspect and other features of the professions might justify competitive restraints that would be condemned if practiced by other occupations. A footnote, however, is a notoriously weak reed on which to base future action. And in any event, anticompetitive practices will have to be justified on the merits, not with homilies about professionalism. The famous footnote 17, in our view, is nothing more than a recognition of the traditional "Rule of Reason" analytical approach when dealing with other than per se illegal restraints.

Post-Goldfarb opinions support this view. In United States v. National Society of Professional Engineers, 5/ the Division attacked as a per se violation a prohibition against any form of competitive bidding contained in the code of ethics of a professional engineers association. The prohibition impeded price competition by blocking the

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5/ No. 76-1023 (D.C. Cir., 1977).

free flow of price information to users of engineering services. The Court of Appeals for the District of Columbia sustained the Division's challenge, holding that blanket prohibitions against competitive bidding are a per se violation of the Sherman Act.

There are still other areas where the law is unsettled. An agreement to ban advertising if adopted by businessmen would be a per se violation of the antitrust laws. 6/ The extent to which this analysis would (or should) apply to agreements among professionals to limit advertising is unsettled. The Supreme Court is at present faced with the questions of whether a broad prohibition against legal advertising mandated by the Arizona Supreme Court violates either the First Amendment or the Sherman Act in the case of Bates v. Arizona State Bar. The Department has filed an amicus brief in Bates supporting the petitioners' First Amendment contentions, but opposing their antitrust arguments. Our opposition is premised on the view that commands emanating from a state's sovereign judicial body are immune from antitrust attack under the so-called "state action" doctrine of Parker v. Brown. 7/

6/ United States v. Gasoline Retailers Ass'n., 285 F.2d 688 (7th Cir. 1961).

7/ 317 U.S. 341 (1943).

Generally speaking, that doctrine confers antitrust immunity on certain types of conduct if it is compelled by the state acting in its sovereign capacity. In Cantor v. Detroit Edison Co., the Supreme Court held that a utility's privately inspired program to distribute "free" light bulbs in connection with the sale of electricity was unprotected by the state action doctrine. The state public service commission had approved the free light bulb program, and state law required its continuance absent commission approval. The Court reasoned, however, that since the private utility voluntarily devised the program, its use was not compelled by the state.

Cantor established a very narrow scope for the state action doctrine. Prior decisions had concluded that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity. Cantor appears also to include as a relevant factor concepts of fairness - - whether the state's participation in a private decision is so dominant that it would be unfair to hold the private party responsible for his conduct implementing the decision.

After Cantor, the federal district court in the Eastern District of Virginia was presented with a challenge to the practice of issuing advisory opinions defining the practice of law by the Council of the Virginia State Bar. At issue in Surety Title Insurance Agency v. Virginia State Bar, was a Council opinion holding that conducting a title search constitutes the practice of law. The private opinion had anticompetitive effects. To avoid assisting the unauthorized practice of law, attorneys boycotted real estate transactions where the title search was performed without a lawyer. Title insurers were thereby effectively precluded from competing with attorneys in title searches.

The district court reasoned that the issuance of such advisory opinions was compelled by the Virginia Supreme Court. In addition, it acknowledged the legitimate state interest in ensuring the competence and integrity of persons rendering legal services. The court found, however, that these objectives could be accomplished without the anticompetitive effects of the advisory opinion process. That process permitted financially interested

private attorneys to define the extent of their legal monopoly. Accordingly, the court held that the advisory opinion process could claim no antitrust shelter under the state action doctrine and unreasonably restrained trade in violation of the Sherman Act.

Both Cantor and Security Title provide clear warning that any antitrust immunity claimed by virtue of state regulation will be subject to close judicial scrutiny. A natural question is whether regulatory immunity may be invoked by private professionals who adopt anticompetitive restraints in the areas of price competition and advertising to promote ethical conduct. Where the feared abuses can be attacked as well through narrow criminal statutes or strict disciplinary measures, the claim of immunity should fail.[8/]

For many years, the anticompetitive activities of professionals have survived in a climate of benign neglect. That era has ended. The Antitrust Division has brought eight major suits against professionals within the past three years, including suits against the American Bar

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8/ Cf. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 96 S. Ct. 1817 (1976).

Association, the American Pharmaceutical Association, and the Texas State Board of Public Accountancy. We will remain active on a variety of fronts.

Obviously, the Division looks askance at any restrictions on independent pricing. The use of relative value guides to price medical services may be the next big battleground of antitrust attack. The Division has pending two civil suits challenging relative value guides used by the Illinois Podiatry Society and the American Society of Anesthesiologists.

Second, restrictions on advertising will be closely scrutinized.

Third, antitrust attention will be given to the involvement of private professionals in defining the scope of their legal monopolies, in establishing standards for entry, in accrediting professional schools, and in imposing discipline. It is difficult to perceive how private practitioners can approach these issues with the requisite antitrust neutrality because they have a pecuniary interest in their resolution. Due process would be violated if a judge resolved a dispute with that type of interest riding on the outcome.[9/]

9/ See Tumey v. Ohio, 273 U.S. 510 (1927); Ward v. Village Monroeville, 409 U.S. 57 (1972).

Fourth, the conduct and composition of state regulatory bodies will be investigated to ensure that private regulation does not masquerade under the cloak of state compulsion. Only commands that directly issue from a state's sovereign political bodies can confer antitrust immunity on private conduct taken to implement the commands.

Fifth, the Antitrust Division will be offering its views from time to time to assist states in their consideration of proposals for professional regulation. It may be that states that are considering the licensing of lightning-rod salesmen, tatoo artists, or wig-fitters, for example, would be interested in the probable anti-competitive impact and inflationary result on the economy before coming to a final decision.

The goals of professionals, consumers, and the Antitrust Division need not be antagonistic. We all are seeking ways to advance the public good in the delivery and pricing of professional services. Working in harmony, we should be able to achieve change for the better without courtroom battles. Litigation is an undesirable way to make reasoned policy decisions.

Professionals sit atop the pyramid of American society in many respects. They are highly educated, well-paid, and work in comfortable surroundings. Despite recent alarming trends in the opposite direction, society still gives the professions favored treatment and special deference.

The professions have a corresponding duty to make their services readily available to all who need them and at reasonable prices. This duty is recognized in ethical codes. The ABA's Code of Professional Responsibility states:

> "[I]mportant functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available."

I wish I were more confident, as a lawyer, that the legal profession, as an example, was living up to the letter and spirit of this proud ideal.

The antitrust laws can act as a spur to professionals in meeting their societal obligations. I would hope, however, that professionals will work voluntarily and in the public interest to eliminate anticompetitive practices

that interfere with the efficient delivery of services. The professions should be leaders of public opinion, not defendants in losing courtroom struggles. For our part, I pledge to you that, whichever path professionals take, the Antitrust Division stands ready to meet its responsibilities.