

STATEMENT OF THE ANTITRUST, TRADE REGULATION AND CONSUMER AFFAIRS
DIVISION OF THE DISTRICT OF COLUMBIA BAR
ON PROPOSED AMENDMENT TO LIMIT FTC JURISDICTION OF LAWYERS

Summary

The Antitrust, Trade Regulation and Consumer Affairs Division of the District of Columbia Bar opposes an amendment proposed to be added to Federal Trade Commission authorization legislation which would exempt from the FTC's jurisdiction over "unfair and deceptive practices" acts and practices by professionals or professional associations if they are "effectively regulated by the state court of last resort in civil actions . . . or by such court and by state law." This proposal constitutes narrow special interest legislation to place lawyers beyond the FTC's consumer protection jurisdiction despite the absence of any showing of agency abuses or overreaching. Especially with the growth of lawyer advertising and new forms of legal services, and the absence of expertise or capability of state authorities effectively to police unfair and deceptive professional activities, Federal Trade Commission jurisdiction in this area should be retained.

(An identical letter will be sent to the House Energy & Commerce Committee.)

Steering Committee of Division II

Thomas M. Susman, Chairperson
Jeffrey Blumenfeld
Ellen Broadman
Barry J. Cutler
Anita Johnson
William B. Schultz
Toby G. Singer

The views expressed herein represent only those of the Antitrust, Trade Regulation and Consumer Affairs Division (Division II) of the District of Columbia Bar and not the D.C. Bar or its Board of Governors.

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The Honorable Bob Packwood
Chairman, Senate Commerce Committee
259 Russell Building
United States Senate
Washington, D.C. 20510

Dear Senator Packwood:

We are writing to furnish you with the views of the Anti-trust, Trade Regulation and Consumer Affairs Division (Division II) of the District of Columbia Bar ^{1/} on the proposed amendment to limit the jurisdiction of the Federal Trade Commission ("FTC" or "the Commission") over "unfair and deceptive practices" by lawyers.

The amendment that has been proposed would be added to S. 1714 (authorizing appropriations for the FTC for fiscal year 1984), ^{2/} and would exempt from the FTC's consumer protection authority professional acts and practices, including those which would otherwise be "unfair and deceptive" in violation of section 5 of the FTC Act, if a profession is "effectively regulated by the state court of last resort in civil actions . . . or by such court and by state law." Although drafted to apply on its face to all professions, the amendment would in fact grant this special exemption to lawyers only since, so far as we are aware, only lawyers are regulated by the state courts of last resort.

^{1/} The views expressed herein represent only those of Division II of the District of Columbia Bar and not the D.C. Bar or its Board of Governors.

^{2/} The amendment has been circulated by the Texas Bar Association with the proposal that it be added on the Senate floor.

The Division on Antitrust, Trade Regulation and Consumer Affairs of the District of Columbia Bar opposes this amendment to exempt lawyers from the FTC's consumer protection jurisdiction. This position was reached by an overwhelming vote of approximately 75 members of the Division who attended a debate between James C. Miller III, Chairman of the FTC, opposing the amendment, and former Congressman Robert Eckhardt, representing proponents of the amendment. Our Division agrees with Chairman Miller that, if enacted, "this special exemption would result in substantial injury to consumers and to our national economy."

We oppose the amendment for a number of reasons. As lawyers, we oppose this effort to confer a special status upon attorneys. Attorneys, who have a central role in writing and interpreting the law, should never place themselves above the law. Moreover, we have seen no compelling justification for the exemption.

A similar issue was decided in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Goldfarb, representing a class of consumers who had paid legal fees in connection with purchasing houses in Virginia, sued the Virginia State and Fairfax County bars for setting a minimum fee schedule which required attorneys to charge the purchaser a fee of 1% of the sales price of a house for the legal work required in connection with the purchase. The Bar argued that as a "learned profession" it should be exempt from the Sherman Act. Chief Justice Burger, writing for a unanimous Supreme Court, rejected that claim:

The [Fairfax, Virginia] County Bar argues that Congress never intended to include the learned professions within the terms 'trade or commerce' in § 1 of the Sherman Act and therefore the sale of professional services is exempt from the Act.

* * * *

Whatever else it may be, the examination of a land title [by a lawyer] is a service; the exchange of such a service for money is 'commerce' in the most common usage of that word. It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers exert a restraint on commerce. 421 U.S. at 786-88.

As a result of the Goldfarb case, it now costs approximately 1/4 to 1/2 of 1% of the sales price to purchase the legal services required in connection with a house purchase in

Virginia, although the charge is no longer calculated on a percentage basis.

The inclusion of the requirement that lawyers be "effectively regulated" by the highest court gives consumers no protection. The state bar in Virginia would have qualified under this standard, but the Supreme Court nevertheless held the federal antitrust laws had been violated. Many other states also had compulsory minimum fee schedules, similar to those in Virginia, but those states were also in violation of federal law. In fact, in Texas, which would presumably qualify under this standard, any rules which the Supreme Court wishes to promulgate may be vetoed by the state bar.

While we recognize that the Goldfarb case involved antitrust issues, whereas the proposed amendment would apply to the FTC's consumer protection jurisdiction, we believe the policy considerations apply equally in both areas.^{3/}

Proponents of the amendment have not identified a single instance in which the FTC has overreached its authority in this area; thus, there has been no showing of any need for the amendment. On the other hand, we believe that past experience convincingly demonstrates that neither the state bar associations nor the state courts can adequately protect consumers from unfair and deceptive practices by attorneys since this is not their principal responsibility or area of expertise. This view is supported by the National Association of Attorneys General, comprised of the chief law enforcers of the states, as reflected in their July 14, 1983 Resolution opposing the "Texas Bar" amendment. With the growth of lawyer advertising, it is particularly important that the FTC be permitted to retain jurisdiction over attorneys.

In addition to the Goldfarb case, there are other examples where state bar associations have placed illegal restrictions on attorneys. For example, the U.S. Supreme Court has twice struck down as unconstitutional state-imposed restrictions on advertising by lawyers. Bates v. State Bar of Arizona, 433 U.S. 350 (1977); In the Matter of R.M.J., 455 U.S. 191 (1982). R.M.J. involved a rule by the Supreme Court of Missouri which prohibited attorneys from listing the court in which they are admitted to practice and

^{3/} We note in passing that in a brief amicus curiae which it filed in the Goldfarb case, the State Bar of Texas argued that the antitrust laws did not apply to the State Bar because it is a statutory arm of the state Supreme Court.

other similar informaton. While this restriction on advertising may have benefited some attorneys, it, like the minimum fee schedule, deprived consumers of information which is necessary in order to make intelligent decisions about purchasing legal services.

We also believe that the amendment is wholly unworkable. Nowhere does the amendment define how a bar would qualify as "effectively regulated" or how this issue is to be resolved. Proponents of the amendment may contemplate that all states with a "unified bar" (where membership is compulsory) would qualify, but, if this is to be the standard, many attorneys who are barely regulated by their state courts would be exempt from the jurisdiction of the FTC over unfair and deceptive practices. In any event, a decision by the FTC to exercise jurisdiction over a state bar might be delayed for several years by a judicial challenge to the Commission's finding that the bar is not "effectively regulated."

Finally, we believe that it is generally undesirable to include jurisdictional changes in the FTC's authorization act. Particularly where there is no special showing of urgency, passage of the amendment would set a bad precedent that would encourage similar attempts to obtain narrow exemptions in other areas.

In summary, it is the opinion of the Division on Antitrust, Trade Regulation and Consumer Affairs of the D.C. Bar that the proposed amendment is anticompetitive, unnecessary and may tend to serve the self-interest of lawyers to the detriment of consumers.

Sincerely yours,

Division 2 Steering Committee
Thomas M. Susman, Chairman

Jeffrey Blumenfeld

Ellen Broadman

Barry J. Cutler

Anita Johnson

William B. Schultz

Toby G. Singer 4/

4/ Toby G. Singer did not participate in formulating the views expressed in this letter.