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Occupational Licensing: An Antitrust Analysis

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in Missouri. Both Jefferson County and St. Charles County have rejected the county charter form of government.[75] This is apparently a manifestation of out-county fears that gaining power to act independently of the state legislature in some areas may only result in the transfer of that power to one city or interest group in the county. Such fears will arise at each and every charter election, and, whether unfounded or not, will take some time to allay.

The 1970 constitutional amendment has apparently given charter counties more tools with which to work, but obtaining the approval of a majority of voters for countywide programs may often be difficult because of out-county opposition. Charter government does present many safeguards for out-county areas: the petition requirement to form a charter commission, a countywide vote to adopt a charter, an elected county legislative body, a majority vote of the county council, and a subsequent countywide vote for countywide measures. These safeguards should be sufficient to prevent any abuse of charter power. The 1970 amendment to section 18(c) does not, however, clearly enumerate the powers of charter counties. The uncertainty of what, if any, powers were added by the amendment, the potential constitutional conflicts, and the interpretation problems must be resolved by judicial decision. A liberal judicial interpretation of section 18(c) would seem desirable to enable charter counties to utilize the amendment and to enable them to carry out the purpose behind its adoption.

REX V. GUMP

OCCUPATIONAL LICENSING: AN ANTITRUST ANALYSIS

I. INTRODUCTION

In recent years licensing of persons seeking to engage in various occupations has been an ever-increasing phenomenon.[1] Occupational licensing includes licensing of professionals, such as physicians, attorneys, and engineers, as well as nonprofessionals, such as beauticians, barbers, boiler inspectors, and egg graders. It restricts certain occupations to those individuals licensed by a particular state or subdivision of a state.[2] Under a typical

75. *See* note 10 *supra.*

1. COUNCIL OF STATE GOVERNMENTS, OCCUPATIONS AND PROFESSIONS LICENSED BY THE STATES, PUERTO RICO AND THE VIRGIN ISLANDS (1968); B. SHIMBERG, B. ESSER, & D. KRUGER, MANPOWER ADMINISTRATION, U.S. DEP'T OF LABOR, OCCUPATIONAL LICENSING: PRACTICES AND POLICIES 13 (1973) [hereinafter cited as SHIMBERG]. In 1968 the Council of State Governments listed sixty-seven licensed occupations including abstractor, accountant, attorney, and physician, as well as auctioneer, barber, boiler inspector, cemetery salesman, egg grader, librarian, milk weigher, photographer, used car dealer, horseshoer, feeder pig dealer, tattoo artist, and hunting guide.

2. M. FRIEDMAN, CAPITALISM AND FREEDOM 137, 141 (1962); W. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 118 (1956).

licensing scheme, the license may be granted only after satisfying requirements of a licensing board,[3] such as passing an examination, and may be subject to denial for other reasons.[4] Those granting the license are usually members of the same occupation as those seeking licensure.[5] Entry of new members into a field, therefore, may be effectively controlled by those already members of a particular occupation by denial of licensure. In the same manner, behavior of those already in the occupation may be controlled by the threat of license suspension or revocation.[6]

Restricting entry into an occupation and controlling behavior of those already in the occupation have strong economic implications. Economic theory[7] has long recognized the effect of such a closed market structure on existing members of the occupation, consumers, and potential entrants into the market.[8] A closed market structure, a cartel, may be defined as:

> Monopolistic control of the supply of a product or service for the purpose of enhancing returns to members of the cartel and protecting members of the cartel from price competition that would reduce the return to a competitive level.[9]

The resultant higher profit margin for those already in the market[10] directly correlates with less efficient utilization of resources and less consumer choice.[11] The cost of protection for cartel members is increased price of the product or service to consumers and restricted access of prospective entrants into the market. Imposition of a licensing requirement magnifies the detrimental effects created by preexisting natural barriers, such as large start-up costs, specialized knowledge, and patents.[12] Given these effects, additional entry barriers, such as occupational licensing, should be discouraged unless strong reasons exist for perpetuating them.

Conversely, a competitive economic model insures that resources would be used more efficiently and beneficially for prospective buyers and sellers.[13] In such a competitive system both buyers and sellers have alternatives. "Buyers can choose among alternative sellers, and sellers are free to enter any line of production they believe will be profitable."[14] Sellers have maximum mobility; they can enter and leave various industries at will. Entry

3. SHIMBERG, *supra* note 1, at 8-9.
4. Barron, *Business and Professional Licensing—California: A Representative Example*, 18 STAN. L. REV. 640, 651-54 (1966).
5. BUREAU OF NATIONAL AFFAIRS, ANTI-TRUST AND TRADE REGULATION REPORT D-2 (No. 694, 1974); Barron, *supra* note 4, at 649.
6. Barron, *supra* note 4, at 644.
7. It must be remembered that economic models are just models and as such may not accurately describe the complexities of the real world.
8. Barron, *supra* note 4, at 643.
9. *Id.* at 644.
10. J. BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES 172-73 (1956); Barron, *supra* note 4, at 643.
11. J. BAIN, *supra* note 10, at 207.
12. *Id.*
13. Barron, *supra* note 4, at 640.
14. *Id.*

will be determined by the existence or absence of a profit factor. Buyers also have maximum mobility; they are free to choose among all sellers of a particular product or service. Selection by buyers will eliminate those sellers who cannot utilize their resources most efficiently. Theoretically, prices will reflect this competitive situation. If price exceeds cost of a given product or service, profit will exist. Because there are no restrictions on entry into this market, new sellers are free to enter. The presence of new sellers in the market will cause a reduction in price to near cost.[15]

This competitive market system is the focal point of the Sherman Antitrust Act.[16] In the main, the premises of the Act are coextensive with the theories underlying this system. Many cartels which inhibit attainment of this objective, therefore, have been condemned.[17] Although occupational licensing produces the same economic effect, it has not traditionally been recognized as a barrier to entry of the same posture. It is the purpose of this comment to analyze the Sherman Antitrust Act as a vehicle for eliminating barriers to entry created by occupational licensing.

II. Scope of the Sherman Antitrust Act

The jurisdiction of the Sherman Antitrust Act appears to be coextensive with the commerce clause.[18] The Act provides:

> [Section 1] 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. . . .
>
> . . . .
>
> [Section 2] Every person who shall monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .[19]

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15. *Id.* at 640-41.

16. 15 U.S.C. §§ 1 *et seq.* (1890). *See* United States v. Reading Co., 253 U.S. 26 (1920); United States v. Union Pac. R.R. Co., 226 U.S. 61 (1912); United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897).

17. *See* United States v. Topco Associates, Inc., 405 U.S. 596 (1972).

> [T]he freedom guaranteed each and every business, no matter how small, is the freedom to compete. . . . Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in another sector of the economy.

Id. at 610. *See also* Am. Tobacco v. United States, 328 U.S. 781 (1946); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); Patterson v. United States, 222 F. 599 (6th Cir. 1915); United States v. National Retail Lumber Dealers Ass'n, 40 F. Supp. 448 (D.C. Colo. 1941).

18. *See* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 557-59 (1944); *cf.* Goldfarb v. Virginia State Bar, 95 S. Ct. 2004, 2011-12 (1975); Burke v. Ford, 389 U.S. 320, 321 (1967); Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 229-35 (1948).

19. Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (1890).

The threshold question for analysis is whether occupational licensing is within this jurisdictional purview.[20]

A. *Trade or Commerce*

At the inception of Sherman Act litigation, case law focused heavily on whether the activity in issue could properly be classified as constituting "trade or commerce."[21] Early decisions limited the scope of "trade or commerce" to production, distribution, and exchange of goods and transportation. Manufacture of a product,[22] personal efforts or services unrelated to production,[23] and learned professions were not "trade or commerce" within the meaning of the Act.[24] This narrow construction was short-lived in the commercial context;[25] subsequent cases developed an expansive view of the "trade or commerce" requirement.[26] No longer are manufacturing or personal services deemed outside "trade or commerce." Learned professions, such as law, medicine, and engineering, have also been found to be within the ambit of "trade or commerce."[27]

The scope of activities considered "trade or commerce" has been defined in *United States v. American Medical Association*[28] as ". . . all occupations in which men are engaged for a livelihood."[29] Applying this definition, occupations subject to licensing would seem to fall within the phrase "trade or commerce." Any remaining doubt as to the validity of this conclusion has been erased by the Supreme Court in *Goldfarb* v. *Virginia*

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20. Rasmussen v. Am. Dairy Ass'n, 472 F.2d 517 (9th Cir. 1973).
> Conduct of the defendant is within the jurisdictional reach of the Sherman Act if Congress can prohibit that conduct under the Commerce Clause. . . . Before this general test is particularized, an important distinction should be stressed—the distinction between jurisdictional questions . . . and the question of a . . . substantive violation of the Sherman Act. . . .

Id. at 521.

21. Federal Baseball Club v. National League, 259 U.S. 200 (1922); United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897); United States v. E. C. Knight Co., 156 U.S. 1 (1895); *see* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

22. United States v. E. C. Knight Co., 156 U.S. 1 (1895).

23. Federal Baseball Club v. National League, 259 U.S. 200 (1922).

24. Goldfarb v. Virginia State Bar, 497 F.2d 1 (1974), *rev'd*, 95 S. Ct. 2004 (1975).

25. In noncommercial activity "trade or commerce" remains a stumbling block to application of the Sherman Antitrust Act. *See* Marjorie Webster Jr. College v. Middle States Ass'n of Colleges & Secondary Schools, 432 F.2d 650, 654 (D.C. Cir. 1970) (antitrust laws do not apply to school accreditation organizations because the restriction is not with regard to commercial activity). *Contra,* Goldfarb v. Virginia State Bar, 95 S. Ct. 2004, 2012-13 (1975).

26. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 539, 547 (1944); United States v. American Medical Ass'n, 110 F.2d 703, 710 (D.C. Cir. 1940).

27. Goldfarb v. Virginia State Bar, 95 S. Ct. 2004, 2012-13 (1975).

28. 110 F.2d 703 (D.C. Cir. 1940).

29. *Id.* at 710.

State Bar.[30] In rejecting the "learned professions" exemption to "trade or commerce," the Court said:

> [T]he nature of an occupation standing, alone, does not provide sanctuary from the Sherman Act . . . nor is the public service aspect of professional practice controlling in determining whether Section 1 includes professions. Congress intended to strike as broadly as it could in Section 1 of the Sherman Act. . . .[31]

Given this broad statement, any allegation that occupational licensing does not fall within "trade or commerce" would have little merit.

B. *Among The Several States*

Assuming that occupational licensing is trade or commerce, a second requirement must be met before the Sherman Antitrust Act's jurisdiction attaches: "trade or commerce" must be "among the several states."[32] "Trade or commerce" purely intrastate in character and effect fails to meet this jurisdictional test.[33]

Most early cases turned on a local-interstate distinction in determining whether this jurisdictional requirement had been met.[34] One of the first cases litigated under the Act, *United States v. E. C. Knight Co.*,[35] held that manufacture of goods was local in character and therefore outside the Act's jurisdiction.[36] Such a local analysis greatly limited the scope of the Act.

Modern cases have rejected this local analysis. The distinct trend has been an expansive construction of the commerce clause,[37] resulting in a broader jurisdictional reach for the Sherman Antitrust Act.[38] Two predominate theories have advanced this trend. The first of these, plenary control, emphasizes the use of facilities of interstate movement.[39] The

30. 95 S. Ct. 2004 (1975).
31. *Id.* at 2013.
32. Sherman Antitrust Act, 15 U.S.C. § 1 (1890).
33. United States v. Yellow Cab Co., 332 U.S. 218, 230 (1947). *See also* Evanston Cab Co. v. Chicago, 325 F.2d 907 (7th Cir. 1963) (local operation of taxicabs did not constitute interstate commerce within the meaning of the Act); John Kalin Funeral Home, Inc. v. Fultz, 313 F. Supp. 435 (W.D. Wash. 1970) (if all mortuary supplies were delivered to and came to rest in plaintiff's establishment and never resold, the Act's jurisdiction did not attach).
34. *See, e.g.*, Industrial Ass'n v. United States, 268 U.S. 64 (1925); Hopkins v. United States, 171 U.S. 578 (1898); United States v. E. C. Knight Co. 156 U.S. 1 (1895).
35. 156 U.S. 1 (1895).
36. *Id.* at 16.
37. Mandleville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219 (1948); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944); Wickard v. Filburn, 317 U.S. 111 (1942).
38. *See* text accompanying note 18 *supra.*
39. United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460 (1939); Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir. 1954). In Rasmussen v. Am. Dairy Ass'n, 472 F.2d 517 (9th Cir. 1973), the court found a local manufacturer of beverages had a sufficient relationship to the interstate commerce in fluid milk to come within Congress' plenary control over interstate commerce. The opinion, in dictum, indicated barbering may not satisfy the jurisdictional requirements.

second focuses upon the interstate impact of an activity—even one totally local in character.[40]

Under the first approach the scope of the commerce clause is based on Congress' plenary control over the instrumentalities of interstate movement.[41] Through the "necessary and proper" clause,[42] this control reaches back to the point of origin and forward to the point at which the modes of interstate movement are no longer involved.[43]

Most likely, occupational licensing under state statutes would be immune from Sherman Act jurisdiction under this rationale. Licensing statutes center primarily on restricting the practice of an occupation within a given state or subdivision and do not involve tangible interstate movement.

The second approach is conceptually broader. This approach finds its genesis in the opinion of Chief Justice Marshall in *Gibbons v. Ogden*.[44] Marshall defined the scope of the commerce clause as commerce which concerns or affects more than one state.[45] It is unclear, however, what requisite effect must be achieved to meet this constitutional test. The predominate approach previously seemed to have hinged on whether the cumulative impact of the activity actually exerted a substantial economic effect on interstate commerce.[46] If it did, then the activity—whether purely local or not—was within the realm of the commerce clause. However, in *Heart of Atlanta Motel, Inc. v. United States*[47] and *Perez v. United States*[48] the Court stated that the scope of the commerce clause included intrastate activity which *might* have a substantial effect on interstate commerce.[49] These two cases may indicate that potential (as opposed to actual) and substantial interstate effect will be sufficient to bring the activity within the reach of the commerce clause.

Restrictive interpretations of the commerce clause continue to surface, however. A recent Supreme Court case, *Goldfarb v. Virginia State Bar*,[50]

40. Burke v. Ford, 389 U.S. 320, 321 (1967); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 549-52 (1943); Wickard v. Filburn, 317 U.S. 111 (1942).

41. *See, e.g.*, Champion v. Ames, 188 U.S. 321 (1903); Oklahoma-Texas Trust v. SEC, 100 F.2d 888 (10th Cir. 1939).

42. U.S. CONST. art. I, § 8.

43. United States v. Sullivan, 332 U.S. 689 (1948); United States v. Darby, 312 U.S. 100 (1941); McDermott v. Wisconsin, 228 U.S. 115 (1913).

44. 22 U.S. 1 (1824).

45. *Id.* at 7.

46. The fact that one individual's activity has a trivial impact on interstate commerce is not sufficient to remove him from the scope of federal regulation. The appropriate test is the cumulative impact of those similarly situated. *See* Wickard v. Fillburn, 317 U.S. 111 (1942); Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir. 1943). *See also* Katzenbach v. McClung, 379 U.S. 294 (1964).

47. 379 U.S. 241 (1964).

48. 402 U.S. 146 (1971).

49. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964); Perez v. United States, 402 U.S. 146, 152 (1971).

50. 95 S. Ct. 2004 (1975).

seemingly resurrects the earlier "actual effect" argument.[51] While finding restraint on the availability of legal services substantially affects interstate commerce, the Court based its analysis on the local-interstate distinction.[52] Citing numerous factors, the Court concluded that "a substantial volume of commerce was involved."[53] *Goldfarb* indicates that facts showing actual and substantial interstate effect must be alleged to meet the Sherman Antitrust Act's jurisdictional requirements. Thus, the Court may be retreating from the "potential interstate effect" test applied in *Heart of Atlanta Motel* and *Perez*.[54]

The impact of this decision on occupational licensing litigation cannot be underestimated. By requiring actual effect, occupational licensing statutes which create a cartel-like impact, but fail actually to affect a substantial volume of commerce, may be immune from antitrust action for failure to satisfy the jurisdictional requirements.

III. The State Action Exemption

Even if occupational licensing falls within the jurisdictional requirements of the Sherman Antitrust Act, a major obstacle confronting antitrust litigation is the state action exemption. Licensing is primarily achieved by state statute. In *Parker v. Brown*[55] the Supreme Court found California's statutory program regulating prices, disposition, and production of raisins ultimately moving in interstate commerce outside the purview of the Act.[56] The rationale of this decision rested on the premise that Section 1 of the Act was directed at private action rather than state action:

> We find nothing in the language of the Sherman Act or in its history which suggests its purpose was to restrain a state or its officers or agents from activities directed by its legislature.[57]

Respect for federal-state comity and ultimate preservation of the federal system also influenced the *Parker* holding.[58] Emphasizing action by independent state officials, sanctioned by legislative mandate, *Parker* formed the basis for a judicially created state action exemption to the Act.[59] The purpose of this exemption was to exclude state-compelled anti-

51. *See* text accompanying note 46 *supra*.
52. 95 S. Ct. at 2011-12.
53. *Id.* at 2012.
54. *See* text accompanying note 49 *supra*.
55. 317 U.S. 341 (1943). *Parker* involved a suit brought by a California producer and packer of raisins. The suit challenged California's Agricultural Prorate Act. The Act required each raisin producer to deliver over two-thirds of his crop to an agency authorized by law to control marketing and eliminate competition, thus increasing the price of raisins. A three judge federal court enjoined enforcement of the Act finding that it: (1) violated the Sherman Antitrust Act; and (2) constituted an undue burden on commerce. The Supreme Court reversed.
56. *Id.* at 352.
57. *Id.* at 350-51.
58. *Id.* at 351. *See also* P. Benson, The Supreme Court and the Commerce Clause 243-44 (1970).
59. Pogue, *The Rationale of Exemption from Antitrust*, 19 A.B.A. Anti-trust Section 313, 325-26 (1961).

competitive goals and means from the scope of the Act. Underpinning this exemption was the perceived congressional directive to prevent only private anticompetitive actions.[60]

The scope of the state action exemption has been left unclear by subsequent decisions. Attempts at definition generally emerge in one of three patterns. The majority of federal courts have adopted a three-pronged mechanical approach.[61] A substantial minority embrace a more flexible variation of the three-pronged mechanical approach.[62] Finally, a few courts interpret the state action exemption along the lines of a police power rationale.[63]

Those circuits adopting the three-pronged mechanical test embrace a restrictive view of *Parker*.[64] Attempts at definition of this test can best be illustrated by *Traveler's Insurance Co. v. Blue Cross of Western Pennsylania*.[65] In that case, the defendants argued that state regulation of the insurance business and state approval to operate as an insurance carrier in Pennsylvania exempted them from an action brought under the Sherman Antitrust Act. Rejecting this contention, the court stated that ". . . regulation and supervision alone do not constitute a delegation of governmental authority."[66] Further case law using this mechanical test has refined the exemption and three essential elements have emerged: (1) a legislatively created entity; (2) furtherance of an express public policy; and (3) express statutory authorization to utilize anticompetitive means to achieve the specific governmental purpose expressed.[67] Absence of one of these elements precludes application of the state action exemption.

Other circuits have adopted a more flexible approach. These circuits have not required all three elements of the mechanical test to be present before the state action exemption is applied.[68] Rather, emphasis has been

60. Parker v. Brown, 317 U.S. 341, 351 (1943).

61. *See* New Mexico v. Am. Petrofina, 501 F.2d 363 (9th Cir. 1974); Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971); Whitten v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970); Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir. 1966); E. W. Wiggins Airways, Inc. v. Mass. Port Authority, 362 F.2d 52 (1st Cir. 1966); Traveler's Ins. Co. v. Blue Cross of W. Pa., 298 F. Supp. 1109 (W.D. Pa. 1969); Schenley Indus. v. N. J. Wine & Spirit Wholesalers Ass'n, 272 F. Supp. 872 (D.N.J. 1967); Marnell v. United Parcel Serv., 260 F. Supp. 391 (N.D. Cal. 1966).

62. *See* Goldfarb v. Virginia State Bar, 497 F.2d 1 (4th Cir. 1974), *rev'd*, 95 S. Ct. 2004 (1975); Washington Gas Light Co. v. Virginia Elec. & Pwr. Co., 438 F.2d 248 (4th Cir. 1971); Asheville Tobacco v. FTC, 263 F.2d 502 (4th Cir. 1959).

63. *See* Hitchcock v. Collenberg, 140 F. Supp. 894, 900, 902 (D. Md. 1956); *cf.* Olsen v. Smith, 195 U.S. 332, 345 (1904).

64. Whitten v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970). "The Court's emphasis [in *Parker*] on the extent of the state's involvement preclude[s] the facile conclusion that action by any public official automatically confers exemption." *Id.* at 30.

65. 298 F. Supp. 1109 (W.D. Pa. 1969).

66. *Id.* at 1112.

67. *Id.* at 1111.

68. Washington Gas Light Co. v. Virginia Elec. & Pwr. Co., 438 F.2d 248 (4th Cir. 1971).

placed on the existence of statutorily created state machinery and state supervision implementing an important state policy.[69] If these factors are present, the *Parker* state action exemption will apply. This approach differs from the mechanical test in that it does not require an express statutory goal of anticompetitive activity, nor does it necessarily require expressly authorized anticompetitive means to achieve the state policy. The emphasis of this approach focuses upon a statutorily created agency and an overriding public interest. Failure to control affirmatively the activities of such an agency,[70] or expressly to set out approval of anticompetitive goals and means in the enabling statute[71] does not preclude application of the state action exemption.

The third interpretative approach, present in a few cases, rests its analysis primarily upon state regulation falling within the scope of a state's police power.[72] This approach emphasizes a state's compelling interest in protection of public health, safety, and other valid interests. Presence of such an interest, without more, triggers the state action exemption.[73] Absence of express state anticompetitive goals, authorization of anticompetitive means, or lack of state supervision do not in themselves preclude application of the state action exemption.

The continued predominance of the mechanical test was recently thrown into question by the *Goldfarb* decision.[74] The Supreme Court did not expressly adopt the mechanical test enunciated in lower court decisions, nor did it cite to any case law adopting this test in support of its position.[75] Rather, the Court, while recognizing the existence of a state statute and state agency, expressed the prerequisites for the state action exemption as "activity compelled by the state as sovereign."[76] The Court, in dictum, stated:

> We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid

69. *Id.* at 251-52.

70. *Id.* at 252.

71. Goldfarb v. Virginia State Bar, 497 F.2d 1 (4th Cir. 1974), *rev'd*, 95 S. Ct. 2004 (1975); Woods Exploration & Prod. Co., v. Aluminum Co., 438 F.2d 1286 (5th Cir. 1971).

> The concept of state action is not susceptible to rigid, bright-line rules. Each case must be considered on its own facts in order to determine whether or not the anti-competitive consequence is truly the action of the state.

Id. at 1294.

72. Hitchcock v. Collenberg, 140 F. Supp. 894 (D. Md. 1956). *See also* Olsen v. Smith, 195 U.S. 332 (1904) (a pre-*Parker* case holding licensing of river pilots properly within the state's police power).

73. Hitchcock v. Collenberg, 140 F. Supp. 894 (D. Md. 1956).

74. Goldfarb v. Virginia State Bar, 95 S. Ct. 2004 (1975).

75. The *Goldfarb* opinion did, however, cite *Olsen v. Smith,* discussed note 72 *supra*. *See* note 63 and accompanying text *supra*.

76. 95 S. Ct. 2004, 2015 (1975).

interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.[77]

The *Goldfarb* rationale for the state action exemption approximates the third interpretative approach. The opinion may indicate a shift toward a broader exemption coextensive with a state's police power.

Expansion of the state action exemption would have strong repercussions in occupational licensing litigation. Occupational licensing, by its very definition, is statutory. It may very well be argued under the police power test that such licensure is properly deemed a "compelling interest . . . of the state to protect public health, safety, and other valid interests. . . ."[78] If this argument is sustained, occupational licensing would be immune from the remedial efforts of the Sherman Antitrust Act.

Similarily, if the second approach were applied, occupational licensing could properly be found within the state action exemption if a statutorily created licensing agency was deemed to further an important state policy. The exemption would apply regardless of the lack of affirmative control over licensing activities or absence of an express statutory intention to utilize anticompetitive means toward achievement of an anticompetitive goal. Consequently, the cartel-like effect of licensing statutes would be imposed without inquiry into the presence of legislative intention to impose such a result.

Under the three-pronged mechanical test, occupational licensing would not be exempt per se from the thrust of the Act. Although occupational licensing has its genesis in state statutes, this alone would not invoke the state action exemption. Generally, monopolistic public policy is not expressed in the licensing statutes, nor are anticompetitive means authorized to achieve a monopolistic policy. Absence of either of these elements would preclude invocation of the state action exemption and subject occupational licensing to antitrust litigation.[79]

Such a strict construction of *Parker* comports with the basic policy underlying the Act.[80] Although designed to apply solely to private action,[81] the objective of the Act is to promote and protect a competitive economic system and exceptions to its application should be narrowly construed. This goal would not be vitiated by a narrow construction of the *Parker* exemption. Indeed, the Court in *Parker* stated that the exemption did not apply to private action masquerading as state action.[82] Furthermore, the *Parker* decision was influenced by the existence of an express federal policy coextensive with state policy.[83] California had adopted a state

77. *Id.* at 2016.
78. *Id.*
79. Traveler's Ins. Co. v. Blue Cross of W. Pa., 298 F. Supp. 1109 (W.D. Pa. 1969).
80. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).
81. Parker v. Brown, 317 U.S. 341, 351 (1943).
82. *Id.* at 351.
83. *See* P. BENSON, *supra* note 58, at 244.

statute similar to the Federal Agricultural Agreement Act. The California statute covered areas of commerce in which Congress had not expressly legislated, but which directly effectuated policies of the federal statute. This consistency of interest, arguably, was the pivotal factor in the *Parker* decision. Accordingly, this factor should limit the scope of the state action exemption to state programs consistent with an express national policy.[84]

The narrow three-pronged mechanical test is the most favorable to litigants attacking occupational licensing. Unless an express state policy, expressly authorizing anticompetitive means is sanctioned for use by a legislatively created entity, the state action exemption should not apply and occupational licensing would not be immune from the reach of the Sherman Antitrust Act.

IV. An Unreasonable Restraint of Trade

Assuming occupational licensing is not immune from the Sherman Antitrust Act by reason of the state action exemption, liability is not automatic. Liability under the Act is based upon an activity's injury to the public.[85] A corollary to finding public injury is a finding that the activity in issue is unreasonable under the facts of the particular situation[86] or because the very nature of the activity is unreasonable per se.[87]

The reasonableness standard is a judicially created concept.[88] It finds statutory support, however, in the express statutory policy to promote competition and protect the public from the effects of a noncompetitive market.[89] It follows that only conduct that offends this statutory policy should be condemned as an unreasonable restraint of trade.[90]

Determining what constitutes unreasonable activities or practices is

84. *Cf.* Hecht v. Pro-Football, 444 F.2d 931, 937 (D.C. Cir. 1971).

85. Rogers v. Douglas Tobacco Board of Trade, Inc., 266 F.2d 636, 644 (5th Cir. 1959).

86. Standard Oil Co. v. United States, 221 U.S. 1, 63 (1911); Lynch v. Magnavox Co., 94 F.2d 883, 891 (9th Cir. 1938); Sandidge v. Rogers, 167 F. Supp. 553, 559-60 (S.D. Ind. 1958). *See also* Feddersen Motors, Inc. v. Ward, 180 F.2d 519 (10th Cir. 1950).

87. Certain activities are per se unreasonable—*i.e.*, the activity is so likely to injure the public under any set of circumstances that no inquiry is made into the existing fact situation. Courts have found price fixing, division of markets, group boycotts and tying arrangements to be per se unreasonable. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

88. Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911). *See generally* Bloom, *What is Antitrust?*, 9 N.Y.L.F. 5, 8 (1963); Jones, *Historical Development of the Law of Business Competition*, 36 Yale L.J. 207, 220 (1926).

89. United States v. Union Pac. R.R. Co., 226 U.S. 61 (1912).

> To preserve from undue restraint the free action of competition in interstate commerce was the purpose which controlled Congress in enacting this statute [Sherman Antitrust Act], and the courts should construe the law with a view to effecting the object of its enactment.

Id. at 87.

90. *Id.*

a difficult task. Courts must analyze all economic factors peculiar to the particular trade or industry and their effect on the competitive market.[91] Pertinent factors considered in making this determination traditionally include: (1) the intensity and dimension of the relevant market; (2) the history of the restraint; (3) the nature of the restraint and its effect, actual or probable; and (4) the evil believed to exist, the reason for adopting the particular remedy, and the purpose or end sought to be attained.[92]

Examination of occupational licensing statutes in terms of all the above factors is a prerequisite to finding a licensing scheme an unreasonable restraint of trade. Each licensing scheme would have to be examined in light of its particular factual context. The last two of the above factors particularly lend themselves to a general analysis.

The nature of the restraint imposed by occupational licensing is a barrier to entry.[93] Empirical evidence supports the conclusion that most occupational licensing statutes have an inhibiting effect on free competition thereby causing public injury.[94] A case study reported by the Federal Trade Commission is illustrative.[95] The study compared television repair rates in two states, one utilizing a licensure system and the other a certification system. The licensing state had repair bills twenty percent higher than those in the nonlicensed system. This study strongly suggests that the effect of such licensing statutes, by limiting the number of sellers of a product or service, is to force prices to a high, noncompetitive level.

The last factor encompasses a balancing test. Proponents of occupational licensing argue that public health and welfare would be endangered in the absence of regulatory statutes. Therefore, they contend, occupational licensing statutes protect the innocent public against the abuses of charlatans and insure that only competent persons are allowed to engage in the occupation.[96] This argument might have significant merit in a situation where an unwary consumer who is victimized by an incompetent practitioner would suffer irremediable harm, such as medicine, law, and other professions, but it loses its potency in the nonprofessional area.

A pivotal argument in support of finding occupational licensing an unreasonable restraint of trade in nonprofessional fields is the availability

91. Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

92. *Id.* at 238.

> The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is 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.

93. Occupational licensing statutes would not fall within the per se categories and thus would necessarily have to be found unreasonable in the circumstances to be subject to action under the Sherman Antitrust Act.

94. Thomsen v. Cayser, 243 U.S. 66 (1917).

95. FED. TRADE COMM'N, BUREAU OF ECONOMICS, REGULATION OF THE TELEVISION REPAIR INDUSTRY IN LOUISIANA AND CALIFORNIA, A CASE STUDY (1974).

96. *See* W. GELLHORN, *supra* note 2, at 109.

of alternative methods which advance the same interests that licensing purports to further.[97] By either registration or certification the public interest can be protected without the resultant public injury imposed by a licensing scheme.

Registration is the least restrictive alternative. By requiring all individuals who wish to practice a given trade to register with the state, consumers may choose among all available sellers. Any seller who does not sufficiently produce will eventually be cast aside in favor of sellers whose products or services measure up to consumer standards.[98]

Certification is a second available alternative. Under a certification scheme a governmental agency may certify an individual as qualified to practice a particular trade, but may not prevent noncertified persons from selling the same product or service.[99] Consumers are thus given the choice of selecting among all available sellers. Simultaneously, certification assures that those certified are competent.

Perhaps the most persuasive factor courts should consider in determining the reasonableness of occupational licensing statutes is the policy underlying the Sherman Antitrust Act itself. This policy was most aptly stated in *Northern Pacific Railway Company v. United States*:[100]

> It [the Sherman Antitrust Act] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.[101]

Occupational licensing statutes inherently conflict with this policy by creating barriers to entry. To find a licensing statute reasonable, courts must analyze the factors previously listed. Only if the competitive policy of the Act is outweighed by competing public interests should occupational licensing be deemed reasonable.

V. Conclusion

Occupational licensing statutes present an analytical dilemma. Most certainly, many statutes blatantly offend the competitive economic policy the Sherman Antitrust Act seeks to advance. However, these statutes may be immune from the thrust of the antitrust remedies because of lack of jurisdiction under the commerce clause or the state action exemption. Any litigant seeking to subject occupational licensing to antitrust analysis will be faced with these problems.

97. *See* M. Friedman, *supra* note 2, at 148-49; Barron, *supra* note 4, at 660-65.
98. *See* Barron, *supra* note 4, at 662, 664.
99. *See* M. Friedman, *supra* note 2, at 149; Barron, *supra* note 4, at 663.
100. 356 U.S. 1 (1958).
101. *Id.* at 4.

The major problem facing courts in occupational licensing litigation will be the determination of which statutes should be preserved. Not every occupational licensing scheme should fall under the Act. In many professions it may be persuasively argued that licensing is the only adequate safeguard preventing irreparable public injury. This argument is particularly strong in the legal and health professions. In both, the consumer may not have sufficient knowledge or expertise to choose a qualified practitioner. A wrong choice could be an irreversible decision jeopardizing life or property. In such situations public policy must be counterbalanced against economic ideals. Where the reasonableness of the restraint of trade outweighs the competitive philosophy of the Sherman Antitrust Act, the competitive ideal must give way to prevent public injury.

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