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Antitrust Scrutiny of the Health Professions: Developing a Framework for Assessing Private Restraints

*Robert F. Leibenluft**
and
*Michael R. Pollard***

I. INTRODUCTION

The current spate of antitrust litigation challenging professional activities raises fundamental questions about the future role of professional groups in a more competitive health care market. Since the formation of medieval craftmen's guilds, individuals engaged in similar or competitive business and professional pursuits have banded together to seek solutions to common problems.[1] Associations of health professionals have long been engaged in promulgating and enforcing private regulations governing educational standards, admission to practice, ethical business practices, and relationships with other professional groups.[2] Indeed, autonomous control over the content of their work may be what distinguishes professions from mere occupations.[3] History, however, has taught us that the delegation of regulatory functions to private groups provides ample opportunities for abuse of this authority and may have significant anticompetitive effects.[4] Thus, it is im-

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1. M. THOMPSON, ANTITRUST AND THE HEALTH CARE PROVIDER 107-08 (1979).

2. *See* R. STEVENS, AMERICAN MEDICINE AND THE PUBLIC INTEREST (1971); Grad, *The Antitrust Laws and Professional Discipline in Medicine*, 1978 DUKE L.J. 443.

3. E. FREIDSON, PROFESSION OF MEDICINE (1970).

4. *See, e.g.*, American Medical Ass'n v. United States, 317 U.S. 519 (1943); Group Health Coop. v. King County Medical Soc'y, 237 P.2d 737 (Wash. 1951); Grad, *supra* note 2, at 457-84; Havighurst, *Antitrust Enforcement in the Medical Services Industry*, 58 MILBANK MEMORIAL FUND Q. 89 (1980).

portant to distinguish legitimate self-regulatory actions intended to improve the profession from unwarranted restraints on professional practice that are designed to stifle competition and impede innovation.

The challenge for the courts, as well as the agencies responsible for enforcing the antitrust statutes, in dealing with the health professions, is to establish parameters for acceptable self-regulation. It is clear after *Goldfarb v. Virginia State Bar*[5] and *National Society of Professional Engineers v. United States*[6] that the professions are subject to the antitrust laws. At the same time, however, it is doubtful that anyone else could promulgate and administer professional regulations any better than the professional groups themselves. The history and benefits of self-regulation may explain the strong hints by the Supreme Court[7] that the professions do differ from commercial enterprise in some respects and, therefore, may merit a more thoroughgoing review of the impact of alleged illegal practices than would be conducted in other, nonprofessional contexts.

Establishing criteria for legally acceptable behavior for professional associations will be an iterative process. It is difficult to draw distinct lines today, mainly because it is impossible to foresee all the possible effects of various professionally imposed restraints. Line drawing of this sort cannot be done in the abstract. What does seem feasible is to consider the different types of antitrust analysis that might be applied in scrutinizing certain restraints and to indicate, in general terms, the type of framework that would be most appropriate for courts to employ when considering particular professional practices. This Article attempts to do just that. First, however, the Article reviews the changes that have occurred over the years in the health services market that will necessitate an increase in antitrust enforcement activity during the 1980s.

II. The Need for Antitrust Enforcement in the 1980s

The market for professional health services has changed considerably in recent years. Variations in how physicians and other health professionals deliver their services are numerous and are increasing. Fee-for-service practice is no longer the only alternative for recent medical school graduates. Today, a physician can join a

5. 421 U.S. 773 (1975).
6. 435 U.S. 679 (1978).
7. 421 U.S. at 788-89 n.17; 435 U.S. at 696.

prepaid health maintenance organization (HMO)[8] or individual practice association (IPA),[9] a primary care network (PCN),[10] a multispecialty (but not prepaid) group,[11] or work in one of several government-sponsored medical care settings, in addition to hanging out his or her shingle and working alone.[12] Moreover, physicians now have the option of working with nonphysician providers—such as nurse midwives, nurse practitioners, or physicians' assistants—to expand their practices and increase their own productivity.

The reasons for such significant innovation and change in the delivery of health services are threefold. First, the supply of health professionals increased dramatically during the 1970s. Among physicians alone, the number of medical school graduates increased by 65 percent,[13] and the number of newly licensed physicians almost doubled during the decade.[14] The existing health care delivery system did not easily absorb this quantum jump in the supply of manpower and consequently interest in alternative forms of practice grew among new entrants.

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8. For the definition of a federally qualified HMO, see 42 U.S.C. § 300e (1976). In general, an HMO is an organized system of health care financing and delivery which provides comprehensive health services to voluntarily enrolled members who pay a fixed annual or periodic fee. AMERICAN MEDICAL ASSOCIATION, REPORT OF THE COUNCIL ON MEDICAL SERVICE (1980). *See also* H. LUFT, HEALTH MAINTENANCE ORGANIZATIONS: DIMENSIONS OF PERFORMANCE 2-3 (1981).

9. IPAs are a type of HMO in which participating physicians maintain their own individual office practices and are paid on a fee-for-service basis out of a common fund. *See* GENERAL ACCOUNTING OFFICE, HEALTH MAINTENANCE ORGANIZATIONS CAN HELP CONTROL HEALTH CARE COSTS 8 (1980).

10. A PCN is a delivery system based on a primary care physician—such as a pediatrician, family practitioner, or general internist—who agrees to provide all basic services and then arrange, as well as supervise, all referrals to specialists. The primary care physician is paid a fixed amount by his patients, depending on their age and sex, thereby creating the proper economic incentives for him to monitor the use of expensive specialists and hospital services. The best examples of this approach are the SAFECO Life Insurance Company plans in California and Washington.

11. A multispecialty group usually consists of a partnership or corporate structure for the associated practices of a group of fee-for-service physicians. This type of group practice offers participating physicians immediate access to referral physicians, backup during emergencies or vacations, and opportunities for peer review. Patients also benefit in terms of continuity of care and one-stop shopping.

12. *See* A. ENTHOVEN, HEALTH PLAN 55-69 (1980), for a detailed description of alternative delivery systems. While these systems deliver care to less than 5% of the U.S. population, they are growing, and new ones are being developed, in key metropolitan areas like Washington, D.C., Boston, Minneapolis, and San Francisco.

13. *Medical Education in the United States 1978-1979*, 243 J.A.M.A. 841, 852 (1980).

14. L. WUNDERMAN, PHYSICIAN DISTRIBUTION AND MEDICAL LICENSURE IN THE U.S. 357 (1979).

Second, increases in the costs of medical and hospital care exceeded the rise in the Consumer Price Index throughout the decade and prompted reformers to suggest a number of options for controlling costs.[15] Early in the decade it was well established among leading economists that the health services market does not respond to the normal forces of supply and demand.[16] In 1972, Fuchs and Kramer published a study that concluded that physicians can and do determine the demand for their own services.[17] This finding provided a theoretical base for a number of regulatory initiatives, like Professional Standards Review Organizations (PSROs)[18] and health planning,[19] designed to control physicians' practice patterns. By the end of the decade, however, objective analysis of some of these regulatory programs revealed that physician-focused regulation could not achieve the hoped-for health sys-

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15. Z. DYCKMAN, A STUDY OF PHYSICIANS' FEES 1 (1978). Proposed reforms included limiting the supply of hospital beds, putting a cap on hospital expenditures, nationally negotiated physicians' fees, increased use of HMOs to develop incentives for physicians to use expensive resources prudently, and greater reliance on consumer choice in order to stimulate competition among insurers and providers. *See generally* A. ENTHOVEN, *supra* note 12; V. FUCHS, WHO SHALL LIVE? (1974); J. MEYER, HEALTH CARE COST INCREASES (1979); Noll, *The Consequences of Public Utility Regulation of Hospitals, in* CONTROLS ON HEALTH CARE 25 (Institute of Medicine ed. 1975); REGULATING HEALTH CARE (A. Levin ed. 1980); U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, MEDICAL TECHNOLOGY: THE CULPRIT BEHIND HEALTH CARE COSTS? (1979); M. ZUBKOFF, I. RASKIN & R. HANFT, HOSPITAL COST CONTAINMENT (1978); Ginsberg, *Competition and Cost Containment,* 303 NEW ENG. J. MED. 1112-15 (1980); Havighurst, *Health Maintenance Organizations and the Market for Health Services,* 35 LAW & CONTEMP. PROB. 716 (1970).

16. K. BOULDING, PRINCIPLES OF ECONOMIC POLICY 255 (1958); P. SAMUELSON, ECONOMICS 122 (2d ed. 1955); G. STIGLER, THE THEORY OF PRICE 219-20 (3d ed. 1966). *See generally* H. KLARMAN, THE ECONOMICS OF HEALTH (1965); Mushkin, *Toward a Definition of Health Economics,* 73 PUB. HEALTH REP. 785 (1958).

17. V. FUCHS & M. KRAMER, DETERMINANTS OF EXPENDITURES FOR PHYSICIANS' SERVICES IN THE UNITED STATES, 1948-68 (1972). Not all health economists accepted the Fuchs-Kramer hypothesis, however. *See* J. NEWHOUSE, THE ECONOMICS OF MEDICAL CARE (1978); Sloan & Feldman, *Competition Among Physicians, reprinted in* COMPETITION IN THE HEALTH CARE SECTOR (W. Greenberg ed. 1978); Green, *Physician Induced Demand for Medical Care,* 13 J. HUMAN RESOURCES 21 (1978).

18. PSROs were established by the Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329, 42 U.S.C. § 1305, to monitor the costs and quality of services provided to federal beneficiaries under the Medicare program.

19. Health planning encompasses a number of regulatory initiatives designed to rationalize the growth of health care facilities. Federal involvement dates back to 1946 when the Hill-Burton hospital construction program was launched as part of a post-World War II effort to assure access to modern hospitals throughout the country. This and several other health planning programs were consolidated in the National Health Planning and Resources Development Act of 1974. 42 U.S.C. §§ 300-300e-14a (1976 & Supp. III 1979), *as amended by* Health Planning and Resources Development Amendments of 1979, Pub. L. No. 96-79, 93 Stat. 592, 42 U.S.C. § 201 (Supp. III 1979).

tem reform.[20] In fact, "command and control" type regulation came under substantial attack,[21] and policymakers began to look toward market-oriented reforms as an alternative.

Third, state and federal law enforcement agencies began to challenge privately-imposed restrictions on practice under antitrust statutes.[22] The immediate effect of these challenges was to allow professionals to advertise and organize themselves into competing economic units.

The trends outlined above will continue in the 1980s. The number of new physicians currently in the medical education pipeline indicates that our total physician supply will be over 536,000 by 1990.[23] This represents a tremendous absolute increase, as well as an increase in the ratio of physicians to population, and has triggered predictions of an "oversupply" of physicians within the next few years. At the same time, the continued growth in the supply of nonphysician providers—nurse practitioners, nurse midwives, physicians' assistants, clinical psychologists, podiatrists, and psychiatric social workers, for example—will create a large pool of potential competitors as these individuals either singly, or in association with physicians, seek greater independence in their relationships with patients.[24] This group of providers will double in number by 1990.[25]

If the past is prologue, some physicians will undoubtedly respond to these strong competitive pressures by seeking closer association with their peers—"circling the wagons"—to fend off potential competitors. Already, physician and dentist groups have found economic boycotts to be an effective tool for stopping third party

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20. CONGRESSIONAL BUDGET OFFICE, THE EFFECTS OF PSRO'S ON HEALTH CARE COSTS (1979); D. SALKEVER & T. BICE, HOSPITAL CERTIFICATE-OF-NEED CONTROLS (1979).

21. *See* C. SCHULTZE, THE PUBLIC USE OF PRIVATE INTEREST 16-27 (1977); Breyer, *Analyzing Regulatory Failure*, 92 HARV. L. REV. 547 (1979).

22. *See generally* Borsody, *The Antitrust Laws and the Health Industry*, 12 AKRON L. REV. 417 (1979); Rosoff, *Antitrust Laws and the Health Care Industry*, 23 ST. LOUIS U.L. REV. 446 (1979). For illustrative cases brought by the Federal Trade Commission, see American Medical Ass'n, 94 F.T.C 701 (1979), *aff'd* _ F.2d _ (2d Cir. Oct. 7, 1980); Indiana Federation of Dentists, FTC Docket No. 9118 (initial decision, March 24, 1980) (appeal to full Commission pending); Michigan State Medical Society, FTC Docket No. 9137 (complaint issued, July 27, 1979). *See generally* FEDERAL TRADE COMMISSION, HEALTH SERVICES POLICY SESSION BRIEFING BOOK 32-45 (1979).

23. GRADUATE MEDICAL EDUCATION NATIONAL ADVISORY COMM., SUMMARY REPORT, 1 REPORT OF THE GRADUATE MEDICAL EDUCATION NATIONAL ADVISORY COMMITTEE TO THE SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, 15, 23 (1980).

24. *Id.* at 28-30.

25. *Id.* at 92-93.

payers from imposing stringent cost containment measures.[26] Boycotts also have been used to discourage the formation and growth of HMOs.[27] Increasingly, boycott tactics are being employed in the denial of hospital privileges,[28] cancellation of malpractice coverage under medical society sponsored insurance plans,[29] and termination of emergency room coverage at community hospitals that attempt new methods for delivering care.[30] It is not inconceivable that providers will attempt to establish predatory pricing schemes as another way to discourage the entry of new forms of health care delivery. Clearly, statewide and localized concerted efforts to stifle competition are increasing and are likely to become more common as competitive pressures intensify.

III. Evolution of Antitrust in the Professional Context

Application of the antitrust laws to the professions is in its infancy. While the competitive pressures outlined in the preceding section have been mounting for some time, the real growth of antitrust activity aimed at the professions can be traced to two landmark cases[31] decided by the Supreme Court since 1975.

Prior to that time, antitrust experts doubted whether the antitrust laws applied at all to the "learned professions." By its terms, the Sherman Act is limited to conduct involving "trade or com-

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26. Indiana Federation of Dentists, FTC Docket No. 9118 (initial decision, March 24, 1980) (appeal to full Commission pending); Michigan State Medical Society, FTC Docket No. 9129 (complaint issued, July 27, 1979). Havighurst feels that boycotts are the medical profession's "ultimate defensive weapon." Havighurst, *supra* note 4, at 10.

27. Forbes Health System Medical Staff, 94 F.T.C. 1042 (1979); Medical Service Corp. of Spokane County, 88 F.T.C. 906 (1976). The Department of Justice, which brought the 1943 AMA case involving the boycott of Group Health Association, American Medical Ass'n v. United States, 317 U.S. 519 (1943), recently brought and settled a similar case. United States v. Halifax Hosp. Medical Center. [1980] 5 Trade Reg. Rep. (CCH) ¶ 50,731. The State of Ohio has filed a similar case, Ohio v. Mahoning County Medical Soc'y, [1980-1] Trade Cas. § 63,100 (N.D. Ohio 1979), in which the court rejected defendant's motion for summary judgment. *See also* Feminist Women's Health Center v. Mohammad, 586 F.2d 530 (5th Cir. 1978), in which the plaintiff clinic alleged and proved a conspiracy to obstruct its operation.

28. Levin v. Doctor's Hospital, Inc., 354 F.2d 515 (D.C. Cir. 1965); Robinson v. Magovern, [1978-2] Trade Cas. ¶ 62,411 (W.D. Pa. 1978).

29. *Nurse Midwifery: Consumers' Freedom of Choice: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. (Dec. 18, 1980) (denial of malpractice insurance to physicians who provided back-up services for nurse-midwives).

30. Hope, et al., FTC Docket No. 9144, [1980] 3 Trade Reg. Rep. ¶ 21,737 (consent order).

31. National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679 (1978); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

merce,"[32] and dicta in several early Supreme Court cases implied that since professional activity could not be so characterized, it was exempt from the Act's coverage.[33] Jurisdiction was also challenged on the basis that professional activity was purely local in nature and therefore beyond the federal government's constitutional power to regulate interstate commerce.[34]

The extent of the jurisdiction and "trade or commerce" defenses was raised but not resolved in two early Supreme Court cases. In *American Medical Association v. United States*[35] the Justice Department charged the AMA and a local medical society with conspiring to obstruct the operation of a prepaid medical plan. The interstate commerce defense was inapplicable since the alleged activity took place in the District of Columbia and therefore could be challenged under section 3 of the Sherman Act,[36] which was not limited by commerce clause restrictions. The Supreme Court, in considering the "trade or commerce" defense, narrowed its application by focusing on whether the object of the restraint was engaged in commerce, instead of examining the occupation of the defendants. While this interpretation resulted in affirmance of the circuit court's finding of liability, it also enabled the Court to sidestep the question of whether a profession is a "trade" under the antitrust laws.[37]

Nine years after the *AMA* decision, the Supreme Court was faced with similar allegations of a physician boycott of prepaid group practices in *United States v. Oregon State Medical Society*.[38] This time the Court upheld the trial court's conclusions that illegal behavior that may have occurred prior to 1941 did not justify an injunction in 1949 and that no other antitrust violations

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32. "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 . . . ." 15 U.S.C. § 1 (1976).

33. Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427 (1932); FTC v. Raladam Co., 283 U.S. 643 (1931); Federal Baseball Club v. National League, 259 U.S. 200 (1922).

34. *See, e.g.*, Elizabeth Hosp. Inc. v. Richardson, 269 F.2d 167 (8th Cir. 1959); Rigall v. Washington County Medical Soc'y, 249 F.2d 266 (8th Cir. 1957).

35. 317 U.S. 519 (1943).

36. "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia . . . is declared illegal." 15 U.S.C. § 3 (1976).

37. The Court stated, "Much argument has been addressed to the question whether a physician's practice of bis profession constitutes trade under § 3 of the Sherman Act. In the ligbt of what we shall say with respect to the charge laid in the indictment, we need not consider or decide this question." 317 U.S. at 528.

38. 343 U.S. 326 (1952).

had been proved.[39] While not expressly ruling on whether an exception existed for the "learned professions," the Court observed in passing that ethical considerations inhere in the doctor-patient relationship and that, therefore, usual forms of business competition could be "demoralizing to the ethical standards of a profession."[40] In addition, the Court affirmed the lower court ruling that the sale of medical services by physician sponsored organizations did not have sufficient impact on interstate commerce to justify Sherman Act jurisdiction. Even though this holding could be construed narrowly,[41] when coupled with general pronouncements on the special nature of the professionals, the case presented a substantial setback to antitrust enforcement efforts in the professional context.

For the next twenty years, the Supreme Court did not have to face the question of an antitrust exemption for the learned professions. When the issue arose again in *Goldfarb v. Virginia State Bar*,[42] however, the Court unanimously rejected the claims made for a broad professional defense. At issue in *Goldfarb* was the legality of a minimum fee schedule for real estate closings established by a local bar association. After determining that the practice constituted price-fixing, the Court concluded that Congress intended the antitrust laws to be applied broadly: "The 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 § 1 [of the Sherman Act] includes professions."[43]

The Court also found that the financial arrangements necessary to conduct the real estate transactions had a sufficient effect on commerce to sustain Sherman Act jurisdiction. This holding

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39. Some commentators have suggested that the government lost the case because it failed to pursue adequately allegations that the Medical Society's efforts to form its own prepaid plan were predatory tactics designed to inhibit the growth of the for-profit prepaid plans. *See* Goldberg & Greenberg, *The Effect of Physician-Controlled Health Insurance*, 2 J. HEALTH POL, POL'Y & L. 48 (1977); Havighurst, *Professional Restraints on Innovation in Health Care Financing*, 1978 DUKE L.J. 303, 314-16.

40. 343 U.S. at 336.

41. The Supreme Court affirmed the lower court decision under the "clearly erroneous" rule, noting that "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 339 (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). *See* Bauer, *Professional Activities and the Antitrust Laws*, 50 NOTRE DAME LAW. 570, 596 (1975).

42. 421 U.S. 773 (1975).

43. *Id.* at 787 (citations omitted).

was consistent with recent Supreme Court decisions narrowing the "interstate commerce" defense in a variety of contexts.[44] The defense now is unavailable to many institutional defendants and in some cases has been denied to individual practitioners acting in a single state.[45]

Goldfarb thus made it clear that professionals do not enjoy a broad antitrust exemption. In its now famous footnote seventeen,[46] however, the Court left the door open for special treatment of professionals in cases involving restraints that fall short of classic price-fixing. In considering just how the professions might be treated differently, two issues seemed particularly relevant to the Court: (1) what are the goals of antitrust (and relatedly what factors would merit consideration as possible counterweights to anticompetitive activity), and (2) how should courts go about determining the legality of alleged anticompetitive activity? Both of these questions have received substantial attention by courts and scholars reviewing the application of antitrust principles to typical commercial contexts. A brief digression on these questions may be helpful, therefore, to set the stage for *National Society of Professional Engineers v. United States*,[47] the second Supreme Court decision considering antitrust and the "learned professions."

The brevity of the federal antitrust statutes, along with the absence of any clear, single congressional intent leading up to the passage of the Sherman and Clayton Acts,[48] have left to the courts the responsibility for pinpointing antitrust goals and developing a framework on how to analyze antitrust violations. These issues re-

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44. *See, e.g.*, Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976) (small proprietary hospital has requisite commerce effect through its purchase of out-of-state supplies, insurance, management consultation, and financing).

45. *Id. See also* Zamiri v. William Beaumont Hosp., 430 F. Supp. 875 (E.D. Mich. 1977) (loss of Medicare and Medicaid funds supplied requisite interstate effect). *See* Borsody, *supra* note 22, at 423-29 (1979).

46. The Court stated:

> 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.

421 U.S. at 788 n.17.

47. 435 U.S. 679 (1978).

48. *See* H. THORELLI, THE FEDERAL ANTITRUST POLICY (1955).

main far from resolved. The debate on antitrust goals has centered in recent years on whether the sole end of antitrust enforcement is economic efficiency. The alternative view is that other goals involving equity concerns, such as dispersion of economic power, the protection of small business, the preservation of equal opportunity, and the promotion of fairness, must also be considered.[49] Related to this issue is the question of how to weigh the social gains resulting from a restriction against its anticompetitive harms. Although the predominant view has been to limit antitrust analysis to anticompetitive impact, defendants have persistently sought to justify their conduct by suggesting that in their particular situation, competition was harmful to the public interest.[50] Proponents of this position have found support in two early Supreme Court cases[51] that seem to validate activities that were detrimental to competition.[52]

In addition to providing little guidance on the goals of antitrust, the basic statutes are also silent on how courts should proceed in determining whether restraints are in fact illegal. The Sherman Act literally bans all "restraint[s] of trade." Because every commercial agreement or contract restrains trade to some extent, a distinction had to be drawn between reasonable restraints and undue restrictions.[53] Gradually, after gaining experience with a number of restraints in different commercial contexts, the courts have developed two approaches to analyzing restraints. Concerted action generally is analyzed under the Rule of Reason,[54] to determine whether the purpose and effect of arrangements is to harm competition significantly. This inquiry, however, tends to be protracted and expensive and provides little guidance concerning the

49. For consideration of these questions, see Bork & Bowman, *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363 (1965); Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977).

50. *See* L. SULLIVAN, LAW OF ANTITRUST § 66 (1977).

51. Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

52. *See generally* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pt. 1), 74 YALE L.J. 775 (1965).

53. *See generally id.*

54. The "Rule of Reason" under the Sherman Act prohibits every contract, combination or conspiracy that unreasonably and significantly restrains competition. Whether the particular restraint unduly suppresses competition depends on "the facts peculiar to the business in which the restraint is applied, the [nature and] history of the restraint, its probable impact, and the reasons why it was imposed." National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 692 (1978).

legality of various activities. Thus, a second type of analysis is applied to certain classes of restraints that experience indicates will have anticompetitive effects in the overwhelming number of cases. Once a restraint is found to fall in such a class, it is declared per se illegal and inquiry is not required to determine the actual purpose and effect of the arrangement.[55]

The Supreme Court has concluded that per se treatment is appropriate for such categories of restraints as horizontal price-fixing,[56] group boycotts,[57] market divisions,[58] and tying arrangements.[59] Neither the courts nor commentators, however, have arrived at a clear consensus about what other types of arrangements deserve per se treatment. Because of its overwhelming importance in determining the burden that plaintiffs must bear in antitrust litigation, the classification of restraints in either the per se or Rule of Reason category has been the focus of much of the controversy concerning the appropriate scope of the antitrust laws.[60]

With this background in mind, the contribution of *Professional Engineers* to the debate can be better appreciated. The case clarified antitrust goals and pointed the way toward how courts should proceed in analyzing restraints in the professional context. In *Professional Engineers* the Supreme Court examined a section of the canon of ethics of the National Society of Professional Engineers that prohibited members from submitting competitive bids for engineering services. The society attempted to justify the canon

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55. The Supreme Court recently discussed the rationale for per se treatment:

> *Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must bo balanced against its pro-competitive cousequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, *per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials . . . .

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 n.16 (1977).

56. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

57. Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

58. United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).

59. International Salt Co. v. United States, 332 U.S. 392 (1947).

60. As Sullivan points out, however, the consequences of this classification would be greatly reduced were courts to limit themselves strictly to procompetitive justifications in Rule of Reason cases. L. SULLIVAN, *supra* note 50, at § 72. As indicated below, Broadcast Music, Inc. v. Columbia Broadcast Sys., Inc., 441 U.S. 1 (1979), suggests that a continuum approach be employed in which the analyses required under the two standards begin to converge. *See* text accompanying notes 94-98 *infra*.

on the grounds that it minimized the risk that competition would produce inferior engineering work and thereby endanger public health and safety. In rejecting this justification, the Court substantially clarified its views on the purpose of antitrust law. In the Court's opinion, the goal of the Sherman Act is to further competition; therefore, the sole purpose of judicial analysis "is to form a judgment about the competitive significance of the restraint . . . not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry."[61] Making exceptions to the Act whenever public safety rationales were offered, the Court said, "would be tantamount to a repeal of the statute."[62]

Despite the Court's conclusions, the *Professional Engineers* opinion unfortunately failed to provide explicit guidance about how courts should analyze restraints by professionals. The Court did acknowledge the "cautionary footnote" in *Goldfarb,* stating that it still adhered to the view that "by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary."[63] The Court, however, offered little counsel about whether, and what kind of, special consideration should be given to professional services. The opinion itself is unclear as to whether a per se or Rule of Reason approach was applied in reviewing the engineers' canon.[64]

Even with these shortcomings, however, *Professional Engineers* does provide very significant insights in considering arrangements by professional groups. In particular, as will be discussed below,[65] the Court's emphasis on competitive impact as the touchstone for determining legality under the antitrust laws points the

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61. National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 692 (1978).

62. *Id.* at 695.

63. *Id.* at 696 (citing with approval Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-89 n.17 (1975)).

64. Throughout the *Professional Engineers* opinion the Court implied that it was undertaking a Rule of Reason inquiry; but it then condemned the ethical canon as a trade restraint "on its face," thereby suggesting per se illegality. This ambiguity has created confusion among commentators. *Compare* Havighurst, *supra* note 39, at 348 n.194 *and* Kissam, *Antitrust Law, the First Amendment, and Professional Self-Regulation of Technical Quality* in REGULATING THE PROFESSIONS 143 (R. Blair & S. Rubin eds. 1980) *with* Sullivan & Wiley, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason,* 27 U.C.L.A. L. REV. 265, 323 (1979) *and* Note, *Prepaid Prescription Drug Plans Under Antitrust Scrutiny: A Stern Challenge to Health Care Cost Containment,* 75 NW. U.L. REV. 506, 511 n.29 (1980).

65. *See* text accompanying notes 92-128 *infra.*

way to constructing a coherent framework for analyzing professional restraints. Before considering that framework, however, it is useful to consider some of the difficulties encountered in previous attempts to apply antitrust concepts in the professional context.

IV. Key Issues in Considering the Application of Antitrust Law to Health Professionals

A. Arizona v. Maricopa County Medical Society*: An Unsatisfactory Resolution to Some Difficult Questions*

Illustrative of the need for guidance in applying antitrust law to arrangements by health professionals is the recent Ninth Circuit decision in *Arizona v. Maricopa County Medical Society*.[66] Declaring that it was "uncertain about the competitive order that should exist within the health care industry,"[67] the Ninth Circuit held that an agreement by physicians to fix maximum prices, which would be classifed per se illegal in most situations, was to be judged by the Rule of Reason. The justification for providing such a broad exception to per se analysis was poorly reasoned and articulated. Moreover, the opinion provided little guidance concerning how courts using the Rule of Reason should assess a whole range of practices that their experience in other contexts has taught them have so few "redeeming virtues" that they are considered per se illegal.

In *Maricopa* the court was concerned with the conduct of two "foundations for medical care" (FMCs) and the county medical society associated with them. FMCs are a new method for financing health care that has been adopted by some medical societies in recent years.[68] They resemble Blue Shield plans, in that services are prepaid, but FMCs include strong "peer review" mechanisms in an attempt to control costs more effectively. At issue in *Maricopa* was the FMCs' practice of polling their members from time to time to set upper limits on fees charged to patients and covered by insurance plans approved by the FMCs. The State of Arizona charged that this practice constituted price-fixing and, therefore, was a per se violation of the antitrust laws. The district court, after noting the recent trend away from per se characterization and the hints in *Goldfarb* and *Professional Engineers* that the professions may

66. [1980-1] Trade Cas. ¶ 63,239 (9th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3663 (U.S. March 9, 1981) (No. 80-419).

67. *Id.* at 78,154.

68. *See* Egdahl, *Foundations for Medical Care*, 288 N. Eng. J. Med. 491-98 (1973).

warrant special treatment, held that the Rule of Reason approach was required.[69] It therefore denied the plaintiff's motion for partial summary judgment on the issue of liability, because insufficient evidence had been submitted regarding the purpose and effect of the practices and the market power of the defendants.

In a 2-1 decision, the Ninth Circuit affirmed the lower court's ruling. Observing that it was generally unfamiliar with competition in the health care industry, the court declared that the proper inquiry was simply whether prices would have been lower but for the practices of the FMCs.[70] To prove this price effect, the state would have to show that the FMCs engaged in predatory pricing in an attempt to discourage entry, a scenario the court felt was based on a theory too controversial and evidence too scanty to justify a per se ban.[71]

By basing its refusal to apply per se standards on the unusual nature of the health care industry, the court in *Maricopa* may have created a special exemption from traditional antitrust analysis for physicians and other medical providers. Some practices, which elsewhere lack any redeeming virtues, may have substantial procompetitive effects that outweigh their anticompetitive aspects in the health care context. The court's decision, however, provides little guidance in selecting those practices; instead, it suggests that the entire profession might deserve an exemption since its competitive climate is unlike that of most other industries. This result is ironic, for these "conditions" are, to a large extent, the result of efforts by health care providers themselves to stifle competition.[72]

Even more important, the Ninth Circuit's requirement that the plaintiffs show that the FMCs practice would raise prices is misplaced. While price increases might indeed result from the defendant's conduct, the crucial issue is the overall effect on competition. Whatever possible benefits may result from maximum fee-setting, it is hard to refute that the practice is a restraint on competition: it consists of denying individual buyers and sellers the

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69. Arizona v. Maricopa County Medical Soc'y, [1979-1] Trade Cas. ¶ 62,694 (D. Ariz. 1979), *aff'd*, [1980-1] Trade Cas. ¶ 63,239 (9th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3663 (U.S. March 9, 1981) (No. 80-419).

70. [1980-1] Trade Cas. ¶ 63,239, at 78,155.

71. Judge Kennedy concurred on the grounds that the court lacked experience with the health care industry and therefore required a Rule of Reason examination of the FMCs' practices. He hinted, however, that the trial might very well show that the practices did not have an anticompetitive effect. *Id.* at 78,157-58.

72. *See* Havighurst, *supra* note 4, at 97; Palmer, *Antitrust Activities by the FTC in the Health Field*, 37 FED. B.J. 40, 42 (1978).

freedom to determine their own prices.[73] In the context of a prepaid health plan, however, such an arrangement may be necessary to control expenditures and maintain competitive prices for the overall plan. The relevant inquiry, therefore, should be whether the defendant has shown sufficient possible procompetitive effects of its restraints that the overall impact will not be detrimental to competition. By failing to focus its attention on this question, the Ninth Circuit's approach enables health professionals, by simply pointing to their industry's special characteristics, to negate the extensive experience courts have accumulated with regard to a whole gamut of competitive restraints. A better developed analytical framework is needed—one that allows courts to consider the exceptional characteristics of the health care industry without requiring that they discard well-developed analytic tools that facilitate certainty and efficiency in judicial decisionmaking.

B. Drawbacks to Some of the Existing Approaches to Professional Restraints

Courts and commentators have suggested various ways to analyze the legality of professional restraints. Unfortunately, these proposals tend to be either too broad—i.e., they consider factors unrelated to competitive impact—or too narrow—i.e., they focus exclusively on the noncommercial aspects of certain professional conduct without regard to the unique economic factors that may come into play with purely commercial restraints in the health sector. The commercial/noncommercial distinction is not useful in the health care market, however, because the fact that conduct is purely commercial does not necessarily mean that it is not also procompetitive.

The first attempts to create a new analytical framework were made soon after *Goldfarb* laid to rest any doubts that the antitrust laws applied to the professions. Seizing upon the Supreme Court's acknowledgment that the public service aspects of the profession might warrant a special approach,[74] several commentators proposed that the courts should apply an expanded Rule of Reason approach balancing the anticompetitive aspects of a given restraint

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73. *See* Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 213 (1951) (Agreements to fix maximum resale prices, "no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."); L. SULLIVAN, *supra* note 50, at § 78 (1977).

74. *See* note 46 *supra*.

against its direct benefit to the public.[75] These commentators suggested that courts should consider heavily such factors as the extent to which a good faith intention to carry out professional responsibilities motivated a restraint and whether the restraint was unnecessarily restrictive.

This broad weighing of anticompetitive effects against public benefits was adopted tentatively by the Ninth Circuit in *Boddicker v. Arizona State Dental Association.*[76] An agreement tying membership in a national dental association to membership in a local association was at issue. The court held that for this practice to survive a Sherman Act challenge, it "must serve the purpose for which the profession exists, *viz.* to serve the public. . . . Those [practices] which only suppress competition between practitioners will fail to survive the challenge. This interpretation permits a harmonization of the ends that both the professions and the Sherman Act serve."[77]

Defendants for many years have advocated such a "harmonization" process whereby courts would consider the public interest justifications of their restraints when assessing alleged antitrust violations. While there are cases that suggest that such a broad Rule of Reason approach should be adopted, the prevailing trend has been to limit the inquiry to the effect of the restraint on competition.[78] Allowing other factors to be considered would require courts to make value judgments for which they are ill-equipped and that traditionally have been reserved to the legislature.[79] Moreover, the Supreme Court's decision in *Professional Engineers*[80] dispelled any thoughts that the professions warranted the more expansive approach. The Court made it clear that its sole concern under the antitrust laws was the effect of a restraint on competition and not

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75. *See, e.g.*, Note, *The Antitrust Liability of Professional Associations After* Goldfarb: *Reformulating the Learned Professions Exemption in the Lower Courts*, 1977 DUKE L.J. 1047, 1068; Note, *Application of the Antitrust Laws to Anticompetitive Activities by Physicians*, 30 RUTGERS L. REV. 991, 1020-21 (1977). *See also* Bauer, *supra* note 41, at 585.

76. 549 F.2d 626 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977). *See also* Paralegal Inst., Inc. v. American Bar Ass'n, 475 F. Supp. 1123, 1130, (E.D.N.Y. 1979) (applying the principles enunciated in *Boddicker* to find that ABA guidelines for accreditation of paralegal schools were reasonable under the Sherman Act).

77. 549 F.2d at 632. The court cautioned, however, that this interpretation was only a "principle to be employed in deciding specific cases" and not a blueprint that would resolve all controversies. The latter would require additional guidance from the Supreme Court and other cases. *Id.*

78. *See* L. SULLIVAN, *supra* note 50, at § 66.

79. *See* Bork, *supra* note 52, at 838-39 (1965).

80. *See* text accompanying notes 61-63 *supra.*

whether competition itself was in the public interest or in the interest of the members of the industry.[81] The latter questions were policy decisions to be made solely by Congress.[82]

An alternative to the expansive Rule of Reason approach for all professional restraints involves a two-step analysis in which a court would first decide whether conduct has a sufficient noncommercial purpose to remove it from per se treatment; if such a purpose is found, then a Rule of Reason analysis would be pursued.[83] One commentator has suggested that conduct pass a three-pronged test in the first step of the analysis in order to avoid a finding of per se illegality: the conduct (1) must arguably fall within the legitimate self-regulating powers of the profession, (2) must not serve a predominantly profit-oriented or commercial purpose, and (3) must be undertaken in good faith—meaning that it meets an objective test focusing on a reasonable person in the position of the professional defendant and examines the timing and sequence of events leading up to and following the imposition of the restraint.[84]

Making a determination based on a commercial/noncommercial distinction, however, causes several problems. Certain restraints that elsewhere would be considered per se illegal may, in

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81. *But see* Note, *Antitrust-Rule of Reason*, 57 J. URB. L. 142, 162 (1979), suggesting that despite the *Professional Engineers* holding, a liberal weighing of social and political values is both desirable and inevitable.

82. 435 U.S. at 689-92. The state legislatures, through the state action doctrine, can also make certain actions exempt from the antitrust laws. *See* Parker v. Brown, 317 U.S. 341 (1943).

83. The most explicit judicial statement of this approach is found in Veizaga v. National Bd. for Respiratory Therapy, [1977-1] Trade Cas. ¶ 61,274 (N.D. Ill. 1977):

> Where professional organizations are alleged to have committed a per se offense, a two-step analysis is required. First, the court must determine whether the challenged activity is, by its nature and character, commercial. If the court should find that it is commercial, the professional organization may be liable for a per se offense. However, if the court should find the activity to be noncommercial, it should then apply a rule of reason analysis, using the factors outlined in Board of Trade v. United States, 246 U.S. 231 (1917). We believe that the second step is necessary to ensure that those professional activities, while noncommercial in their character, but unreasonable (in the antitrust sense) in their impact, are subject to the antitrust laws. This analysis satisfies the concern of the court that professions should be subject to the antitrust laws but still be treated differently where the public service aspects of the professions are involved.

Id. at 70,870.

84. Note, *The Professions and Noncommercial Purposes: Applicability of Per Se Rules Under the Sherman Act*, 11 J. L. REF. 387, 399-400 (1978). For an example of a refusal by a court to invoke a Rule of Reason approach for an otherwise per se illegal boycott because it was not satisfied that these three criteria had been met, see Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 546-47 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979).

the health care context, have procompetitive effects.[85] When a commercial purpose is conceded, however, under the above approach defendant's conduct will be per se illegal no matter what its beneficial effects. In addition to being too narrow in this respect, the test is also too broad in others. According to *Professional Engineers,* the only issue under either the per se or Rule of Reason analysis is the effect of a restraint on competition.[86] The three-pronged examination is therefore unnecessary and irrelevant, because it is not directed to the ultimate issue to be decided. A restraint on competition—even if it is an exercise of legitimate self-regulatory powers, in pursuit of a noncommercial purpose, and undertaken in good faith—is nevertheless illegal if its anticompetitive aspects are not balanced by procompetitive effects.[87] It is inapposite to use only those three critieria to exempt traditionally anticompetitive conduct from a per se ban, for they shed no direct light on the crucial question under consideration: the impact of the practice on competition. Moreover, the distinction between a commercial and noncommercial purpose is often a difficult, if not impossible one to draw. Noncommercial reasons can easily be advanced to justify most restraints. In many cases, conduct may have *both* commercial and noncommercial motives.[88] While inquiry into purpose may shed some light on a restraint's intended effect, placing central importance on this distinction would entangle courts in difficult assessments about a host of arguably noncommercial rationales that are only tangentially related to the conduct's net impact on competition.

The approaches examined in this section are not without their merits. Such considerations as noncommercial purpose, good faith,

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85. *See* text accompanying notes 152-54 *infra.*

86. 435 U.S. at 692.

87. The proponent of the three-pronged approach suggests that the test for whether a given professional activity is legitimate self-regulation is whether "the conduct is germane to the purposes of the profession's self-regulatory mandate." Note, *supra* note 84, at 401. To the extent that a restraint is clearly an articulated state policy and actively supervised by the state, it may be exempt from antitrust sanctions. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (dictum); Parker v. Brown, 317 U.S. 341 (1943). The exemption is the result of the state action doctrine, however, and is not the product of special treatment afforded to self-regulating professionals. Under *Professional Engineers,* ethical norms designed to regulate competition or marketing restraints relating to product safety still must have at most an insubstantial net anticompetitive effect. *See* National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 696 n.22 (1978); Smith v. Pro Football, Inc., 593 F.2d 1173, 1188-89 (D.C. Cir. 1978); Mardirosian v. American Inst. of Architects, 474 F. Supp. 628, 638 n.18 (D.D.C. 1979).

88. *See* Havighurst, *supra* note 39, at 353 n.214.

and the absence of less restrictive alternatives do provide some help in determining whether certain conduct violates the antitrust laws.[89] These factors should be considered, however, not in terms of creating special exemptions from antitrust scrutiny for certain professional restraints, but rather as bearing on the extent of the procompetitive justifications that may balance the anticompetitive effects of the conduct in question. The crucial inquiries therefore are: (1) how might practices, elsewhere per se illegal, be procompetitive when undertaken in the professional context, and (2) how should courts go about assessing such procompetitive justifications? As the next section will demonstrate, much experience already has been gained in wrestling with related questions, and the outline to their answers is apparent in existing case law.

C. Between Per Se and Rule of Reason Analysis: Judicial Experience with an Intermediate Level Scrutiny of Restraints

Since *Goldfarb* was decided in 1975, the courts have been faced with the task of assessing the legality under the antitrust laws of many professional practices with which they have had little experience. Activities of engineers, lawyers, doctors, dentists, realtors, architects, pharmacists, and many others have for the first time been examined for their possible anticompetitive impact.[90] Lacking the considerable experience with these business relationships that the Supreme Court has suggested is necessary before per se standards may be applied,[91] courts have been reluctant to adopt wholesale characterizations developed in other commercial contexts. As the preceding discussion has indicated, however, *Professional Engineers* has limited the scope of inquiry under the Rule of Reason to competitive impact.[92] The result of these develop-

89. *See* L. SULLIVAN, *supra* note 50, at §§ 70-72, 74.

90. *See, e.g.*, National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679 (1978); Virginia Academy of Clinical Psychologists v. Blue Shield, 624 F.2d 476 (4th Cir.), *cert. denied*, 49 U.S.L.W. 3617 (U.S. Feb. 24, 1981) (No. 80-930); Feminist Women's Health Center, Inc. v. Mohammand, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979); Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977); Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n, 484 F. Supp. 1195 (D.D.C. 1980); Paralegal Inst., Inc. v. American Bar Ass'n, 475 F. Supp. 1123 (E.D.N.Y. 1979); Mardirosian v. American Inst. of Architects, 474 F. Supp. 628 (D.D.C. 1979); United States v. American Soc'y of Anesthesiologists, Inc., 473 F. Supp. 147 (S.D.N.Y. 1979).

91. United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08 (1972). *See* Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 9-10 (1979); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50-51 (1977); White Motor Co. v. United States, 372 U.S. 253, 263 (1963).

92. *See* text accompanying notes 61-63 *supra*.

ments is that while more practices are likely to be analyzed under the Rule of Reason, that analysis in the professional context need not consider justifications unrelated to competitive impact. This narrower focus on competition suggests a solution to the potentially unmanageable burdens of extended judicial examination of professional conduct. An intermediate level of scrutiny between traditional per se and Rule of Reason analysis can be used to determine the likelihood that restraints will have a net procompetitive impact. Such an examination would permit courts to gain experience with new business practices, but could be carried out in a straightforward manner without the need for extended economic analysis.[93]

While such middle level scrutiny has not been explicitly recognized by the courts, the reality is that courts do apply this type of analysis when they determine whether certain restraints should be characterized as per se violations. Often a case involves conduct that does not constitute a classic "naked" restraint of trade; instead, the defendant has argued that the arrangement's impact on competition is only incidental to unproved production efficiencies or improved market functioning, and that, therefore, the arrangement in fact enhances competition.[94] If such conduct were characterized as a per se horizontal restraint, like price-fixing, market division, or group boycott, all further inquiry into these possible procompetitive justifications would be cut off. Consequently, courts have traditionally conducted a truncated analysis that examines the procompetitive justifications and possible anticompetitive results. If satisfied that siguificant beneficial results may exist, the court will not declare the restraint illegal under the per se ban, but will instead apply the more extensive Rule of Reason scrutiny.

This characterization process was evident in the Supreme Court's recent decision in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*[95] The question was whether the issuance of blanket licenses for copyrighted music constituted an illegal price-fixing arrangement. The Court noted that, while in a literal sense composers and publishing houses had joined together to set prices, it was not always "a simple matter" to determine whether such conduct deserved the label of per se price-fixing.[96] To

93. *See* Sullivan & Wiley, *supra* note 64, at 323-24, 332-35.
94. L. SULLIVAN, *supra* note 50, at § 74.
95. 441 U.S. 1 (1979).
96. *Id.* at 9.

determine how to characterize the practice, the Court said it would be necessary to

> focus on whether the effect and, here because it tends to show effect . . . the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice *facially* appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive."[97]

That this examination required some intermediate level of analysis was clear from the Court's observation that "[t]he scrutiny occasionally required must not merely subsume the burdensome analysis required under the rule of reason [citing *Professional Engineers*], or else we should apply the rule of reason from the start."[98]

Three situations have been recognized in which this more extensive inquiry is required before a restraint may be characterized as either "per se" or "Rule of Reason" conduct. All three situations involve cases in which the particular circumstances of the market have enabled the defendants, charged with a per se violation, to justify their actions as procompetitive. These exceptions merit attention because they suggest that existing antitrust doctrine is sufficiently flexible to cope with legitimate professional activity. They are:

(1) *Joint action to make or expand a market.* In certain situations competitors may agree on practices that affect price formation or divide markets in order that an organized market can be widened and run more efficiently. The leading case is *Chicago Board of Trade v. United States*[99] in which the Supreme Court upheld an arrangement among grain traders that, by fixing night prices at the level of the closing bid of the prior day session, had the effect of channelling all nighttime transactions into the more organized daytime exchange. Of a similar nature are cases dealing with tobacco auction markets in which the time of sales was regulated to enable buyers to attend all auctions sequentially.[100] Another way in which joint action may expand a market is through standardization, thereby bringing together elements of supply and demand that previously did not participate in the same market.

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97. *Id.* at 19-20 (citation omitted) (emphasis added).
98. *Id.* at 19 n.33.
99. 246 U.S. 231 (1918).
100. *See* L. SULLIVAN, *supra* note 50, at § 76 and cases cited therein.

For example, if thirty firms each manufactured nuts and bolts of different sizes, each company might be dealing with only its own subgroup of buyers. Standardization of the product could bring all of the buyers and sellers together in the same market and thereby enhance competition.[101]

(2) *Joint action to improve market functioning.* Certain factors, such as high transaction and information costs, uncertainty, and substantial externalities, can cause a market to function poorly.[102] In such a situation, certain joint activities that are not overly restrictive may be undertaken by competitiors in order to improve market functioning. Standardization again provides an example: if an industry adopts uniform requirements for products, warranties, service, and other nonprice terms, buyers may be better able to make comparisons, thereby stimulating price competition.[103] Certification programs similarly may have procompetitive effects by providing consumers with otherwise difficult-to-obtain information about products or services.

The extent to which competitors can take such self-regulatory action to correct possible market failures is unclear. No matter how laudable their justification, activities that openly involve boycotts as a sanction against nonconforming competitors are probably still per se illegal absent explicit congressional or state authorization for such self-regulation.[104]

Self-regulation that does not take the form of an explicit boycott, but that may have similar effects, requires substantial analysis before it can be characterized to avoid per se labelling. The court will consider such factors as (a) the possibility that the self-

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101. This example is suggested by Sullivan & Wiley, *supra* note 64, at 323-24.

102. *See* C. SCHULTZE, *supra* note 21, at 32-43.

103. Of course in an oligopolistic market, standardization of nonprice terms may facilitate collusion and, therefore, have anticompetitive effects. *See* F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 200-04 (2d ed. 1980); L. SULLIVAN, *supra* note 50, at §§ 99-100. Thus, each particular situation requires analysis, and no simple rule of legality or illegality can be drawn.

104. *See* Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941). The Supreme Court in Silver v. New York Stock Excb., 373 U.S. 341 (1963), declared that a boycott could escape per se condemnation only if the justification stems from a legislative mandate "or otherwise." *Id.* at 348-49. The commentators have disagreed on whether that phrase might allow for self-regulation in cases in which there is no government declaration but the structure of the industry requires such collective action. *Compare* L. SULLIVAN, *supra* note 50, at § 88 *with* Note, *supra* note 84, at 400. *See also* Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486, 1499 (1966). If the collective action is truly essential for the industry to function, it is probably better considered under the ancillary restraint doctrine. *See* text accompanying notes 106-110 *infra*; R. BORK, THE ANTITRUST PARADOX 342-44 (1978).

policing justification might actually be a sham, (b) whether the standards are objective and reasonable, (c) the extent to which the goals of the program advance consumer interests and are socially useful, and (d) whether the enforcement mechanisms are procedurally fair.[105] Collective action that satisfies these criteria is considered to have sufficient procompetitive effects to warrant more complete analysis under the Rule of Reason.

(3) *Joint action to achieve integrated efficiencies.* Concerted action may also escape per se treatment if it leads to efficiencies that can be directly traced to the integration of activities by the participating firms. This exception, known as the "ancillary restraint doctrine," was first enunciated in *United States v. Addyston Pipe & Steel Co.*[106] Judge (later Chief Justice) Taft, relying on common law precedents, declared that covenants in restraint of trade may be legal if they are "merely ancillary" to the main purpose of a lawful contract, necessary to protect the convenantee, and reasonably adapted and limited to that protection.[107]

It should be emphasized that the arrangements to which the ancillary restraint doctrine applies are those in which efficiencies result from a partial integration of functions. They are thus distinguished, on the one hand, from loose agreements like cartels, which have little potential for producing efficiencies, and, on the other hand, from complete integrations, like mergers, which are not treated as "naked" restraints of trade but are instead evaluated under the Rule of Reason or under the antimerger provisions of section 7 of the Clayton Act.[108] Typical partial integration arrangements that may be treated as ancillary include joint selling, buying, advertising, or research activities. As in the other exceptions to per se analysis, the touchstone is still the ultimate effect of the conduct on competition. Ancillary restraints are tolerated because they may increase efficiency and thereby enhance competition.[109]

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105. *See* L. SULLIVAN, *supra* note 50, at § 88.

106. 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

107. 85 F. at 282-83. As examples of such ancillary restraints Taft suggested agreements by a seller of a business or property not to compete with the buyer or by a partner not to do anything to interfere with the business of the partnership. *See* Bork, *supra* note 52, at 796-801.

108. *See* L. SULLIVAN, *supra* note 50, at § 77.

109. *See* Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 20 (1979). (In characterizing conduct under the per se rule, inquiry is whether restraint is designed to "increase economic efficiency and render markets more, rather than less, competitive") (quoting United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978)). *But see* Posner, *Information and Antitrust: Reflections on the* Gypsum *and* Engineers *Decisions*, 67 GEO. L.J. 1187, 1192 (1979), in which the author suggests that the status

Thus, conduct that involves integration efficiency nevertheless will be condemned as per se illegal if, after a truncated analysis, the court concludes that the participants possess such significant market power that the arrangement's effect likely will be to dampen competition.[110]

As discussed above,[111] the courts traditionally have considered the three exceptions to per se analysis when deciding whether restraints should be characterized as falling within the per se category. The extent of this consideration falls somewhere between the review given to "naked" per se restraints and full-blown Rule of Reason treatment. It matters little whether the process is called an "expanded per se approach" or a "circumscribed Rule of Reason" examination, as long as it is recognized that an intermediate level of analysis is being employed. As will be developed below, this traditional approach supplies a sufficiently flexible framework to enable courts to analyze restraints by health professionals.[112]

While the characterization process technically has been only the first step in deciding how an antitrust analysis should proceed, from a practical standpoint it often has been conclusive. If conduct is characterized as a "naked restraint," by definition it is per se illegal, and the inquiry ends. Conduct that escapes such characterization conceivably could be declared illegal under the Rule of Reason. In practice, however, the burden of showing anticompetitive purpose and effect is so great that restraints that have passed muster under the characterization stage are rarely found illegal under a later full Rule of Reason analysis.[113] Thus, the factors used in this examination and the weight they are accorded deserve special attention. It is to these questions that the discussion now turns.

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of a pure efficiency defense involving no procompetitive benefits is still unresolved by *Professional Engineers.*

110. L. SULLIVAN, *supra* note 50, at § 77.

111. *See* notes 99-109 *supra* and accompanying text.

112. Indeed, the Supreme Court decisions in both *Goldfarb* and *Professional Engineers* can be seen as employing this middle-level analysis, which has created some confusion among commentators who have sought to classify the results as either per se or Rule of Reason decisions. *See* Note, *supra* note 75, 1977 DUKE L.J. 1047, 1051 n.23 (discussing conflicting view of *Goldfarb*). *See also* note 64 *supra.*

113. In many cases a court, after characterizing a restraint as one that does not warrant per se treatment, will proceed without much further analysis also to hold it lawful under the Rule of Reason. *See, e.g.,* Hatley v. American Quarter Horse Ass'n, 552 F.2d 646 (5th Cir. 1977); E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178 (5th Cir. 1972), *cert. denied,* 409 U.S. 1109 (1973); United States v. American Soc'y of Anesthesiologists, Inc., 473 F. Supp. 147 (S.D.N.Y. 1979).

D. *A Framework for Analyzing Restraints by Professionals*

As the Supreme Court observed in *Goldfarb*, "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."[114] On the other hand, this recognition does not require that judicial experience derived from ninety years of antitrust enforcement be jettisoned wholesale. Removing restraints from a per se ban entails substantial losses in judicial economy, certainty, and deterrence.[115] There are few guidelines concerning how a Rule of Reason inquiry should be conducted. As one commentator has noted, "The rule has been throughout most of its history more a euphemism for nonliability than an administrable test of legality."[116] Thus, there is a need for an intermediate level analysis and a framework that can serve to guide courts in considering conduct by professionals. As the preceding section has indicated, the outline of such a framework can be found in antitrust precedents involving the "characterization" of restraints that have possible procompetitive justifications.

The touchstone for legality under the antitrust law must be the effect of conduct on competition.[117] Acts by professionals deserve exceptional treatment only to the extent that their competitive impact differs from the results that would be expected from similar practices in commercial contexts with which the courts are more familiar. When professionals engage in activities that in other settings have so few redeeming virtues that they are considered per

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114. Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 n.17 (1975).

115. As one commentator has noted,

> A [Rule of Reason] standard under which all circumstances are weighed, and violations found only upon demonstration of specific anticompetitive effects, may sound sober and moderate, but in the real world has little deterrent effect, produces trials and inordinate length and expense, and often undermines antitrust enforcement. Business practices tested under a full rule of reason, with no presumptions based on any set of facts and with the burden of showing anticompetitive effect on the plaintiff, will usually turn out to be legal.

Pitofsky, *The* Sylvania *Case: Antitrust Analysis of Non-price Vertical Restrictions*, 78 COLUM. L. REV. 1, 2 (1978).

116. Posner, *supra* note 109, at 1191 n.33.

117. "Competition" may have several definitions and has been used by courts and commentators to mean different things. *See* R. BORK, *supra* note 104, at 56-61. Perhaps the best approach to clarifying what is meant by "increasing competition" is to use that term to refer to efforts which facilitate output expansion; therefore the goal of antitrust is to design rules that bar output restriction. *See* Elzinga, *The Compass of Competition for Professional Services*, in REGULATING THE PROFESSIONS, *supra* note 64, at 109-10.

se illegal, their conduct should likewise be *presumed* unlawful. In contrast to the inference that is created when the conduct occurs in typical business circumstances, however, this presumption should be rebuttable. It can be overcome by a showing that, in the particular context, the practices have substantial procompetitive effects that may balance out any anticompetitive impact.[118]

Three ways in which restraints may enhance competition have been suggested: conduct can create or expand markets, improve market functioning, or provide efficiencies as a result of a partial integration. While there may be additional ways in which restrictions can have procompetitive effects, the courts have so far recognized only these mechanisms.[119] It is essential that any attempt to expand this list of justifications be tied strictly to the touchstone of competitive effect and not be muddled by acceptance of other allegedly beneficial rationales.

In weighing the plausibility of a defendant's procompetitive justifications, a court can look for guidance to cases from the commercial context in which exceptions have been made to traditional per se treatment.[120] The extent to which a practice resembles a "naked trade restraint" certainly should be an important factor. Thus, for example, conduct that effectively fixes minimum prices will carry a much stronger presumption of illegality than will restrictions tending to limit the manner in which professionals can practice. In considering whether a restraint is likely to enhance competition, courts also should consider the following factors:

(1) *Motivation and Purpose of the Arrangement.* The ultimate concern of the court is, of course, the effect of a particular restraint. Nevertheless, an inquiry into the defendants' intentions in pursuing their conduct may shed light on its probable impact.[121]

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118. The use of rebuttable presumptions to facilitate trials of trade restraints that may not merit per se treatment has been suggested by several commentators. *See* Bohling, *A Simplified Rule of Reason for Vertical Restraints: Integrating Social Goals, Economic Analysis and* Sylvania, 64 IOWA L. REV. 461, 510-18 (1979); Oppenheim, *Federal Antitrust Legislation: Guidepoints to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1158-81 (1952); Note, *A Suggested Role for Rebuttable Presumptions in Antitrust Restraint Trade Litigation*, 1972 DUKE L.J. 595.

119. Sullivan and Wiley suggest that even arrangements defended as attempts to remedy market failures may be inappropriate for private parties to undertake and perhaps therefore must be left to the legislatures. Sullivan & Wiley, *supra* note 64, at 324.

120. *See* text accompanying notes 99-110 *supra*.

121. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts [in determining legality under the antitrust laws]. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of

Presumably defendants are well situated to assess the consequences of their actions, and if they intend anticompetitive results, this is a strong indication that such results are likely to occur.

Evidence that actions with possible procompetitive motivations were actually committed in bad faith is extremely probative. The timing and sequence of events may show that the defendant's conduct was actually a specific response to a competitive challenge.[122] If the practices in question involve some form of standard-setting or certification, the crucial question is whether the criteria employed are objective and reasonable; if not, it can be inferred that there will be few procompetitive gains to balance the anticompetitive effects of withholding approval to the nonconforming competitors.[123] Similarly, if the scheme in question involves some form of self-regulation, an inquiry into the availability of procedural safeguards will indicate the fairness of the standards and the likelihood that they will have net procompetitive effects.[124]

In considering the purpose of the arrangements, two caveats are in order. First, there need not be a noncommercial purpose to the arrangement. A commercially motivated restriction, which expands or improves a market or creates efficiencies, will be lawful as long as its effect is to enhance competition. Second, an inquiry into purpose and motive is unlikely to be conclusive. Often several motivations exist for a particular action, and it will be difficult for plaintiffs to show that an anticompetitive purpose was the principal aim of the arrangement.[125]

(2) *Availability of Less Restrictive Alternatives.* The rationale advanced here for providing exceptions to the per se treatment of certain restraints is that they also may have substantial procompetitive effects. Less justification exists, however, for approving practices when there are reasonable alternatives available to the defendants, particularly those with similar procompetitive effects that

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intent may help the court to interpret facts and to predict consequences. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

122. *See, e.g.,* Feminist Women's Health Center v. Mohammad, 586 F.2d 530 (5th Cir. 1978), in which allegations that the defendant engaged in intimidation and coercion were sufficient to justify a denial of a motion for summary judgment. The defendants argued that acts to discourage physicians from performing abortions at a local clinic were intended only to insure a minimum standard of care.

123. *See* Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961).

124. *See* Silver v. New York Stock Exch., 373 U.S. 341 (1963); Linseman v. World Hockey Ass'n., 439 F. Supp. 1315 (D. Conn. 1977).

125. "The primary problem with evidence of purpose—to put the matter bluntly—is that in modern antitrust cases, such evidence will often reflect what counsel advise businessmen their purpose should have been." Pitofsky, *supra* note 115, at 35.

are less restrictive on marketplace conduct.[126] Indeed, the existence of such alternatives suggests that the proffered procompetitive justifications may not be the real motivation behind the restraints and that their imposition will have an overall anticompetitive impact.

The consideration of other alternatives should go beyond the mere inquiry into whether the plaintiff is able to contemplate an arrangement that might be less restrictive.[127] The defendant's scheme need not be the best imaginable; rather, alternatives are examined only to shed light on the probable effect the restraint will have on competition. This test, therefore, asks whether the restrictions are reasonably necessary to insure their procompetitive purposes. A finding that reasonable alternatives exist is an element to be weighed by the court in determining the likely net impact of the restraint on competition.

(3) *Market Power of the Defendants.* In some situations the market share of the defendants may be highly relevant. As Professor Sullivan has indicated, the cases can be divided into two categories, depending upon whether market power is necessary to achieve the alleged beneficial purposes of the restraint.[128] If market power is essential to obtain the benefits of the restraints, its consideration is less important since the benefits of the arrangement will multiply in tandem with its harms as market power increases. Thus, the court can assume that the defendants have the requisite power to do both harm and good and need only weigh the pro- and anticompetitive aspects of the conduct. This situation is most likely to occur with arrangements designed to make or improve a market, as these may require the participation of a substantial share of competitors to be effective.[129]

If, however, the procompetitive benefits can be attained re-

126. For opinions holding that a restraint can be justified as procompetitive only if it is no more restrictive than necessary to achieve its procompetitive purposes, see White Motor Co. v. United States, 372 U.S. 253, 270 (1963) (Brennan, J., concurring); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); Sandura Co. v. FTC, 339 F.2d 847, 856 (6th Cir. 1964).

127. *See* M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 705-08 (1973). The Supreme Court in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58 n.29 (1977), has indicated that at least in regard to vertical restraints, the least restrictive alternative need not be employed. *See also* American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1248-49 (3d Cir. 1975).

128. L. SULLIVAN, *supra* note 50, at § 69.

129. Sullivan offers as an example the situation in *Board of Trade* in which the alleged purpose of the arrangement, to perfect the daytime market, could be achieved only to the extent those acting in consent possessed market power. *Id.*

gardless of market power, an inquiry into market share is essential to determine the severity of the anticompetitive effects. Such an analysis is likely to be most needed in cases in which procompetitive results are claimed to stem from efficiencies due to restraints ancillary to a partial integration. If market power is insubstantial, the danger of any harm may be so slight that only a very modest showing of procompetitive benefits would be needed to justify the restraint. On the other hand, if a significant share of the market is involved, it would be extremely unlikely that any procompetitive benefits would be sufficient to outweigh harmful market effects. Inquiry into market share thus may be crucial in considering conduct by new entrants or failing competitors that would be unlawful if undertaken by more dominant firms.[130]

Once the defendants have presented justifications for their conduct, the court's task is to balance these against the restraint's harmful impact on competition. To what extent the plaintiffs must show an anticompetitve effect depends on the familiarity of the court with the restraint, its similarity to traditional per se conduct, and the strength of the procompetitive rationale. At one extreme, for example, are professionals who engage in classic per se illegal conduct such as price-fixing or market division and fail to offer a convincing procompetitive justification. A strong presumption of illegality then exists, and the court should require at most a very modest demonstration of anticompetitive effect. At the other end of the spectrum is conduct involving an indirect restraint in an unusual market context, in which the defendant has offered a plausible procompetitive rationale as well as evidence of good faith, the absence of less restrictive alternatives, and perhaps insubstantial market power. For the plaintiff to succeed in such a situation, a full-blown Rule of Reason case must be proved, with a showing of anticompetitive purpose, effect, and power.

E. Application of Intermediate-Level Scrutiny to the Professions

The preceding framework is useful in explaining several recent antitrust cases dealing with restraints by professionals. *Mardirosian v. American Institute of Architects*[131] involved an ethical

130. This inquiry can be conducted in a more summary manner than that conducted in a § 2 monopolization case since the issue is simply whether the defendants possess *substantial market power* and not whether they possess monopoly power. *Id.*

131. 474 F. Supp. 628 (D.D.C. 1979).

standard of a professional architects' association that prohibited members from seeking a commission on a project for which another architect already had been selected. The court, after declining to rule that the standard was per se illegal, observed that the restraint had clear anticompetitive effects. Despite the defendants' justifications that the restraints promoted the integrity of contracts and prevented deception and conflicts of interest, the court held that the standard was overbroad and would not directly enhance competition.[132] Because it concluded that a procompetitive justification was lacking, the court had little difficulty in granting the plaintiff partial summary judgment on the issue of liability.[133]

A similar analysis was employed in *United States v. Realty Multi-List, Inc.*[134] in which a test for "facial unreasonableness" was applied in considering the membership criteria of a county-wide real estate multiple listing service. Noting that the potential for significant competitive harm existed, the Fifth Circuit discussed the way to conduct an examination to determine whether the requirements might be reasonable ancillary restraints with overall procompetitive benefits. According to the court, assuming that the defendants had market power, the inquiry must focus on (1) whether the restraints had legitimate justifications in the competitive needs of the association itself, and (2) whether the requirements were "reasonably necessary to the accomplishment of the legitimate goals and narrowly tailored to that end." If the restraints failed these tests, they could be condemned without proof of past effect because "[t]hey have, in essence, an anticompetitive effect which has no countervailing procompetitive benefit."[135]

The framework for intermediate-level scrutiny suggested here also provides coherence and guidance to recent antitrust decisions regarding restraints by health professionals. For example, in *Virginia Academy of Clinical Psychologists v. Blue Shield,*[136] a physician-controlled health care plan refused to pay psychotherapists' fees unless the treatment provided was supervised and billed through a physician. The Fourth Circuit, citing *Broadcast Music*

132. *Id.* at 650.

133. *Id.* at 651.

134. 629 F.2d 1351 (5th Cir. 1980).

135. *Id.* at 1375. The court concluded that the membership criteria were unreasonably overbroad but remanded the case to the district court to consider questions of market power and jurisdiction under the Sherman Act. The "facial unreasonableness" test was cited approvingly in United States v. Columbia Pictures Indus., Inc., [1980] 5 TRADE REG. REP. (CCH) ¶ 63,698 (S.D.N.Y.).

136. 624 F.2d 476 (4th Cir. 1980), *cert. denied,* 49 U.S.L.W. 3617 (Feb. 24, 1981).

and *Goldfarb,* agreed with the lower court that per se analysis was inappropriate "[b]ecause of the special considerations involved in the delivery of health services."[137] The Fourth Circuit rejected the district court's finding, however, that clinical psychologists and psychiatrists do not compete, and instead concluded that the Blue Shield arrangement, by requiring the two professions "to act as one,"[138] necessarily limited competition. The court acknowledged that there may be valid reasons for requiring an examination and consultation by a physician—*viz.,* to ensure that persons suffering from physical ailments do not undertake needless psychotherapy.[139] The court, however, was not convinced that the restraint in fact was designed to enhance quality of care. The Blue Shield requirements, by allowing billings through *any* physician and not just those who treated mental and nervous disorders, clearly did not provide this element of supervision. The restraint, therefore, lacked a convincing procompetitive justification and was unlawful.

A similar intermediate-level analysis was attempted in *United States v. American Society of Anesthesiologists.*[140] The anesthesiologists had adopted and published a "relative value guide" in which medical procedures were associated with a numerical unit that could be converted to dollars. This scheme allowed member physicians to compare the relative values of a whole range of medical services. The guide can become a fee schedule merely by plugging in a conversion factor to multiply the number of units for each procedure and then calculating the amount to be charged. Such a guide, established by competitors in a commercial context, probably would constitute illegal price-fixing because the dissemination of information and agreement on the establishment of price structures usually leads to price uniformity and stabilization.[141] The court, however, declined to declare the guide per se illegal, considering it to be a response to the rapid development of anesthesiology as a full-blown medical specialty and the consequent need for a "cohesive, internally consistent, logical and appropriate

137. 624 F.2d at 484.

138. *Id.* at 485.

139. *Id.*

140. 473 F. Supp. 147 (S.D.N.Y. 1979). For a good discussion of the *Anesthesiologists* decision, see 33 VAND. L. REV. 233 (1980).

141. *See* United States v. Container Corp. of America, 393 U.S. 333 (1969); United States v. United States Steel Corp., 223 F. 55, 154-61, 173-77 (D.N.J. 1915), *aff'd,* 251 U.S. 417 (1920); Kallstrom, *Health Care Cost Control by Third Party Payors: Fee Schedules and the Sherman Act,* 1978 DUKE L.J. 645, 689-96.

method"[142] for arriving at fees.

The court then proceeded to analyze the restraint under the Rule of Reason. It concluded that generally anesthesiologists do not compete with each other for patients. Instead, anesthesiologists' services are paid for by insurers, and there was no evidence that insurers were coerced into accepting the guides. Furthermore, and perhaps most siguificantly, the guides were published without conversion factors, and no evidence existed that physicians or third-party payers used them without making their own adjustments to establish prices. Thus, the guides were seen as an acceptable means of describing anesthesiology services. As the court stated, "When viewed in the context of this unusual market, it would seem that defendant's activities tended to promote the interplay of such competitive forces as existed in the area."[143]

The court's assessment is not entirely satisfying. It is difficult to see why a less restrictive means, such as the establishment of relative value scales by each insurer, as opposed to the anesthesiologist society, would not have served the same procompetitive purposes without running the risk of dampening price competition among the doctors.[144] The point here, however, is that although the court's ultimate decision may have been unwise, it at least followed a framework of analysis that made decisionmaking manageable. The court went astray only when it failed to subject the defendant's rationale to the more rigorous scrutiny it deserved. As in the *Blue Shield* case, a knee-jerk characterization of the restraints as per se illegal was rejected. The court's next step was to consider possible procompetitive justifications, and here it concluded that the guides served to improve the market by facilitating comparisons of the anestliesiologists' services. That this conclusion may have been mistaken can be traced to the failure of the court to consider in greater depth the merits of this justification and whether reasonable less restrictive alternatives could accomplish the same purposes.

The complexities of a market in which third-party insurers play a substantial role also explains the *Maricopa* court's reluctance to declare a maximum price-fixing arrangment illegal per

142. United States v. American Soc'y of Anesthesiologists, 473 F. Supp. 147, 158 (S.D.N.Y. 1979).

143. *Id.* at 160.

144. *See* Havighurst & Kissam, *The Antitrust Implications of Relative Value Studies in Medicine*, 4 J. HEALTH POL., POL'Y & L. 48 (1979).

se.[145] As the analysis presented here suggests, however, it was a mistake for the *Maricopa* court to assume that because conduct in the professional context does not fall within the per se category, it must necessarily be subjected to a full-scale Rule of Reason analysis with the plaintiff bearing an almost insurmountable burden of proof. Instead, the court should have required the defendants to present some procompetitive rationale for their arrangement. Judge Larson noted in his dissent that the defendants' only justification—that the arrangement served to cut costs—was not convincing since there were no real incentives for physicians to limit fees.[146]

Maximum fee arrangements, in some situations, may be procompetitive.[147] If instituted by insurers they may be reasonably ancillary to arrangements for new health care financing that increase competition in the insurance market.[148] Such restraints imposed by physician groups without market power may be procompetitive in the health care provider market, particularly if they are ancillary to the formation of health maintenance organizations. In *Maricopa,* however, the restraints do not appear to have been ancillary to any legitimate joint venture. The defendants in that situation created neither a new health care provider entity nor a new insurer plan, but instead only contracted out coverage to existing health insurers. Thus, it is doubtful that there were any substantial procompetitive effects to balance the harmful impact of the restraint, and the arrangement should have been declared unlawful.[149]

F. The Implications for Health and Safety

A central tenet in this Article's analysis is the view that restraints by health care professionals can be analyzed in a managea-

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145. *See* text accompanying notes 66-73 *supra.*

146. Arizona v. Maricopa County Medical Ass'n, [1980-1] Trade Cas. ¶ 63,239, at 78,164 (9th Cir. 1980) (Larson, J., dissenting).

147. For a discussion of the procompetitive aspects of maximum price restraints in a related market, prescription drugs, see Note, *supra* note 64, at 518-26, which suggests that pharmacy agreements may be procompetitive by (1) increasing price sensitivity in the market, (2) reducing consumer search time, (3) introducing a sophisticated buyer likely to bargain on the behalf of unsophisticated consumers, and (4) creating a new market in which insurers and pharmacies bargain directly.

148. *See* Kallstrom, *supra* note 141, at 659-65.

149. Several commentators have suggested that the purpose of FMCs is to preserve independent fee-for-service practice by setting entry-discouraging prices that will deter other forms of third-party competition. *See* Havighurst, *supra* note 15, at 716, 768-77; Kallstrom, *supra* note 141, at 659-65.

ble way as long as courts focus solely on the overall effect of the conduct on competition. As demonstrated, this view has been strongly affirmed in recent cases.[150] Nevertheless, some concern may remain that this framework could involve harm to public safety and health as it allows professionals too little room to take legitimate action aimed at assuring quality of care. Close examination of this issue suggests, however, that these fears are misplaced.

To begin with, it is a very simple matter for defendants to conjure up health and safety rationales for anticompetitive conduct that may in fact be primarily economically motivated. As early as the 1943 *AMA* case,[151] physicians attempted to justify restraints on practice as necessary to protect the public from low quality care. This is not to suggest that legitimate quality of care concerns do not play a part in influencing the behavior of professionals; undoubtedly in most cases there are several motivations, commercial and otherwise, for the challenged conduct. It is important to bear in mind, however, that it is easy for professionals to construct a smokescreen of health and safety rationales, with the result that the need for anticompetitive restraints is likely to be highly exaggerated.

Furthermore, the framework proposed here leaves ample room for continuation of legitimate practices instituted by health professionals to ensure the quality of professional services. For example, certification programs that operate fairly and objectively, as long as they are limited to categorizing and rating providers, should have little difficulty in showing they are procompetitive attempts at improving the market by providing otherwise unavailable information to consumers.[152] Similarly, narrowly drafted rules by professional societies aimed at policing false and deceptive advertising can be justified as reasonably necessary to enable the public to make accurate and informed decisions.[153] Insurer-initiated profes-

150. *See* text accompanying notes 61-63 *supra*. In the early 1970s some lower courts held that certain vertical restraints may be justified in the marketing of potentially dangerous products in order to ensure quality control or prevent misuse. *See, e.g.*, Tripoli Co. v. Wella Corp., 425 F.2d 932 (3d Cir.) (en banc), *cert. denied*, 400 U.S. 831 (1970). United States v. Safety First Prods. Corp. [1972] Trade Cas. ¶ 74,223 (S.D.N.Y. 1972). *Professional Engineers*, however, expressly limited the holding in those cases to restraints that have no anticompetitive effects and are reasonably ancillary to the seller's main purpose of protecting the public from harm or itself from product liability. 435 U.S. at 696 n.22.

151. *See* text accompanying notes 35-37 *supra*.

152. Havighurst, *supra* note 39, at 362-68; *see* Kissam, *supra* note 64, at 156-66. In general, accreditation and certification are likely to enlarge the market by being "output-expanding" as opposed to "output-restricting." *See* Elzinga, *supra* note 117, at 112-16.

153. Thus, in *In re* American Medical Ass'n, 94 F.T.C. 701, 1009 (1979), *aff'd*, 638 F.2d

sional arrangements requiring relative value scales and maximum price agreements also may be viewed as procompetitive because they create new markets or enlarge existing ones.[154] The common element in these practices is that they all tend to expand and improve the range of consumer choices. The basic premise is clearly enunciated in *Professional Engineers*: "The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."[155] If for some reason the market for health care services is functioning poorly, the appropriate response in most cases should be practices aimed at making that market perform better, and not restraints designed to circumvent it altogether.

Nevertheless, some situations may occur in which the market simply cannot be improved enough to function satisfactorily. In those situations, antitrust laws need not apply at all; but the decision that market conditions require exceptional treatment must be left to the legislatures. The state action doctrine exempts from antitrust scrutiny conduct pursuant to a state regulatory program, thus allowing states to impose minimum standards of practice and training through licensing schemes. To qualify for the exemption, the restraint must be " 'clearly articulated and affirmatively expressed as state policy' " and " 'actively supervised' by the State itself."[156] Congress, either expressly or by implication, also may exempt conduct from the antitrust laws. For example, the enactment of a national health planning scheme resulted from the recognition that cooperation among hospitals may be necessary to contain rising health costs. Thus, certain planning and other joint activities by providers may be impliedly immune from antitrust liability.[157]

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443 (2d Cir. 1980), the Federal Trade Commission acknowledged that "an ethical precept narrowly directed toward false or deceptive advertising and unfair solicitation may enhance competition by insuring the communication of accurate information in a manner that allows it to be processed unburdened by unscrupulous practices."

154. *See* text accompanying notes 102-03 *supra*.

155. National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 695 (1978).

156. California Retail Liquor Dealer's Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). *See also* Parker v. Brown, 317 U.S. 341 (1943).

157. National Gerimedical Hosp. and Gerontelogy Center v. Blue Cross, 628 F.2d 1050 (8th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3531 (U.S. Jan 27, 1981); Huron Valley Hosp., Inc. v. City of Pontiac, 466 F. Supp. 1301 (E.D. Mich. 1979); Miller, *Antitrust and Certificate of Need: Health Systems Agencies, the Planning Act, and Regulatory Capture*, 68 GEO. L.J. 873, 888-92 (1980); Walbolt & Pankau, *Antitrust, Public Health-Care Institutions, and the Developing Law*, 1980 ARIZ. ST. L.J. 385, 390-92.

Finally, it must be recognized that health professionals are permitted to join together in good faith efforts to persuade the legislatures that, in particular circumstances, regulatory schemes embodying restraints to ensure health and safety are required.[158] In those situations in which legitimate quality-of-care concerns cannot be handled by a competitive arrangement, professional societies are free to petition for a more satisfactory, albeit anticompetitive, legislative solution.

V. CONCLUSION

The application of antitrust laws to professional activity will not only increase during the 1980s, but will also become more complex as enforcement agencies and private litigants move beyond the blatant restraints that have existed for so long in this area of commerce. Courts will be faced with difficult issues involving restrictions on entry to health care institutions for certain providers, increasingly sophisticated boycott activity, and complex relationships between providers of services and third-party payers, to name a few. The importance of rigorous antitrust enforcement as the primary vehicle for policing the health services market cannot be overemphasized in a period of regulatory reform like the present. If command-type regulation is peeled away, thereby allowing competitive forces to come into play, it is absolutely essential that antitrust be available and used to insure that fair and open competition can prevail.

This Article has suggested that courts adopt an intermediate level of scrutiny, between per se and Rule of Reason analysis. Under this analysis, a rebuttable presumption of illegality attaches to those practices which in other contexts are per se illegal. The weight of this presumption varies with the familiarity of the court with the restraint, its similarity to traditional per se conduct, and the strength of the procompetitive justification.

This analytical approach is desirable for two reasons. First, courts are reluctant to apply commercial per se rules of illegality to professional restraints, and with good reason. Professional practices do differ from purely commercial transactions. At the same time, however, some professionals do engage in highly anticompetitive practices. Courts ought to have a test for assessing these practices that is less cumbersome than full-blown Rule of Reason anal-

158. *See* United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

ysis. Second, a truly competitive market for health services will provide better assurance of high quality care and reasonable prices than a market controlled by dominant professional groups. Competition will create incentives for providers and insurers to disseminate more information to consumers—information about prices, availability, billing procedures, and provider qualifications. Also, competition may encourage development of alternative forms of delivering services, particularly those that have the potential for increasing efficiency and reducing costs. By focusing on the procompetitive effects of professionally imposed restraints, courts will be able to review objectively both the economic and social consequences of the challenged activity.

An intermediate level of review is not a radical departure from existing case law. Nevertheless, recognizing that it exists and spelling out how it should be conducted is important for the further development of the law in this area. Adoption of this method of analysis means that anticompetitive restraints on professional practice, which do not trigger per se analysis, may be successfully challenged. More importantly, this method of analysis insures that the debate on the benefits of anticompetitive restraints will not be sidetracked. Undocumented and emotional claims that the restraints are necessary to preserve quality of care will be insufficient to move the analysis into the Rule of Reason mode, or worse, out of the courts altogether. The intermediate review suggested is grounded in the bedrock of traditional economic and market analysis and leaves to the legislatures the difficult task of deciding when market forces should be subsumed by regulation. Not only is this approach consistent with contemporary political reality, it also reflects longstanding legal doctrines pertaining to the appropriate roles of judges and lawmakers.