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THE ANTITRUST DIVISION v. THE PROFESSIONS—
"NO BIDDING" CLAUSES AND FEE SCHEDULES

I. Introduction

The Department of Justice has recently begun to question the methods used by lawyers, engineers, architects and certified public accountants in determining fees. Until recently, the code of ethics of the American Institute of Certified Public Accountants as well as the codes of various engineering and architectural societies have contained provisions prohibiting the submission of bids to potential clients. In addition, many bar associations publish recommended fee schedules for various services offered to clients. The antitrust division now contends that both these practices are prohibited by Section 1 of the Sherman Antitrust Act.

Case law dealing with these practices is scarce. Until now the majority of cases filed have been settled by injunctions entered under consent decrees. On June 1, 1972, an injunction by consent decree was entered against the American Society of Civil Engineers enjoining the society from adopting any plan or program which prohibits members from submitting price quotations for engineering services. In effect, this forced the society to remove the "no bid" clause from its code of ethics. It should be noted that such a decree does not act as evidence or admission with respect to any issue of law or fact. Similar judgments were entered later in the year against the American Institute of Architects and the American Institute of Certified Public Accountants. An action is now pending against the National Society of Professional Engineers. The Justice Department alleges that the society's code of ethics, which prohibits members from submitting competitive bids for engineering services, violates Section I of the Sherman Act.

1 An example of such a "no bid" clause is Section 11(c) of the National Society of Professional Engineers' Code of Ethics:

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

Though fee schedules are published by some engineering societies, they are not included, for the purposes of this article, in sections dealing with "no bid" clauses. The remarks concerning fee schedules would apply.

3 United States v. American Soc'y of Civil Eng'rs, Civil No. 72-1776 (S.D.N.Y., June 1, 1972), 1972 TRADE CAS. ¶ 73,950.
The society filed a rebuttal arguing, *inter alia*: First, the work of a human being is not an article of commerce. Second, competitive bidding in most instances results in an award of the work to be performed to the lowest bidder regardless of other factors such as ability thereby endangering the public welfare and safety. Third, the engineering profession traditionally has been regulated by the state rather than the federal government. Fourth, the society has no enforcement power.\(^7\)

The Justice Department has not brought suit against any bar associations as of this writing. However, a Virginia homeowner, Louis Goldfarb, and two Virginia fair housing organizations brought class actions against the Virginia State Bar and three county bar associations alleging "a continuing agreement of action between the defendants and co-conspirators to raise, fix and maintain the fees for legal services performed by members of the associations."\(^8\) The court found that the schedules involved were published in violation of Section 1 of the Sherman Act.\(^9\)

The Justice Department is contemplating similar suits. In an address before the Pennsylvania Bar Association, Deputy Assistant Attorney General Bruce Wilson alleged that the practice of publishing minimum fee schedules was "fraught with antitrust dangers and should be abandoned or at least radically changed if it is to remain outside the forbidden zone."\(^10\) He argued that fee schedules are more than merely suggestions and that they limit individual competitive freedom in a manner inconsistent with the goals of the Sherman Act. He concluded that the effect of these limitations was to deprive the public of the benefits of lower prices resulting from the efficiency of more competent lawyers.\(^11\) More recently Assistant Attorney General Thomas E. Kauper warned the New York State Bar Association that attorneys have been given enough notice and that "[i]t may well be that our next warning will be in the form of a complaint."\(^12\)

Thus, in the near future cases will probably be decided establishing whether a professional organization may regulate the methods of fee determination used by its members. Previous cases decided by consent decree are of little use in determining the probable outcome of these cases because the risk of antitrust litigation is extremely high. The associations which negotiated consent decrees may have had a strong case but decided that continuing to regulate methods of fee determination was not worth the risk and cost of litigation. Section 4 of the Clayton Act provides that any person injured as a result of conduct forbidden by

\(^10\) Address by Bruce B. Wilson, Deputy Assistant Attorney General, before the Pennsylvania Bar Ass'n, Conference of County Bar Officers, 5 TRADE REG. REP. ¶ 50,131 (1972) [hereinafter cited as Address by Bruce B. Wilson].
\(^11\) Id.
\(^12\) Address by Thomas E. Kauper, Assistant Attorney General Antitrust Division, before the New York State Bar Ass'n, Jan. 24, 1973, ANTITRUST AND TRADE REG. REP. No. 598, at D-1 (1973).
the antitrust laws may recover treble damages plus the cost of suit including attorney's fees.\textsuperscript{13} Section 5(a) of the Clayton Act provides that a judgment against a defendant in any action brought on behalf of the United States shall be prima facie evidence against the defendant in any matters where the judgment or decree would be an estoppel. This provision does not apply to a consent decree.\textsuperscript{14} In effect, if one of the associations litigated the validity of a "no bid" clause or fee schedule and lost, a future plaintiff would only need to prove direct damages caused by the association's action.

II. Trade or Commerce

Through the history of the Sherman Act the Supreme Court has broadened the phrase "trade or commerce" to include restraints on services as well as goods. \textit{Apex Hosiery Co. v. Leader}\textsuperscript{15} contained dicta stating that the Sherman Act was intended to prevent restraints which tended to control the market for services as well as goods.\textsuperscript{16} In \textit{United States v. National Association of Real Estate Boards}\textsuperscript{17} the Supreme Court followed the dicta in \textit{Apex Hosiery} and held that the Washington Real Estate Board violated Section 3 of the Sherman Act\textsuperscript{18} by adopting a fee schedule for realtors' services. Section 3 contains similar language to Section 1 but applies basically to trade or commerce within the District of Columbia or the United States territories. The Court stated:

> The fact that the business involves the sale of personal services rather than commodities does not take it out of the category of "trade" within the meaning of § 3 of the Act. The Act was aimed at combinations organized and directed to control of the market by suppression of competition "in the marketing of goods and services."\textsuperscript{19}

The Court, however, carefully noted that it intimated no opinion at that time on whether the professions fell within the Act.\textsuperscript{20} Subsequent to this decision the district court of Utah held in \textit{United States v. Utah Pharmaceutical Association} that fee schedules published by an association of pharmacists selling prescription drugs violated the Sherman Act.\textsuperscript{21} The court stated: "[O]ne cannot lawfully agree with others to fix the price of goods in commerce merely because of professional credentials or because such price fixing also touches upon the matter of professional fees."\textsuperscript{22} The Supreme Court later affirmed this decision.\textsuperscript{23} \textit{Utah Pharmaceutical Association} is clearly distinguishable from the case of lawyers or engineers because goods were involved. However, this distinction

\begin{itemize}
\item \textsuperscript{14} 15 U.S.C. § 16(a) (1970).
\item \textsuperscript{15} 310 U.S. 469 (1940).
\item \textsuperscript{16} \textit{Id.} at 493.
\item \textsuperscript{17} 339 U.S. 485 (1950).
\item \textsuperscript{19} 339 U.S. at 490.
\item \textsuperscript{20} \textit{Id.} at 492.
\item \textsuperscript{22} 201 F. Supp. at 35; \textit{cf.} American Medical Ass'n v. United States, 317 U.S. 519 (1943).
\item \textsuperscript{23} \textit{Utah Pharmaceutical Ass'n v. United States}, 371 U.S. 24 (1962).
\end{itemize}
may be of little substance since the court previously held that restraints on services fell within the act in National Association of Real Estate Boards. In fact, in Goldfarb v. Virginia State Bar Association the court held that the Sherman Act applied to the professions at least with respect to fee schedules.

III. Among the Several States

In Mitchell v. Lublin, McGaughy & Associates the Supreme Court held that a firm of engineers was engaged in interstate commerce for purposes of the Fair Labor Standards Act while noting that the commerce test under that Act was narrower than the test under the commerce clause of the Constitution. In Atlantic Cleaners & Dyers v. United States the Supreme Court held that Congress exercised "all the power it possessed" in enacting the Sherman Act. Thus, any trade or commerce which is appropriate for regulation by Congress under the commerce clause is subject to the Sherman Act. Since the Court was willing to hold that engineers were engaged in interstate commerce under the narrow test applied in Mitchell, it is unlikely that it would hold that engineers were not engaged in interstate commerce under the broader test applied under the Sherman Act.

The power of Congress is not limited to regulation of commerce among the states. It extends to intrastate activities which affect interstate commerce even if the particular activities being regulated are wholly intrastate. In Mandeville Island Farms, Inc. v. American Crystal Sugar Co. the Supreme Court held that Congress' power to keep the interstate market free of goods produced under conditions inimical to the general welfare extended to some cases where there was no specific effect on interstate commerce. The Court held: "[I]f is enough that the individual activity where multiplied into a general practice is subject to federal control . . . or that it contains a threat to the interstate economy that requires preventative regulation." The effect on interstate commerce need not be large but merely must be more than inconsequential.

In light of these cases and the Court's expansive view of the commerce clause, it is unlikely that the Court would hold that engineering or lawyers'
services were not within the regulatory ambit of the Sherman Act. Both engineering firms and law firms cut across state lines in their day-to-day activities. Neither the services performed by engineers nor those performed by lawyers have only an “inconsequential effect” on commerce. There is support for this view. In a white paper prepared by a Task Force on Competitive Bidding Implications, the spokesmen for the National Association of Professional Engineers practically conceded that engineering services are within the scope of the Sherman Act. In July of 1971 the authors of an article in the American Bar Association Journal alleged, among other things, that fee schedules violated the Sherman Act. In 1972 an article favoring fee schedules was published in response but did not challenge the contention that lawyers’ services were within the scope of the Act. In Goldfarb v. Virginia State Bar Association the trial court held that law firms had a sufficient effect on interstate commerce because much of the financing for homes being purchased by Virginia residents using lawyers’ services came from out of state.

IV. In Restraint of Trade

The terms of Section 1 of the Sherman Act refer to “Every contract . . . in restraint of trade. . . .” Nevertheless, in Standard Oil v. United States the Supreme Court held that the Sherman Act does not restrain all contracts which limit or restrict trade or commerce but only those which are an undue or unreasonable restraint. Whether a restraint is reasonable generally depends on the circumstances surrounding the agreement. However, the Court noted that there were certain contracts which by their nature and character create a conclusive presumption of unreasonableness regardless of the expediency or nonexpediency of the contracts. Following Standard Oil two basic theories developed under which a restraint may be held to violate the Sherman Act. They are generally termed the “per se rule” and the “rule of reason.”

Various restraints have been held illegal per se. Some examples are: agreements between competitors at the same level of the market structure to allocate territories in order to minimize competition; tying arrangements; group boycotts; and price fixing. The only one that is relevant in relation to fee sched-

37 Miller and Weil, Let’s Improve, Not Kill, Fee Schedules, 58 A.B.A.J. 31 (1972) [hereinafter cited as Miller and Weil].
40 221 U.S. 1 (1910).
41 Id. at 58-60.
42 Id. at 65; Klor’s, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).
ules and "no bid" clauses is price fixing. In *United States v. Socony-Vacuum Oil Co.* the Supreme Court held:

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.*

The determination of whether a practice is illegal *per se* or falls within the rule of reason is critical. If a practice is within the rule of reason, evidence is submitted and a finding of fact is made as to whether the restraint is reasonable or not. In determining the reasonableness of a restraint the court will consider facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, the history of the restraints and the reasons for its adoption. In sharp contrast, evidence regarding motive, intent, good faith or economic benefit is inadmissible if the court finds as a matter of law that a practice is illegal *per se.* Elimination of competitive evils is no defense to a practice held illegal *per se.*

V. Fee Schedules

The Supreme Court in *United States v. National Association of Real Estate Boards,* held that the Washington Real Estate Board's action in adopting standard rates was price fixing and as such was a *per se* violation of the Sherman Act. Although the district court had made a specific finding that the schedules were nonmandatory, the Supreme Court held:

An agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, no matter what end it was designed to serve. And the fact that no penalties are imposed for deviations from the price schedules is not material. Subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line.

The ninth circuit has held that a person's professional status is no defense to price fixing.

In the *American Bar Association Journal* presentation on fee schedules the opponents of such schedules contend that they are a means of price fixing and

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47 310 U.S. 150 (1940).
48 *Id.* at 223.
53 *Id.* at 488.
54 *Id.* at 489.
eliminate or reduce competition.\textsuperscript{56} The proponents, on the other hand, cite statistics which show that 48.3 per cent of practicing attorneys believe fee schedules are not among the top three means of setting fees. They argue that the schedules are not mandatory and that circumstances may make it appropriate to charge either more or less than the suggested amount.\textsuperscript{57} In light of \textit{National Association of Real Estate Boards} it is questionable whether the nonmandatory nature of the schedules is of any significance.

Deputy Assistant Attorney General Bruce Wilson, in the speech to the Pennsylvania Bar Association Conference, discussed earlier, placed emphasis on the possibility of ethical sanctions being applied for departure from fee schedules.\textsuperscript{58} The Disciplinary Rules issued under Canon 2 of the Code of Professional Responsibility provide that the fee customarily charged in the locality for similar legal services should be considered among other factors in determining a fee.\textsuperscript{59} As a result of some state and local bar associations suggesting that fee schedules are mandatory, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued a formal opinion on the subject.\textsuperscript{60} The opinion provided:

\begin{quote}
[M]ere failure to follow a minimum fee schedule, even when habitual, can not \textit{[sic]}, standing alone and absent evidence of misconduct, afford a basis for disciplinary action.

\ldots

Conversely, if a lawyer wantonly ignores the customary charges for similar services in his community in fixing his own fees, then he is failing to take into account one element which both Canon 12 and DR 2-106(B) say should be considered.\textsuperscript{61}
\end{quote}

Thus, even though fee schedules are not mandatory, failure to follow them could be a factor in a disciplinary action resulting in sanctions. This is more coercion than the court found was present in \textit{National Association of Real Estate Boards}. In \textit{Goldfarb v. Virginia State Bar Association}\textsuperscript{62} the trial court held that the fee schedules were illegal per se as price fixing in spite of their nonmandatory nature.

Even assuming the schedules are not illegal per se, there still remains substantial dissent among members of the bar as to the question of reasonableness. Opponents of fee schedules argue that they are most often used when there is no reasonable justification for a large fee. They rely on statistics which they say show that the schedules provide unreasonable fees, that differences in fees in different areas are not justified by economic conditions, and that they are not based on time as they purport to be.\textsuperscript{63}

\begin{thebibliography}{99}
\bibitem{56} Arnould and Corley, \textit{supra} note 36.
\bibitem{57} Miller and Weil, \textit{supra} note 37.
\bibitem{58} Address by Bruce E. Wilson, \textit{supra} note 10.
\bibitem{59} ABA \textbf{CODE OF PROFESSIONAL RESPONSIBILITY} Canon 2, DR 2-106 (B)(3) (1971).
\bibitem{60} ABA \textbf{STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY}, Formal Opinion No. 323 (Aug. 9, 1970).
\bibitem{61} \textit{Id}.
\bibitem{63} Arnould and Corley, \textit{supra} note 36.
\end{thebibliography}
In summary, under present case law it appears that fee schedules are illegal per se. If a court so held, no evidence would be admissible in justification of the practice of publishing them. If a court did not hold that the schedules were illegal per se, the plaintiff would have the burden of showing that the schedules were unreasonable as a matter of fact.

VI. "No Bid" Clauses

The case law concerning "no bid" clauses is less definitive because the issue is more closely related to the right of a professional organization to establish a code of ethics. This right has been affirmed by the courts. In Swift & Co. v. United States, a group of livestock buyers agreed to decide when each would buy and not to bid against each other at the decided times. The Court held that such an agreement violated the Sherman Act since price competition was effectively eliminated. This is distinguishable from "no bid" clauses because they do not eliminate competition but merely change it in form. Agreements among sellers to agree for one person to submit the low bid and all others to submit higher bids and agreements to submit identical bids have also been held illegal but both are distinguishable since their effect was to fix a purchase price and thus eliminate all competition.

Mr. Wilson outlined the reasons for bringing suit against various professional organizations when testifying to the House Committee on Government Operations. He stated:

First, the Department frowns upon two or more members of these, or, in fact, any other profession, agreeing to any pricing structure for their services. Second, [there is a] departmental philosophy that, if any members of these professions and any individual requiring their services desire to participate in any type of selection or procurement procedure then such persons should be permitted to do so without stigma or limitation imposed by the codes of ethics of the professional organizations involved.

The Justice Department thus seeks to broaden the definition of price fixing to include "two or more members . . . of any . . . profession, agreeing to any price-
ing structure for their services.\textsuperscript{71} Traditionally the courts have only held certain specific practices, such as price fixing or group boycotts, illegal per se and have judged other restraints under the rule of reason.\textsuperscript{72} It seems unlikely that the courts will depart from this well-established policy.

If a court holds that a “no bid” clause is illegal per se, evidence of reasonableness is inadmissible. If “no bid” clauses are not held illegal per se, there are strong public policy arguments against direct price competition which have been endorsed by Congress.

VII. Congressional Policy

On October 27, 1972, Congress enacted a bill\textsuperscript{73} introduced by Representative Jack Brooks which amended the Federal Property and Administrative Services Act. The bill codifies the existing system for government procurement of architectural and engineering services. Under this system requirements are announced publicly. Contracts are then negotiated on the basis of competence and qualifications at fair and reasonable prices. The bill provides a mechanism whereby the three firms most highly qualified to provide the services required are selected and ranked. The agency head then enters detailed negotiations with the highest ranked firm. If the agency head and the firm cannot arrive at a satisfactory agreement, including a reasonable price, negotiations are entered with the next most qualified firm. This process is continued until an agreement is reached. Similar procedures are generally used by private companies contracting for engineering services.\textsuperscript{74}

The committee reports on this bill accept many of the arguments advanced by the design professions in favor of their codes of ethics.\textsuperscript{75} One of the principal problems in procurement of design services is lack of standards for measuring the quality and quantity of services to be performed. At the time the contract is signed only broad guidelines are available. The House Committee recognized that it is not practical to require extensive preliminary design and investigative work.\textsuperscript{76} In accepting the professions’ argument that the initial competition between firms should be based solely on qualification, the committee stated:

\begin{quote}
Under [the Brooks Bill architects and engineers] are under no compunction to compromise the quality of the design or the level of effort they will contribute to it in order to meet the lower “fee” quotations of other [architects and engineers]. They are free to suggest optimum design approaches that may cost more to design, but can save in construction costs and otherwise increase the quality of the building or facility to be constructed.\textsuperscript{77}
\end{quote}

The Senate Committee’s report contained similar language.\textsuperscript{78}

\textsuperscript{71} Id.
\textsuperscript{72} See text accompanying notes 39-48, \textit{supra}.
\textsuperscript{74} S. Rep. No. 1219, 92nd Cong., 2d Sess. 2 (1972).
\textsuperscript{75} \textit{White Paper, supra} note 35.
\textsuperscript{77} Id. at 3.
\textsuperscript{78} S. Rep. No. 1219, 92nd Cong., 2d Sess. 6 (1972).
The Brooks Bill resulted from a controversy started by an opinion of the Comptroller General which stated that architects and engineers are subject to the competitive negotiation provisions of the federal procurement laws and as such must submit price quotations as part of any proposal.\textsuperscript{79} Both the House and Senate Committees considered whether the bill conflicted with any sections of the antitrust laws in light of the recent cases brought by the Department of Justice. They concluded it did not. The bill concerns the method used by the government in procurement; the antitrust cases involve restraints imposed by the professions applying to anyone seeking services.\textsuperscript{80}

The Brooks Bill and similar federal acts\textsuperscript{81} have no direct effect on the validity of "no bid" clauses under the antitrust law. Nevertheless, they may serve as strong evidence regarding the reasonableness of restraints imposed by the professions. The House Committee, recognizing that federal, state and local governments as well as private business and industry have followed the practices codified by the Brooks Bill for many years, specifically found that the system was a "highly acceptable form of cost competition."\textsuperscript{82}

Federal, state and local governments are some of the largest users of design services. The Brooks Bill provides that the present system will be retained for federal procurement of these services. The National Society of Professional Engineers is presently proposing model legislation for enactment by state legislatures.

VIII. State Statutes

State regulation of engineering services has been treated extensively in the white paper prepared by the Task Force on Competition Bidding Implications of the National Society of Professional Engineers.\textsuperscript{83} Two different types of statutes are in question: first, state procurement acts and, second, state licensing statutes with regulatory provisions.

Tennessee and Texas have state procurement statutes.\textsuperscript{84} Each essentially provides that no state agency or political subdivision shall use competitive bidding for procurement of any type of professional services. These statutes have no effect on procurement of professional services by private industry or individuals. Though they apply to all professions, they have their most significant impact on architects and engineers because they do a larger portion of their business with governmental agencies than lawyers, accountants or members of other professions. This type of statute presents no antitrust questions because only

\textsuperscript{80} H.R. REP. No. 1188, 92nd Cong., 2d Sess. 5-6 (1972); S. REP. No. 1219, 92nd Cong., 2d Sess. 4 (1972).
\textsuperscript{82} H.R. REP. No. 1188, 92nd Cong., 2d Sess. 6 (1972).
\textsuperscript{83} White Paper §§ 12-13; supra note 35.
\textsuperscript{84} 3 TENN. CODE ANN. § 12-432 (Supp. 1971); 1B TEX. REV. CIV. STAT. ANN. art. 664-4 (Supp. 1972).
state procurement is involved. The states can use any method of procurement they desire.

The second type of statute presents significant antitrust questions. Florida and Ohio currently have statutes which provide that a state supervisory board shall adopt rules of professional conduct for engineers. The rules are binding with sanctions provided for violators.\(^85\) The Model Rules of Professional Conduct for Adoption by State Registration Boards published by the National Society of Professional Engineers contains a "no bid" clause.\(^86\) These rules are applicable to all engineers in states where they are adopted and in effect provide an exemption from the antitrust laws in this regard.

Conflicts between state regulatory acts and the antitrust laws have given rise to litigation in the past. The leading case is *Parker v. Brown.*\(^87\) *Parker* concerned the legality of an agricultural price stabilization program adopted by California which was similar to a federal program then in effect. The Supreme Court held that nothing in the history of the Sherman Act suggested that Congress intended to restrain a state from activities directed by its legislature. The Court also noted, however, that a state could not grant immunity by authorizing someone to violate the antitrust statute.\(^88\) The meaning of *Parker* is still partially unsettled.

In *Asheville Tobacco Board of Trade v. F.T.C.*\(^89\) the United States Court of Appeals for the Fourth Circuit held that *Parker* applied: "[w]hen a state has a public policy against free competition in an industry important to it. . . ."\(^90\) In a more recent case the same court held that "to find shelter under *Parker,* the acts complained of must be the result of state action, either by state officials or by private individuals 'under the active supervision' of the state. . . ."\(^91\) Thus, under the fourth circuit's interpretation of *Parker* the states have a large amount of power to limit competition in industries important to them. The only limitation is that the restraint cannot be a sham by which individuals evade the antitrust laws.

The D.C. Court of Appeals interprets *Parker* more narrowly. In *Hecht v. Pro-Football, Inc.*\(^92\) the court stressed the similarity between federal and state policy in *Parker.* *Hecht* actually dealt with a conflict between federal statutes but if this interpretation of *Parker* were followed by other courts, the states would only have very limited powers to regulate industries within their borders.

The National Society of Professional Engineers’ white paper implies that the Model Rules issued pursuant to Florida- or Ohio-type statutes would be held valid under either interpretation of *Parker.*\(^93\) If a court followed the broader view of the fourth circuit line of cases, the statutes and rules would be held


\(^{86}\) White Paper, supra note 35.

\(^{87}\) 317 U.S. 341 (1943).

\(^{88}\) Id. at 350-51.

\(^{89}\) 263 F.2d 502 (4th Cir. 1959).

\(^{90}\) Id. at 509.


\(^{93}\) White Paper § 12, supra note 35.
valid if the court found, as a matter of fact, that the state had a legitimate public interest in eliminating direct price competition in the design professions. This seems clear. The validity of the statutes and rules is more in doubt under the Hecht court's interpretation of Parker.

The National Society of Professional Engineers argues that the relationship between the Brooks Bill and the Florida or Ohio statutes is the same as the relationship between federal and state law in Parker. This is not the case. In Parker, general stabilization of agricultural prices was the policy of both the federal and state governments. In the present case Congress has only adopted a policy for procurement of services by the federal government. In contrast, the Model Rules, issued under the Florida or Ohio statutes, would declare that it was in the public interest that no one obtain engineering services on the basis of competitive bidding. A court may not find this to be a distinction of substance, but if a court chooses to follow Hecht, this would be a basis on which to invalidate such a "no bid" policy.

IX. Conclusion

It appears that in the near future the courts will determine whether the professions may regulate the methods used by their members to determine fees for professional services. Two types of restraints are involved: fee schedules and restraints on bidding. The courts will probably find that the professions fall within the scope of the Sherman Act in that they affect a significant amount of interstate commerce. Unless the courts are willing to open a substantial exception for the professions, fee schedules will be held illegal per se. The reasonableness of fixed prices is no defense under the per se rule. In contrast to fee schedules, "no bid" clauses are probably not illegal per se and will fall within the rule of reason. Congressional policy favors the design professions in arguing that the limitations they have placed on price competition are reasonable.

The states are actively legislating in this area. Two types of statutes are involved: those which merely provide the method to be used by the state for procurement of professional services and those which attempt to regulate competition among engineers within the state. The former presents no antitrust problems but the latter may conflict with the Sherman Act. The law is unclear but probably the state statutes will be upheld.

If the Antitrust Division is successful in the coming litigation, areas will be opened to price competition where such competition has previously been limited. This would have a profound effect on the professions but it remains to be seen whether the effect would be reduced prices for quality services or, as many have predicted, lower quality services.

John F. Gaither, Jr.