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Relative Value Guides and The Sherman Antitrust Act

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RECENT DEVELOPMENT

Relative Value Guides and The Sherman Antitrust Act

I. INTRODUCTION

The skyrocketing costs of health care services for the American people constitute a crisis of national importance.[1] The seriousness of this crisis is reflected in the attention that antitrust enforcement agencies of the federal government[2] are giving to the health care industry.[3] The agencies are responding, at least in part, to the common perception that these skyrocketing costs result as much from the restrictive trade practices of the health care industry as from the growing use of sophisticated technology and inflation.[4] Competition is viewed as an antidote to increasing prices and antitrust laws as the vehicle by which federal agencies such as the Federal Trade Commission (FTC) and the antitrust division of the Department of Justice (Justice) may administer the antidote.[5]

One practice of the health care industry, the use of relative value guides (RVGs), is currently receiving close scrutiny by the FTC and Justice, both of which characterize RVGs as anticompetitive in purpose and effect.[6] A RVG is an index of services that assigns each service a value equal to a number of arbitrary units.[7]

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1. *See generally Skyrocketing Health Care Costs: The Role of Blue Shield: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce,* 95th Cong., 2d Sess. (1978) [hereinafter cited as *Hearings on Skyrocketing Costs*]; *Inflation of Health Care Costs: Hearings Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare,* 94th Cong., 2d Sess. (1976).

2. The two agencies of the federal government principally responsible for antitrust enforcement are the Federal Trade Commission, acting pursuant to the Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41-58 (1976), and the Antitrust Division of the Department of Justice, acting pursuant to the Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7 (1976).

3. *See, e.g.,* OFFICE OF PUBLIC PLANNING, FTC, HEALTH SERVICES POLICY SESSION BRIEFING BOOK (1979). *See also* Kallstrom, *Health Care Cost Control by Third Party Payors: Fee Schedules and the Sherman Act,* 1978 DUKE L.J. 645, 691.

4. *See, e.g.,* note 1 *supra. See also* Borsody, *The Antitrust Laws and the Health Industry,* 12 AKRON L. REV. 417, 417 (1979).

5. *See* Havighurst, *Role of Competition in Cost Containment* in FTC, COMPETITION IN THE HEALTH CARE SECTOR: PAST, PRESENT, AND FUTURE (Greenberg ed. 1978) (Proceedings of a Conference Sponsored by the Bureau of Economics) [hereinafter cited as FTC Conference]; Proger & Wentz, *Antitrust Primer,* in ANTITRUST IN THE HEALTH CARE FIELD (Proger ed. 1979). *See generally* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 695 (1978): "The Sherman Act reflects a legislative judgment that ultimately competition will not only produce lower prices, but also better goods and services."

6. Proger & Wentz, *supra* note 5, at 7. *See* note 12 *infra.*

7. *See generally* Blaine, *A Relative Value Index for Lawyer's Services,* 53 ILL. B.J. 1006

The user of a RVG can compute the price of a particular service by multiplying a conversion factor, the value of one unit, with the number of units assigned to that service. RVGs, first published by the medical profession in 1956,[8] probably affect price formation.[9] Whether RVGs constitute price fixing, conduct illegal per se under the antitrust laws, however, remains unclear.

In 1975[10] Justice initiated the first formal challenge to the legality under the antitrust laws of a medical association's RVG in *United States v. American Society of Anesthesiologists*.[11] *Anesthesiologists* is the only action initiated by Justice or the FTC against RVGs that went to trial.[12] In the other actions the defendants signed consent orders prohibiting them from further development or dissemination of RVGs.[13] Therefore, the decision of the *Anesthesiologists* court, upholding the use of a RVG, threatens to frustrate the efforts of the FTC and Justice to prevent physicians' groups from formulating and using RVGs. After reviewing the applicable case law under the Sherman Act, this Recent Development focuses on the impact of *United States v. American Society of Anesthesiologists* on the law of antitrust. The Development concludes with a consideration of the legality of RVGs and the proper role of RVGs in the fight against increases in the costs of health care.

II. BACKGROUND

A. *Statutory Basis*

The cornerstone of antitrust law in the United States is the

(1965); Brewster & Seldowitz, *Medical Society Relative Value Scales and the Medical Market*, 80 PUB. HEALTH REP. 501 (1965).

8. Brewster & Seldowitz, *supra* note 7, at 502.

9. *See* United States v. American Soc'y of Anesthesiologists, Inc., 473 F. Supp. 147, 159 (S.D.N.Y. 1979).

10. Not coincidentally, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), was decided in 1975. *See* text accompanying notes 53-55 *infra*.

11. *See* note 9 *supra*.

12. *See* United States v. Alameda County Veterinary Medical Ass'n, 1977-2 Trade Cas. ¶ 61,738 (N.D. Cal. 1977) (consent order prohibited use of fee surveys or schedules); United States v. Illinois Podiatry Soc'y, Inc., 1977-2 Trade Cas. ¶ 61,767 (N.D. Ill. 1977) (consent decree); California Medical Ass'n, 3 TRADE REG. REP. (CCH) ¶ 21,403 (April 17, 1979) (consent order); Minnesota State Medical Ass'n, 90 F.T.C. 337 (1977) (consent order); American College of Radiology, 89 F.T.C. 144 (1977) (consent order); American Academy of Orthopedic Surgeons, 88 F.T.C. 968 (1976) (consent order); American College of Obstetricians and Gynecologists, 88 F.T.C. 955 (1976) (consent order).

13. *See* note 12 *supra*. The effect of these actions was to stop medical groups from using RVGs. *See* Borsody, *supra* note 4, at 455. The relative ease with which the FTC obtained the consent orders may be distinguished from the *Anesthesiologists* holding on the basis of the difference in scope between the FTC Act and the Sherman Act. *See generally* FTC v. Brown Shoe Co., 384 U.S. 316 (1966); FTC v Motion Picture Ad. Service Co., 344 U.S. 392 (1953).

Sherman Antitrust Act of 1890.[14] Section 1 of the Act provides in part: "Every contract, combination in the form of trust or otherwise, conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[15] The sweeping language of section 1 presents a problem: since "restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law."[16] Because of the haphazard manner in which the Sherman Act passed through Congress, legislative history, which ordinarily enables a court to react beyond a statute's literal meaning,[17] provides little help in determining its intended meaning.[18] Senator Sherman's statement that the Act "does not announce a new principle of law, but applies old and well recognized principles of the common law,"[19] has been a source of confusion in construing an Act designed to balance the struggle between competition and combination in ways unknown to the common law.[20]

B. The Per Se Rule and the Rule of Reason

The first Supreme Court decision to interpret section 1 of the Sherman Act was *United States v. Trans-Missouri Freight*

14. 15 U.S.C. §§ 1-7 (1976).

15. *Id.* § 1.

16. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 687-88 (1978) (footnotes omitted).

17. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940) (Stone, C.J.):

> The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself does not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts should interpret its words in the light of its legislative history and the particular evils at which the legislation was aimed.

18. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318 (1897); THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 214-21, 225-32 (1954). *See also* LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 85-99 (1965). For the classic statement on the legislative history of the Sherman Act, see HAMILTON & TILL, ANTITRUST IN ACTION 11 (1940): "The great bother is that the bill which was arduously debated was never passed, and that the bill which was passed was never really discussed."

19. 21 CONG. REC. 2456 (1890).

20. *See* LETWIN, *supra* note 18, at 97; POSNER, ANTITRUST LAW, AN ECONOMIC PERSPECTIVE 24 (1976):

> The discontinuity between the common law of trade regulation and the Sherman Act is important to remember whenever one sees a lawyer or judge attempting to buttress his antitrust theories by reference to some common-law doctrine that he contends was incorporated into the antitrust laws by the Sherman Act. Such an argument is almost always unhistorical. The Sherman Act did not enact the common law of restraint of trade. A better guide to interpreting the Sherman Act is the economic analysis of monopoly.

Association.[21] The *Trans-Missouri* Court held that price fixing by defendant railroads was illegal under section 1 and flatly refused to consider the defense that the prices fixed were reasonable.[22] *United States v. Addyston Pipe & Steel Co.*[23] recognized that the proper test of legality under section 1 was the reasonableness of the challenged practice.[24] The Court held, however, that when the challenged practice is price fixing, no analysis of the reasonableness of the price is necessary.[25] *Addyston* specifically rejected the defendants' invitation to consider the effect of the price fixing upon the market, noting that even if price fixing was the only solution to a chaotic market, it was still illegal under the Sherman Act.[26] The rationale for the per se approach was judicial efficiency, courts not having the time or the expertise to consider defenses to price fixing, an activity so obviously inimical to competition.[27]

Twelve years after first indicating that only unreasonable practices were prohibited restraints of trade, the Supreme Court, in *Standard Oil Co. v. United States*[28] spelled out the "standard of reason"[29] applicable under section 1, declaring illegal contracts or conduct creating "unreasonably restrictive conditions."[30] This Rule of Reason was applied to determine whether the challenged practice was a restraint of trade. The Rule was not intended to apply to a determination of whether a practice, found to be a restraint of trade, was reasonable in light of the condition of the industry and other factors.[31]

Chicago Board of Trade v. United States[32] broadened the Rule

21. 166 U.S. 290 (1897).

22. *Id.* at 339-42.

23. 175 U.S. 211 (1899), *aff'g* 85 F. 271 (6th Cir. 1898) (Taft, J.).

24. *Id.* at 235-38.

25. *Id.* at 238, *quoting* 85 F. at 293.

26. 175 U.S. at 235.

27. For an early explanation of the application of the per se rule to price fixing, see People v. Sheldon, 139 N.Y. 251, 264, 34 N.E. 785, 789 (1893) (Andrews, C.J.), *quoted in* United States v. Addyston Pipe & Steel Co., 85 F. at 288:

> If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing.

See also SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 1, at 7 (1977).

28. 221 U.S. 1 (1911).

29. *Id.* at 60.

30. *Id.* at 58.

31. The *Standard Oil* Court stated: "[R]esort to reason was not permissible in order to allow that to be done which the statute prohibited." *Id.* at 65. *Accord* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 689 (1978).

32. 246 U.S. 231 (1918).

of Reason under the precedential aegis of *Standard Oil*. The test was not whether the practice of price fixing was unreasonably anticompetitive and, therefore, a prohibited restraint, but whether the price fixing of the Board of Trade,[33] admittedly a restraint under the Act, promoted or destroyed competition.[34] Never before had a restraint been thought capable of "promoting" competition. Furthermore, as the Court noted, a determination whether a practice promotes or destroys competition required an examination of the industry involved—the very thing earlier Courts had attempted to preclude by finding that price fixing was a practice that is always unreasonably anticompetitive and, therefore, a prohibited restraint. Thus, *Board of Trade* represents a shift in focus from that of *Standard Oil,* the reasonableness of the practice, to the reasonableness of the restraint.[35]

United States v. Trenton Potteries[36] attempted to reestablish the per se approach of *Trans-Missouri* and prohibit the use of a reasonableness standard to validate price fixing.[37] *Trenton* held that the practice of price fixing was unreasonably anticompetitive and, therefore, was a restraint prohibited under the Sherman Act. The Court distinguished *Board of Trade* on the basis that a regulated board of trade required different treatment than that of competitors in an "open market."[38] Enunciating the per se rule, *Trenton* noted that the object of the Act was "maintenance of competition" and that an effective price fixing agreement was designed to eliminate competition.[39]

Appalachian Coals, Inc. v. United States[40] twisted the per se

33. The Chicago Board of Trade had established a rule fixing the price of grain bought hy members of the Board when the Board was closed at the last closing price. *See generally* GELHORN, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 173 (1976).

34. The Court stated:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied . . . .

246 U.S. at 238.

35. This shift in focus is reflected in the Court's statement that:

> Every Board of Trade and nearly every trade organization imposes some *restraint upon the conduct of business* by its members. Those relating to the hours in which business may be done are common; and they tend to make a special appeal where, as here, they tend to shorten the working day or, at least, limit the period of most exacting activity.

Id. at 241 (emphasis added).

36. 273 U.S. 392 (1927).

37. GELHORN, *supra* note 33, at 175. *But see* Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).

38. 273 U.S. at 401.

39. *Id.* at 397.

40. 288 U.S. 344 (1933).

rule of *Trenton* by inserting a Rule of Reason analysis into the factual determination of whether the challenged practice was price fixing. *Appalachian,* citing *Board of Trade,* held that activities that fix prices are not necessarily the price fixing which triggers the per se rule.[41] The Court held that when 137 competitors, producers of coal, combined into a joint selling agency to set uniform prices for the 137 members, no price fixing of the per se type existed. The joint setting of prices was not illegal price fixing because the joint action was reasonable in light of the chaotic conditions of the industry and the national economy.[42] *Standard Oil* had stated the Rule of Reason test as whether the challenged practice was unreasonably anticompetitive and, therefore, a restraint prohibited under the Act. *Board of Trade* asked whether the restraint itself was reasonable in light of the surrounding circumstances and, therefore, permissible. *Appalachian* broadened the Rule of Reason to swallow the per se rule by inquiring whether the particular price fixing was unreasonable and, as such, the type of price fixing illegal per se under the Act.[43]

United States v. Socony-Vacuum Oil Co.[44] attempted to repair the damage inflicted by *Appalachian* and reassert the per se illegality of practices that fixed prices. Unfortunately, *Socony* failed to expressly overrule *Board of Trade* and *Appalachian.*[45] The Court did, however, overrule *sub silentio* the *Board of Trade* and *Appalachian* tests of reasonableness[46] with the statement that "Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive;"[47] unless the practices challenged in the earlier cases were not price fixing within the scope of the *Socony* holding. The breadth

41. *Id.*

42. *Id.* at 373.

43. The *Appalachian* Court stated:

> It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendant's plan of making sales, tbe reasons which led to its adoption, and the probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal.

Id. at 361.

44. 310 U.S. 150 (1940).

45. Instead, the *Socony* Court distinguished both cases, *id.* at 216-17, and flatly stated:

> Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and tbat no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.

Id. at 218.

46. *See* text accompanying notes 32-35, 40-42 *supra.*

47. 310 U.S. at 221. For a discussion of the "aberrant" cases of *Board of Trade* and *Appalachian,* see SULLIVAN, *supra* note 27, § 68, at 186 (1977).

of the *Socony* holding renders such a conclusion impossible: "under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."[48]

The *Socony* Court specified that a finding of per se illegality did not require:

> that both a purpose and a power to fix prices are necessary for the establishment of a conspiracy under § 1 of the Sherman Act. . . . It is the "contract, combination . . . or conspiracy in restraint of trade or commerce" which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other.[49]

Furthermore, the "conspirators" need not have "the means available for accomplishment of their objective . . . ."[50] The *Socony* holding was a restatement of the Rule of Reason articulated in *Standard Oil:* "Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy."[51]

United States v. United Liquors Corp.[52] established that price fixing, pursuant to the *Socony* doctrine, included practices other than the setting of uniform prices in dollar amounts. In *United Liquors* an agreement fixing the percentage of discounts and the classification procedures used in determining which customers would receive the discounts was held to be price fixing and, thus, illegal per se, even though there was no agreement on the base prices from which the discounts were computed.

The 1975 decision of *Goldfarb v. Virginia State Bar*[53] illustrates how the Court's use of the per se and Rule of Reason doctrines results in confusion. In *Goldfarb* the Court first asked whether respondents had engaged in price fixing.[54] If price fixing is found, the Court applies the per se rule. This method of analysis encourages litigants and courts to raise the issue of reasonableness within the

48. 310 U.S. at 223.
49. *Id.* at 224 n.59.
50. *Id.*
51. *Id.*
52. 149 F. Supp. 609 (W.D. Tenn. 1956), *aff'd per curiam*, 352 U.S. 991 (1957). For a listing of cases in which an agreement for the maintenance of price differentials was held unlawful, see 2 TRADE REG. REP. (CCH) ¶ 4630.33 (1971).
53. 421 U.S. 773 (1975).
54. *Id.* at 780.

determination of whether price fixing exists.[55] This approach was approved in *Board of Trade* and *Appalachian*[56] but specifically disavowed in *Socony*.[57] Although the *Goldfarb* Court held that the use of a minimum fee schedule was price fixing and illegal per se, the Court still discussed, albeit briefly, the "unusually damaging" nature of the fee schedule on competition and the consumer.[58] Such a discussion is unnecessary under the per se rule and only serves to confuse lower courts in their efforts to delineate the parameters of the Rule of Reason and the per se rule.[59]

The Court's recent decision in *National Society of Professional Engineers v. United States*[60] is another example of the confusion in this area. The Court quoted *Board of Trade's* statement of the Rule of Reason despite the questionable validity of *Board of Trade* after *Socony*.[61] The Court did clarify, however, that the Rule of Reason cannot justify anticompetitive price fixing: "Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions."[62]

The convoluted development of the rule of per se illegality and the Rule of Reason permits courts to determine the legality of a challenged trade practice in an ad hoc, outcome determinative manner.[63] Under the rubric of "reasonableness" courts can hold that price fixing is not the price fixing held to be illegal per se under the Sherman Act.[64] Such judicial activity renders uncertain the state of the law and, if *Socony* was correct in its interpretation of the Sher-

55. *See id.* at 781-83; note 64 *infra*. *See generally* Bauer, *Professional Activities and the Antitrust Laws*, 50 NOTRE DAME LAW. 570, 571 (1975).

56. *See* text accompanying notes 32-35, 40-43 *supra*.

57. *See* text accompanying notes 44-51 *supra*.

58. 421 U.S. at 782-83.

59. *See, e.g.*, Arizona v. Maricopa County Medical Soc'y, 1979-1 Trade Cas. ¶ 62,694, at 77,893 (D. Ariz. 1979). The *Maricopa* court held that: "[T]be Rule of Reason is to be applied when analyzing practices of professions alleged to be in violation of the antitrust laws." *Id.* at 77,897.

60. 435 U.S. 679 (1978).

61. The *Professional Engineers* Court stated: "the inquiry mandated by the Rule of Reason is whetber the challenged agreement is one tbat promotes competition or one that suppresses competition." *Id.* at 691.

62. *Id.* at 688.

63. *See* note 9, *supra*.

64. The analysis often used to achieve this result is illustrated in *Maricopa Medical Society*, in which the court found that the physicians "have agreed in advance to accept in full satisfaction the amount determined," but then proceeded to consider reasonableness after noting tbe absence of evidence "that the physicians individually agreed to those terms [the price fixing] wbich *presumably* would preclude finding any antitrust violation even under a per se analysis." 1979-1 Trade Cas. ¶ 62,694, at 77,895 (emphasis added).

man Act as establishing the per se illegality of price fixing, usurps the role of the legislature in determining the antitrust policy of the United States.[65]

C. The Learned Professions Exemption

Until *Goldfarb v. Virginia State Bar*[66] it was commonly thought that the "learned professions," such as the practice of medicine, were exempt from the reach of the Sherman Act.[67] The exemption was based on the principle that the activities of a profession were not "trade or commerce."[68] The principle originated with the case of *The Schooner Nymph*[69] in which the court distinguished the "learned professions" from groups engaged in "trade."[70] *Goldfarb* held that "[t]he nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, nor is the public-service aspect of professional practice controlling in determining whether § 1 includes professionals."[71] The Court left uncertain, however, the extent to which the professions were subject either to the Sherman Act or the judicial doctrines that the Court had developed in applying the Act.[72] *Goldfarb* suggested that the per se rules might not apply to the professions because even anticompetitive practices of the professions might be justified under a rule of reason, given their special relationship to the public.[73]

National Society of Professional Engineers v. United States[74] established that professions were subject to rules of per se illegality.[75] Not only did the Court in dicta reassert the *Socony* holding

65. *See* text accompanying note 47 *supra.*

66. 421 U.S. 773 (1975).

67. *See, e.g.*, Note, *Application of the Antitrust Laws to Anticompetitive Activities by Physicians*, 30 RUTGERS L. REV. 991 (1977). *See generally* Annot., 39 A.L.R. FED. 774 (1978).

68. *See, e.g.*, United States v. Oregon State Medical Soc'y, 343 U.S. 326, 336 (1952); Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 436 (1932).

69. 18 F. Cas. 506 (C.C.D. Me. 1834).

70. *Id.* at 507.

71. 421 U.S. at 787 (citation omitted).

72. 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 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 contronted today.

Id. at 788 n.17.

73. *Id.*

74. 435 U.S. 679 (1978).

75. *Id.* at 696.

that price fixing was illegal per se and applicable to the professions, but the *Professional Engineers* Court held that the ban on competitive bidding challenged in the case, although not price fixing, was also illegal per se.[76] Whatever the impact of professional involvement on a challenge to a trade practice, *Professional Engineers* indicates that price fixing by professionals is subject to the per se rule and cannot be justified with arguments as to the reasonableness of price fixing in the carrying out of professional responsibilities to the public.[77]

III. UNITED STATES V. AMERICAN SOCIETY OF ANESTHESIOLOGISTS

On September 22, 1975, Justice filed suit for injunctive relief against the American Society of Anesthesiologists (ASA) pursuant to sections 1 and 4 of the Sherman Act.[78] The Complaint alleged that the ASA's RVG, first adopted in 1962,[79] was price fixing, illegal per se.[80] The ASA answered that its RVG was not price fixing because the RVG was only advisory and was a reasonable effort to establish a rational system of pricing for the services of anesthesiologists.[81] Furthermore, the ASA claimed that even if the RVG was

76. *Id.* at 692. The reassertion of the per se illegality of price fixing was dicta because of the Court's statement that the bidding was not price fixing. The Court's analysis of the bidding in terms of its effects on prices, however, along with the *Goldfarb* holding, leaves little doubt that professionals' price fixing is subject to the traditional *Socony* doctrine of per se illegality.

77. *Id.* at 696.

78. The ASA is a tax exempt membership corporation incorporated in New York State with an office in Park Ridge, Illinois. The ASA has approximately 11,000 members, including nearly all of the anesthesiologists in the United States. Nurse anesthetists, however, are not members of the ASA. In a cryptic footnote the *Anesthesiologists* court noted both that nurse anesthetists "engage in a fee for service practice" and that "there is no evidence to support the conclusion that [nurse anesthetists] compete with anesthesiologists." 473 F. Supp. at 160 n.22. Whether or not anesthesiologists and anesthetists compete, anesthetists administer almost half of all anesthesia in the United States. *Medicare-Medicaid Administrative and Reimbursement Reform Act: Hearings Before the Subcomm. on Health of the Senate Comm. on Finance*, 95th Cong., 1st Sess. 365 (1977) (Statement of Ms. Ecklund, President of the American Association of Nurse Anesthetists) [bereinafter cited as *Hearings on Reform Act*]. There is a current feud between the two professional groups as to the qualifications and capabilities of the certified nurse anesthetist. *Compare id.* at 394-98 (Statement of Ms. Ecklund) *with id.* at 373-84 (Statement of Dr. Ament, President of the ASA).

79. On October 25, 1962, the ASA adopted a RVG on the nearly unanimous vote of the ASA's House of Delegates. Between 1962 and 1974 five editions of the ASA's RVG were adopted and distributed to the membership and insurers, including state and federal agencies.

80. 473 F. Supp. at 155.

81. The ASA did not adopt a conversion factor and never suggested actual dollar values for the RVG's units. Component societies of the ASA, however, often set conversion factors. *Id.* at 154-55. The "advisory" nature of the ASA's RVGs may be the basis for the *Anesthesiologist's* court's holding. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 781 (1975),

price fixing, the Sherman Act did not apply because of the learned professions exemption.[82]

The *Anesthesiologists* court initially reviewed the case law establishing that price fixing is illegal per se.[83] After determining that it had jurisdiction,[84] the court considered the effect of the ASA's RVG on the setting of prices. Judge Duffy phrased the issue as "whether there was an agreement that the [RVG] would be used in pricing anesthesia services so as to curtail competition or interfere with the setting of prices by free market forces."[85] The court noted an absence of evidence that the RVG was more than a "*suggested* methodology" for setting prices and concluded that the RVG was therefore not price fixing.[86] The *Anesthesiologists* opinion, however, did not present a convincing or consistent argument that the ASA's RVG did not fix prices under *Socony*. Judge Duffy acknowledged that: first, the RVG "did tend to affect price formation;"[87] second, the purpose of the ASA in publishing the RVG was to assist in developing local fee schedules;[88] and last, the RVG was "intended to and did play an important role in the negotiations with third party payors."[89] Given these facts, *Anesthesiologists* cannot logically rest upon the finding of the court that the ASA formulated its RVG without the purpose and effect "of raising, depressing, fixing or stabilizing the price of a commodity [or a service] in interstate commerce . . . ."[90]

That Judge Duffy realized the inadequacy of the "no price fixing" holding is suggested in his statement that:

> [B]ecause this is a case of first impression and because it cannot be denied that the relative value guides, although not intended to fix prices, did tend to affect price formation, I believe a more extended review is in order. *Indeed, I believe the only proper way to analyze this case is under the "Rule of Reason."*[91]

The *Anesthesiologists* court then held that the ASA's RVG was not a restraint of trade under the Sherman Act because it felt that the

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in which the Court noted that a "purely advisory fee schedule" might present a "different question."

82. *See* 473 F. Supp. at 158-60.
83. *Id.* at 155-56.
84. *Id.* at 156-57.
85. *Id.* at 158.
86. *Id.* at 158-59.
87. *Id.* at 159.
88. *Id.* at 158-59.
89. *Id.* at 155.
90. *Id.* at 159, *quoting* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).
91. *Id.* (emphasis added).

RVG was a reasonable means of establishing what anesthesiologists should charge for their services.[92] The court justified the application of a rule of reason with the language of *Board of Trade,* in which the Supreme Court considered the reasonableness of a form of price fixing instead of employing a per se approach.[93] By relying on this shaky precedent, Judge Duffy avoided *Socony* and instead considered the reasonableness of a practice which, under *Socony,* was illegal per se.[95] Under this reasonableness test, the court concluded that the ASA's RVG promoted competition in the health care services market because it enabled anesthesiologists to more easily negotiate with third party payors.[96] The *Anesthesiologists* opinion fails to explain how competition was heightened by the combination of providers of anesthesia services to better negotiate with the entities paying the providers' fees.

IV. The Use of RVGs by the Medical Profession

United States v. American Society of Anesthesiologists reflects both the failure of the court to understand the proper role of RVGs in the fight against rising health care costs and the apparent inability of the Supreme Court to articulate clearly the parameters of the per se rule and the Rule of Reason. The district court relied upon *Board of Trade,* a case of questionable precedential value,[97] to justify determining under a reasonableness standard whether the ASA's RVG was price fixing and, therefore, illegal per se. Reasonableness, however, should not play a part in deciding whether a challenged activity is price fixing.

The courts should resolve the question whether a RVG is price fixing with simple factual evaluation. As the *Goldfarb* Court stated, the first step of the court's inquiry in a case in which price fixing is alleged is, did the defendants "engage in price fixing?"[98] *Socony* defined price fixing as those practices which raise, fix, peg, or stabilize prices.[99] The issue, therefore, was whether the ASA's RVG

92. Judge Duffy stated:

> In my view [the RVG's] widespread use was and is more a testament to a need on the part of anesthesiologists for a cohesive, internally consistent, logical and appropriate method for arriving at their fees than it is evidence of an attempt by the ASA to compel (or even urge) adherence to any pricing formula.

Id. at 158.

93. *Id.* at 159.

94. *See* text accompanying note 47 *supra.*

95. *See* 473 F. Supp. at 159.

96. *Id.* at 159-60.

97. *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 700 (1978).

98. Goldfarb v. Virginia State Bar, 421 U.S. 773, 780 (1975).

99. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

raised, fixed, pegged, or stabilized the prices of anesthesiologists' services.

As noted by the *Anesthesiologists* court, the purpose of the ASA's RVG was to assist in developing local fee schedules.[100] Fee schedules were needed, or at least desired, because of the growing role of third party payors in providing reimbursement to anesthesiologists for their services to consumers.[101] RVGs were developed during the 1950s in response to the increased need of health insurance plans for a uniform, consistent methodology to compute the proper level of reimbursement for a physician performing a service for an insured.[102] Physicians thus maintained their control over pricing despite the position of the third party payors by negotiating as a unit for the adoption of their self-formulated RVGs.[103] Given the political and market power of physicians' groups, insurers were understandably reluctant to risk antagonizing them by rejecting a RVG or suggested conversion factors.[104]

Common sense suggests that RVGs encourage price uniformity and fixing. Although there are no empirical studies on the effects of RVGs on price uniformity, commentators believe that RVGs promote such uniformity.[105] Furthermore, physicians and their associations can and have used RVGs to increase the general level of fees paid by third party payors by having the payors accept a revised guide that facilitated fee escalation.[106] It is interesting to note that almost every RVG published includes a disclaimer of price fixing intent;[107] the publishers obviously are aware of the price fixing possibilities. Certainly, RVGs render price fixing very easy to accomplish.[108] One objection of the American Medical Association to a

100. 473 F. Supp. at 158.

101. *See* Brewster & Seldowitz, *supra* note 7, at 501; Sloan & Feldman, *Competition Among Physicians* in FTC Conference, *supra* note 5, at 91. Sloan & Feldman note that in 1970 anesthesiologists received seventy-five percent of their gross revenues from third party payors. *Id.*

102. *Hearings on Reform Act, supra* note 78, at 288 (Statement of Mr. Miller, Equitable Life Assurance Society).

103. *See generally Hearings on Skyrocketing Costs, supra* note 1, at 230 (Statement of Mr. Weller, Assistant Attorney General for Antitrust, State of Ohio); Sloan & Feldman, *supra* note 101, at 90.

104. *See generally Hearings on Skyrocketing Costs, supra* note 1, at 230-303 (Testimony and written statement of Mr. Weller).

105. *See, e.g.*, Kallstrom, *supra* note 3, at 693. *See also* Sloan & Feldman, *supra* note 101, at 90-91; Blaine, *supra* note 7, at 1011.

106. *See, e.g.*, Sobaski, *Effects of the 1969 California Relative Value Studies on Costs of Physician Services Under SMI* (June 1975), *cited in* Sloan & Feldman, *supra* note 101, at 92.

107. Brewster & Seldowitz, *supra* note 7, at 506.

108. *See* Kanwit, *Panel Discussion: Trade and Professional Associations: The Antitrust*

proposal that the federal government develop its own RVG for use in the Medicare, Medicaid, and Champus[109] programs is that once the RVG were established, nothing could stop the government from using the RVG as a set fee schedule.[110] Moreover, if the use of a RVG itself is not adequate proof of price fixing, the minimal steps necessary to use the RVG to establish fixed dollar amounts will be very difficult to detect and nearly impossible to prove.[111] *United Liquors,* which invalidated an agreement fixing discount rates although no dollar amounts were set, provides precedential support for the proposition that under the *Socony* doctrine RVGs are price fixing and illegal per se under the Sherman Act.[112]

The *Anesthesiologists* court appeared to recognize that the ASA's RVG was price fixing in the ordinary sense, as well as the *Socony* meaning, of the words. The court, however, applied a rule of reason in analyzing the legality of the RVG. One possible basis for the use of a rule of reason was that the ASA was a combination of professionals.[113] The *Goldfarb* and *Professional Engineers* decisions indicated, however, that the per se rules for price fixing were applicable to the professions.[114] The majority of courts since *Goldfarb* and *Professional Engineers* have refused to exempt professionals from the scope of the Sherman Act.[115] Given the conflict of interest physicians face in developing RVGs for use in negotiating with insurers for their reimbursement levels and the similarity of RVGs to the minimum fee schedule prohibited in *Goldfarb,* RVGs are a particularly inappropriate exception to the Supreme Court's statement that professions are subject to the command of the Sherman Act.[116]

Combat Zones, 46 ANTITRUST L.J. (ABA) 670, 671 (1977) (Ms. Kanwit was the Director, Chicago Regional Office, FTC); Palmer, *Antitrust Activities by the Federal Trade Commission in the Health Field—An Address Before a Joint Meeting of the Health & Welfare Committee and the Council of Antitrust and Trade Regulation of the FBA,* 37 FED. BAR. J. 40, 46 (1978) (Mr. Palmer currently is on sabbatical from his position as Deputy Director, Bureau of Competition, FTC).

109. The Champus program was established in 1956 and is the program providing payment for medical services to military personnel and their dependents. 473 F. Supp. at 152.

110. *See Hearings on Reform Act, supra* note 78, at 248 (Statement of Drs. Holden & Beddingfield, American Medical Association). *But see id.* at 393, 509 (Statements of Dr. Ament, ASA, and the California Medical Association, respectively).

111. *See* Kallstrom, *supra* note 3, at 693-94.

112. *See* text accompanying note 52 *supra. See also* Vandervelde v. Put & Call Brokers Ass'n, 344 F. Supp. 118, 136 (S.D.N.Y. 1972); 2 TRADE REG. REP. (CCH) ¶ 4600, at 7011 (1971).

113. *See* text accompanying notes 66-77 *supra.*

114. *See* text accompanying notes 71, 75-77 *supra.*

115. Borsody, *supra* note 4, at 431.

116. *See* Comment, *The Professions and Noncommercial Purposes: Applicability of Per Se Rules Under the Sherman Act,* 11 U. MICH. J.L. REF. 387, 389, 413 (1978). *See also* Arizona

Congress, of course, has the option of limiting the coverage of the antitrust laws over physicians' participation in the development of RVGs. In the last three sessions of Congress, Senator Talmadge has introduced the Medicare-Medicaid Administrative and Reimbursement Reform Act, which allows the federal government to formulate a RVG with the input of third party payors, physicians, and associations of physicians.[117] Physicians' groups generally support the RVG provision, but insist that physician input is essential to the formulation of the RVG and worry that the government will take the next step and construct a rigid fee schedule.[118] The FTC wants the bill amended to exclude physicians from any participation in the development of the RVG.[119] The bill has not passed, but Congressional action is the proper way to legalize physician participation in the development and dissemination of RVGs, if such involvement is desirable.

The advantages of RVGs to the public at large relate to the ability of third party payors to use RVGs in establishing appropriate fee schedules for the reimbursement of individual physicians.[120] Third party payors either reimburse physicians on a usual, customary, and reasonable (UCR) method or on a fee schedule method.[121] Both methods use RVGs, but the fee schedule method is more dependent on a set price structure and thus tends to rely more heavily on the RVG's values.[122] Most commentators are convinced that the UCR method is inherently inflationary because of its reliance on usual and customary charges of physicians.[123] For that reason, the government has encouraged third party payors, including the government itself, to develop fee schedule methods of reimbursement.[124] The FTC, however, does not want physicians involved in the devel-

State Dental Ass'n v. Boddicker, 549 F.2d 626 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977); Borsody, *supra* note 4, at 455.

117. S. 505, 96th Cong., 1st Sess., 125 CONG. REC. 1864-76 (1979); S. 1470, 95th Cong., 1st Sess. (1977); S. 3205, 94th Cong., 2d Sess. (1976).

118. *See* note 110 *supra*.

119. *See Hearings on Reform Act, supra* note 78, at 449-52 (Letter of Mr. Pertschuk, Chairman, FTC, expressing official views of FTC).

120. *See* Kallstrom, *supra* note 3, at 646-47, 660, 690-91.

121. For a brief explanation of the UCR (usual, customary, and reasonable) and CPR (customary, prevailing, and reasonable) methods, see *Hearings on Skyrocketing Costs, supra* note 1, at 706-09.

122. *See generally* Health Care Financing Administration Strategy Memo, 1980-81 (1979), *reprinted in Hearings on Skyrocketing Costs, supra* note 1, at 760-72.

123. *Hearings on Skyrocketing Costs, supra* note 1, at 854, 709 (Statements of Rep. Moss and Mr. Derzon, Administrator of HCFA, respectively).

124. *See, e.g.*, Health Care Financing Administration Strategy Memo, 1980-81, *supra* note 122, at 6. *See also* Iglehart, *A New Strategy for Medicare and Medicaid*, 1978 NAT'L J. 471; note 119 *supra*.

opment of the RVGs upon which the fee schedules will be based because it feels that physician involvement will simply perpetuate the inflationary spiral of health care costs present under the UCR system.[125]

Physician involvement in the development of RVGs cannot benefit the consumer. Doctors have an inherent conflict of interest between the desire to serve the public and the desire to compensate themselves.[126] Third party payors have the experience and the ability to formulate their own RVGs.[127] When third party payors develop and use RVGs no conflict of interest arises because the insurers are more directly concerned than even the consumer with the cost of medical services.[128] The consumer ultimately benefits from lower premiums.

The FTC and Justice do not believe that the formulation and use of RVGs by third party payors is a violation of the antitrust laws.[129] In their view, only competitors are prohibited from agreeing on price indices; consumers and third party payors are free to establish RVGs, at least until such groups acquire the power to dictate prices to the medical profession.[130] The attitude of the FTC and Justice is based on the perception that RVGs are: first, an essential part of the health insurance industry and second, a valuable tool in the fight against escalating medical costs because of their independence from the inflationary UCR methodology.[131]

V. CONCLUSION

RVGs have proven useful in the effort to slow the rise in the costs of health care services. The *Anesthesiologists* decision represents a misguided attempt to reverse the actions of the FTC and Justice in prohibiting medical societies and associations from promulgating RVGs. The court erred in two respects: first, the ASA's RVG is a form of price fixing illegal per se under the Sherman Act and the court's twisted evasion of that conclusion only hinders the development of coherent doctrine in this area, and second, the bene-

125. *See* note 119 *supra.*

126. *See Hearings on Reform Act, supra* note 78, at 450-52. *See also* Havighurst, *supra* note 5, at 386, 391; Kanwit, *supra* note 108, at 670-71.

127. *See generally* Sloan & Feldman, *supra* note 101.

128. Insurers pay almost two thirds of personal health care expenditures in the United States. *See* CRS, HEALTH CARE EXPENDITURES AND THEIR CONTROL 22 (1977), *reprinted in Hearings on Reform Act, supra* note 78, at 588-638. Consumers rarely have an incentive or interest in seeking out the cheapest health care available. *See* CRS, *supra*, at 24.

129. *See* note 119 *supra.*

130. *See id. See also* Kanwit, *supra* note 108, at 670-71.

131. *See* notes 108 & 119 *supra. See also* Kallstrom, *supra* note 3, at 689-96.

fits to be gained from the use of RVGs by medical professionals are obtained, without the detriments, by allowing third party payors to promulgate RVGs. Allowing physician involvement in the development of RVGs is simply not, competitively speaking, reasonable. Physicians are competitors and it is rare when the consumer is not benefited from competition in the market—RVGs are no exception.

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