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I. INTRODUCTION

People see the world through their own lens. Spending eight or more hours a day engrossed in a profession will, inevitably, alter your perspective.

To illustrate, someone seeking a solution to, let's say, "general fatigue," will receive different answers depending upon whether they visit (1) a medical doctor, (2) a mental-health professional, (3) a fitness trainer, or (4) a nutritionist. Each of these professionals, separately, when they encounter this same symptom sees a problem to be solved through their practice's particular methods. They see the solution of the problem of general fatigue through their own lens, engrained from perhaps years of daily practice.

At the same time, it is reassuring for people to believe that they participate in a noble profession that really helps people. And they get to know others within the profession socially and probably develop favorable views of them as well.

So when these professionals get together for trade association conferences, meetings, or other events, they likely pat each other on the back and glow in their own importance. This isn't necessarily bad; it is human. It certainly happens with lawyers, which perhaps shows that we are human too.

But like many all-too-human characteristics that are usually harmless, this bias toward one's profession has a dark side when sprinkled with power.

When members of a profession obtain power—either through government privilege or massive horizontal collaboration—they will likely abuse it. They can't help themselves. They see the world a certain way and will exercise their power in that direction.

These professionals will typically exercise their power to the detriment of customers, clients, or patients and to the other professions that compete with them to serve those individuals.

In fact, this term the U.S. Supreme Court will decide a case that implicates these concerns: *North Carolina State Board of Dental Examiners v. Federal Trade Commission*.[2] In that case, the U.S. Federal Trade Commission ("FTC") accused a state-sponsored board made up of practicing dentists of violating the antitrust laws by trying to stop dentist competitors from engaging in teeth-whitening. For any number of safety and consumer-protection rationales—or their own

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[2] *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, No. 13-534.

self-interest—the powerful group of dentists decided that only dentists in North Carolina should be able to whiten people's teeth. It may or may not have been a coincidence that dentists were the highest-price providers of this service and that expunging competition would likely help to keep these high prices.

The issue in this case is not whether the horizontal group conduct is anticompetitive, but whether a state-action exemption applies because the dental board has state characteristics.

This, of course, isn't the first time that a group of professionals have banded together and exercised power premised upon the superiority of their profession. The great Adam Smith, in his famous book, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, remarked in 1776 that "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[3]

The Supreme Court addressed such a group in 1978 in the great case of *National Society of Professional Engineers v. United States*.[4] That case involved an association of engineers that believed that its members were above competing on price. Indeed, the group forbids its engineers from doing so.

Here's why:

> it would be cheaper and easier for an engineer "to design and specify inefficient and unnecessarily expensive structures and methods of construction." Accordingly, competitive pressure to offer engineering services at the lowest possible price would adversely affect the quality of engineering. Moreover, the practice of awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety, and welfare.[5]

Thus, these engineers seemed to believe that price competition would cause bridges to collapse. The Supreme Court, however, easily disposed of this defense.

The *Professional Engineers* Court explained that the federal antitrust laws require a system of competition: "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."[6] Justice John Paul Stevens, for the majority, continued: "In this case, we are presented with an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer."[7] Here, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."[8]

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[3] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, Book 1, Chapter X, Part II, p. 152 (R. H. Campbell & A. S. Skinner, eds. 2 vols. Glasgow Edition of the Works and Correspondence of Adam Smith 2, 1976).

[4] *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

[5] *Id.* at 684-85.

[6] *Id.* at 695.

[7] *Id.* at 692.

[8] *Id.*

The group's restriction on competitive bidding "prevents all customers from making price comparisons in the initial selection of an engineer, and imposes the Society's views of the costs and benefits of competition on the entire marketplace."[9]

Justice Stevens explained that the engineers' attempt to justify their restraint "on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act."[10]

An antitrust case is not the place to debate the merits of competition. Through the Sherman Act, Clayton Act, and other federal legislation, Congress has already determined that we are ordering our economy through a system of competition: "The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."[11] Notably, the Court explained, "the statutory policy precludes inquiry into the question whether competition is good or bad."[12]

Although decided almost 41 years ago, the case is just as relevant today. Lawyers, medical doctors, dentists, and a whole host of professions have a similar perspective. Everyone sees the world through their own lens and has an exaggerated idea of their profession's importance in the world.

In support of this perspective, these professionals form groups and try to get away with clearly anticompetitive restraints. The industry seeks to decide when to suspend competition. These groups will argue that they are above the federal antitrust laws because "they," in particular, are very important and without these restraints, the world, or at least a bridge, will collapse. But that, as the Supreme Court in *Professional Society of Engineers* explained, is not a defense to an antitrust lawsuit.

[9] *Id.* at 695.
[10] *Id.*
[11] Id.
[12] Id. at 696.