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Anti-trust Prosecutions - What Constitutes "Trades" - the Practice of Professions

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NOTES

THE CORPORATE PRACTICE OF PROFESSIONS

The decision of the United States Supreme Court in *American Medical Association v. United States*¹ once again brought to the front the problem of the corporate practice of professions.

On February 24, 1937, Group Health Association Inc. was granted a charter in Washington, D. C.² By its certificate of incorporation and its by-laws the corporation was empowered to treat its members and their dependents, through hired agents and employees, for any and all diseases and injuries.³ The certificate expressly provides that Group Health Association, Inc., is "to provide . . . for the services of physicians and other medical attention and any and all kinds of medical, surgical and hospital treatment to members here-of and their dependents."⁴ This corporation offered memberships in a risk sharing, prepayment health plan to certain government employees. It employed two surgeons, one pediatrician, one urologist, and one obstetrician;⁵ and through this staff offered to render most types of medical and surgical treatments at a stated annual cost. Besides offering services to individuals, Bit went further and for a lump sum of \$40,000 agreed to extend similar medical and hospital services to such employees of the Home Owners Loan Corporation office as paid a monthly fee.

The Medical Society of the District of Columbia opposed this plan on the grounds that it not only contravened the best interests of both the public and the profession, but also violated the principles and ethics of the American Medical Association.⁶ Knowing these facts, several members of the Society nevertheless accepted employment of Group Health. One such member⁷ was expelled from membership after charges had been brought against him in accordance with the rules and regulations of the Society.

The newspapers took up the story of this struggle and early in 1938, when comment pro and con had attained a national scope,

¹ January 18, 1943, 63 S.Ct. 326.

² The corporation was organized under the title of the code for the District of Columbia providing for the incorporation of societies for "benevolent, charitable, educational, literary, musical, scientific, religious, or missionary purposes, including societies formed for mutual improvement or the promotion of the arts." D.C. Code (1929) tit. 5, Section 121.

³ See Certificate of Group Health Association, Inc., article 3, filed in the office of Recorder of Deeds, District of Columbia, on February 24, 1937, and recorded in Title 53, folio 556, et. seq. Also By-laws of the Group Health Association, Inc., Art. V, section 5, as revised October 25, 1937, and filed together with the certificate of incorporation.

⁴ Certificate of Group Health Association, Inc., Article 3.

⁵ Questions and Answers about Group Health (1937) section 9.

⁶ (1938) 111 J. Am. Med. Ass'n. 1194.

⁷ Washington Post, March 27, 1938, Magazine section.

Representative Scott⁸ offered a resolution in Congress calling for an investigation of the antagonistic activities of the Medical Society of Washington, D. C., and of the American Medical Association.

Because of the notoriety the matter had received and in fear of a quo warranto proceeding by the district attorney for the illegal practice of medicine and by the superintendent of insurance for selling insurance, the Group Health Association, Inc., sought a declaratory judgment as to its right to provide medical services according to its plan. In July, 1938, Justice Bailey, in deciding *Group Health Association, Inc. v. Moor* (D.C.D.C. 1938) 24 F. Supp. 445, held that the corporation through its licensed physicians was not illegally practicing medicine, nor was it within the scope of regulatory insurance laws because it provided services rather than money benefits to its contributing members.

In August, 1938,⁹ Assistant Attorney-General Thurman Arnold warned the American Medical Association and the Medical Society that the expulsion or threatened expulsion of members for allying themselves with Group Health, or for having professional relations with doctors of that organization amounted to forcing its members to participate in an illegal boycott of the Group Health Association's doctors; and the exclusion by Washington hospitals of physicians who were not members of the Medical Society ". . . may or may not amount to coercion upon them . . ." ¹⁰ and that, "In the opinion of the Department of Justice, this is a violation of the anti-trust laws because it is an attempt on the part of one group of physicians to prevent qualified doctors from carrying on their calling."

On October 17, 1938, Arnold placed the matter in the hands of the Federal Grand Jury. An indictment was returned in the District Court of the United States for the District of Columbia under Section 3 of the Sherman Anti-Trust Act,¹¹ naming as defendants the American Medical Association, two of its subordinate bodies, the Washington Academy of Surgery, and twenty-one individual doctors, all members of the American Medical Association.¹² The indictment charged that

⁸ Honorable Byron Scott, 83 Cong. Rec., May 3, 1938 at p. 8101.

⁹ Mimeograph release of the Department of Justice signed by Thurman Arnold, Assistant Attorney General, and approved by Homer Cummings, Attorney General, July 30, 1938, and (1938) 111 J. Am. Med. Ass'n. 537.

¹⁰ *Ibid.*

¹¹ 26 Stat. 209 (1890), 15 U.S.C.A. 3 (1927). "Every contract, combination in form of trust or otherwise, a conspiracy, in restraint of trade or commerce in . . . or of the District of Columbia . . . is declared illegal. Every person who shall make any contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by a fine not exceeding \$5000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

¹² The Medical Society of the District of Columbia and Harris County Medical Society of Harris County, Texas.

the defendants had combined and conspired together for the purpose of (1) restraining the business of the Group Health Association; (2) restraining the members of the Group Health Association from obtaining by cooperative methods medical care from doctors engaged in such group practice; (3) restraining the doctors of the staff and certain other doctors¹³ from pursuing their callings; (4) restraining the business of the Washington hospitals. All of the defendants demurred to the indictment and were sustained by the District Court on grounds, amongst others, that neither the practice of medicine nor the business of the Group Health Association is a trade within the meaning of the term as used in the Sherman Act.

Notice of appeal was filed in the United States Court of Appeals for the District of Columbia on July 31, 1939. On hearing the Court of Appeals reversed the District Court, holding that the restraint of trade prohibited by statute may be extended both to medical practice and to the operations of the Group Health Association. *United States v. American Medical Association*, 72 App. D.C. 12, 110 F. (2d) 703, 710, 711.

The case then went to trial in the District Court. Certain defendants were acquitted by direction of the judge. As to the others the case was submitted to the jury which found the American Medical Association and the Medical Society of the District of Columbia guilty. This judgment was affirmed by the Court of Appeals which reiterated its ruling as the applicability of Section 3 of the Sherman Act, considered alleged errors and affirmed the judgments. *American Medical Association v. United States*, App. D.C., 130 F. (2d) 233.

The matter went to the Supreme Court on *certiorari* limited to these questions: (1) Whether the practice of medicine and the rendering of medical services as described in the indictment are "trade" under Section 3 of the Sherman Act; (2) whether the indictment charged or the evidence proved "restraint of trade" under Section 3 of the Sherman Act; (3) whether a dispute concerning terms and conditions of employment under the Clayton and Norris-LaGuardia Acts was involved, and, if so, whether petitioners were interested therein, and therefore immune from prosecution under the Sherman Act.

In affirming the judgments the Supreme Court did not consider the first question, but did answer the second question in the affirmative and the third question in the negative.

In answering the second question Justice Roberts said, "Group Health is a membership corporation engaged in business or trade," and, "The fact that it is cooperative, and procures services and facili-

¹³ Doctors not on the staff of Group Health Association but who engaged in consultations with the staff doctors.

ties on behalf of its members only, does not remove its activities from the sphere of business."

What is this so-called "trade or business" that Group Health is engaged in?

Justice Bailey having held that it was not the practice of medicine, justified his decision on the grounds that the corporation itself is not prescribing for the sick, but it merely enters contracts with licensed physicians, who in turn prescribe for the members of the corporation, and that these physicians are independent contractors.¹⁴ He attempted to distinguish the admittedly illegal practice of medicine by corporation from mere contracts made by a corporation with physicians for the purpose of securing medicinal services for the members of the corporation; he reasoned that since one person may contract in advance for the services of a physician over a period of time, an incorporated group of persons may do likewise.¹⁵

It may be seen that both the reasoning and the conclusion of Justice Bailey are unsound; first, because it is evident that under Group Health's plan the physicians are not independent contractors, but are employees of the corporation; and second, because the existence of the distinction between "practicing medicine" and "furnishing medical services," while providing grounds for verbalistic conflict, is a nullity in the eyes of a practical thinker, both being mere labels for the same series of acts.

Justice Roberts having held that Group Health is engaged in business or trade said, "The fact that it is cooperative and procures services and facilities on behalf of its members only, does not remove its activities from the sphere of business." Apparently Justice Roberts means that in spite of the fact that Group Health confines its services to its own members, it is nevertheless engaged in business. That that is true is self evident, but likewise it is evident that he avoided saying just what business Group Health is in. This turns us back to Justice Bailey's answer—the business of "furnishing medical services," or as herein submitted, the business of practicing medicine.

That the privilege of practicing a profession is one residing solely in individuals has long been recognized. A learned profession can only be practiced by a duly qualified human being. His authorization to practice is given, not only because of the fact that upon examination he has proved possession of the essential skill and knowledge of the subject, but also because upon appraisal being made of his character

¹⁴ Group Health Association, Inc., v. Moor and Pine. U. S. District Court of the District of Columbia, July 27, 1938.

¹⁵ *Ibid.*

he has proven possession of those moral qualities which merit public trust.¹⁶

While for some purposes it is considered legally a person,¹⁷ a corporation being an artificial entity, existing only in the contemplation of the law, has neither the right nor the power to practice a profession.¹⁸ A corporation being a fictitious character has no mind and cannot think; consequently, it cannot meet educational requirements. The practice of a profession necessarily involves the intimate and confidential relation of trust and confidence between practitioner and client or patient. The courts hold that a corporation cannot satisfy these considerations.¹⁹

Whether or not a corporation may lawfully sell the technical or professional services of its licensed employees depends, in the absence of express statutory language,²⁰ on the policy which the court finds embodied in the license statute.²¹ In the case of trade licenses, the sole purpose of the licensing act is to assure technical competence in those who do the work and as early as 1756 it was held that no statutory policy was violated when an unlicensed entity sold the services of licensed artisans.²² Similarly, a corporation was allowed to sell the services of licensed architects,²³ but the policy of the medical license statutes, as conceived by the courts, has been to accord the physician the same professional status as the common law provides to the lawyer.²⁴ The analogy found in the practice of law has been applied by the courts to physicians in establishing the general rule that as a corporation lacks ethical standards and is incapable of personal relations,

¹⁶ *State Electro-Medical Institute v. State*, 74 Neb. 40, 103 N.W. 1078 (1905). In re *Co-operative Law Co.*, 198 N.Y. 479, 92 N.E. 15 (1910).

¹⁷ A corporation is a citizen for the purpose of federal jurisdiction, *Doctor v. Harrington*, 196 U.S. 579 (1905); however, it is not a citizen within the purview of Article IV, Section 2, of the Constitution to the effect that the "citizens of each state shall be entitled to all of the privileges and immunities of the citizens of the several states." *Paul v. Virginia*, 8 Wall. 168 (U.S. 1868).

¹⁸ *People by Kerner v. United Medical Service*, 362 Ill. 442, 200 N.E. 157 (1936); *Painless Parker v. Board of Dental Examiners*, 216 Cal. 285, 14 P. (2d) 67 (1931); *Wm. Messer Co. v. Rothstein*, 129 App. Div. 215, 113 N.Y.S. 772 (1908).

¹⁹ *People v. Merchants' Protective Corp.*, 189 Cal. 531, 209 Pac. 363 (1922); In re *Shoe Manufacturers' Protective Association*, 3 N.E. (2d) 746 (Mass. 1936); *People v. Pacific Health Corp.*, 82 P. (2d) 429 (Cal. 1938); *People v. United Medical Service, Inc.*, 362 Ill. 442, 200 N.E. 157 (1936).

²⁰ In re *Associated Lawyers*, 134 App. Div. 350, 119 N.Y.S. 77 (1909); *Winberry v. Hallehan*, 361 Ill. 121, 147 N.E. 552 (1935).

²¹ *People by Kerner v. United Medical Service*, *Supra*; *Painless Parker v. Board of Dental Examiners*, *Supra*; *Wm. Messer Co. v. Rothstein*, *Supra*.

²² *Raynard v. Chase*, 1 Burr 3, 97 Eng. Rep. 155 (1756). Cf. *Wm. Messer Co. v. Rothstein*, *Supra*.

²³ *People ex rel State Board of Examiners v. Rodgers Co.*, 277 Ill. 151, 115 N.E. 146 (1917); *People v. Allied Architects' Ass'n.*, 201 Cal. 428, 257 Pac. 511 (1927).

²⁴ In re *Co-operative Law Co.*, 198 N.Y. 479, 92 N.E. 15 (1910).

it not only is unable to receive a medical license, but also it is unlawful for a corporation to sell the services of a licensed physician.²⁵

If a corporation were licensed to practice law or medicine there would be in effect a dual alliance imposed upon the licensed practitioner it employed. Because a corporation can only act through its agents and employees²⁶ the practitioners it employed would owe a duty to the corporation²⁷ as well as to the patient or client.²⁸ Such duties in many instances would conflict. The benefits of a completely individual and personal employment relationship²⁹ and the danger of an impairment of professional ethics by a management group³⁰ are the two considerations which justify the rule and have made the courts unwilling to accept the analysis of the trade licenses cases and to segregate the business functions of the corporate entity from the professional functions of its licensed employees.

Having herein made a resume of the reasoning from which the rule that corporations are incapable of practicing professions evolved, a consideration of the holding in *American Medical Association v. United States* leaves us with the following question: By what manner of reasoning can it be said that a person or persons who combine to stop a corporation from doing that which under the law it has no right to do, are guilty of a conspiracy in restraint of trade as defined by the Sherman Anti-Trust Act?

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²⁵ *People v. Pacific Health Corp.*, Supra; *People by Kerner v. United Medical Service*, Supra; *Painless Parker v. Board of Dental Examiners*, Supra.

²⁶ *New York & N. H. R. R. v. Schuyler*, 34 N.Y. 30 (1865).

²⁷ *Restatement of Agency* (1938) Section 13.

²⁸ *Herzog, Medical Jurisprudence* (1931) Section 96.

²⁹ *Stern v. Flynn*, 154 Misc. 609; 278 N.Y.S. 598 (1935).

³⁰ *People v. Pacific Health Corp.*, Supra.