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Antitrust Law—Jurisdictional Scope of the Sherman Act—State Action Exception—Learned Profession Exception—Boddicker v. Arizona State Dental Association, 549 F.2d 626 (9th Cir.), cert. denied, 98 S. Ct. 73 (1977)

Julie C. McIntyre

RECENT NINTH CIRCUIT DECISIONS

ANTITRUST LAW—JURISDICTIONAL SCOPE OF THE SHERMAN ACT—STATE ACTION EXCEPTION—LEARNED PROFESSION EXCEPTION—*Boddicker v. Arizona State Dental Association*, 549 F.2d 626 (9th Cir.), *cert. denied*, 98 S. Ct. 73 (1977).

I. INTRODUCTION

In *Boddicker v. Arizona State Dental Association*,[1] the Ninth Circuit held that the membership requirements of the American Dental Association (ADA) and its constituent societies fell within the purview of the Sherman Act (the Act).[2] This decision is illustrative of the continued expansion of Sherman Act jurisdiction by applying a liberal construction of the interstate commerce requirement.[3] At the same time, the court contracted the scope of recognized exceptions to the Act,[4] thereby indicating a reluctance to afford immunity to entities and individuals whose conduct constitutes a violation of antitrust legislation.

II. FACTS OF THE CASE

Under the national network of dental societies established by the ADA, the Arizona State Dental Association is a "constituent society" of the ADA and the Central Arizona Dental Society is a "component

1. 549 F.2d 626 (9th Cir.), *cert. denied*, 98 S. Ct. 73 (1977).

2. The Sherman Anti-Trust Act §§ 1, 2, 15 U.S.C. §§ 1, 2 (Supp. V 1975), provide in pertinent part:

> § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared . . . to be illegal shall be deemed guilty of a felony . . . .
>
> § 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

Id.

3. *See* Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 745-46 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773, 785 (1975).

4. *See, e.g.*, Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976).

In contravention of the trend to expand liability under the Act, the Supreme Court recently concluded that the enforcement of a ban on legal advertising by the Arizona State Bar was exempt from liability under the state action doctrine. Bates v. State Bar of Ariz., 97 S. Ct. 2691, 2698 (1977). *See* text accompanying notes 71-72 *infra*. Unlike the

society" of the state association.[5] Pursuant to the by-laws of the ADA, a dentist may not become a member of a constituent or component society without first remitting dues and becoming a member of the ADA. As a result of this arrangement, the ADA collected more than $6,000,000 in annual membership dues in 1972 from dentists throughout the United States.

Each of the three associations (the ADA, the state society and the local society) was organized with the objective of improving public health and the practice of dentistry.[6] Membership in state and local societies is not a prerequisite to the practice of dentistry in Arizona. However, the two associations offer substantial benefits to their members, including continuing education programs, group insurance and entry into various specialty organizations. The ADA provides its members with insurance programs, dental aptitude tests and seminars. It also publishes a journal and newsletters.

Vernon Boddicker, an Arizona dentist whose membership in the Arizona dental societies had been terminated for failure to pay ADA dues, brought an action against the three associations. He was joined in the lawsuit by two other Arizona dentists who had paid dues to the ADA under protest in order to retain their status as members in good standing of the state and local societies. The plaintiffs alleged that the agreement to require membership in the ADA was an unreasonable condition to membership in the state societies and constituted an anticompetitive tying arrangement[7] in violation of the Sherman Act.[8] They claimed that denial

situation in *Boddicker*, however, where the defendants had by their own volition imposed the membership requirements, the defendant State Bar in *Bates* had merely enforced a rule promulgated by the Arizona Supreme Court.

5. The organizational structure created by Chapter III of the by-laws of the ADA is analogous to that of the federal/state governments: federal (ADA), state (constituent societies) and county (component societies).

6. Article II of the ADA Constitution provides: "The objective of this Association shall be to encourage the improvement of the health of the public, to promote the art and science of dentistry and to represent the interests of the members of the dental profession and the public which it serves."

7. "Tying arrangement" is defined as "an agreement under which a seller agrees to sell a product or service (the tying item) only on the condition that the buyer agrees . . . to purchase a second (tied) product [or service]." 1 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION ¶ 6.02[3][c] (1976). In International Salt v. United States, 332 U.S. 392, *appeal dismissed*, 332 U.S. 747 (1947), the Court held that tying arrangements are illegal per se. The inclusion of an activity within the per se doctrine has the effect of eliminating any evaluation of the reasonableness of such activity in connection with a determination of Sherman Act liability. Thus, once the existence of a tying arrangement is established, a violation of the Sherman Act is deemed to exist. *See* 1 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION ¶ 6.02[3] (1976).

The plaintiffs in *Boddicker* contended that the membership arrangement imposed by the dental associations constituted a tying arrangement inasmuch as membership in the state

of membership in the Arizona societies would impair their ability to practice dentistry since they would be unable to reap the benefits provided by the state and local societies.[9] Further, they maintained that expulsion from the Arizona societies would diminish their practices and professional reputations, resulting in their need for fewer supplies and less equipment.[10]

The district court dismissed the complaint[11] for lack of subject matter jurisdiction, upholding the contention of the dental societies that the required payment of ADA membership dues to maintain state and local society membership did not affect interstate commerce.[12] As an additional basis for its dismissal, the court held that the procedures complained of were not within the ambit of the Sherman Act since they involved the practice of a learned profession and therefore did not constitute trade or commerce.[13]

III. REASONING OF THE COURT

The Ninth Circuit Court of Appeals, in reversing the holding of the district court, concluded that there was a possibility that the dues arrangement had exerted a substantial economic effect upon interstate commerce and that therefore it fell within the jurisdictional reach of the Sherman Act.[14] In addition, relying on *Goldfarb v. Virginia State Bar*[15] and *Cantor v. Detroit Edison Co.*,[16] the Ninth Circuit held that the type of activity involved was not afforded immunity by any recognized exception to the application of the Act.[17]

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and local dental societies (the tying item) can be obtained by dentists only if they also pay dues to the ADA (the tied item).

8. 15 U.S.C. §§ 1, 2 (Supp. V 1975). *See* note 2 *supra*.

9. 549 F.2d at 629.

10. *Id.* at 629 n.4. *See* note 27 *infra*.

11. Boddicker v. Arizona State Dental Ass'n, [1975-1] TRADE CAS. (CCH) ¶ 60, 229 (D. Ariz. March 3, 1975), *rev'd*, 549 F.2d 626 (9th Cir.), *cert. denied*, 98 S. Ct. 73 (1977).

12. *Id.*

13. *Id.* The minute entry of the district court states, in pertinent part:

> It is ordered that the Motion to Dismiss is granted as follows: [T]he anti-trust claim should be dismissed because the activities complained of do not affect interstate commerce and because the procedures involved in joining professional associations do not constitute "trade or commerce" within the purview of the anti-trust laws . . . .

Id.

14. 549 F.2d at 630.

15. 421 U.S. 773 (1975).

16. 428 U.S. 579 (1976).

17. In the decision of Boddicker v. Arizona State Dental Ass'n, [1975-1] TRADE CAS. (CCH) ¶ 60,229 (D. Ariz. March 3, 1975), *rev'd*, 549 F.2d 626 (9th Cir.), *cert. denied*, 98 S. Ct. 73 (1977), the district court did not have the advantage of considering Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) and Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) since both cases were decided subsequent to the district court's order to grant the defendants' motion to dismiss.

A. *Jurisdiction: The Interstate Commerce Requirement*

Under the Sherman Act, Congress is given the power to regulate anticompetitive activities that are "in restraint of trade or commerce among the several States."[18] This language not only sets forth a standard by which to determine the existence of a substantive offense, it also establishes the jurisdictional parameters of the Act.[19] The Supreme Court has, on numerous occasions,[20] found this language illustrative of congressional intent to extend the jurisdictional scope of the Sherman Act to the constitutional limits of congressional power under the commerce clause.[21]

The Supreme Court has consistently extended the application of the Sherman Act to comport with expanding notions of the power granted to Congress by the commerce clause.[22] In *Wickard v. Filburn*,[23] the Court recognized that activities which had not actually occurred within the flow of interstate commerce would still be subject to jurisdiction under the Act if they could be shown to have exerted a "substantial economic effect on interstate commerce . . . ."[24] The Court also noted that while a local activity, standing alone, might not be sufficient to satisfy the jurisdictional requirement, it would do so if, when multiplied into a general practice, it had a substantial effect on interstate commerce.[25]

The Ninth Circuit concluded in *Boddicker*, on the basis of the *Wickard* rationale, that the nexus between the conduct of the dental associations and the interstate commerce alleged in the complaint was "unquestionably adequate."[26] In reaching its conclusion, the court cited as determinative the extensive multistate activities of the ADA and the flow of funds both to and from the ADA. The court also referred by footnote[27]

18. 15 U.S.C. § 1 (Supp. V 1975).

19. Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 521 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973); Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. LAW & ECON. 7, 33 (1966).

20. *See, e.g.*, Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743 n.2 (1976); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 194 (1974); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558 (1944).

21. U.S. CONST. art. I, § 8, cls. 1, 3 provide in pertinent part: "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several states . . . ."

22. Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743 (1976).

23. 317 U.S. 111 (1942).

24. *Id.* at 125.

25. *Id.* at 127-28. *Accord*, Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948); Lehrman v. Gulf Oil Corp., 464 F.2d 26, 31-37 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972).

26. 549 F.2d at 629.

27. *Id.* at 629 n.4. Footnote 4 states in pertinent part:

> In addition, plaintiffs contend that expulsion from the local societies will diminish their practice and professional reputation. A less vigorous dental practice necessarily

to the plaintiffs' contention that the alleged tying arrangement caused a diminution of the dentists' practices and professional reputations, thereby decreasing their need for out-of-state supplies, with a concomitant impact on interstate commerce.

The reasoning of the Ninth Circuit has consistently departed from that of the other circuits as to the nature of the nexus with interstate commerce required for Sherman Act jurisdiction.[28] Although other circuits have concluded that the factual issues on the merits are inseparable from the factual issues on the jurisdictional question,[29] the Ninth Circuit has bifurcated the import of the language "restraint of trade or commerce among the several States,"[30] into the substantive and jurisdictional issues created.[31] Pursuant to this analysis, a violation of the Act has occurred if defendant's conduct is in restraint of trade under sections 1 and 2 of the Act.[32] On the other hand, to determine the existence of jurisdiction, the Ninth Circuit has held[33] that the presence of a restraint should be assumed and that the court should focus on whether defendant's conduct is of a nature sufficient to invoke Congress' power to regulate interstate commerce.[34] As a result of this viewpoint, the Ninth Circuit, to a greater extent than the other circuits, has tended to scrutinize *all* of the defendant's activities to determine the existence of jurisdiction, rather than limiting its consideration to those activities of which the plaintiff has complained, *i.e.*, the alleged restraint.

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includes the use of fewer supplies, less equipment, etc. Although the amount of interstate commerce affected by the deterioration of three dentists' practices may seem insubstantial, like effects on the practices of similarly situated dentists across the nation probably will result in the altered flow of dental supplies in interstate commerce.

Id.

28. Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 894 n.20 (3d Cir. 1977). *See generally* Comment, *The Confusing World of Interstate Commerce and Jurisdiction Under the Sherman Act—A Look at the Development and Future of the Currently Employed Jurisdictional Tests*, 21 VILL. L. REV. 721, 725 (1976).

29. *E.g.*, McBeath v. Inter-American Citizens for Decency Comm., 374 F.2d 359, 363 (5th Cir.), *cert. denied*, 389 U.S. 896 (1967).

30. 15 U.S.C. §§ 1, 2 (Supp. V 1975).

31. Gough v. Rossmoor Corp., 487 F.2d 373, 375 (9th Cir. 1973); Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 521 (9th Cir.), *cert. denied*, 412 U.S. 950 (1973). In Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 892-94 (3d Cir. 1977), the Third Circuit compared the various approaches to the determination of jurisdiction taken by the circuit courts of appeals, noting that "the Ninth Circuit's approach to the interrelation of Sherman Act claims' merit and their jurisdictional prerequisite differs greatly from that in the other circuits discussed." *Id.* at 894 n.20.

32. 15 U.S.C. §§ 1, 2 (Supp. V 1975).

33. Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 521-22 (9th Cir.), *cert. denied*, 412 U.S. 950 (1973).

34. U.S. CONST. art. I, § 8, cls. 1, 3. *See* note 21 *supra*.

It is difficult to discern the extent of the resulting divergence, however, because the courts often carelessly refer to defendant's "conduct," failing to specify whether they have considered all activities carried on by the defendant or just that conduct which allegedly constitutes the restraint. The dissent in *Boddicker* contended that "the question is not simply whether the defendant engages in interstate commerce, but whether the alleged restraint substantially affects interstate commerce."[35] While several circuit courts have expressly acknowledged the possibility that the nexus required is between the restraint and interstate commerce,[36] the Supreme Court has never expressly addressed the issue.[37]

In *Hospital Building Co. v. Trustees of Rex Hospital*,[38] the Court made it clear that it is improper to employ a separate analysis in considering the jurisdictional and substantive issues, respectively.[39] In that case, the district court did not articulate the basis upon which it granted the defendants' motion to dismiss. After electing to treat the dismissal as having been based on rule 12(b)(6)[40] for failure to state a claim upon which relief could be granted, the Supreme Court commented that the

> analysis in this case would be no different if we were to regard the District Court's action as having been a dismissal . . . under Rule 12(b)(1)[41] [for lack of subject matter jurisdiction]. In either event, the critical inquiry is into the adequacy of the nexus between

35. 549 F.2d at 634 (Fitzgerald, J., dissenting).

36. *See, e.g.*, Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 896 (3d Cir. 1977); Evans v. S.S. Kresge Co., 544 F.2d 1184, 1188-89 (3d Cir. 1976); United States v. Finis P. Ernest, Inc., 509 F.2d 1256, 1260-61 (7th Cir.), *cert. denied*, 423 U.S. 893 (1975).

37. While the Supreme Court has never focused on the issue, there is language in certain Court opinions which indicates, without elaboration, that the nexus must be between the conduct constituting a restraint and interstate commerce. *See, e.g.*, Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743 (1976) ("As long as the restraint in question 'substantially affects interstate commerce,' . . . the interstate commerce nexus required for Sherman Act coverage is established."); Goldfarb v. Virginia State Bar, 421 U.S. 773, 784 (1975) ("The necessary connection between the interstate transactions and the restraint of trade . . . is present . . . ."); United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 461 (1949) ("We first should be satisfied that the activities on which restraints are alleged to have been exerted constitute commerce among the states."). *But cf.* United States v. Finis P. Ernest, Inc., 509 F.2d 1256, 1260 (7th Cir.), *cert. denied*, 423 U.S. 893 (1975) ("The Supreme Court has never decided the question of whether a business with out-of-state activities which engages in a local conspiracy to restrain commerce falls within the Sherman Act even though there is no restraining effect on interstate commerce.").

38. 425 U.S. 738 (1976).

39. *Id.* at 742 n.1.

40. FED. R. CIV. P. 12(b)(6).

41. *Id.* 12(b)(1).

> [defendants'] conduct and interstate commerce that is alleged in the complaint.[42]

Again, the Court's reference to "conduct" is ambiguous. However, its subsequent recognition that "[a]s long as the restraint in question 'substantially and adversely affects interstate commerce,' . . . the interstate commerce nexus required for Sherman Act coverage is established"[43] tends to support the conclusion that, by its reference to defendants' "conduct," the Court contemplated that the restraint alleged was the only activity which could be considered in determining subject matter jurisdiction.

The circumstances in *Boddicker* illuminate the anomalous results which can occur when a defendant's activities as a whole are taken into consideration in order to invoke jurisdiction under the Sherman Act.[44] To the extent that the alleged tying arrangement imposed by the dental associations is successful, the ADA will realize greater revenue. It will thereby be able to continue and even expand multistate activities. The free flow of interstate commerce created by the societies' activities will be burdened only if the dentists succeed in their antitrust action, thereby presumably causing a reduction in ADA dues which were formerly remitted by dentists desirous of maintaining their good standing in the state and local societies. Thus, to the extent that the general activities of the ADA were considered, the Ninth Circuit relied upon activities which would only be increased by the continued success of the restraint, thereby enhancing the flow of interstate commerce.

The logical conclusion to be drawn from the Ninth Circuit's analysis, namely that *any* substantial effect upon interstate commerce (even a positive one) is sufficient to invoke jurisdiction, is inconsistent with the underlying purpose of the Sherman Act. As was acknowledged in *Boddicker*,[45] the legislative history of the Sherman Act indicates that its adoption was the result of congressional desire to maximize consumer welfare by prohibiting conduct which creates a *restraint* on trade.[46] Certainly, consumer welfare is not furthered by the imposition of sanctions upon activities which *promote* interstate commerce.[47]

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42. 425 U.S. at 742 n.1.

43. *Id.* at 743 (quoting Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195 (1974)).

44. 15 U.S.C. §§ 1, 2 (Supp. V 1975).

45. 549 F.2d at 632 n.10.

46. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. LAW & ECON. 7, 10 (1966).

47. The analysis of the Ninth Circuit in considering the broad range of the defendants' activities appears, at first blush, to be consistent with the legislative intent to extend the scope of the act to the limits of power granted by the commerce clause. *See* note 21 *supra*

Thus, if the Supreme Court were to expressly hold that the restraint itself must affect interstate commerce (which as yet the Court has only intimated),[48] the conclusion of the Ninth Circuit as to the presence of jurisdiction would be left to stand upon facts which it relegated to the status of a footnote.[49] Since the plaintiffs did not claim that their practice of dentistry was carried on in the flow of interstate commerce, they must show, in order to invoke jurisdiction, that the restraint imposed by the membership arrangement has a substantial effect upon interstate commerce.[50] Evidently, the only effect pleaded by the plaintiffs was that their expulsion from the state and local societies would diminish their professional reputations, and consequently their practices, thereby reducing their need for supplies and equipment purchased in interstate commerce.[51] It can be argued that the diminution in the practices of those dentists barred would be balanced by a corresponding increase in the practices of other dentists. Consequently, there would be no net reduction in the volume of supplies sold to Arizona dentists through interstate commerce. However, the requirement could still be met. Pursuant to the reasoning in *Goldfarb*,[52] if a substantial volume of interstate commerce is affected by the restraint, no particular magnitude of effect need be shown.[53] Thus, if imposition of the membership scheme alters the flow of interstate commerce, Sherman Act jurisdiction would be invoked under the analysis of *Goldfarb*[54] if (and only if) the interstate market for dental supplies could be considered substantial.[55]

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and accompanying text. However, it has been recognized that the power vested in Congress by the commerce clause has a chameleon-like quality, expanding or contracting to comport with the goal to be achieved:

> [W]e must be on guard against the notion that the term [interstate commerce] has a ready and uniform meaning at all times and in all situations. . . . [T]he concept of interstate commerce has had to be widened to meet the changing conditions [in the United States economy]. It must also be pointed out that any notion that it is possible to frame a definition of interstate commerce which could be uniformly applied in all questions of state and federal power would hardly fit in with the facts.

M. RAMASWAMY, THE COMMERCE CLAUSE IN THE CONSTITUTION OF THE UNITED STATES 401 (1948).

48. *See* note 37 *supra* and accompanying text.

49. 549 F.2d at 629 n.4. *See* note 27 *supra*.

50. Wickard v. Filburn, 317 U.S. 111 (1942).

51. 549 F.2d at 629 n.4. *See* note 27 *supra*.

52. 421 U.S. at 785. *Accord*, United States v. Champion Int'l Corp., 557 F.2d 1270 (9th Cir. 1977).

53. The Court based this conclusion on the fact that "[o]therwise, the magnitude of the effect would control, and our cases have shown that, once an effect is shown, no specific magnitude need be proved." 421 U.S. at 785.

54. *Id.*

55. The Supreme Court has not yet held an effect upon interstate commerce as minimal as that alleged in *Boddicker* to be sufficient to invoke Sherman Act jurisdiction. However,

the Court has become willing to accept fewer connections as constituting a substantial economic effect. *See* note 58 *infra* and accompanying text. In *Goldfarb*, where a significant percentage of the funds involved in the purchase of the homes in question came from sources outside of Virginia, the local activity of attorneys in examining title reports was held to have been an integral part of a transaction which occurred in interstate commerce and thereby had a substantial effect upon interstate commerce. The Court recognized that, under Virginia law, such an examination could be performed only by an attorney and was necessary in order to obtain financing. 421 U.S. at 483-84. In Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976), the restraint threatened a proposed expansion of hospital facilities. The hospital had purchased approximately $100,000 per year in hospital supplies from out-of-state suppliers. If expansion were prohibited, the hospital's purchases from out-of-state suppliers and its revenue received from out-of-state sources would be substantially less than if expansion were permitted. The hospital's parent corporation would receive considerably smaller management fees. Additionally, the financing of the expansion, provided by out-of-state sources, would not occur. These factors were deemed sufficient to invoke Sherman Act jurisdiction. *Id.* at 744.

Those circuit courts which have considered the issue recently seem to have followed the Supreme Court's lead in expanding the jurisdiction of the Sherman Act. Of the eight circuit court cases in which the issue has been considered subsequent to *Goldfarb*, the courts failed in only two to find the presence of a sufficient effect upon interstate commerce to invoke Sherman Act jurisdiction. The Eighth Circuit, in deciding to dismiss the complaint in Diversified Brokerage Servs., Inc. v. Greater Des Moines Bd. of Realtors, 521 F.2d 1343, 1346-47 (8th Cir. 1975), stressed the fact that the plaintiffs had chosen not to attempt to show that defendant's intrastate activities had placed a substantial burden on interstate commerce.

In the second action dismissed for lack of subject matter jurisdiction, Morgan v. Odem, 552 F.2d 147 (5th Cir. 1977), the decision was justified by the Fifth Circuit's initial statement: "In spite of an attempt to cast this case in . . . [an] antitrust mold, it concerns nothing more than a state law construction contract dispute over which the federal court had no jurisdiction." *Id.* at 148. The court held that the meager allegation that the Veterans Administration had acted as guarantor of the loan to finance the construction of plaintiffs' home was insufficient to show a substantial effect upon interstate commerce. *Id.* at 149.

In another action litigated in the Eighth Circuit, Northern v. McGraw-Edison Co., 542 F.2d 1336 (8th Cir. 1976), the court concluded that the distribution system operated by the defendant sufficiently affected interstate commerce to invoke Sherman Act jurisdiction. Under the system, dry cleaning stores located in over 30 states were required to purchase their equipment solely from the defendant in order to secure a franchise and trademark. This practice yielded nearly $9,000,000 in sales over a six-year period. *Id.* at 1346.

In Miller v. Granados, 529 F.2d 393, 397 (5th Cir. 1976), the Fifth Circuit found that the defendants' use of the mails, news and advertising media, and the payment for services, facilities and materials from out-of-state dealers was sufficient to invoke jurisdiction under the Sherman Act.

In Taxi Weekly, Inc. v. Metropolitan Taxicab Bd. of Trade, Inc., 539 F.2d 907, 910 (2d Cir. 1976), the Second Circuit held that a conspiracy which led to the demise of a local newspaper had sufficient interstate implications for Sherman Act jurisdiction since the paper often printed out-of-state news and received a large portion of its advertising fees from out-of-state firms.

The Third Circuit, in Evans v. S.S. Kresge Co., 544 F.2d 1184, 1189-90 (3d Cir. 1976), held that interstate commerce had been substantially affected where a food store's annual out-of-state purchases in excess of $400,000 were jeopardized by the defendant's alleged leasing practices. The leasing practices were part of a nationwide scheme.

In a subsequent decision, Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884 (3d Cir. 1977), the Third Circuit found that Sherman Act jurisdiction existed where the plaintiffs were required to pay the defendant's attorney for related legal services as a

As the majority in *Boddicker* correctly indicated,[56] the fact that the membership arrangement has been imposed upon the dentists on a nationwide basis lends credence to the existence of a substantial effect upon interstate commerce. According to the aggregate theory of impact upon interstate commerce espoused in *Wickard v. Filburn*,[57] and in light of the Court's willingness to find increasingly tenuous connections with interstate commerce as sufficient to satisfy the jurisdictional requirement,[58] it is possible that the volume of supplies purchased in interstate commerce by dentists throughout the United States could be considered substantial enough to invoke jurisdiction under the Act.

Furthermore, federal courts are reluctant to grant dismissals for lack of subject matter jurisdiction[59] prior to providing the plaintiff ample opportunity for discovery, particularly in cases where, as in *Boddicker*, the jurisdictional and substantive issues are inextricably interwoven.[60] This

condition to securing a loan from the defendant in order to purchase a home. The court cited as determinative, among other interstate contacts, the existence of out-of-state purchasers of homes and the fact that the defendant was a federally chartered institution governed by federal regulations whose funds were often obtained from the Federal Home Loan Bank Board in order to make such loans. *Id.* at 897.

The Fourth Circuit, under circumstances closely analogous to those in *Boddicker*, reversed a district court's order of dismissal in Ballard v. Blue Shield of S.W. Va., Inc., 543 F.2d 1075 (4th Cir. 1976). In that case, a group of chiropractors alleged a conspiracy between several doctors, a medical association and six insurance companies to refuse insurance coverage for chiropractic services. The court held that interstate commerce might be substantially affected by the resulting reduction in the sales of therapeutic devices manufactured outside the State of West Virginia, increased costs to out-of-state patients and injuries to interstate insurance companies that pay chiropractic claims. *Id.* at 1077-78.

56. 549 F.2d at 629 n.4 ("Although the amount of interstate commerce affected by the deterioration of the three dentists' practices may seem insubstantial, like effects on the practices of similarly situated dentists across the nation probably will result in the altered flow of dental supplies in interstate commerce.").

57. 317 U.S. 111, 127-28 (1942).

58. *E.g.*, Goldfarb v. Virginia State Bar, 421 U.S. 733, 784 (1975). *See generally* Furgeson, *The Commerce Test for Jurisdiction under the Sherman Act*, 12 HOUS. L. REV. 1052 (1975); Note, *Portrait of the Sherman Act as a Commerce Clause Statute*, 49 N.Y.U.L. REV. 323 (1974).

In a recent decision, Bates v. State Bar of Ariz., 97 S. Ct. 2691 (1977), the Supreme Court based its rejection of the plaintiffs' contention that the Arizona State Bar should be subject to liability under the Sherman Act for its ban on legal advertising upon the conclusion that the state action exemption, set forth in Parker v. Brown, 317 U.S. 341, 351 (1943) (*see* notes 64-72 *infra* and accompanying text), encompassed the activities of the defendants. 97 S. Ct. at 2696. Although the Supreme Court did not discuss the issue of jurisdiction, the Court must have determined that jurisdiction existed prior to its determination of the substantive issue of the applicability of the state action exemption. *See* Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 889 n.12 (3d Cir. 1977).

59. Rios v. Dillman, 499 F.2d 329, 330 (5th Cir. 1974). *See* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1350 (1969).

60. Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 746 (1976); Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 473 (1962).

factor would weigh heavily in favor of affirming the Ninth Circuit's holding. It has been stated that "[w]here the jurisdictional issue . . . cannot be decided without the ruling constituting at the same time a ruling on the merits of the case, the case should be heard and determined on the merits through regular trial procedure."[61]

In order to determine whether the tying arrangement alleged in *Boddicker* violates the Sherman Act, the plaintiffs must show that the membership procedures employed by the dental associations impose a restraint. This same restraint must have a substantial effect upon interstate commerce in order to invoke jurisdiction. As the Third Circuit stated in *Mortensen v. First Federal Savings & Loan Association*:[62]

> [I]t is because the nexus [that the plaintiffs] will have to establish to succeed on the merits is at least in part the same nexus they must allege or even prove to withstand jurisdictional attacks, that we feel it is incumbent upon the trial judge to demand less in the way of jurisdictional proof than would be appropriate at a trial stage.[63]

While *Mortensen* and other decisions support the conclusion reached in *Boddicker*, this does not alter the fact that the mode of analysis employed by the Ninth Circuit is not derived from firm precedent.

B. Immunity Under the State Action Exemption

According to the holding in *Parker v. Brown*,[64] when Congress enacted the Sherman Act it did not intend to restrain "state action or official action directed by a state."[65] Since the *Parker* decision, courts have struggled with the extent to which the doctrine should be applied. Until recently, most courts had held that the exemption extended to all activities of private parties taken pursuant to state legislation which either required, approved or authorized the acts taken.[66]

In *Goldfarb v. Virginia State Bar*,[67] the Supreme Court clearly stated that the exemption was limited to anticompetitive conduct which had

61. Fireman's Fund Ins. Co. v. Railway Express Agency, 253 F.2d 780, 784 (6th Cir. 1958), *quoted with approval in* McBeath v. Inter-American Citizens for Decency Comm., 374 F.2d 359, 363 (5th Cir.), *cert. denied*, 389 U.S. 896 (1967).

62. 549 F.2d 884 (3d Cir. 1977).

63. *Id.* at 892.

64. 317 U.S. 341 (1943).

65. *Id.* at 351.

66. Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248, 251 (4th Cir. 1971); Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299, 302 (D. Mass.), *aff'd mem.*, 242 F.2d 748 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957). *See generally* Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1 (1976).

67. 421 U.S. 773 (1975).

been compelled by direction of the state acting as sovereign.[68] The scope of the doctrine was further narrowed in *Cantor v. Detroit Edison Co.*[69] where, although the activity challenged by plaintiff could not have been abandoned without prior approval of a state regulatory commission, the defendant was held responsible for the restraint imposed since it had exercised sufficient freedom of choice in deciding to initiate the anticompetitive activity.[70] In *Bates v. State Bar of Arizona*,[71] although state action immunity was held to extend to the ban on legal advertising which had been enforced by the Arizona State Bar, the Supreme Court reaffirmed the position it had taken in *Cantor* and *Goldfarb* that no exemption would exist to protect a defendant who had acted in an area where state policy was neutral.[72]

Unlike the situation in *Bates*, where the defendant was compelled to act according to rules promulgated by the Arizona Supreme Court,[73] the conduct allegedly constituting a restraint in *Boddicker* was not compelled by the Arizona State Legislature or any agency of the State of Arizona. The practice of dentistry was not subject to a regulatory scheme by which the State of Arizona had even condoned the requirement of membership in the ADA as a condition precedent to membership in the state and local associations.[74] In light of the freedom of choice exercised by the dental associations in establishing their membership requirements

68. *Id.* at 791.

69. 428 U.S. 579 (1976).

70. *Id.* at 598.

71. 97 S. Ct. 2691 (1977).

72. 428 U.S. at 598.

73. 17A ARIZ. REV. STAT. Sup. Ct. Rules, rule 27(a) (1973) provides in pertinent part: "[T]he Supreme Court of Arizona does hereby . . . create . . . an organization known as the State Bar of Arizona. . . . The State Bar of Arizona may . . . promote and further the aims as set forth herein and hereinafter in these rules." *Id.*

Id. rule 29(a) provides in pertinent part: "The duties and obligations of members shall be as prescribed by the Code of Professional Responsibility of the American Bar Association . . . ." *Id.*

ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101(B) provides in pertinent part: "A lawyer shall not publicize himself . . . as a lawyer through newspaper or magazine advertisements . . . ." *Id.*

In *Bates*, two Arizona attorneys alleged that the enforcement of Disciplinary Rule 2-101 constituted a Sherman Act violation by the Arizona State Bar. The Court concluded that since the disciplinary rule had been promulgated by the Arizona Supreme Court pursuant to authority granted by the Arizona Constitution and the bar had been affirmatively commanded by the Arizona Supreme Court to enforce the rule, the bar was not subject to liability under the Act for the restraint it had imposed.

74. Although the Arizona State Legislature authorized the formation of a Board of Examiners to which it granted the authority to regulate the practice of dentistry, ARIZ. REV. STAT. § 32-1207 (1976), no mention was made of the membership qualifications of the state or local societies or their arrangements for paying dues.

and the fact that the State of Arizona had been neutral and uninvolved in that choice, the Ninth Circuit correctly observed in *Boddicker* that the state action doctrine afforded no exemption "to shelter the practices being challenged."[75]

C. *Immunity of the Practice of a Learned Profession*

Defendants whose challenged activities fall within the practice of a "learned profession" have consistently argued[76] that such activities do not constitute "trade or commerce" and are therefore not within the scope of the Act. They contend that the principal goal in the practice of a profession is neither competition nor profit, but the provision of services necessary to the community. Therefore, the imposition of antitrust laws designed to further competition would be at odds with their professional goal.

The genesis of this argument seems to be the construction placed upon the phrase "restraint of trade" found in section 3 of the Sherman Act[77] by the Supreme Court in *Atlantic Cleaners & Dyers, Inc. v. United States*:[78] "Whenever any occupation, employment, or business is carried on for the purpose of profit or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade."[79] However, the Supreme Court has refused to accept the existence of an all-encompassing exemption from antitrust liability based solely on the nature of the defendant's occupation.[80] In fact, the Court has not yet encountered a case in which it has decided that application of the learned profession exemption was appropriate.[81] In *Goldfarb v. Virginia State Bar*,[82] however, it implicitly recognized the existence of the exemption by noting that "[i]t would be unrealistic to view the practice of professions as

75. 549 F.2d at 632.

76. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 785-86 (1975); American Medical Ass'n v. United States, 317 U.S. 519, 528 (1943).

77. 15 U.S.C. § 3 (1970) provides in pertinent part: "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States . . . is declared illegal . . . ." *Id.*

78. 286 U.S. 427 (1932).

79. *Id.* at 436 (quoting The Schooner Nymph, 18 F. Cas. 506, 507 (C.C.D. Me. 1834) (No. 10,388)).

80. Goldfarb v. Virginia State Bar, 421 U.S. 773, 786-87 (1975).

81. The recent decision in *Bates* is indicative of the Court's tendency to avoid the application of a learned profession exemption. While the Court found that the State Bar's prohibition of attorney advertising was excluded from Sherman Act liability on the basis of the *Parker* doctrine, immunity could as easily have been based on the learned profession exemption. The Court, however, did not even acknowledge the existence of such an exemption.

82. 421 U.S. 773 (1975).

interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas."[83]

In determining whether the Sherman Act applies to the practice of a profession, courts have generally focused on the commercial or non-commercial nature of the activity which has allegedly imposed a restraint on trade.[84] Application of the learned profession exemption to non-commercial activities has been justified by recognizing the underlying purpose of the Act:[85] "The end sought was the prevention of restraints to free competition in *business and commercial* transactions . . . ."[86] The "commercial versus non-commercial" rationale was followed in *Goldfarb*. Upon noting that previous Supreme Court cases specifically included "services" within the scope of section 1 of the Act,[87] the Court held that that aspect of a lawyer's practice involving commercial intercourse, *i.e.*, the exchange of a service for money, is subject to regulation under the Act.[88]

The analysis employed by the majority in *Boddicker* narrows the scope of the learned profession exemption to an even greater extent than the "commercial versus non-commercial" test. Recognizing that *Goldfarb*[89] offered little guidance in determining the compatibility of particular practices of a profession with the Sherman Act, the Ninth Circuit looked to the decision in *Cantor*[90] for further direction.[91] The majority contended that although application of the learned profession immunity was not at issue in *Cantor*, the reasoning of the Court in refusing to apply the state action exception was closely analogous to the rationale of *Goldfarb* in refusing to apply the learned profession exception.[92] On the basis of *Cantor*, the court concluded that in order for an activity within the practice of a "profession" to survive a Sherman Act challenge, it "must

83. *Id.* at 787 n.17.

84. Ballard v. Blue Shield of S.W. Va., Inc., 543 F.2d 1075, 1079 (4th Cir. 1976); Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295, 303 (D. Mass. 1975).

85. Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295, 303 (D. Mass. 1975).

86. Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940) (emphasis added).

87. Radovich v. National Football League, 352 U.S. 445, 451-52 (1957); American Medical Ass'n v. United States, 317 U.S. 519, 528-29 (1943).

88. 421 U.S. at 788. In *Goldfarb*, the plaintiffs alleged that they were unable to obtain legal services at a rate less than that recommended by the fee schedule published by the county bar and enforced by the state bar. The plaintiffs sued both the state and county bar associations, contending that the operation of the minimum fee schedule constituted price fixing in violation of § 1 of the Sherman Act. The Court stated that "the exchange of [a legal] service for money is 'commerce' in the most common usage of that word," and therefore falls within the scope of the Act. *Id.* at 787-88.

89. 421 U.S. 773 (1975).

90. 428 U.S. 579 (1976).

91. 549 F.2d at 630-31.

92. *Id.* at 631-32 (discussing *Goldfarb*, 421 U.S. at 792-93).

serve the purpose for which the profession exists, *viz.* to serve the public."[93]

In light of the rigorous standard imposed to determine if a claim should be dismissed for failure to state a cause of action,[94] however, the practical effect of the difference between application of the "commercial versus non-commercial" test and the "purpose of existence" test employed by the Ninth Circuit is minimal. The *Boddicker* court remanded since the dental associations' pleadings did not show that their membership scheme unquestionably existed to further the purpose of the dental associations, that is, to improve the practice of dentistry.[95] Had the "commercial versus non-commercial" test been employed, it is doubtful that the court would have decided that the exchange of benefits offered by ADA membership for the dentists' money was non-commercial in nature. Therefore, the use of either test in this instance would have led to the same conclusion: the trial court's decision to dismiss for failure of the complaint to state a cause of action should be reversed.

IV. CONCLUSION

The rationale utilized in *Boddicker v. Arizona State Dental Association* evidences the tendency of the Ninth Circuit to circumvent the limitation on the scope of the Sherman Act which requires a nexus between the restraint and interstate commerce. The court's consideration of the broad range of activities carried on by the ADA enabled it to justify its decision as to the existence of jurisdiction under the Act, at least in part, upon interstate transactions which would be *augmented* by the increased flow of funds resulting from the success of the alleged tying arrangement. Such an interpretation is clearly contrary to the legislative objective of the Act, *i.e.*, the prevention of *restraints* on competition.

The conclusion reached in *Boddicker*, however, demonstrates the increasingly pervasive interpretation of the purview of the Sherman Act which has been employed by courts in recent years. Not only did the Ninth Circuit take an expansive view of the interstate commerce requirement, it constricted the applicability of the learned profession exemption, with the ultimate effect of placing more controversies within the scope of the Sherman Act and allowing fewer defendants to escape liability.

Julie C. McIntyre

93. 549 F.2d at 632.

94. Pursuant to the holding in Conley v. Gibson, 355 U.S. 41 (1957), a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46.

95. 549 F.2d at 632.