University of Miami Law School
Institutional Repository

University of Miami Business Law Review

4-1-2003

Wilk v. AMA: The Lingering Effects of an Inadequate Injunction to Remedy Malignant Anti-Trust Violations Against the Chiropractic Profession - A Search for the Cure to Federal and State Executive, Legislative, and Judiciary Inaction to Continued Discrimination of Chiropractic as Related Especially to Insurance

Henry M. Rubinstein

Follow this and additional works at: http://repository.law.miami.edu/umblr

 Part of the Law Commons

Recommended Citation

Henry M. Rubinstein, *Wilk v. AMA: The Lingering Effects of an Inadequate Injunction to Remedy Malignant Anti-Trust Violations Against the Chiropractic Profession - A Search for the Cure to Federal and State Executive, Legislative, and Judiciary Inaction to Continued Discrimination of Chiropractic as Related Especially to Insurance*, 11 U. Miami Bus. L. Rev. 131 (2003)
Available at: http://repository.law.miami.edu/umblr/vol11/iss1/6

This Comment is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Business Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

WILK V. AMA: THE LINGERING EFFECTS OF AN INADEQUATE INJUNCTION TO REMEDY MALIGNANT ANTI-TRUST VIOLATIONS AGAINST THE CHIROPRACTIC PROFESSION - A SEARCH FOR THE CURE TO FEDERAL AND STATE EXECUTIVE, LEGISLATIVE, AND JUDICIARY INACTION TO CONTINUED DISCRIMINATION OF CHIROPRACTIC AS RELATED ESPECIALLY TO INSURANCE

BY: HENRY M. RUBINSTEIN, D.C.*

INTRODUCTION

Chiropractor. Chiropractic. Upon hearing these words what comes to mind? To those who have never been under chiropractic care, almost assuredly the reaction to those words carries a negative connotation. Why is it that such strong feelings exist about a subject that one has no experience with, and where do these strong opinions originate?

Wilk v. American Medical Association[1] touches upon these very questions and answers them to a degree. Dr. Chester Wilk, the main plaintiff in this suit and a chiropractor practicing in Illinois, filed suit against the American Medical Association (AMA), and others similarly situated for violation of the Sherman Anti-Trust Act. Wilks alleged that the AMA and other groups, as well as individual actors, had conspired to contain or eliminate the chiropractic profession. Wilk alleged that, as a result of these actions, the

---

* This article is dedicated to the chiropractors that forged ahead against the overwhelming power of organized medicine and risked arrest and incarceration to bring a drug free alternative to the suffering. This article is also dedicated to the countless chiropractors and their patients that lobbied and petitioned legislatures in all 50 states to pass licensing laws legalizing Chiropractic. This article would have been impossible without the guidance of Professors Jonathan Simon, John Gaubatz, Linda Keller, Attorney John Rooney, and Sandra Riley. I would like to especially thank my wife, as well as Patti, Lavi, Ruvayn, and Shaina for their support.

1 671 F. Supp. 1465 (N. D. Ill. 1987).

chiropractic profession and he personally suffered injury through the loss of reputation and lost opportunity.[2]

After lengthy legal wrangling that began in 1978, the court issued its final opinion and order in 1990, fully 12 years later. Judge Getzendanner of the United States District Court for the Northern District of Illinois Eastern Division found that the AMA and its members (the majority of medical doctors in the U.S.) participated in a conspiracy against chiropractors in violation of the nation's anti-trust laws.[3]

Judge Getzendanner found in the early 1960's that the AMA officially decided to contain and eliminate Chiropractic as a profession by working, both overtly and covertly.[4] The judge found that the AMA partially succeeded in this endeavor by making it unethical for medical physicians to professionally associate with chiropractors, who they portrayed as unscientific cultists. They further conspired to prevent access to hospitals, use of diagnostic facilities and hospital medical staffs. They also prevented medical doctors from teaching at chiropractic colleges or engaging in any joint research.[5]

Conspiring to eliminate a profession is per se a violation of the Sherman Act, yet the court allowed a patient care defense. The court afforded the AMA an opportunity for an exception to the Sherman Act[6] by way of the Noerr-Pennington Doctrine. This doctrine provides constitutional rights to lobby the government and permits courts to intercede in what is believed to

---

[2] *Id.* (initiating permanent injunction order against AMA), *available at* http://www.chirobase.org/08Legal/AT/ato4.html.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 3.

[6] 15 U.S.C.A. §§ 1-2 (West Supp. 2002)

§ 1. Trusts, etc., in restraint of trade illegal; penalty

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 hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 10,000,000 if a corporation, or, if any other person, $ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolization; penalty

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, and, on conviction thereof, shall be punished by fine not exceeding $ 10,000,000 if a corporation, or, if any other person, $ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

be a public policy concern. Nevertheless, the Court concluded that the AMA failed in this defense because it was proven that other motives were involved aside from alleged patient safety.[7]

The court further noted that an injunction was appropriate due to the lingering effects of the illegal boycott and conspiracy. The court found that these actions continue to influence the decision by medical doctors to professionally associate with chiropractors (even though as part of the settlement in three other cases involving chiropractors and the AMA, the AMA changed its stance). The AMA now considers it ethical to professionally associate with doctors of chiropractic, but has left it up to personal decision-making.[8]

The court further declared that the tainted reputation of chiropractic, which resulted from the boycott, had not been repaired and thus chiropractic continues to suffer economic injury.[9] The court found that in spite of the AMA's assurances of a discontinued boycott, or the newly formulated canon minus the section preventing professional association, that the AMA has never affirmatively acknowledged that there are and should be no collective impediments to professional association and cooperation between DC's and medical doctors, except as provided by law, and has consistently argued that its conduct had not violated the antitrust laws.[10] The injunction, however, addresses only prospective interference by the AMA with the right of a physician, hospital, or other institution to make an individual decision on the question of professional association with chiropractors.

This Article addresses the court's wholly inadequate injunction that does nothing to rectify the pernicious, and pervasive poisoning of the chiropractic profession by the AMA, or the multitude of medical providers and health-care delivery decision makers in government and private sectors, where the AMA's stinging barbed tentacles ultimately reach. Before discussing the reasons why the injunction was inadequate and my proposed solution to this inadequacy, it is important to understand the history of the AMA and how pervasive its effect on society as a whole has become, in order to be able to fully comprehend and grasp the remedy required by way of the federal and

---

[7] WALTER I. WARDWELL, CHIROPRACTIC: HISTORY AND EVOLUTION OF A NEW PROFESSION 13 (1992). It is interesting to note that chiropractors, whose patient base involves patients that would otherwise be cared for by neurologists, orthopedists, and neurosurgeons among others, pay considerably less for malpractice coverage than the comparably mentioned MEDICAL DOCTOR's. From this it is plain to see that actuarially chiropractors are safer than MEDICAL DOCTOR's in treating the same conditions.

[8] Permanent Injunction Order Against AMA, *supra* note 2, at 2.

[9] Not to mention the economic and health injury to those that are persuaded to not seek chiropractic care.

[10] Permanent Injunction Order Against AMA, *supra* note 2, at 3.

state courts, and the federal and state governments. Unfortunately, the history discussed below was not properly addressed by the *Wilk* court, nor by the injunction.

II. HISTORY

Paul Starr[11] did an exhaustive review of the healthcare system in the United States and how the AMA became interwoven into its very fabric since its inception in 1846, which was 49 years prior to the discovery of Chiropractic. According to Paul Starr, the AMA was formed primarily by the orthodox medical practitioners of the day, as opposed to those who were known as non-orthodox practitioners. For the most part both trained in medical schools. The orthodox, or regulars were at that time very disorganized and ultra-competitive, and relied on the notions of strong noxious cures, bloodletting, and surgery.

The non-orthodox were more inclined toward botanicals, herbs and homeopathic remedies, with the homeopaths by far the largest group next to the orthodox medical doctors. Their training in these other non-noxious remedies came from outside the medical schools where they got their M.D. degree. According to Starr, "monopoly was doubtless the intent of the AMA's program" when conceived in 1846.[12]

The AMA in 1852 accused the homeopaths, who were medical doctors that disavowed the orthodox views, of waging a war of radicalism against the profession, primarily because the homeopaths chose to appeal directly to the populace and were publicly vocal in their disfavor toward medicine's noxious cures.[13] Therefore, the AMA banished the homeopaths and sought their extinction by not working with them, as well as, excluding them from hospitals, military service, and medical boards.[14]

The AMA Code of Ethics at that time barred from membership those doctors that subscribed "to an exclusive dogma."[15] The homeopaths dubbed the orthodox medics "allopaths", insisting that they, also, had an exclusive dogma, of cure by opposites, the reverse of the homeopathic dogma of cure by similars.[16]

Since the AMA could not seem to eliminate them and their popularity grew the more the orthodox medics tried, they allowed homeopathy to be

---

11 PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE (1982).

12 *Id.* at 91.

13 *Id.* at 98.

14 *Id.* at 98-99.

15 *Id.*

16 *Id.* at 100.

taught in the medical schools to garner the lucrative referrals that associating would bring, and gain an opportunity to influence them at the same time. With this collaboration many homeopaths split into two camps, one of the purists and the other the moderates.[17] The more the regular medics accepted these moderates, the less the homeopathic profession flourished until they were essentially absorbed by orthodox medicine by the early 1900's. The newly formed AMA's first victim of a concerted effort to eliminate a competitor was accomplished with honey instead of vinegar

Between 1900 and 1905 the AMA revised itself and formed a National House of Delegates with delegates chosen by state chapters that were in turn fed by local chapters.[18] This organization led to a camaraderie that was an economic boon to its members and thus by the 1920's 60 percent of the medical doctormedical doctors in the U.S. had become members. Thus, the term *"organized medicine,"*[19] was coined. The true reason for increased membership aside from potential referrals (which were negligible) was due to the explosion of medical malpractice claims.[20]

The courts were to a great extent to blame for the growth of the AMA, since it was the courts that formulated the requirement that medical doctors would be judged by the local standard of the community in which they practiced. To determine the local standard, a local medical doctor would be required to testify as to the negligence of the accused doctor.[21] Members of the AMA would not testify against each other and thus AMA members almost never lost a malpractice case. This also led to lower insurance premiums for members.[22] These were two extremely important member benefits. To be a member was truly a great advantage and to be shunned by the AMA was an economic death sentence.[23]

The AMA still wanted to further reduce competition, so it dedicated its resources to controlling the educational process. Until the early 1900's, just about anyone could go to, or start a medical school. In order to practice medicine one needed only a diploma from any diploma mill medical school to get a license. There was no uniformity or accrediting agencies. With over 170 medical schools cranking out diplomas to anyone who could afford the tuition fees, competition among doctors for patients was fierce.[24]

---

17 *Id.* at 101. Paul Starr, The Social Transformation of American Medicine, p. 101.

18 *Id.* at 109.

19 *Id.* at 110.

20 *Id.* at 111.

21 *Id.* Paul Starr, The Social Transformation of American Medicine, p. 111.

22 *Id.*

23 *Id.*

24 *Id.* at 112.

The AMA needed to reduce the number of schools churning out doctors. With fewer doctors, the pot of riches would increase dramatically. To accomplish this, the AMA formed the Council on Medical Education in 1904 and proceeded to raise the standards by secretly rating the schools.[25] The longer the training period and the higher the entry requirements, the higher the rating the school would receive. With the AMA-controlled schools raising the bar, many schools were forced to close due to the competition to provide the required facilities in order to achieve a higher rating, and entice the wealthier students. These students could afford the higher tuition and stay in school for a longer period without earning a living.[26]

To get the message out and eliminate the lower tier schools, the AMA hired The Carnegie Foundation to do a public rating. The Carnegie Foundation sent Abraham Flexner, to conduct the rating test. By the time he was finished inspecting and rating the schools, the AMA was the premier accrediting agency and all those schools that did not follow their guidelines disappeared. As a result, competition was reduced again.[27]

It is thus readily apparent that had the court, or the plaintiff done a little more research, it would have been borne out that the AMA's pattern of behavior is one it has carried out since its inception and then, as now, has never been a question of patient safety, but rather economic and political gain, in order to achieve total domination of the healthcare field and healthcare dollar, whether their particular approach to healthcare (dogma) was more beneficial, or not.

It is clear from the above history and the conflict between chiropractic and organized medicine, much the same as the conflict between organized medicine and the homeopaths, that the injunction issued in *Wilks* could not go nearly far enough in rectifying the damage done by such a powerful lobby. Metaphorically, the court rescued the captive, abused, and neglected child from its tormenters and set them free to roam the streets. No provisions were made to see that this abused child would not suffer the abuse of other scavengers with the same astuteness of laying prey to the susceptible.

III. CONSTITUTIONAL CONSIDERATIONS

The problem we are faced with, however, is how to afford the chiropractic profession protection while simultaneously allowing for the constitutional freedom of speech of its antagonists. Must we protect their

---

25 *Id.* at 117.

26 *Id.*

27 *Id.* at 118.

freedom of speech? Should we protect their freedom of speech? Is Chiropractic a protected group? Is public health a compelling interest to override the constitutional freedoms of speech of organized members?

These questions can best be answered by looking at the Supreme Court's reasoning and decisions involving the First Amendment and proscribed speech. One such case is *R.A.V. v. City of St. Paul, Minnesota*,[28] in which the court held that the First Amendment did not permit the government to impose special prohibitions on speakers who expressed views on disfavored subjects. *R.A.V.*, involved a St. Paul Bias-Motivated Crime ordinance that prohibited certain types of action or speech that would arouse anger, alarm, or resentment in others "on the basis of race, color, creed, religion or gender."[29] The court determined that even if the expression reached by the ordinance was "proscribable under the 'fighting words' doctrine, ...the ordinance was facially unconstitutional because it prohibited otherwise permitted speech solely on the basis of the speech" addressed and not the content.[30]

The slander and libel by medical practitioners toward Chiropractic and chiropractors to friends, family, patients, the media, and colleagues might be considered proscribable speech, and if so, then must not be shown to be permitted speech if prohibited based solely on the subjects the speech addresses in order to pass constitutional muster if enacted into law.

The court in its unanimous opinion, however, was greatly divided with four concurrences. In the plurality opinion by Scalia, he states that "[t]he First Amendment generally prevents government from proscribing speech . . ., or even expressive conduct . . ., because of disapproval of the ideas expressed. Content based regulations are presumptively invalid" (citations omitted).[31]

With an opening such as this, it appears that chiropractors would have extreme difficulty in formulating legislation, or convincing the court of extending the injunction toward private individuals.

However, the court goes on to say that "[f]rom 1791 to the present, however, our society . . . has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight-social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"[32]

---

28 R.A.V. v City of St. Paul, Minn., 505 U.S. 377 (1992).

29 *Id.* at 380.

30 *Id.* at 381.

31 *Id.* at 382.

32 *Id.* at 383.

The court has "recognized that the freedom of speech referred to by the First Amendment does not include a freedom to disregard these traditional limitations," for example: obscenity, defamation, or fighting words.[33] The court further qualifies this by stating that "since the 1960's [they] have narrowed the scope of the traditional categorical exceptions for defamation . . . and for obscenity, . . . but a limited categorical approach has remained an important part of [their] First-Amendment jurisprudence."[34]

In order for chiropractic to be protected from the anti competitive speech characteristic of organized medicine, it must somehow fit into one of the traditional categorical exceptions, most notably defamation.The court explains "areas of speech can, consistently with the First-Amendment be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) . . . ."[35] Using the courts reasoning below, legislation could be drafted and possibly the *Wilk* injunction extended to private individuals, not because of the content of the defamatory speech, but because the defamatory speech is found to be violative of the Sherman Act prohibition of illegal anti-competitive action that constitutes an illegal boycott.

Justice Scalia emphasizes that "[t]he proposition that a particular instance of speech can be proscribable on the basis of one feature . . . but not on the basis of another . . . is commonplace", and he goes on to say that the court has "long held, for example, that non-verbal expressive activity can be banned because of the action it entails, but not because of the idea it expresses . . . ."[36]

The court applies a test of the content discrimination that is proscribable in where its basis consists of the very reason the entire class of speech at issue is proscribable, and where no significant danger of idea or viewpoint discrimination exists. In the case of chiropractic, the speech by organized medical practitioners that defames and is in the tradition of the biased, irrational behavior that triggered the violations of the Sherman Antitrust Act, would be proscribed speech, but speech that entails scientific-based research that simply explains whether a certain condition would not benefit from the care of a chiropractor would be protected speech, as it would be relaying scientifically-based information.[37]

The *R.A.V.* court reiterates that commercial speech that poses the risk of fraud is one characteristic of commercial speech that does not merit the protection of the First Amendment.[38] The patient safety defense that was

---

33 *Id.*

34 *See e.g.*, R.A.V. v. City of St. Paul, Minn., at 383.

35 *Id.*

36 *Id.* at 385.

37 *Id.* at 388.

38 *Id.*

found ineffectual by the *Wilk* court would find no protection when conveyed to potential chiropractic patients or current patients, in that it would be a type of commercial speech that carries the risk of fraud, in that historically such speech has been in pursuit of an illegal boycott, and whose sole purpose has been to destroy competition.The fact that *R.A.V.* was decided in 1992, and after the *Wilk* injunction, is immaterial in that the cases drawn upon by the *R.A.V.* court were decided long before then and as far back as 1791.

One need not go so far as to say that chiropractors due to longstanding discrimination enjoy protection as would a suspect class, although an argument could be made that chiropractic dogma as medical dogma could be compared to that of a religious dogma and entitled to protection from the majority, and that any government healthcare entities and laws that discriminated against one dogma over another, might be a violation of the Establishment Clause. Commercial speech alone and defamation works adequately well to protect chiropractors from objectionable, fraudulent, unlawful anti-competitive speech and behavior.For the *Wilk* court to overlook a remedy for the lingering effect of the illegal boycott by the AMA was a weak and ineffectual attempt to appear as if a remedy was provided.Perhaps the court in *Wilk* was ill prepared, or at a loss for how to enforce such a speech prohibition, or felt it better left to congress, but the court certainly did not give congress direction to concern itself with this blatant violation of federal law, seriously weakening a 'benefit of the doubt' to the court argument. One need only go to the multitude of cases involving desegregation to find the blueprint for the court to retain jurisdiction over this injunction, as is, or in an ideal form.

In *Daniels*,[39] the court found that post-trial discrimination or "wrongdoing after final judgment requires a new complaint, unless it amounts to contempt of court."[40] This case involved only a consent decree that had expired and not an injunction such as in *Wilk*. The *Wilk* court could have made provisions in the injunction that would make clear the fact that future violations would be within the court's jurisdiction, instead of just providing a shopping list of to-do items as it did. As the *Daniels* court provided, '[a]ccused contemnors are not entitled to jury trials before judges may enter remedial court orders . . . .'[41] This holding would not only apply to the AMA but to all those named in the original suit that had made settlement agreements, as well.

---

[39] Daniels v. Pipe Fitters Ass'n, Local Union 597, 113 F.3d 685 (7th Cir. 1997).

[40] *Id.* at 688 (citing EEOC v. Enter. Ass'n Steamfitters, 542 F.2d 579, 590 (2nd Cir.1976); Patterson v. Am. Tobacco, 535 F.2d 257, 269 (4th Cir. 1976).

[41] *Id.* at 7.

The way the *Wilk* court wrote its order made it appear that it would not retain jurisdiction over future accusations of continued discrimination. The *Wilk* injunction lacked the backbone needed to require that the AMA not just superficially lift the practice of non-association, but should have required the AMA Code to deem it unethical to deny association and cooperation, for the greater good of the patient and society. Allowing the AMA to make a fingers crossed behind the back assertion that they will no longer practice deception and treachery is to blame for the continued ill effects suffered by the chiropractic profession at the hands of organized medicine, directly and, or indirectly. The *Wilk* case should never have been closed. The court should have maintained jurisdiction until all remnants of discrimination had been substantially eradicated. *Dowell*[42] sought dissolution of a decree entered by the court imposing a school desegregation plan. The District court granted relief, with the Tenth Circuit Court of Appeals reversing that decision. The Tenth Circuit held that dissolution of the decree would require "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions . . . ." [43] The Supreme Court held that the Tenth Circuit's test was too stringent when dealing with injunctions or by the . . . Fourteenth Amendment and reversed.

Unitariness was one of the criteria for the lifting of the injunction in this case. In the case of *Wilk*, unitary would apply to the AMA's lifting of barriers to association, but would not achieve 'unitary status' by this alone. Unitary status is achieved when "the vestiges of . . . prior discrimination [have been eliminated] and has been adjudicated as such through the proper judicial procedures."[44]

In *Wilk*, the court apparently applied the unitary doctrine to the AMA's change in their Code of Ethics, and prematurely relinquished jurisdiction when it should have maintained jurisdiction until unitary status could be achieved. In the desegregation cases such as here, an injunction that allows a school board to issue statements and rules of desegregation to remedy past discriminatory behavior is qualified with a provision that such matters as discrimination be left to the individuals schools to decide in their own best interest whether to abide by those rules, would be laughable. Yet, this is exactly the type injunction that the *Wilk* court provided and without any continuing jurisdiction.The court in finally disposing of the matter said "although an order can be binding as to the unitary character it is not enough to terminate jurisdiction until the remedy has reached unitary status."[45] The

---

42 Bd. of Ed. of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991).

43 *Id.* at 240.

44 *Id.* at 245.

45 *Id.* at 246.

court further reiterated in quoting *Grant*,[46] "compliance alone cannot become the basis for modifying or dissolving an injunction."[47] In *Wilk*, this precedent should have served to put more backbone into the injunction, not less.

In furtherance of my proposition that the *Wilk* injunction was wholly inadequate is the pronouncement that

> "[f]ederal-court decrees most directly address and relate to the constitutional violation itself. Because of this inherent limitation upon the federal judicial authority, federal-court decrees exceed approximate limits if they are aimed at eliminating a condition that does not violate the constitution or does not flow from such a violation. . . ."[48]

The illegal boycott by the AMA was violative of the federal Sherman Anti - Trust Act,[49] borne of preventing constitutional violations of interstate

---

[46] U.S. v. W.T. Grant Co., 345 U.S. 629, 633 (1953).

[47] 498 U.S. 237 at 246.

[48] *Id.* at 247, quoting Milliken v. Bradley, 433 U.S. 267, 282 (1977).

[49] 15 U.S.C.A. §§ 1-3 (West Supp. 2002).

§ 1. Trusts, etc., in restraint of trade illegal; penalty

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 hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolization; penalty

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, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 3. Trusts in Territories or District of Columbia illegal; combination a felony

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of

the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and

any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations,

is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a

felony, and, on conviction thereof, shall be punished by fine not exceeding $ 10,000,000 if a corporation, or, if any other person, $ 350,000, or by

commerce. Thus, a stricter injunction against the AMA and its cohorts would be constitutionally required.

In *W.T. Grant Co.*, "[the] court observed that a promise to comply with the law on the part of the wrongdoer did not divest a district court of its power to enjoin the wrongful conduct in which the defendant had previously engaged." [50] Although the *Wilk* court did issue the injunction, it was certainly not of effect for all wrongful conduct engaged in by the AMA and at the least, it must be reiterated, the order required mention of a continued jurisdiction in perpetuity. Proof that the discriminatory, anti competitive effects of the AMA's illegal boycott continue to exist is readily evident today. If the actors involved are not directly the AMA, then they are either members, or entities and individuals that are directly influenced by such linked individuals by way of medical school graduates of AMA accredited schools, government influenced committees with such members included, hospitals and staffs, insurance companies, health care organizations, and peer reviewers, etc.

One example, of the very types of proscribable speech that my thesis is intended to bring to light, comes from the University of Miami Richter Library. I did a computer search of all titles available at all UM Schools including the medical school, using the keyword "chiropractic." Only thirty-two hits returned the word. All but five were reports on governmental meetings. Noticeably absent was the *Wilk* Order and Injunction. Fourteen years post *Wilk* sees no change of import here. *"At your own Risk: The Case Against Chiropractic,"*[51] was one of the five books, a vintage AMA boycott era scare novel rife with blaring attacks on chiropractic. The prologue begins with the heading. "[t]he Death of Linda Epping."[52] This book, a Simon and Shuster of New York publication, was no fringe publication.

The following is but a brief listing of the continued injury being suffered by the chiropractic profession as a result of the AMA boycott. In 1985, during the *Wilk* trials and after the AMA claimed it had changed its Code of Ethics, a chiropractor entered into an agreement with a medical neurologist to refer patients to each other and to share office space in each other's practices. The neurologist had his office in a condominium office park. A staff member at the local hospital with an office in the condo, as well as other hospital staff members contacted the M.D. and requested that he terminate this M.D.-D.C. relationship as "no good would come to him from

---

imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[50] 498 U.S. 237 at 248-49.

[51] RALPH LEE SMITH, AT YOUR OWN RISK: THE CASE AGAINST CHIROPRACTIC (1969).

[52] *Id.*

associating with a chiropractor." [53] Shortly thereafter the condo association sent a letter to the M.D. to cease and desist this relationship, or he would be held in violation of the newly enacted anti-chiropractic condo association by-laws and would be evicted. Shortly thereafter, the hospital suspended the M.D.'s staff privileges after a period of heightened scrutiny of his cases and other abusive and punitive behavior. The M.D. caved in and ceased his association with the chiropractor.[54]

Dr. Ernest Petrocco, a chiropractor, applied for staff privileges at the local hospital in 1994. He was denied staff privileges because the hospital by-laws did not allow privileges to chiropractors.[55] A chiropractor brought suit for anti trust, claiming that the insurance company refused to provide coverage for chiropractic services, as a method of retaining the endorsement of the local medical society. The chiropractor sought a claim of conspiracy. (The court explained that a conspiracy can be drawn from acts by a defendant in contradiction to its economic interests.)[56] Although the case was one of summary judgment in which the plaintiff survived the defendant's motion to summarily dismiss, it illustrates how an insurance company would conspire with medical societies to deny chiropractors reimbursement, even where as here, it was in contradiction to the insurance companies economic interest to do so.

Dr. John Cowan, a chiropractor, brought suit against an insurance company for not providing non-emergency based chiropractic care in accordance with state statute. The court found that the statute allowed for limitations in benefits and thus considered the action by the insurance company valid as it did provide for less than utter negation![57] In Louisiana, a municipal Healthcare Trust Fund Board was sued by chiropractors for singling out the primary treatment by chiropractors for a severe limitation in their employee health benefit plan, in violation of the Insurance Equality Statute. Unlike the *Cowan* case this court did not fall for the smoke and mirrors de minimus reasoning.[58] In Virginia, chiropractors are currently involved in a lawsuit against a Blue Cross subsidiary for anti-competitive and discriminatory practices aimed at chiropractors where services are

---

[53] Chinnici v. Central Dupage Hospital Assn., No. 89C07752, 1990 U.S. Dist. LEXIS 8164 at *1-5 (N.D. Ill. July 2, 1990).

[54] *Id.*

[55] Petrocco v. Dover General Hospital and Medical Center, 642 A.2d 1016, 1018 (N.J. Super. Ct. App. Div. 1994).

[56] Johnson v. Blue Cross/ Blue Shield of New Mexico, 677 F. Supp. 1112 (N.M. 1987).

[57] Cowan v. Blue Cross and Blue Shield of Michigan, 421 N.W. 2d. 243, 244-45 (Mich. Ct. App. 1988).

[58] Nosser v. Health Care Trust Fund Bd., 666 So. 2d 1272, 1273 - 75 (La. Ct. App. 1996).

reimbursed at a lower scale if provided by a chiropractor, rather than if provided by an M.D., or D.O., although the services are identical.[59]

At *Webring* on the internet, is a subgroup called the *Anti-Quackery Ring* with links to anti-chiropractic information services.[60]The website *chirowatch.com* is another website filled with chiropractic hate literature with such titles as "*Are you playing Chiro-roulette?*" and "*What are the links between chiropractic and scientology?*"[61]Dr. Stephen Barrett, M.D., a longtime anti-chiropractic advocate dating back to the AMA Committee on Quackery, is still spewing his hatred with impunity at *Quackwatch* on the net, in four languages no less.[62]

Chirobase lists itself as "A Skeptical Guide to Chiropractic History, Theories and Current Practices." Also operated by Stephen Barrett , this site includes the aide of a PhD., and a chiropractor.[63]

In November of 2002, the state of Vermont, whose governor is an M.D., by emergency rule will cease to provide chiropractic coverage under Medicaid to those over 21 years of age. The savings to Medicaid would be $43,000 for a nine-month period. According to the Secretary of the Agency of Human Services, without the reduction "there exists an imminent peril to public health, safety, or welfare."[64]

The irony in the budget cuts is that those patients who cannot afford chiropractic will seek out a medical, or osteopathic doctor. This will ultimately cost the state more, as the total reimbursement to chiropractors per visit is $14.56, and to the others between $21.70 and $53.30, exclusive of diagnostic tests, which are included in the chiropractic visits.[65]

Dynamic Chiropractic, a national chiropractic publication, recently reported that Wal-Mart, the largest private employer in the world, had without explanation discontinued chiropractic coverage in its employee health plan.[66]

"As a longtime insurance official, I have first hand knowledge of how strained the relationship has been between [DC's] and the insurance industry," stated Patricia Jackson.[67] She further adds that "[f]or over 30 years,

---

[59] American Chiropractic Ass'n , Inc. v. Trigon Healthcare, Inc., 151 F. Supp.2d 723 (W.D.Va. 2001).

[60] *Anti-Quackery Ring at* www.http://g//webring.com/hub?ring=antiquackerysite.

[61] *Chirowatch, at* http//www.chirowatch.com/.

[62] *Quackwatch, at* http://www.quackwatch.org/index.html.

[63] *Chirobase, at* http://www.chirobase.org.

[64] Steve Kelly, *VCA Files Restraining Order in Superior Court, at* http://www.chiroweb.com/archives/20/26/09.html

[65] *Id.*

[66] *Largest Private U.S. Employer Axes Chiropractic*, DYNAMIC CHIROPRACTIC, Nov. 30, 2002, at 1.

[67] Patricia Jackson, *Doing the Right Thing on Managed Care, at* http://www.chiroweb.com/archives/20/17/13.html.

I have witnessed such horrible offenses as not allowing [DC's] into state peer-review organization buildings to meet with medical staff, and claims adjusters who rampantly refused to recognize [DC's] as physicians."[68]

Time magazine recently ran an article titled " *Back off, Chiropractors*!"[69] with a subheading of "*Recent research suggests some chiropractic techniques may be dangerous for patients.*"[70]

The ICA News reported that at a recent US House of Representatives Small Business Committee meeting, [m]ember[s] . . . slammed Medicare's chief administrator for the arrogance, meanness and indefensible prejudice of that agency's operations and policies towards providers in general and chiropractic in particular."[71]

The above are illustrations of just of a few of the many cases of continued discrimination against chiropractors and the economic injuries suffered as a result of the AMA conspiracy and illegal boycott.

As a final illustration, the University of Miami Student Health Insurance Plan does not even categorize chiropractors as physicians as required by Florida Statute, and not only limits the reimbursement, but categorizes the treatment by chiropractors as mere physical therapy.[72]

IV. CHIROPRACTIC BASIS FOR PROTECTION

This leads to the question as to what reason would the insurance industry have in restricting chiropractic access when the business of insurance is profitability? Is chiropractic actuarially less cost effective, or is it effective and any perceived bias just paranoia? These questions are answered in part by Paul G. Shekelle.[73]

---

[68] *Id.*

[69] Leon Jaroff, *Back Off, Chiropractors*! Time, February 27, 2002, at wysiwyg://1049/http://www.time.com/...nist/printout/0,8816,213482,00.html.

[70] *Id.*

[71] *Congressional Committee Slams Medicare For Harassment of Providers; Focuses On Agency's Targeting Of Chiropractors, at* http://www.chiropractic.org/news/may16.committee.htm.

[72] FLA. STAT. §§ 456.039(1) and 627.6482(10) (2002).

[73] PAUL G. SHEKELLE, THE USE AND COSTS OF CHIROPRACTIC CARE IN THE HEALTH INSURANCE EXPERIMENT (1994).

> This report presents an analysis of the use and costs of chiropractic services from data that were collected during the RAND Health Insurance Experiment, which was a randomized controlled trial of the effect of insurance on the use of health services. The Health Insurance Experiment was funded by the Department of Health, Education, and Welfare. This study was funded in parts by grants from the Agency for Health Care Policy and research and from the Consortium for Chiropractic Research. Information about the use of chiropractic services, the effect of cost sharing on the use of chiropractic services, and a comparison of the costs of chiropractic care and medical care for patients with back pain is presented. This report should

According to Shekelle "2.4 billion [dollars was] spent on chiropractic in 1988."[74] Shekelle explains "little research has been done on the use, costs, or effectiveness of chiropractic care due in part to vigorous opposition by the Medical Community."[75] Shekelle's report goes on to say that "studies show that the majority of users are middle aged, employed, high school educated, with low-back pain the most common symptom presented and spinal manipulation the service most provided."[76] "Chiropractors are the third most used source of professional help for these symptoms behind general practitioners and orthopedists, and with twice as many visits."[77]

Involving a Worker's Compensation study, Shekelle provides that "claims information on 396,000 patients from 1988-1990 revealed the average cost of chiropractic claims for a patient that visited a chiropractor was $411.00 on average and that of a doctor using the same diagnostic code was significantly higher"[78]

In a study of Worker's Compensation in Utah that compared non-surgical medical care and chiropractic care utilizing the same diagnostic codes revealed significantly more visits and days of care: the costs, however, were greater for the medically treated group. In general the overall costs were greater for the medically treated workers.[79]

Three studies were performed in Oregon, Florida and Iowa of Worker's Compensation claims comparing total time lost from work and the total cost of care. "All [the] studies concluded that [those] treated by chiropractors had less time lost from work and less total cost of care...."[80]

Other studies have not been able to conclusively show a cost effectiveness for chiropractic care in Worker's Compensation.[81]

BC/BS of Arizona conducted a study of their experience with chiropractic care from 1983-1986. In 79 categories of service, chiropractors were most expensive in 40%, medical doctors 13%, osteopaths 28%, and physical therapists 19%. This type analysis is flawed in that it does not consider coverage limitations that include, per visit service restrictions, in

---

be of interest to clinicians, health services researchers, and health policy analysts who deal with back-pain care.

74 *Id.* at 2.

75 *Id.*

76 *Id.* at 6.

77 *Id.*

78 *Id.* at 7.

79 Paul G. Shekelle, THE USE AND COSTS OF CHIROPRACTIC CARE IN THE HEALTH INSURANCE EXPERIMENT (1994).

80 *Id.* at 9.

81 *Id.*

general service limitations, or whether the service is one more identified with a particular practitioner.[82]

"[I]ncreasing the insurance restrictions on chiropractic use substantially decreases the use of chiropractic services."[83]

This does not mean, however, that those patients whose insurance excludes chiropractic care suffer at home alone. They will just go to a medical doctor and if on average the cost of care is equal, it makes no difference to the insurance company whether chiropractors are a viable alternative for their subscribers.

"In summary, the efficacy of spinal manipulation has been demonstrated for some patients with a single condition, and no others."[84]

This refers to that which is scientifically proven, where such research is available. As further scientific studies are performed additional benefits may be proven. (emphasis added).[85]

The Rand Health Insurance Experiment, a population based randomized controlled trial, sponsored by the Federal Government, tracked the use of medical services and health status of enrollees over a three or five-year period."[86]

The Experiment concluded that approximately seven and one-half percent of the population saw a chiropractor during that time. Chiropractors delivered the great majority of manipulative care, over 90 percent. Users are more likely to be white, middle-aged, high school graduated and married. The four major reasons for seeing a chiropractor were face and neck pain, headaches and low back pain, and swelling and injury, which comprised 70 percent of the visits.[87]

The utilization of chiropractic is very sensitive to cost sharing. The higher the cost to the patient the less they sought chiropractic care. This was much more so for chiropractors than any other type of provider.[88] "In terms of total cost per episode of care, chiropractors are the second lowest provider type (bested only by general practitioners). When hospital costs are removed, chiropractors are the highest cost providers along with orthopedists and osteopaths."[89]

---

82 *Id.*

83 *Id.* at 11.

84 *Id.* at 14.

85 Paul G. Shekelle, THE USE AND COSTS OF CHIROPRACTIC CARE IN THE HEALTH INSURANCE EXPERIMENT (1994).

86 *Id.*

87 *Id.* at 63-64.

88 *Id.* at 66.

89 *Id.* at 67. It must be noted, however, that with chiropractic there is no hospitalization, or surgery involved and substantially less, if any medication–an obvious benefit.

Based on the above study it would appear that chiropractic has a neutral cost effect overall and that at worst should be treated with indifference by the insurance industry. The cost of similarly effected patients seeing a general practitioner is overall less costly than specialized chiropractic care. Without restriction, insurance plans already allow subscribers direct access to orthopods and osteopaths, the most expensive forms of care. In light of this information, no logical explanation exists for the current bias towards chiropractors by insurance providers.

Dr. Walter Wardwell,[90] a noted professor of sociology at the University of Connecticut, has written extensively on chiropractic and also served on the U.S. Public Health Services Expert Review Committee that was established to determine whether chiropractic would be included under Medicare. While on this committee he observed, " the medically dominated committee recommended against including [chiropractors.]"[91] Dr. Wardwell, in his book did an extensive analysis of this type of medical discrimination and made some illuminating observations.

He made a particularly poignant comment in the Preface of his book that he "always tended to sympathize with the underdog chiropractors, much as [he] always sympathize[s] with opposed ethnic groups . . . ."[92]
That Wardwell, an independent, objective observer should equate the plight of chiropractors with that of ethnic discrimination is further illustrative of the problem with the injunction.

Wardwell states that "[b]ecause of differences in licensing laws and modes of practice, third-party payers are uncertain about what chiropractors should be reimbursed for. If it is less costly to reimburse chiropractors than Medical Doctor's, insurance companies should not be reluctant to reimburse them for almost anything they do."[93]

"It is ironic . . . that chiropractors have won insurance in all states and the universal right to reimbursement by third party payors, that they have become subject to many new limitations and restrictions. The most stringent regulations are those of Medicare . . . . The insurance companies often apply these Medicare restrictions in their other health insurance programs," he added.[94] It thus appears that the federal government is the most egregious perpetrator of discrimination against chiropractors.

---

90 WALTER I. WARDWELL, CHIROPRACTIC: HISTORY AND EVOLUTION OF A NEW PROFESSION (1992).

91 *Id.* at vjii.

92 *Id.* at ix.

93 *Id.* at 264.

94 *Id.* at 266.

"Possible solutions to this problem would be to change the law so as to remove that provision and leave state regulations in effect, or to obtain federal legislation guaranteeing equal access for all licensed practitioners in all health plans," [95] said Wardwell, in referring to ERISA which exempts from state regulation companies that establish their own employee health plans.[96]

Wardwell quotes Keating and Mootz[97] who "refer to chiropractors' realistic paranoia born of nine decades of confrontation with medical orthodoxy."[98] "Such paranoia is pervasive as chiropractors continue to feel discriminated against by insurance companies unwilling to reimburse them fairly for their services, and they see the hand of organized medicine influencing third-party payors, which was one of the AMA's stated goals from at least 1962."[99]

"Chiropractors have been excluded from most policy-making and advisory boards at the federal level," which helps explain the discriminatory practices by the federal government.[100]

Wardwell quotes George McAndrews, the lead counsel for *Wilks v AMA*, as saying "quality and patient benefits are not the real issues. The medical profession reacts like Pavlov's dog to competition . . . ."[101]

"[T]he AMA . . . [r]ecognizing that chiropractors clearly are not destined to become ancillary practitioners ... should consider the ... health of the American people," urges Wardwell.[102]

Wardwell includes in his book actual memos from the AMA to various interested parties that are of such egregiousness that it is hard to believe that these are the same doctors that we entrust our health. Below are some examples.

> Four campaign goals were enumerated in a confidential memorandum summarizing discussion at a "Meeting of a Committee on Quackery, September 15, 1967" (Trever, 1972, p 123):
> Basically, the Committee's short-range objectives for containing the cult of chiropractic and any additional recognition it might achieve revolves about four points:

---

95 *Id.*

96 Walter I. Wardell, Chiropractic: History and Evolution of a New Profession (1992).

97 Joseph Keating and Robert D. Mootz, *The Influence of Political Medicine on Chiropractic Dogma:Implications For Scientific Development*, 12 JMPT 12 393-98 (1989).

98 Wardwell, *supra* note 90, at 267 (quoting Keating and Mootz *supra* note 97, at 396).

99 *Id.* (citation omitted).

100 *Id.* at 269.

101 *Id.* at 277.

102 *Id.*

> 1. Doing everything within our power to see that chiropractic coverage under Title 18 of the Medicare Law is not obtained.
> 2. Doing everything within our power to see the recognition or listing by the U.S. Office of Education of a chiropractic accrediting agency is not achieved.
> 3. To encourage continued separation of the two national chiropractic associations.
> 4. To encourage state medical societies to take the initiative in their state legislatures in regard to legislation that might affect the practice of chiropractic.
>
> The AMA model plan for state medical societies included enlisting the aid of outside groups (Trever, 1972, p 123): Other members of the scientific community and voluntary health organizations (such as the state cancer society, heart and arthritis associations) should be encouraged to adopt policy statements on this subject chiropractic), and to implement informational programs for their members and the public . . . . The state's interprofessional association or health council should involve itself in a public education program on the subject of quackery, and it should emphasize the subject of chiropractic.
>
> An interdepartmental Task Force on Chiropractic was established at the AMA headquarters in Chicago, designed to include (or influence) its divisions of Law, Communication, Medical Practice, Health Services, Community Health and Health Education, Physical Medicine and Rehabilitation, Health Care to the Poor, Council on Legislative Activities, and Liaison Committee to the American Bar Association . . . . [103]

The Committee also distributed "10,000 pieces of AMA propaganda" to educators and guidance counselors in order to block the inclusion of a chiropractic chapter in the Health Careers Guidebook that is distributed to school guidance counselors by the US Department of Labor.[104]

The AMA House of Delegates adopted a resolution in 1970 that directed the medical schools to include specific information in the curricula as to the health hazard created by the unscientific cult of chiropractic.[105]

The AMA attack was relentless and pervasive with the booklet, "Chiropractic: The Unscientific Cult" being sent to every medical doctors waiting room and the planting of articles that were critical of chiropractic in

---

[103] *Id.* at 163.

[104] *Id.*

[105] *Id.* at 163-64.

Reader's Digest, Consumer Reports, Good Housekeeping, and other widely read magazines.[106]

The AMA also sponsored the publication of Ralph Lee Smith's book *At your Own Risk: The Case Against Chiropractic*, mentioned above.[107]

"The AMA anti chiropractic campaign . . . delayed chiropractic acceptance for many decades [and] it certainly convinced most medical doctors, many other health providers, and educated lay persons to believe that chiropractic is an 'unscientific cult.' Ritual condemnation became routine in medical doctor's offices and in legislative forums."[108]

The only explanation for insurance industry discrimination, therefore, is that the bias toward chiropractors is a result of the long-standing AMA opposition to chiropractic, and that it has apparently permeated the insurance industry. For this reason, state insurance equality laws must be strengthened and federal preemptions must be eliminated.

V. STATUTORY CONSIDERATIONS

The first step would obviously be for the federal government to cease and desist their discriminatory practices toward chiropractors involving Medicare, Medicaid, the armed services, and federal employee health plans. This would require the current government officials and politicians to come to the same realization that came to the politicians early in the AMA's history, who saw the antics of organized medicine in relation to the homeopaths and turned a blind eye to their economically motivated posturing.

Had the *Wilk* court been more assertive and forceful with their injunction, perhaps the government would have taken notice, whether voluntarily, or by subsequent lawsuits.

The states in an attempt to provide protection to the professions that it licenses and the citizens that utilize those professionals, in particular chiropractors, have passed laws to either mandate coverage in insurance plans and/or provide for equal remuneration for services rendered. On the state level this partially corrects for the AMA boycott.

One method in which states may regulate such plans is by way of the McCarran-Ferguson Act.[109]The McCarran-Ferguson Act was passed in

---

106 *Id.* at 174.

107 *Id.* at 164.

108 *Id.* at 176.

109 Title 15 U.S.C.A.§ 1011. Declaration of policy. 'Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, silence on the part of the Congress shall not.

response to a Supreme Court decision in the previous year, where the court "held that a fire insurance company which conducted a substantial part of its business across state lines was engaged in interstate commerce so that its insurance transactions were subject to federal regulation. . . ."[110]

The states, however, were not granted total control by this Act, but only to the extent where the state laws and regulations apply to the business of insurance. Exactly defining the criteria of this business of insurance has required the attention of the court on all too many occasions. The court in *Metropolitan* held that "when interpreting the scope of the McCarran - Ferguson Act [that] three criteria [are] relevant to determining whether a particular practice falls within the business of insurance."[111] The court listed the three criteria as "first, whether the practice has the effect of transferring or spreading a policy holder's risk; second, whether the practice is an integral part of the policy relationship between one insurer and the insured; and

---

be constructed to impose any barrier to the regulation or taxation of such business by the several States.

'§ 1012. Regulation by State law; Federal law relating specifically to insurance, applicability of certain Federal laws after June 30, 1948.

'(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

'(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, [**8] That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 191, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

'§ 1013. Suspension until June 30, 1948, of application of certain Federal laws, Sherman Anti-Trust Act applicable to agreements to, or acts of, boycott, coercion, or intimidation.

'(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

'(b) Nothing contained in this chapter shall render the said Sherman Act, inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

See, e.g.,In re Grand Jury Investigation of the Aviation Insurance Industry, 183 F. Supp. 374, 377 (S.D.N.Y. 1960)

[110] Richard Cordero, Annotation: *Exemption or Immunity from Federal Antitrust Liability Under McCarran – Ferguson Act (15 USCA §§ 1011-1013)* and *State Action and Noerr – Pennington Doctrines for Business of Insurance and Persons Engaged in it*, 116 A.L.R. Fed. 163 (1993).

[111] Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 743 (1985).

third, whether the practice is limited to entities within the insurance industry.[112] (Citations omitted)

Application of these principles suggests that mandated-benefit laws are state regulation of the business of insurance.[113]

In keeping with this holding, it would appear that mandated benefit laws that required that chiropractic care provided by a chiropractor be treated without discrimination would meet all three criteria and thus those laws would be considered the business of insurance. But in 1974, came the Employee Retirement Income Security Act (ERISA).[114]

"(ERISA), comprehensively regulates employer pension and welfare plans."[115] Such plans are defined as those "which provides to employee's

---

[112] *Id.*

[113] *Id.*

[114] Employee Retirement Income Security Act of 1974, PL,93-406, 88 Stat. 829, 29 U.S.C. Section 1001 et. seq. ERISA comprehensively regulates, amongst other things, employee welfare benefit plans that, "Through the purchase of insurance or otherwise," provide medical, surgical, or hospital care, or benefits in the event of sickness, accident, disability or death § 3(1), 29 USC. § 1002(1).

Congress capped off the massive undertaking of ERISA with three provisions relating to the pre-emptive effect of the federal legislation.

[1.] The preemption clause:]

"Except as provided in subsection (b) of this section [the saving clause], the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . . " § 514.(a), as set forth in 29 U.S.C. § 1144 (a).

[2.] The savings clause:]

"Except as provided in subparagraph (B) [the deemer clause], nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." § 514(b)(2)(A), as set forth in 29 U.S.C. § 1144(b)(2)(A).

[3.] The deemer clause;]

Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance, insurance contracts, banks, trust companies, or investment companies." § 514.(b)(2)(B), 29 U.S.C. § 1144.(b)(2)(B).

To summarize the pure mechanics of the provisions quoted above: If a state law "Relate[s] to . . . employee benefit plan[s]," it is pre-empted. §514.(a). The saving clause excepts from the pre-emption clause laws that 'regulat[e] insurance." § 514(b)(2)(A). The deemer clause makes clear that a state law that "purport[s] to regulate insurance" cannot deem an employee benefit plan to be an insurance company. § 514 (b)(2)(B). . . .

See also Tom Baker and Kyle Logue, Insurance Law and Regulation 193-94, (Spring 2002) (unpublished manuscript final distribution as a handout by Professor Jonathon Simon, Insurance Law and Policy, LAW 119A Course Materials University of Miami School of Law).

[115] *Metropolitan*, 471 U.S. 724 at 732.

medical, surgical, or hospital care or benefits . . . . Whether these benefits are provided "through the purchase of insurance or otherwise."[116] The court in *Metropolitan,* goes on to explain that "[p]lans may self-insure or they may purchase insurance for their participants. Plans that purchase insurance - - so called "insured plans"—are directly affected by state laws that regulate the insurance industry."[117]

However, the court goes on to explain that although "ERISA thus contains almost no federal regulation of the terms of benefit plans [,] it does, however, contain a broad pre-emption provision declaring that the statute shall "supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan."[118]

At this point all would seem lost for state-mandated chiropractic benefits except for the fact that the ERISA pre-emption "is substantially qualified by an insurance 'saving clause,' . . . which broadly states that, with one exception, nothing in ERISA shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities."[119]Thus, state-mandated chiropractic benefits may appear to be back on track. But, that hope appears to be short-lived, as the court explains "that the specified exception to the savings clause . . . the so-called "deemer clause," . . . states that no employee-benefit plan . . . shall be deemed to be an insurance company or other insurer . . . to be engaged in the business of insurance . . . for purposes of any law of any state purporting to regulate insurance companies . . . ."[120]And therein lies the problem with the law as it relates to state-mandated chiropractic benefits, and the host of other state-mandated benefits that insureds have grown to require for their health, safety and welfare.

In order for there to be an outlet for states to undo the effects of the AMA boycott, the deemer clause of the ERISA Act must be eliminated, or that chiropractic services be an exception to the deemer clause.The primary reason for removing the deemer clause is that it allows employers a loophole whereby they can become self-insured by means of smoke and mirrors. "Employers often hire health insurance companies to manage the [self-insured health plan] trust and even purchase 'stop-loss' insurance to protect the assets of the trust, with the result that, in practice, there is little apparent difference on a day to day basis between health insurance and an ERISA

---

116 *Id.*

117 *Id.*

118 *Id.* (quoting section 514(A), 29 U.S.C. Section 1144(A)).

119 *Id.* at 733.

120 *Id.*

trust."[121] With this readily apparent to even the unsophisticated, it appears that the courts are just winking at the fraud perpetrated upon the citizenry of each state, whose laws were meant to provide more for their residents by deeming those laws to not be saved by federal preemption.

In the absence of congress acting to eliminate the deemer clause, there appears to be another approach that chiropractors might use to gain access to the great majority of US citizens that would utilize their services in spite of the years of baseless negativity espoused by the AMA over the years, if only their insurance would provide the coverage. Although in *Metropolitan*, it appears that general insurance plans not provided by an employer would not be pre-empted by ERISA, with the vast majority of insureds receiving insurance through employee plans,[122] action must be taken if chiropractors are to be released from the grip of longstanding discrimination.

The other possibility that exists for chiropractors to seek redress from the effects of the AMA boycott is to pursue additional anti trust litigation at the state level for those plans such as in *Johnson*,[123] where the insurance company conspired with the local medical societies to deny chiropractors reimbursement for services rendered to the company's subscribers. A case such as this and the cause of action entailed would carry its own peculiar legal woes. The McCarran – Ferguson Act again comes into play. If the Act gives over the regulation of the business of insurance to the states, then it would seem logical that the Sherman Act, a federal law, would be pre-empted by the Act. However, the McCarran – Ferguson Act provides that "[n]othing contained in this chapter shall render the said Sherman Act, inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."[124]

The courts have construed this to mean that in order to be exempt from the Sherman Act, the conduct in question must not be related to the business of insurance under McCarran-Ferguson, and where it is the business of insurance as is the case in *Johnson*, supra, the conduct must fit under the exemption to McCarran-Ferguson as it relates to the Sherman Act, where the conduct takes the form of coercion, intimidation, or boycott. Unfortunately, *conspiracy* to monopolize health insurance plans within a state in order to discriminate against an unfavored mode of treatment or provider is exempt from the Sherman Act.[125]

---

121 *See* Baker and Logue, *supra* note 117, at 199.

122 *Id.* at 192.

123 *Nosser v. Health Care Trust Fund Bd. of the City of Shreveport, 666 So. 2d at 1273-75.*

124 Metropolitan Life Insurance Co. v. Massachusetts, 471 at 743, *see supra* note 111.

125 *Id.; see also supra* note 113.

In order to rectify such a situation, the McCarran-Ferguson Act must be amended to include conspiracy to the listed exceptions of coercion, intimidation and boycott, under 15 U.S.C.A. § 1013(b).However, in a case such as *Johnson*, supra, where the insurance company acts in concert with a non-exempt entity such as a local medical society, it forfeits the protection of the McCarran-Ferguson Act anti-trust exemption and can be tried in federal court for violation of the Sherman Act.[126] Had the *Wilk* court maintained jurisdiction and extended the injunction to all those 'co-conspirators' that benefited from and who continue on with the illegal boycott antics of the AMA to thwart chiropractic and chiropractors, such illegal conduct might be less rampant. However, that is not the case and in the absence of insurance companies acting in concert with third parties, coercion, intimidation, or boycott must be proven to bring an action within federal jurisdiction, where at least the *Wilk* seventh circuit court decision carries some substantial persuasiveness.

With a claim of boycott, the activity must be between two entities "capable of entering into an agreement or joining in common action in what would amount . . . to a conspiracy, that is a combination of two or more persons acting in concert to accomplish a common unlawful purpose."[127]An insurance company acting to unlawfully discriminate against chiropractic could not be brought to answer under the Sherman Act by exemption of McCarran-Ferguson, since it would be considered acting internally and not in concert.

Coercion and intimidation, however, can involve a single person or entity not liable under § 1 of the Sherman Act, that might be liable under § 2 as conducting unlawful practices that constitute either an abuse of monopoly power or an attempt to monopolize.[128] However, the courts to date have predicated coercion and intimidation on whether the acts constitute a boycott.[129] Where the activity is internal as we have seen, no boycott is possible. Thus the exception to the McCarran-Ferguson Acts exemption to anti-trust violations is negated, leading us back to ground zero, requiring that conspiracy be added to the exceptions and in addition that the definition of boycott include single entities with substantial market power and share fall

---

126 *Id.*

127 *Id.*

128 *Id.*

129 "The McCarran-Ferguson Act does not prohibit coercion and intimidation in and of itself, but only such coercion and intimidation that would constitute an agreement or act of boycott." Hopping v Standard Life Ins. Co., No. GC81-167-LS-P, 1983 U.S. Dist. LEXIS 13781 at *28 (N.D. Miss. Sept. 14, 1983).

under the category of those that can be held to have created an unlawful boycott.

VI. CONCLUSION

The one thing that could have changed the history of the post *Wilk* injunction would have been the Supreme Court accepting certiorari on appeal from the AMA. Had the court done so, then the precedent set nationwide would have sent a clear message and carried much greater weight with the judiciary, congress, the executive, the states, and with the general public. Failure for the Supreme Court to accept jurisdiction has been the second most devastating event for chiropractic next to the AMA's illegal boycott and conspiracy.

Based on all the evidence gathered of the continued ill effects of the AMA's illegal boycott and conspiracy, it is clear that the *Wilk* injunction has had little to no effect on the unimpeded growth of chiropractic, nor has it provided any meaningful remedy for the cancer of discrimination that the AMA has spread to the reputation of chiropractic.

The lack of foresight by the Supreme Court has only created the necessity for increased litigation lacking precedential guidance. The foot dragging by the executive and legislative branches of the federal government has allowed the ill effects of the AMA's illegal boycott and conspiracy to continue to the detriment of chiropractic and ultimately the health, safety, and welfare of the citizens of the United States. With a healthcare system dominated by organized medicine that is failing a great many Americans, time is of the essence for the government to open their ears to alternatives and to realize that "monopoly [is] doubtless the intent of [organized medicine's] program,"[130] and not the welfare of this country.

---

[130] *See supra* note 11.

The
Law Review
Specialists

Western

Newspaper Publishing Company, Inc.

537 East Ohio Street
Indianapolis, Indiana 46204

1-800-807-8833

www.westernpub.com