

CASENOTES

Rule of Reason, Per Se Rule, and Professional Groups: *National Society of Professional Engineers v. United States*¹—In 1972, the United States brought a civil antitrust action against the National Society of Professional Engineers, a professional group comprising approximately 69,000 of the 325,000 registered professional engineers in the United States.² The Government alleged that members of the Society had agreed to abide by a canon of ethics which prohibited the submission of competitive bids for engineering services.³ The Government further maintained that, as a consequence of the canon, price competition was suppressed among members of the Society contrary to section 1 of the Sherman Antitrust Act.⁴ Admitting the essential facts of the Government's complaint, the defendant Society interposed the affirmative defense that the canon should be sustained under the Rule of Reason because price competition among professional engineers is harmful to the public and to the profession.⁵ The Society averred that because each rendition of engineering services is unique, competitive bidding on most projects before the future services are fully planned is inherently deceptive and fraudulent. As such, competitive bidding could result in structures whose design endangers life

¹ 435 U.S. 679 (1978).

² *Id.* at 681-82.

³ *Id.* at 683 n.3, citing the National Society of Professional Engineers *Code of Ethics*, § 11(c). Section 11(c) provides:

Section 11—The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding. . . .

c. He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional engineering services is defined as the formal or informal submission, or receipt, or verbal or written estimates of cost or proposals in terms of dollars, man days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An Engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he shall withdraw from consideration for the proposed work. These principles shall be applied by the Engineer in obtaining the services of other professionals.

⁴ *United States v. National Soc'y of Professional Engineers*, 389 F. Supp. 1193, 1195, 1197 (D.D.C. 1974). Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

⁵ 435 U.S. at 684-85. Brief for Petitioner at 27, *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679 (1978). The Society argued that selection of

and safety. The Society further claimed that competitive bidding is the least efficient method of procuring professional engineering services.⁶

The United States District Court for the District of Columbia ruled that the ban was a per se violation of the Act, and refused to analyze the Society's Rule of Reason justification for the canon.⁷ On the basis of findings of fact concerning the history of the ban on competitive bidding, its scope, and the Society's enforcement mechanisms, the district court held that the ethical canon was "on its face a tampering with the price structure of engineering fees in violation of § 1 of the Sherman Act."⁸ On direct appeal,⁹ the Supreme Court vacated the district court's decision, and remanded the case for further consideration in light of its recent decision in *Goldfarb v. Virginia State Bar*.¹⁰

On remand, the district court found *Goldfarb* supportive of its use of a per se standard of review and, accordingly, reaffirmed its decision.¹¹ In reviewing *Goldfarb*, which held that the learned professions do not enjoy an exemption from the antitrust laws,¹² the district court identified three factors that led the Supreme Court to find a bar association's mandatory minimum fee schedule to be unlawful price-fixing: the nature of the restraint of trade, its enforcement by the professional association, and its adverse impact on consumers.¹³ Turning to the Society's ethical canon, the district court stressed that the ban was not an advisory measure, but was in fact an absolute prohibition of price competition. The district court further noted that Canon 11(c) was actively enforced by the Society, and that it had an adverse impact on consumers. The impact was significant because professional engineering services are essential to nearly every construction project.¹⁴ The Society neverthe-

an engineer by competence rather than bidding is in the public interest and reasonable because:

- (A) Bidding in engineering endangers life and safety;
- (B) Bidding in engineering suppresses the free exchange of information necessary to the profession;
- (C) Bidding in engineering frustrates and prevents competition in construction;
- (D) Selection by competence tends to decrease, and bidding tends to increase, construction, maintenance, operating, and life-cycle costs;
- (E) Selection by competence is the best way to secure optimum design, and bidding leads to functional inefficiency; and
- (F) In engineering, bidding is inherently deceptive and fraudulent.

⁶ 434 U.S. at 685 n.7.

⁷ *United States v. National Soc'y of Professional Engineers*, 389 F. Supp. 1193, 1199 (D.D.C. 1974).

⁸ *Id.* at 1200.

⁹ 422 U.S. 1031 (1975). The direct appeal was made pursuant to 15 U.S.C. § 329 (1970), which was amended on December 29, 1974 to provide for initial review in the courts of appeal in most cases. 15 U.S.C. § 29(a) (1976).

¹⁰ 421 U.S. 773 (1975). *Goldfarb* was decided during the same Term as the direct appeal.

¹¹ 404 F. Supp. 457, 460-61 (D.D.C. 1975).

¹² 421 U.S. at 787.

¹³ 404 F. Supp. at 460.

¹⁴ *Id.*

less claimed that *Goldfarb* stands for the proposition that Rule of Reason analysis, rather than per se rule analysis, is required when professional activities or a professional code of ethics is at issue. This contention was flatly rejected by the district court. In the court's view, such a construction of *Goldfarb* would in large measure revive the learned profession exemption which the *Goldfarb* Court had negated.¹⁵ The district court observed that *Goldfarb* did not use the Rule of Reason standard but applied the per se standard to its determination of price-fixing. Accordingly, the district court concluded that price-fixing "receives no privileged treatment when incorporated into a code of ethics."¹⁶ On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the district court's decision.¹⁷

The Supreme Court granted certiorari¹⁸ to determine whether a professional group's canon of ethics which inhibits price competition in the provision of professional services can be justified as a reasonable restraint of trade because it was adopted to protect the public from deceptive bidding and substandard work.¹⁹ In an opinion written by Justice Stevens, joined by four Justices,²⁰ the Court HELD: An ethical canon forbidding the discussion of prices with potential clients until one member of the professional group is selected for work on its face violates section 1 of the Sherman Act.²¹ The Court further held that a defense based on the assumption that competition is harmful to public safety cannot be justified under the Rule of Reason.²²

The significance of *Professional Engineers* lies in the Court's reassertion of the limits of the Rule of Reason and in the imposition of these limits upon the learned professions. The Court refused to provide an anti-trust exemption for professionals by approving a broader definition of "reasonableness" than currently exists for nonprofessional commerce. Nevertheless, the Court acknowl-

¹⁵ *Id.* at 461.

¹⁶ *Id.*

¹⁷ 555 F.2d 978, 984 (D.C. Cir. 1977). In holding that firm remedial action was warranted, the court of appeals stated that the case presented a program of "all-out interdiction of price information for the client who has not selected its engineer." *Id.* at 983. The court nevertheless indicated that the Society could move the district court for a modification of its decree if the Society adopted a canon more tailored to the legitimate objective of preventing deceptively low bids. *Id.* The court of appeals modified the judgment with respect to that part of the injunction ordering the Society to publish in its journal and ethical opinions that competitive bidding is an ethical practice for an engineer. The court determined that such a remedy was more intrusive than necessary to fulfill the government's interest in eradicating the violation. *Id.* at 984.

¹⁸ 434 U.S. 815 (1977).

¹⁹ *Id.* at 681.

²⁰ *Id.* at 680. Justices Blackmun and Rehnquist concurred in the judgment, joining in Part I of the opinion, which recited the facts, and Part III, which upheld the remedial order as modified by the court of appeals. *Id.* at 699-701. The Chief Justice concurred in the Court's finding of a Sherman Act violation, but dissented from the remedy on first amendment grounds. *Id.* at 701. Justice Brennan took no part in the decision.

²¹ *Id.* at 692.

²² *Id.* at 696.

edged the need to consider professional concerns by recognizing that the form of professional competition is apt to vary from ordinary business competition. Despite this recognition, the factors which the lower courts will apply to distinguish professional competition from ordinary business competition remain unclear.

After a brief review of the Court's reasoning in *Professional Engineers*, this casenote will survey the historical background and development of both the Rule of Reason and the per se doctrine under the Sherman Act. Next, the evolution of the learned profession exemption will be traced through to its demise in *Goldfarb*. In assessing the Court's analysis in *Professional Engineers*, particular attention will be devoted to the Court's refusal to recreate the learned profession exemption and to the Court's restatement of the Rule of Reason with regard to all antitrust litigants. Because the Court did not define the difference between the "business aspects" of a profession and its inherently "professional aspects," the former being subject to the strictures of the antitrust laws, a model will be suggested for isolating the two. Finally, the state action doctrine will be noted briefly in light of its importance in analyzing professional restraints of trade.

I. THE COURT'S REASONING IN *PROFESSIONAL ENGINEERS*

The Supreme Court framed the issue before it as whether a canon of ethics can be justified under the Sherman Act merely because members of a learned profession believe it will minimize the risk of professional competition leading to work endangering the public safety.²³ The Court commenced its analysis of this issue with a close examination of the nature of the engineering profession, the training of professional engineers, the effect of their work on the economy, and the methods by which the members compute their fees. The Court then turned to its 1975 *Goldfarb* decision, where the Court intimated that certain professional practices might be upheld under the Rule of Reason even though they might be considered unlawful if engaged in by nonprofessionals. In this connection, the Court noted that the petitioner Society had placed great reliance on a footnote to the *Goldfarb* opinion,²⁴ as well as the major Rule of Reason cases.²⁵ The Society used this authority to con-

²³ *Id.* at 681.

²⁴ 421 U.S. at 788-89 n.17. The *Goldfarb* Court noted:

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

²⁵ E.g., *Mitchel v. Reynolds*, 1 P. Wms. 181, 1 All Eng. Reprints [1558-1774] 26 (Q.B. 1711); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Chicago Bd. of*

tend that its attempt to preserve the traditional fee setting method was a reasonable means of protecting the public from harmful, unrestrained competitive bidding by professional engineers. To evaluate this contention, the Court felt compelled to reexamine the contours of the Rule of Reason.²⁶

The Court began its examination of the Rule with the observation that the language of the Sherman Act proscribing "every" contract which restrains trade cannot be taken literally.²⁷ In particular, the Court noted that Congress expected the courts to give shape to the Act by drawing on common law principles.²⁸ The Court stated that the Rule of Reason, with its genesis in the common law, has fulfilled this function. Nevertheless, the Court cautioned that the Rule does not justify restraints of trade merely because they may fall within the realm of reason.²⁹ Rather, the Rule looks directly to a challenged restraint's impact on competitive conditions. To demonstrate the Rule's limits, the Court restated the well-settled principle that neither the reasonableness of prices set by private agreement³⁰ nor the contention that monopolistic arrangements in a particular industry may better serve the public³¹ are protected by the Rule of Reason. Accordingly, the Court directed those who would advance such argument to address them to Congress as the proper institution to grant any exemption from the Act for specific industries.³²

Following this discussion of the Rule's parameters, the Court set out the test established in *Standard Oil Co. v. United States*,³³ which is typically used to determine whether a challenged restraint unreasonably restricts competitive conditions. Under this test, unreasonableness is determined either (1) by the nature or character of the contracts, or (2) by surrounding circumstances which evince a purpose or intent to restrain trade and enhance prices.³⁴ The Court emphasized that under either branch of the *Standard Oil* test the focus is only on the restraint's impact on competitive conditions.³⁵ The Court further identified the first branch of the test as relevant to agreements that

Trade v. United States, 246 U.S. 231 (1918); and *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

²⁶ 435 U.S. at 687.

²⁷ *Id.*

²⁸ *Id.* at 687-88 (citing remarks of Senator Sherman, 21 CONG. REC. 2456 (March 21, 1890)).

²⁹ *Id.* at 688.

³⁰ *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282-83 (6th Cir. 1898).

³¹ *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 339 (1897); *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 573-77 (1898), *aff'd*, 175 U.S. 211 (1898).

³² 435 U.S. at 689-90.

³³ 221 U.S. 1 (1911).

³⁴ 435 U.S. at 691; *Standard Oil Co. v. United States*, 221 U.S. at 58.

³⁵ *Id.* at 690. The Court followed this with an explanation of the test provided by Justice Brandeis in *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918). In *Chicago Bd. of Trade*, Justice Brandeis looked for either a promotion or a suppression of competition by the restraint, while taking into account the possibility that some restraints, while regulating competition, may thereby actually promote it. *Id.* at 238. The Court in *Professional Engineers* adopted this approach. 435 U.S. at 691.

are plainly anticompetitive—illegal per se. The second and complementary branch of analysis was identified as involving agreements whose competitive impact can only be determined by a more searching inquiry that takes account of the peculiar nature of the business, the history of the restraint, and the reasons for its imposition.³⁶

Applying this analysis to the Society's ban on competitive bidding, the Court had little difficulty in finding the ethical canon facially invalid under the Sherman Act. Noting that any agreement which interferes with the setting of prices by free market forces is illegal on its face,³⁷ the Court viewed Canon 11(c) as an agreement among competitors to refrain from discussing prices with potential customers. While the Court would not attach the label of direct price-fixing to the ban,³⁸ it did find it to be a price interference mechanism. Thus, the Court ruled out an elaborate industry analysis under the Rule of Reason. Since the bidding ban was absolute, in that it applied with equal force to both complicated and simple projects and failed to discriminate between inexperienced and sophisticated customers, the Court readily discovered an anticompetitive purpose behind the canon. Borrowing from the language of the district court,³⁹ the Court stated that Canon 11(c) impedes the ordinary workings of the marketplace and deprives customers of the ability to compare prices when seeking engineering services.⁴⁰ Although the Court was willing to assume, for the purpose of argument, that competitive bidding in the engineering context might force prices down, lead to inferior work, and, in some instances, be inherently imprecise, the Court refused to allow these considerations to justify the Society's ban under the Rule of Reason. The Court observed that a purchaser might reasonably conclude that quality concerns outweigh price advantages gained through seeking competitive bids and that an individual vendor might be reasonable if he independently refrained from submitting any price information until he has familiarized himself with the client's needs.⁴¹ These considerations would not, however, authorize vendors of engineering services to impose noncompetitive pricing on all purchasers.

In thus refusing to sustain the canon under the Rule of Reason, the Court bluntly stated that the Society's action in imposing its views on the costs and benefits of competition on the entire marketplace was "a frontal assault

³⁶ *Id.* at 692.

³⁷ *Id.* (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226, n.59 (1940)).

³⁸ *Id.*

³⁹ 404 F. Supp. at 460.

⁴⁰ 435 U.S. at 692-93.

⁴¹ *Id.* at 694. In this regard, the Court briefly referred to the Brooks Act, 40 U.S.C. §§ 541-544 (1976). This Act provides a method of engineer selection for certain federal contracts that is similar to the "traditional method" of selection embodied in Canon 11(c). *Id.* The Court cautioned that the Brooks Act cannot be read to create an antitrust exempt for engineering services and amounts to nothing more than a decision by one purchaser not to seek price competition through competitive bidding. The Court declared that the Brooks Act does not authorize vendors of engineering services to impose this determination on all other purchasers. 435 U.S. at 694-95 n.21.

on the basic policy of the Sherman Act."⁴² The Court identified this policy as a legislative judgment in favor of competition that precludes judicial inquiry into whether competition is good or bad.⁴³ Therefore, the Court refused to consider the profession's involvement in large-scale projects which significantly affect public safety as a factor in favor of its competitive ban. The Court reasoned that with the vast number of potentially dangerous goods and services in an economy such as ours, any exemptions to the Sherman Act granted on this basis would be equivalent to a repeal of the statute.⁴⁴

The Court concluded its opinion by clarifying the significance of the footnote in *Goldfarb* which suggested that antitrust concepts developed in other contexts would not be automatically applied to the professions.⁴⁵ It flatly declared that this recognition is not to be read as carving out a broad learned profession exemption through the Rule of Reason. While still adhering to the *Goldfarb* view that the nature of professional competition may vary from ordinary business competition, the Court asserted that only those ethical norms which serve to promote professional competition would fall within the Rule's protection.⁴⁶ Thus, the Court stated that although problems of professional deception are a proper subject for an ethical canon, any canon which equates competition with deception and safety hazards is too broad.⁴⁷

Justice Blackmun, joined by Justice Rehnquist, concurred in the Court's judgment,⁴⁸ but was reluctant to wholly approve the opinion. He perceived the Court's holding to be that a professional group's ethical rule with an overall anticompetitive effect is necessarily violative of the Sherman Act. Justice Blackmun felt it was unnecessary for the Court to pass on the Rule of Reason in this case. Rather, he stressed that Canon 11(c) could be held overbroad for two reasons. First, the "forced process of sequential search" by a client seeking price information, due to the operation of the canon, inevitably discourages price competition without possessing the redeeming feature of preventing the submission of uninformed bids by engineers. Second, Justice Blackmun found the canon overbroad because it prevents engineers from releasing any price information regardless of the extent of the need to protect the purchaser from imprecise bids.⁴⁹ Having thus concluded that the Court's Rule of Reason analysis was unnecessary, Justice Blackmun expressed concern that essential ethical rules would be held invalid under the Court's reasoning. In particular, Justice Blackmun feared that the majority opinion did not allow enough "elbow room" for a realistic application of the Sherman Act to professional activities.⁵⁰

⁴² 435 U.S. at 695.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See note 24 *supra*.

⁴⁶ 435 U.S. at 696.

⁴⁷ *Id.*

⁴⁸ *Id.* at 699.

⁴⁹ *Id.* at 699-700.

⁵⁰ *Id.* at 700-01.

II. CONCEPTUAL BASIS FOR EVALUATING PROFESSIONAL ANTITRUST VIOLATIONS

From the inception of the Sherman Act in 1890 until the very recent past, activities of professional groups were thought to be outside the operation of the antitrust laws. The professions were left to state and self-regulation. Not until the 1975 *Goldfarb* decision did the Supreme Court squarely hold that professional groups enjoy no exemption from the antitrust laws. In the aftermath of *Goldfarb*, the Supreme Court is undergoing a period of developing the parameters of the newly recognized subjection of the learned professions to antitrust laws. *Professional Engineers* is only the second Supreme Court decision construing how professional activities are to be tested when challenged under the antitrust laws. A brief examination of the evolution of the Rule of Reason, the per se doctrine, and the previous learned profession exemption will provide a backdrop for assessing this decision.

A. Doctrinal Underpinnings of the Sherman Act

A proper understanding of the Sherman Antitrust Act requires that it be viewed as aimed not so much against "trusts" as against restraints of trade. At common law, contracts in general restraint of trade were considered contrary to public policy, and hence unlawful and void, while agreements which partially restrained trade were valid if the restraint was lawful, the consideration adequate, and the restriction reasonable.⁵¹ *Mitchel v. Reynolds*,⁵² which the *Professional Engineers* Court identified and discussed as the genesis of the Rule of Reason,⁵³ held that a general restraint—an agreement not to compete throughout the kingdom for an unlimited time—was invalid because it was injurious to the individual whose livelihood was lost, and to the public at large which was denied the services of a useful member.⁵⁴ In time, the nature of the injury to the public assumed primary importance, and the term "general restraint of trade" evolved to "unreasonable restraint of trade." In *Mitchel*, Chief Justice Parke condemned general restraints because, among other reasons, of "the great abuses these voluntary restraints are liable to, as for instance, from corporations who are perpetually labouring for exclusive advantages in trade and to reduce it into as few hands as possible."⁵⁵

The cynical view of corporate power expressed in *Mitchel* became even more prevalent during the nineteenth century. With the rise of trusts after 1880, led by the Standard Oil Company's near monopolization of the domestic oil industry, public alarm increased and provided the impetus for the Sherman Antitrust Act of 1890. At that time it was widely felt that the impingement of competition by the great economic concentrations in railroads and manufacturing was a problem of national scope and beyond the ability of

⁵¹ *Craft v. McConoughy*, 79 Ill. 346, 349 (1875). Cf. *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, 672 (1880).

⁵² 1 P. Wms. 181, 1 All Eng. Reprints [1558-1774] 26 (Q.B. 1711).

⁵³ 435 U.S. at 688.

⁵⁴ 1 P. Wms. 181, —, 1 All Eng. Reprints [1558-1774] at 30-31.

⁵⁵ *Id.* at —, 1 All Eng. Reprints [1558-1774] at 30.

the states individually to control. The Sherman Act was enacted to correct this situation.⁵⁶ The Act did not announce novel principles of law; it merely enabled the federal courts to apply well-settled common law principles to restraints formerly regulated by state law. In this way, Congress intended to help the states control combinations in restraint of trade.⁵⁷ The interpretation of this statute, which proscribes "[e]very contract, combination . . . , or conspiracy in restraint of trade,"⁵⁸ eventually gave rise to two distinct but related methods of evaluating alleged restraints of trade—the Rule of Reason and the *per se* rule.

B. *Origins and Development of the Rule of Reason and the Per Se Rule*

At an early date, the Supreme Court recognized that Congress intended the Sherman Act to be given life through the common law definition of reasonableness. In *Standard Oil Co. v. United States*,⁵⁹ Chief Justice White set forth the principle that reasonableness was to be the guideline in interpreting the Act.⁶⁰ The application of this standard became known as the Rule of Reason. The Rule was given further shape seven years later by Justice Brandeis in *Chicago Board of Trade v. United States*.⁶¹ In that case, a rule of the Board of Trade of Chicago prohibited its members from purchasing grain "to arrive" from outside Chicago between the close of the Board and the opening of business the next day for any price but that set at the close of bidding.⁶² The Government alleged that this price-fixing activity constituted a violation of the Sherman Act. The Supreme Court rejected this allegation as a "bald proposition" and declined to equate any activity which restrains competition with a violation of the Sherman Act by "so simple a test."⁶³ Rather, a restraint which "merely regulates and perhaps thereby promotes competition" is legitimate, as opposed to one which "is such as may suppress or even destroy competition."⁶⁴

⁵⁶ III AMERICAN LANDMARK LEGISLATION 5-14 (I. Sloan ed. 1976).

⁵⁷ As stated by its sponsor, Senator Sherman:

It [the bill] does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Governments. Similar contracts in any State in the Union are now, by common or statute law, null and void.

... This bill, as I would have it, has for its single object to invoke the aid of the courts of the United States to deal with the combinations described in the first section. . . .

21 Cong. Rec. 2456-57 (March 21, 1890)(remarks of Senator Sherman). See also cases cited by Senator Sherman, *Id.* at 2457-59.

⁵⁸ See note 4 *supra*.

⁵⁹ 221 U.S. 1 (1911).

⁶⁰ *Id.* at 60.

⁶¹ 246 U.S. 231 (1918).

⁶² *Id.* at 236-37.

⁶³ *Id.* at 238.

⁶⁴ *Id.*

In order to classify this restraint, the *Chicago Board of Trade* Court ruled that "the courts must *ordinarily* consider the facts peculiar to the business to which the restraint is applied . . ." ⁶⁵ This in turn requires a study of the business before and after the restraint was imposed, the nature of the restraint, and its actual or probable effect. The intent behind the restraint is relevant, but the Court warned that good intent will not save an unreasonable restraint. Rather, intent is ascertained merely to assist the trial court in reaching an understanding of all the facts. ⁶⁶ Applying the *Standard Oil* test to the Board of Trade call rule, the restraint was deemed reasonable because it was to operate for a limited time only, applied only to a small part of the grain coming to Chicago, and had the competitive benefit of facilitating market penetration by outside dealers. Additionally, the call rule was seen to make the market more competitive by encouraging members to bid openly during the business day. ⁶⁷

While the *Chicago Board of Trade* test stands as the classic statement of the Rule of Reason, certain language from the opinion has engendered considerable difficulty by unnecessarily increasing the length and complexity of anti-trust defenses. The statement in *Chicago Board of Trade* that trial courts must *ordinarily* make a detailed study of a defendant's industry to gauge the impact of a practice on competition ⁶⁸ has been used by defendants to promote fruitless inquiries. These inquiries to ferret out reasonableness add nothing to the trier of fact's understanding of the practice and instead invoke exotic standards of reasonableness. ⁶⁹ While the Court recently has stated that Rule of Reason analysis is the general rule, ⁷⁰ and thus the in-depth inquiry of *Chicago Board of Trade* is generally proper, it must not be forgotten that inquiry into

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 239-41.

⁶⁸ *Id.* at 238 (emphasis added).

⁶⁹ See, e.g., *Fashion Originator's Guild v. FTC*, 312 U.S. 457 (1941), wherein retaliatory methods by means of a concerted boycott and private tribunal and enforcement mechanisms were advocated as a reasonable means to prevent competitors from pirating clothing designs. Cf. *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958), wherein per se rules of illegality were approved by the Court as obviating "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry, 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." *Id.* at 5. *Northern Pacific* was quoted with approval by the Court in *United States v. Topco Assocs.*, 405 U.S. 596 (1972). There the Court, per Justice Marshall, recognized that "courts are of limited utility in examining difficult economic problems." *Id.* at 609. The Rule of Reason was seen by the Court as causing courts "to ramble through the wilds of economic theory in order to maintain a flexible approach." *Id.* at 609-10 n.10. No less a supporter of the rule than Professor Handler has had occasion to observe that "there was a dangerous breadth to the rule of reason . . . which had the tendency of making each case a law unto itself, vastly increasing the difficulties of enforcing the antitrust laws." *Study of the Antitrust Laws: Hearings on S. Res. 61 Before the Subcomm. on Antitrust & Monopoly of the Senate Judiciary Comm.*, 84th Cong., 1st Sess. Vol. I, 36 (1955).

⁷⁰ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. at 49.

reasonableness is narrow in that it is only seeking to bring to light the competitive impact of the challenged restraint.⁷¹

Coexistent with the Rule of Reason in antitrust analysis is the per se rule of illegality. Like the Rule of Reason, the per se doctrine is used to identify a deleterious competitive impact when passing on the unreasonableness of a trade restraint. Unlike the Rule of Reason, however, the per se analysis does not require an extended probe into the nature of the defendant's industry to find unreasonableness. Rather, the per se rule rests on a conclusive presumption, based on prior judicial experience, that certain enumerated practices are inherently unreasonable. Among these proscribed practices are price-fixing,⁷² group boycotts,⁷³ and territorial limitations on competition.⁷⁴ If the challenged practice cannot readily be shown to possess a plain anticompetitive purpose and effect, then it does not fall into the per se category; the Rule of Reason is then utilized. If, however, a practice is found to be a per se violation, there is no need to analyze the impact which the practice has on competition within the industry. The Rule of Reason cannot be invoked to rescue the restraint and the court's inquiry is ended.

While the per se rule has its roots in the earliest Supreme Court antitrust cases,⁷⁵ it was not until *United States v. Trenton Potteries Co.*,⁷⁶ decided nine years after *Chicago Board of Trade*, that the Court came to conclusively presume a practice unlawful in all circumstances and not on a case-by-case basis. The defendants in *Trenton Potteries* controlled eighty-two percent of the manufacture and distribution of ceramic bathroom fixtures and combined to fix their prices. The trial court refused to give the jury certain charges, some of which were drawn from language of *Chicago Board of Trade*.⁷⁷ The defendants had requested that the jury be charged that it must find that the fixed prices unreasonably restrained interstate commerce before it could return a guilty verdict. After reviewing prior judicial experience with price-fixing,⁷⁸ the Supreme Court in *Trenton Potteries* ruled that the trial court did not commit error when it charged that price-fixing is an unreasonable restraint of trade as a matter of law.⁷⁹ The Court noted that every price-fixing agreement aims at the elimination of one form of competition. Reasonableness of the fixed prices is immaterial because the power to fix reasonable prices is the power to

⁷¹ *Id.*

⁷² *United States v. Trenton Potteries*, 273 U.S. 392, 396-97 (1927); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 218.

⁷³ *Fashion Originators Guild v. F.T.C.*, 312 U.S. 457, 468 (1940).

⁷⁴ *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972).

⁷⁵ *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897); *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898).

⁷⁶ 273 U.S. 392, 397-401 (1927).

⁷⁷ *Id.* at 395.

⁷⁸ *Id.* at 397. This review included the cases of *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897); *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (1898), *aff'd*, 175 U.S. 211 (1899); *Swift & Co. v. United States*, 196 U.S. 375 (1905); *Dr. Miles Medical Co. v. Park & Sons*, 220 U.S. 373 (1911).

⁷⁹ 273 U.S. at 395-96.

fix unreasonable ones. Rather, the Court observed "[t]he reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow."⁸⁰

The Court in *Trenton Potteries* distinguished *Chicago Board of Trade* as upholding a price for only part of each day that had been "determined by open competition on the floor of the Exchange."⁸¹ Furthermore, since regulation of a Board of Trade was involved, the Court held that *Chicago Board of Trade* did not sanction price agreements among competitors in an open market.⁸² The Court then referred to the requested charges that were drawn from the language of *Chicago Board of Trade*. The Court agreed that they were correct "as a general abstraction," but stated that they were "inapplicable to the case in hand and rightly refused."⁸³ The *Trenton Potteries* Court thus ruled that an elaborate industry examination to determine reasonableness, as set out by *Chicago Board of Trade*, is not universally required in litigation under section 1 of the Act, and that an agreement to fix prices is an instance which is conclusively presumed to be unlawful.

The per se rule as applied to price-fixing was expanded by the Court in *United States v. Socony-Vacuum Oil Co.*⁸⁴ *Socony-Vacuum* firmly established that any agreement which is intended to manipulate prices, and not merely overt price-fixing, is illegal per se. The defendants in that action were convicted of conspiring to raise gasoline prices by buying up and removing from the market "distress gasoline" which exerted a downward pressure on prices.⁸⁵ Employing the term "per se" for the first time, the Court, through Justice Douglas, held that "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate commerce is illegal per se."⁸⁶ The Court refused to consider whether price-fixing might be a reasonable way to correct competitive abuses.⁸⁷ It stated that Congress "has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies."⁸⁸ Thus, the *Socony-Vacuum* Court expressly precluded Rule of

⁸⁰ *Id.* at 397.

⁸¹ *Id.*

⁸² *Id.* at 401.

⁸³ *Id.*

⁸⁴ 310 U.S. 150 (1940).

⁸⁵ *Id.* at 167-68.

⁸⁶ *Id.* at 223.

⁸⁷ In the depression era decision of *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933), the Supreme Court appeared to retreat from the per se rule of *Trenton Potteries*. In *Appalachian Coals*, the defendants' industry was regarded as being so highly competitive as to be unhealthy. The Court approved the defendants' creation of a single marketing agency to stabilize the industry as a reasonable means of fostering "fair competitive opportunities" to promote competition on a sounder basis. *Id.* at 372-74. Thus, the Court upheld price sustaining mechanisms under the Rule of Reason. *Id.*, at 377-78. Whether *Appalachian Coals* rested in part upon shaken faith in the virtues of unrestrained competition can only be speculated. See also L. SULLIVAN, ANTITRUST 179-82 (1977). The matter of price-fixing and gradations thereof was finally put to rest by the *Socony-Vacuum* Court.

⁸⁸ 310 U.S. at 221.

Reason analysis, holding that price-fixing agreements are conclusively presumed unreasonable and hence incapable of legal justification.⁸⁹ This is so, the Court ruled, because of their actual or potential threat to the economic system.⁹⁰ Even though the means employed by the respondents were similar to objectives of the National Industrial Recovery Act,⁹¹ which granted anti-trust immunity in certain instances, this did not shield them from prosecution. Neither, the Court noted, did the fact that certain government officials may have known and tacitly approved of the activities. As to the first matter, the respondents did not receive National Recovery Administration approval for their scheme and they were thus outside the protection of the statute. In any event, the Court declared that although evidence of similarity with governmental objectives and tacit approval by some government officials may have bearing in a Rule of Reason case, it has none in a per se case.⁹²

The standard for identifying activities as illegal per se⁹³ was set out by the Court in *Northern Pacific Ry. v. United States*.⁹⁴ The Court held that "because of [the] pernicious effect on competition and lack of any redeeming virtue" of certain agreements or practices, they 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."⁹⁵ The justifications for the per se rule of illegality are, as the *Northern Pacific* Court noted, certainty of law and judicial economy.⁹⁶ While the per se rule may be the exceptional application and the Rule of Reason the general rule, the *Northern Pacific* standard still has great vitality whenever a per se violation is shown.⁹⁷

C. The Demise of the Learned Profession Exemption: Goldfarb

Prior to the 1975 *Goldfarb* decision, it was widely believed that the learned professions were exempt from the operation of the antitrust laws⁹⁸ and, accordingly, that the professions were unaffected by either the Rule of Reason or the per se doctrine. This assumption rested on statutory construction and policy arguments. Under the former thesis, the professions were outside the scope of the Sherman Act because the rendering of professional services was not trade or commerce, and hence not regulated by the Act.⁹⁹ In addition,

⁸⁹ *Id.* at 224-26 n.59.

⁹⁰ *Id.*

⁹¹ Ch. 90, § 3, 48 Stat. 195 (1933) (enacted June 16, 1933, expired June 16, 1935).

⁹² 310 U.S. at 227-28.

⁹³ See text at notes 72-74 *supra*.

⁹⁴ 356 U.S. 1 (1958).

⁹⁵ *Id.* at 5.

⁹⁶ *Id.*

⁹⁷ See *Continental T.V. Inc. v. GTE Sylvania*, 433 U.S. at 50.

⁹⁸ See Joseph P. Bauer, *Professional Activities and the Antitrust Laws*, 50 NOTRE DAME LAWYER 570, 571-92 (1975). See also *Goldfarb v. Virginia State Bar*, 497 F.2d 1, 13-15 (4th Cir.1974), *rev'd*, 421 U.S. 773 (1975).

⁹⁹ Bauer, *supra*, note 98, at 573-79.

professional services were essentially local in nature, and thus not a matter of interstate commerce.¹⁰⁰ In contrast, the policy-based thesis held that professional ideals and values were inconsistent with the competitive values which the Sherman Act espoused, and that the professions were already subject to state regulation. Thus, the learned professions were considered to be beyond the reach of federal antitrust regulation.¹⁰¹

The profession-trade dichotomy was supported by dicta in several early cases,¹⁰² but little else. The genesis of the judicial distinction was a statement by Justice Story in a case involving fishermen.¹⁰³ He maintained that "[w]henver any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, *not in the liberal arts or in the learned professions*, it is constantly called a trade."¹⁰⁴ In *Federal Baseball Club v. National League*,¹⁰⁵ Justice Holmes offered by way of further illustration that "a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in [interstate] commerce because the lawyer or lecturer goes to another State."¹⁰⁶ These cases did not determine that Congress intended the professions to be exempt from the Act, but rather applied now outmoded standards of "trade" and "interstate commerce" to find an exemption.

The question whether the professions are exempt from the operation of the antitrust laws was squarely faced and decided by a unanimous Court in *Goldfarb*.¹⁰⁷ At issue was a lawyers' minimum fee promulgated by the Fairfax County Bar Association of Virginia. The *Goldfarb* Court was required to decide whether the minimum fee schedule amounted to price-fixing. If it did find price-fixing, the Court then was required to determine whether the activities of the bar association were exempt from the Sherman Act because they did not affect interstate commerce or because of a learned profession exemption. In deciding that the minimum fee schedule amounted to price-fixing, the Court emphasized that it was not passing upon an advisory fee schedule, but rather a rigid price floor for legal services.¹⁰⁸ This rigidity was manifested by the refusal of the attorneys contacted by the petitioner to deviate from the minimum fee and by the consistent enforcement of the schedule.¹⁰⁹ The Court readily found that the fee schedule had an effect on interstate commerce, even though the title search sought by petitioners was to be per-

¹⁰⁰ *Id.* at 571.

¹⁰¹ *Id.*

¹⁰² See *The Schooner Nymph*, 18 F. Cases 506, 507 (C.C.D. Me. 1834); *Atlantic Cleaners and Dyers Inc. v. United States*, 286 U.S. 427, 436 (1932); *FTC v. Raladam Co.*, 283 U.S. 643, 653 (1931).

¹⁰³ *The Schooner Nymph*, 18 F. Cases 506 (C.C.D. Me. 1834).

¹⁰⁴ *Id.* at 507 (emphasis added).

¹⁰⁵ 259 U.S. 200 (1922).

¹⁰⁶ *Id.* at 209.

¹⁰⁷ 421 U.S. at 774. The Court ruled 8-0 against the restraint. Justice Powell, who is a past president of the Virginia Bar Association, absented himself from consideration of the case.

¹⁰⁸ *Id.* at 781.

¹⁰⁹ *Id.*

formed wholly within the State of Virginia, because substantial funds to finance real estate purchases in Fairfax County came from outside the state, and these interstate transactions were wholly dependent on title searches.¹¹⁰

Turning to the question of a learned profession exemption, the Court could not find that Congress intended the professions to enjoy a "sweeping exclusion" from the Sherman Act since the language of section 1 is broad and since there is a heavy presumption against implicit exemptions to the Act.¹¹¹ The Court determined that a title examination for money is "'commerce' in the most common usage of that word,"¹¹² and that it was not disparaging the practice of law as a profession by acknowledging such a business aspect.¹¹³ The Court indicated in an accompanying footnote that conventional antitrust concepts would not be automatically applied to the professions. The Court stated that some practices which would be viewed as violative of the Sherman Act in another context might be treated differently where one of the learned professions was involved.¹¹⁴ It was precisely this question which was at issue in *Professional Engineers*—whether the Rule of Reason, in its present form, will be automatically applied to restraints of trade embodied in the rules and regulations adopted by and governing professional associations.

III. AN ASSESSMENT OF THE COURT'S ANTITRUST ANALYSIS IN *PROFESSIONAL ENGINEERS*

A. *The Refusal to Revive a Learned Professions Exemption*

Taking heart from the dictum in *Goldfarb* that it would be "unrealistic to . . . automatically apply to the professions antitrust concepts which arose in other areas,"¹¹⁵ the petitioner in *Professional Engineers* argued that the rigid per se rule has no place in a challenge to a professional group's code of ethics. Since Canon 11(c) lay at the heart of the engineering profession's efforts to promote ethical conduct in dealings with nonprofessionals, the Society contended that the canon must be evaluated under the Rule of Reason.¹¹⁶ The Society further urged that when passing on the reasonableness of a professional ethical regulation, the Rule's inquiry, to be realistic, must entail considerations of public health and safety and professional ethical conduct.¹¹⁷

The Supreme Court utterly rejected the contentions advanced by the Society, and proceeded to analyze the alleged restraint under the per se rule. While the district court on remand found the ethical proscription to be a "classic illustration of price-fixing in the *Goldfarb* mold,"¹¹⁸ the Court was un-

¹¹⁰ *Id.* at 783-85.

¹¹¹ *Id.* at 787.

¹¹² *Id.* at 787-88.

¹¹³ *Id.* at 788.

¹¹⁴ *Id.* at 788 n.17. See note 26 *supra*.

¹¹⁵ See note 26 *supra*.

¹¹⁶ Brief for Petitioner at 56-57, *National Society of Professional Engineers v. United States*. For text of Canon 11(c), see note 3 *supra*.

¹¹⁷ *Id.* at 57.

¹¹⁸ 404 F. Supp. at 460.

willing to make that equation. Even though it would not term the ban direct price-fixing,¹¹⁹ the Court had no difficulty divining the anticompetitive character of the canon without the aid of extended Rule of Reason analysis.¹²⁰ The Court viewed the agreement embodied by Canon 11(c) as a refusal to discuss prices with potential customers until *after* the initial tentative selection of an engineer. Thus, in the Court's view, the Canon operated as a complete ban on competitive bidding.¹²¹ In reaching this conclusion, the Court attached weight to the ban's equal application to complicated and routine projects, and to inexperienced and sophisticated customers. As such, the ban represented a blanket approach.¹²² In a similar vein, the *Goldfarb* Court attached weight to the all-embracing nature of the lawyers' minimum fee schedule which created a pricing system consumers could not readily avoid.¹²³

The Court's use of this evidence should not be interpreted as meaning that a higher standard of proof is involved when a professional restraint of trade is at issue. The *Goldfarb* Court expressly noted that no specific magnitude of restraint need be proved if an adverse effect on interstate commerce is shown.¹²⁴ Rather, it appears that where a defense is premised on a claim of professional ethics, then a demonstration of the magnitude of the restraint is useful in showing that it actually rests on an anticompetitive purpose and effect. In other words, evidence of magnitude is helpful in penetrating an ethical facade to find a naked restraint of trade. Neither should the failure of the Court to employ the term "per se" in both *Professional Engineers* and *Goldfarb* be read as a dilution of that form of analysis in a professional context. Indeed, in *Professional Engineers* the Court affirmatively held that Canon 11(c) restrained trade "on its face,"¹²⁵ and in *Goldfarb*, the Court labelled the minimum fee schedule "a classic illustration of price fixing."¹²⁶

The Court in *Professional Engineers* thus squarely held that the Rule of Reason would not be reformulated for the learned professions, and that the professions would be held strictly accountable to the dictates of the Act, including the per se rule for price-fixing. By so holding, the Court prevented the dilution of the rule and a virtual resurrection of the former learned profession exemption.

B. Restatement of the Rule of Reason

1. Reassertion of Narrow Parameters

The Court's rejection of the Society's Rule of Reason argument provided the opportunity for restating and clarifying the parameters of the Rule. In

¹¹⁹ 435 U.S. at 692.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ 421 U.S. at 783.

¹²⁴ *Id.* at 785.

¹²⁵ 435 U.S. at 693.

¹²⁶ 421 U.S. at 783.

this light, the Court focused on the Society's misunderstanding of a Rule of Reason decision in the Term immediately previous. This decision, *Continental T.V. Inc. v. GTE Sylvania*,¹²⁷ overruled the 1967 *United States v. Arnold, Schwinn & Co.*¹²⁸ decision, which held that vertical territorial sales limitations were a per se violation of the Sherman Act.¹²⁹ The GTE Court declared the Rule of Reason to be the "prevailing standard of analysis,"¹³⁰ and expressed displeasure with the per se rule of illegality because of its harsh inflexibility.¹³¹ The GTE Court cautioned in a footnote, however, that *Schwinn* and GTE were concerned only with vertical territorial limitations, and did not pass upon the well-settled application of the per se rule to price-fixing.¹³² The petitioner in *Professional Engineers*, perhaps because it did not regard its practice as price-fixing, overlooked this factor. Thus, *Goldfarb* and GTE were read by the petitioner as constituting a trend toward the expansion of the Rule of Reason with a concurrent constriction of the per se doctrine. The Court was at pains to correct this misinterpretation in *Professional Engineers*, stoutly affirming that the "reason" of the Rule refers only to a reasonable impact on competitive conditions and nothing more.¹³³

The *Professional Engineers* Court further emphasized these narrow parameters by examining what the Rule does *not* entail—any conceivable justification which could be said to be within the realm of reason.¹³⁴ Thus, the reasonableness of fixed prices will not be weighed, nor may it be argued that monopolistic arrangements may better serve the public in some instances than competition.¹³⁵ The Court expanded its correction of the Rule's misconception by emphasizing the narrowness of the test as set forth in *Standard Oil* and *Chicago Board of Trade*.¹³⁶ The test of a restraint's reasonableness indicates one of two things—either the restraint reasonably or unreasonably affects competitive conditions. At the outset, of course, it must be shown that the practice, contract, or combination restrains or would tend to restrain trade in some way. Yet, while some actual or potential impact must be shown, the

¹²⁷ 433 U.S. 36 (1977).

¹²⁸ 388 U.S. 365 (1967).

¹²⁹ *Id.* at 378-79.

¹³⁰ 433 U.S. at 49.

¹³¹ *Id.* at 50 n.16.

¹³² *Id.* at 51 n.18.

¹³³ 435 U.S. at 690.

¹³⁴ *Id.* at 688.

¹³⁵ *Id.* at 689. The two cases which the Court cited for this proposition are not actually Rule of Reason cases. Both *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), and *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898), antedate the Court's acceptance of the Rule of Reason in *Standard Oil*. In both of these cases Justice Peckham speaking for the majority rejected adoption of a Rule of Reason construction of the statute and held that the word "every" as in "every contract, combination . . . , and conspiracy" meant exactly that. 166 U.S. at 312; 171 U.S. at 559, 575-77. Notwithstanding this basis for the decision, the proposition is quite correct even under the Rule of Reason.

¹³⁶ *Id.* at 690-91. See text and notes at 59-71 *supra*.

impact need not be great.¹³⁷ If a restraint is shown which is on its face unlawful, then the inquiry is ended and the restraint will be held to be conclusively presumed unlawful. Only when the restraint cannot categorically be typed a per se violation is the reasonableness test called for. Although the reasonableness test is the prevalent one in terms of frequency of use, it is still secondary in that it is used only *after* a per se violation is not found. This latter Rule of Reason test determines *only* whether the restraint merely regulates competition in a way which actually promotes it or whether the restraint suppresses or even destroys competition.

These limitations represent the essence of the Rule of Reason standard set by *Chicago Board of Trade*, which is often lost sight of by defendants urging the courts to apply an involved industry analysis to a challenged restraint. The proposition from *Chicago Board of Trade* that "the court must ordinarily consider the facts peculiar to the business to which the restraint is applied . . ." ¹³⁸ has been misapplied by defendants as an excuse to provide a "parade of horrors" thought to be peculiar to their business.¹³⁹ An additional element of the Rule of Reason inquiry, as enunciated in *Chicago Board of Trade*, is the purpose sought to be attained by the imposition of the restraint. While it has been declared that good intent will not save an unreasonable restraint,¹⁴⁰ the relevance of intent has been seized upon by defendants to color their actions as benevolent and in society's best interests, thus requiring a finding that the restraint is reasonable.

These two errors of interpretation are to be found in Society's case. The petitioner asserted that engineering is a unique profession and hence has many facts peculiar to it which would justify the restraint as reasonable even though it utterly prevented competition. As for intent, the Society argued that its restraint was *essential* to the public interest and to the ethics of its profession, and that it was not adopted to enrich members of that profession. Alternatively, the petitioner argued that the ban on competitive bidding was a regulation of competition which actually promoted competition. The Society maintained that bidding frustrates competition by the contractors who must utilize the design engineer's plans when competing for the award of the project. Therefore, the Society argued, its ban of competitive bidding among engineers facilitated competition among contractors, whose charges account for the greatest costs of new structures.¹⁴¹ In essence, the Society was contending

¹³⁷ See, *Goldfarb*, 421 U.S. at 785; *Klor's, Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207, 211-12 (1959); *Socony-Vacuum*, 310 U.S. at 224-26 n.59.

¹³⁸ 246 U.S. at 238.

¹³⁹ This use is taken out of context and ignores the test laid out in the immediately preceding sentence: "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Id.* Facts peculiar to the business is merely *one* element to be considered in making the above determination.

¹⁴⁰ 246 U.S. at 238.

¹⁴¹ Brief for Petitioner at 31, *National Society of Professional Engineers v. United States*. The Society argued that bidding frustrates and prevents competition among building contractors because:

that to insist upon competitive bidding among engineers was a penny wise, pound foolish course which would only make structures cost more in the long run. This argument was correctly rejected by the Court. If a regulation of competition is to be classified as promoting competition, it ought to enhance competition among the same generic competitors. It would be too attenuated to argue a "water mattress" theory that constriction of competition by one part of the economy enhances competitive conditions on another part of the economy. The affected industry analysis mandated by the Rule of Reason is involved enough without searching the horizons for proof that some group outside the affected industry has received a competitive impetus as a result of a restraint of trade. Whenever presented with the invitation, the Court has refused to countenance such a course of analysis.¹⁴²

2. Rejection of Public Safety Rationale

In essence, the petitioner's argument in *Professional Engineers* was that canon 11(c) should be upheld because it was a reasonable means of preventing harm to the public. The Court stood on solid ground in rejecting this contention, since it was not drawn to the narrow strictures of *Chicago Board of Trade*. The heart of the Society's argument was that Canon 11(c) was a reasonable restraint of competition. Because the Society so firmly believed that competition among engineers in pricing their services was antithetical to the public good or the morale of the profession, it was unable to show that Canon 11(c) was a reasonable restraint of trade which actually promoted competition. In the final analysis, there are reasonable restraints of trade and commerce, but the Court has never found a reasonable restraint of competition. The Society further argued that the canon was analogous to the Chicago Board of Trade's call rule because the canon, which forbade the dissemination of price information before the "initial tentative selection of an engineer," merely regulated the timing of competition.¹⁴³

The *Professional Engineers* Court rejected this analogy for two reasons. First, negotiation between a single vendee and vendor, as required by Canon

Selection of design engineers by bidding results in inadequate, incomplete, and ambiguous plans and specifications. This, in turn, makes construction bids non-comparable, and engenders disputes, additional construction costs and litigation between constructors and clients. Thus, insistence on the form of bidding in the selection of design engineers frustrates the reality of competitive bidding in the awarding of construction contracts.

Id.

¹⁴² See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596, 609-11 (1972). There the Court stated "Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion in another sector is one important reason we have formulated per se rules." See also *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1936) (where the Court stated in dictum that "a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence . . ."); *United States v. Masonite Corp.*, 316 U.S. 265, 276 (1942).

¹⁴³ 435 U.S. 693 n.19.

11(c), is not the equivalent of price competition by two or more potential sellers,¹⁴⁴ as in *Chicago Board of Trade*. By contrast, Justice Blackmun's concurring opinion in *Professional Engineers* accurately depicted the traditional method called for by Canon 11(c) as a forced process of sequential search which inevitably increases the costs of acquiring price information and thus discourages vendees from generating such competition.¹⁴⁵ Second, the *Chicago Board of Trade* Court stressed competitive impact and viewed the Board's restraint as promoting competition since it brought more buyers and sellers together,¹⁴⁶ while the restraint in *Professional Engineers* could hardly be viewed as promoting a competitive climate.¹⁴⁷ Rather, it hampered and discouraged price comparison and rested on the premise that price competition by engineers was harmful to vendees and the public at large.

Professional Engineers provides an excellent illustration of why "reasonableness" must be strictly limited to impact on competition, and why no consideration of broadly defined reasonableness or public safety in general should be allowed. First, as the Court correctly decided, to permit any rhetoric of public safety to alter antitrust analysis would give rise to exceptions to the Act for all potentially dangerous goods and services. Such exceptions would amount to a judicial repeal of the statute since a considerable number of goods and services are potentially harmful if mismanufactured or misprovided.¹⁴⁸ Second, well-established tort principles of products liability, and not the Sherman Act, are sufficient to protect the public from such dangers. Creating an exception to the Sherman Act through a reasonableness test which goes beyond competitive impact to consider safety questions seems particularly ill advised considering the existing complexity of the application of the Rule of Reason. Moreover, if the courts were to abandon the time-honored restrictive scope of the Rule, it would be treading on an area of policy which is peculiarly legislative.

C. Potentially Acceptable Professional Ethical Restraints

While the Court was willing to assume that competitive bidding for engineering services may be inherently imprecise and that individual purchasers might conclude that their interest in quality and safety outweighs considerations of cost savings, the Court regarded this decision as a matter of individual choice.¹⁴⁹ Even though these might be "reasonable" considerations, as

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 700.

¹⁴⁶ 246 U.S. at 240-41.

¹⁴⁷ 435 U.S. at 693.

¹⁴⁸ *Id.* at 695.

¹⁴⁹ 435 U.S. 694-95 n.21. Here the Court addressed petitioner's contention that since the Brooks Act, 40 U.S.C. 541-544 (1976), and similar state statutes called for government procurement of engineering services through the Canon 11(c) method, that its practice could not be declared unreasonable per se. The Court quite properly rejected this argument as well. As the Court noted, the fact that governments as individual purchasers deem it reasonable not to seek competitive pricing does not allow the vendor to impose that choice on others. 435 U.S. 694-95 n.21. Here the practice of

that term is generally used, the Court stated that they could not be used by the vendor to satisfy the Rule of Reason.¹⁵⁰ The Court stressed that the Sherman Act does not *require* competitive bidding, but it does prohibit unreasonable restraints on competition. It reiterated that the Society's ban on competitive bidding prevented *all* customers from making price comparisons and is thus an imposition of the Society's views on the costs and benefits of competition on the entire market place.¹⁵¹ Thus, the Court in *Professional Engineers* reaffirmed the basic antitrust tenet that when a per se violation is shown to exist, the inquiry as to legality is to cease and no amount of "reasonableness" will justify the restraint.

The question remains whether an ethical ban on bidding which applied only to complex projects or unsophisticated customers might have found favor with the Court. It would seem that so long as an ethical canon required an engineer to refrain altogether from the practice of bidding, then the above analysis should apply with full force. It is the vendee who must be the ultimate arbiter of whether price competition is suitable for him, and not a group of interested vendors. In the instant case, the Society's attempt to justify its restraint under the Rule of Reason by asserting that price competition poses a threat to public safety and professional ethics was strongly denounced as "nothing less than a frontal assault on the basic policy of the Sherman Act"¹⁵² since it substitutes the vendor's view of competition for the strongly held congressional faith in competition as embodied in the Sherman Act. Thus it appears altogether unlikely that the Court would countenance a ban on competitive bidding which may be partial in scope but absolute where it applies.

While the integrity of the Rule of Reason remains intact, it is submitted that a certain variation in the competitive impact test has been effected. The *Professional Engineers* Court, expressly adhering to the *Goldfarb* view,¹⁵³ declared anew that the nature of competition in professional services may vary from that of other business services.¹⁵⁴ From this it appears likely that professional competition in the *Standard Oil-Chicago Board of Trade* tests will not conform to competition in the pure sense of buyers and sellers. Until recently,

the United States, as manifested through the Brooks Act, does not amount to a choice of the government *qua* government, but merely as an individual consumer. In any event, the government policy was irrelevant because petitioner's practice was conclusively presumed unlawful, and hence was not open to a reasonableness test. The Court might have drawn an appropriate parallel from *Socony-Vacuum* here. Recall that in that case the petitioners sought to characterize their price-maintenance scheme as reasonable because it was in keeping with the statutory objectives of the United States and was knowingly tolerated by government officials. But, since the petitioners had not obtained approval for their plan by the National Recovery Administration, they were not shielded by the statutory antitrust exemption. 310 U.S. at 227-28. Additionally, tolerance by government officials was dismissed by the *Socony-Vacuum* Court as entirely irrelevant in a per se case. *Id.*

¹⁵⁰ 435 U.S. at 694-95.

¹⁵¹ *Id.* at 695.

¹⁵² *Id.*

¹⁵³ 435 U.S. at 696 (citing *Goldfarb*, 421 U.S. at 788-89 n.17. See note 26 *supra*.

¹⁵⁴ *Id.*

the courts have excluded professional activities from the Sherman Act's reach, thus ascribing but one meaning to the term "competition." Now that professional activities are seen as being within the scope of the Sherman Act, it would be a mistake to impress on professional competition purely economic concepts adopted by antitrust law. To say that learned professions have aspects of trades is not to say that they are simply trades. Vigorous solicitation for customers and markets through price inducements and touting of oneself may be deemed a cardinal virtue of business under the free enterprise system, but it may still be at war with the special nature of a given profession's competition. It will thus remain for the fact-finder to determine the precise nature of a profession's competition, taking into account public service aspects and the extent of state regulations.

The Court in *Professional Engineers* allowed flexibility for applying the Sherman Act to the professions by means of the existing *Chicago Board of Trade* model, noting that ethical norms may serve to regulate and promote professional competition and therefore come within the Rule of Reason.¹⁵⁵ In the case before it, however, the Court did not consider the petitioner's canon to be a permissible regulation of professional competition, and therefore the canon was overturned in its entirety. The Court, though willing to assume that competition may conflict with ethical values, declared that this conflict does not permit professions to do away with competition.¹⁵⁶ It is thus clear that in the tension between the aims of the Sherman Act and the values of the learned professions, the Court has struck a balance weighted toward the aims of the Act. The Court has recognized in recent years what society has long believed—that members of the learned professions are, to an extent, pursuing trades and businesses. The *Goldfarb-Professional Engineers* view of the professions' place in society is far closer to the truth than the view of Justice Holmes that lawyers do not engage in commerce.¹⁵⁷

The ethical canon in *Professional Engineers* was taken out of the purview of the Rule of Reason in large part because it was an overly broad regulation of professional competition. The Court repeated the invitation of the court of appeals for the Society to adopt and submit to the district court another ethical guideline more closely confined to the legitimate objective of preventing deceptively low bids for engineering services.¹⁵⁸ It remains to be determined, therefore, what sort of ethical guideline might be regarded as a reasonable restraint of trade under the Rule of Reason.

IV. MODEL FOR ANALYZING PROFESSIONAL ETHICAL REGULATIONS UNDER THE SHERMAN ACT

A. *Professional Self-Regulation*

In the aftermath of *Professional Engineers*, it can be expected that professional activities which affect interstate commerce will bear increasing judicial

¹⁵⁵ *Id.* 435 U.S. at 696.

¹⁵⁶ *Id.*

¹⁵⁷ See text at note 106 *supra*.

¹⁵⁸ 435 U.S. at 699.

scrutiny. Accordingly, the courts will require analytical tools for determining whether a restraint on competition within a profession is permissible. When a professional association is charged with restraining trade, the court should make a two-step inquiry to determine if the restraint can be justified as a reasonable regulation of professional competition, even if it would be an unreasonable restraint of other forms of commerce. First, is there present an identifiable professional concern which might justify the restraint and which stands in contrast with ordinary commerce?¹⁵⁹ If such a concern can be isolated, the court should probe deeper and determine secondly if the identified concern is the real reason for the restraint. In other words, the court should not be satisfied by a proffered justification under an uncritical minimum rationality standard. An example drawn from the medical profession may demonstrate the operation of the above suggested analysis.

If the American Medical Association takes action to control the number of persons admitted to medical schools, then competition among physicians will be restricted and a restraint of trade will result.¹⁶⁰ Should an antitrust action be brought against the Association, it might raise the defense that the training of physicians is a proper subject of self-regulation and that stringent standards of medical training make medicine markedly different from non-professional commerce. While this would satisfy the first step of the inquiry, it would still be necessary to ask if the concern for qualified physicians underlies the restraint.

If the Association combines for the purpose of restraining the expansion of medical schools because they would produce inadequately qualified physicians or because medical schools could not expand and still have competent faculties and adequate teaching facilities, then the restraint could be considered a reasonable regulation of medical competition. If, however, expansion of medical education can be accomplished without sacrifice of quality, then the above restraint might be merely intended to restrict the number of physicians to maintain present "markets" just as surely as would direct quotas on the number of physicians who may practice within a given area. If the re-

¹⁵⁹ The importance of separating the ordinary aspects of competition from the uniquely professional concerns can be seen by looking again to *Professional Engineers* and *Goldfarb*. For example, the prevention of deceptive pricing policies in the engineering situation might have involved ethical guidelines which required compliance by the engineer before submitting a bid. Such regulation might have been seen by the Court as more at the heart of the profession. Bidding among competitors, however, is a very common business phenomenon. Since it affects the *marketing* of professional services, it can be said to operate on the business aspects of the engineering profession. In the *Goldfarb* lawyers' title search, the Court might have been more receptive to ethical guidelines which required a lawyer to perform a title search with thoroughness according to certain professional standards. Though such a guideline might exert an upward pressure on prices, protecting consumers from the dangers of cut-rate title searches might have been regarded as appropriate self-regulation. To standardize a fixed price for this service, however, is patently operating on the business side of the legal profession.

¹⁶⁰ Compare Note, *Application of Antitrust Laws to Anticompetitive Activities of Physicians*, 30 RUTGERS L. REV. 991 (1977).

straint is shown to rest on the latter purpose, then the test will show that the special nature of medical competition does not underlie the restraint. Accordingly, the restraint will undergo antitrust analysis utilizing well-established economic concepts.

None but the most cynical would apply to the learned professions the observation of Adam Smith that "[p]eople of the same trade seldom meet together, even in merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."¹⁶¹ While one intent of professional associations is certainly the economic betterment of their members, it is no less true that they aim at maintaining high standards of competence in servicing the public. Still, it is clear that the Supreme Court's ear is growing increasingly deaf to superficial excuses of professional dignity and the like. "Ethical considerations" alone will not serve as a talisman to justify restraints of trade by professional groups, and courts will demand that a restraint be closely tailored to mitigate only that which may legitimately be mitigated.

B. *The Role of State Regulation*

In formulating a model for analyzing professional self-regulation, it is important to bear in mind that many restraints of trade which operate on the learned professions are not the work of professional associations alone, but include regulations implemented by the states through statutes and licensing boards.¹⁶² The decision in *Professional Engineers* did not pass upon a professional restraint which is the result of direct state regulation; these still may be shielded from antitrust attack by the state action doctrine. This doctrine holds that the Sherman Act was intended to regulate private conduct and therefore does not reach activities of the states or private practices which depend for their authority upon the legislative command of the state as sovereign.¹⁶³ In recent pronouncements on the limits and availability of the state action exemption,¹⁶⁴ the Court has held that when the state is not a party to an antitrust action, immunity for private parties will depend on a showing of strong state regulatory interest in the subject of the restraint¹⁶⁵ as well as a clear articulation of the state's policy in favor of the restraint.¹⁶⁶ The first requirement is aimed at minimizing undesirable subordination of federal antitrust policy to state policy. *Goldfarb* and *Bates v. State Bar of Arizona*¹⁶⁷ both reaffirmed the long recognized state interest in regulation of the profes-

¹⁶¹ ADAM SMITH, *WEALTH OF NATIONS* 55 (U. Chicago Ed., 1952).

¹⁶² See *Bates v. State Bar of Arizona*, 433 U.S. 350, 355 (1977).

¹⁶³ *Parker v. Brown*, 350 U.S. 341, 350-51 (1943).

¹⁶⁴ *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

¹⁶⁵ *Bates v. State Bar of Arizona*, 433 U.S. 350, 361 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 584-85 (1976).

¹⁶⁶ *Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 594 (1976).

¹⁶⁷ 433 U.S. 350 (1977).

sions,¹⁶⁸ and therefore this requirement will often be met when a professional group can show its restraint of trade rests on state regulation. As for the second requirement of a definite showing of the state policy, the Court has held that it is not enough for a private restraint of trade to be prompted by¹⁶⁹ or acquiesced in¹⁷⁰ by the state. Thus in *Goldfarb* the county bar association's minimum fee schedule was not adopted at the behest of the Virginia Supreme Court which regulates the legal profession in that state, and therefore it was not immune as state action.¹⁷¹ On the other hand, the lawyer's advertising ban in *Bates* was immune to antitrust attack since the Court found it to be compelled by the Arizona Supreme Court, which was the regulator of the legal profession in that state. As such, the Court found it to be a "clear articulation" of Arizona's policy toward regulating the profession.¹⁷²

CONCLUSION

In *Professional Engineers*, the Court has made clear that the Rule of Reason is a narrow concept which will not be broadened to recreate any learned profession exemption to the Sherman Act. The Court has made manifest to the professions in particular, but to others as well, that the Rule of Reason is of limited application, to be used solely to determine the reasonableness of a challenged restraint by a study of its competitive impact. The test of reasonableness is thus an either/or test—either a restraint promotes competition or it suppresses it. The test does not allow room for considerations of public safety and professional ethics to enter the equation. Yet the Court has made it clear that the implementation of the Rule of Reason in the professional context will take into account the special nature of professional competition; any restraint of trade which, although regulatory, actually promotes professional competition will probably be upheld under the Rule of Reason.

What remains to be determined in future cases is the proper meaning to be accorded the term "competition" in the Rule of Reason equation. It is suggested that a division of professional competition may prove helpful in this regard. Those aspects of a profession which are most peculiar to professional services ought to be accorded greater flexibility when they operate incidentally as a restraint on trade, while those aspects of a profession which are akin to ordinary business practices ought to be analyzed under the fully developed concepts of antitrust jurisprudence and thus undergo greater scrutiny. It is hoped that in this way the Rule of Reason can provide the flexibility to recognize genuine professional concerns and a certain measure of harmony can be attained between professional ethics and competitive values.

JOSEPH L. HERN

¹⁶⁸ *Goldfarb*, 421 U.S. at 792; *Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1977).

¹⁶⁹ *Goldfarb*, 421 U.S. at 791.

¹⁷⁰ *Cantor*, 428 U.S. at 584-85.

¹⁷¹ 421 U.S. at 790.

¹⁷² *Id.* at 362.