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Education Law—Bayer Aspirin Tablets Held to Be a Proprierary Medicine Within the Exception To The New York Education Law

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EDUCATION LAW

BAYER ASPIRIN TABLETS HELD TO BE A PROPRIETARY MEDICINE WITHIN THE EXCEPTION TO THE NEW YORK EDUCATION LAW

Appellant, a New York corporation, has been selling pre-packaged Bayer Aspirin Tablets since 1950.[1] In January, 1955, appellants were charged with violating the State Education Law for selling these aspirin tablets. After discontinuing the sale of Bayer Aspirin, appellants brought this action for a declaratory judgment, establishing their right to continue the sale of these tablets without first obtaining registration certificates from the Board of Pharmacy, and further establishing that its employees have the right to make such sales. In addition, a permanent injunction was requested to restrain the defendants from interfering with the sale of Bayer Aspirin by way of section 6823(2) of the Education Law.[2] While the Supreme Court granted summary judgment for the plaintiff,[3] the Appellate Division reversed that judgment and directed a verdict for defendants.[4] In the Court of Appeals, *held*, reversed, all concurring, that under these circumstances, Bayer Aspirin, prepared with inert elements and by secret, complicated processes of manufacture, producing individual qualities differing in some degree from those tablets processed by other companies, were "proprietary medicines" within the statute exempting these medicines from the requirement that drugs be sold in licensed pharmacies. This was held although the active ingredients were known and patents had expired. *Loblaw, Inc. v. New York State Board of Pharmacy*, 11 N.Y.2d 102, 181 N.E.2d 621, 226 N.Y.S.2d 681 (1962).

There are two definitions which have been used in determining what is a proprietary medicine. The first of these is called the "common usage" definition and has five requirements: (1) the producer must have an existing property right, (2) this right may be attributed to a patent, trademark, special formula or unique process for preparation, (3) it must be a pre-packaged medicine in fully prepared form ready for use by the consumer with adequate directions for such use, (4) it must be extensively advertised by the brand name, and (5) no prescription is needed.[5] A further requirement is needed if the technical or second definition is to be complied with, that is, the existence of a secret process of manufacture.[6]

The issue in this case was whether or not Bayer tablets were an exempt

1. Loblaw, Inc., operates 228 supermarkets in New York, Pennsylvania, Ohio, and West Virginia, of which 141 are located in New York State.
2. N.Y. Educ. Law § 6823(2) provides for a fine to be assessed against any violator of this article who is not criminally prosecuted on the complaint of the board as for a misdemeanor, and the procedure for such assessment.
3. 22 Misc. 2d 131, 202 N.Y.S.2d 711 (Sup. Ct. 1960).
4. 12 A.D.2d 180, 210 N.Y.S.2d 709 (4th Dep't 1961).
5. Wrigley's Stores v. Michigan Board of Pharmacy, 336 Mich. 583, 59 N.W.2d 8 (1953).
6. Loblaw, Inc. v. New York State Board of Pharmacy, 11 N.Y.2d 102, 109, 181 N.E.2d 621, 623, 226 N.Y.S.2d 681, 685 (1962).

proprietary medicine under the State Education Law.[7] This Court affirms the decision of Special Term and reverses the Appellate Division, stating that the Appellate Division holding went beyond either of the above-stated definitions and denied the existence of a proprietary right, without regard to the ownership of trademarks or secret processes of manufacture, if it is shown that the basic and essential elements were known to and freely used by the public. The New York Pharmaceutical Society, as amicus curiae, urged that these tablets are a proprietary remedy on the basis of the holding in *Bayer Co., Inc. v. United Drug Co.*[8] They argued that that case dealt with what constitutes a proprietary remedy, while the Court here held that this issue was not before the *Bayer Co.* court which decided only questions of trademarks and fair competition.

The criteria followed by the Michigan court[9] and *used* by this Court, when supplemented by the stated policy considerations, reveal the true reasons for the Court's holding—that Bayer tablets are proprietary medicines within the statutory exemption. Judge Van Voorhis, in consideration of the purpose behind the statute, states that "limiting the sale of such medicines to pharmacists or drug stores would furnish no protection to the public without some further mandatory direction as to inspection or analysis by the pharmacists or druggist which would tend to exclude from sale medicines that might be injurious to health, or some requirement to exercise their skill and science in determining the quality and properties of such as they sell" (citation omitted).[10] If the Court had limited the sale here, the market would have been greatly restricted, which is a result seldom reached unnecessarily by a Court well aware of the established policy favoring free competition. Agreeing with Special Term, the Court said, "it is common knowledge that most drug stores are engaged in a wide field of merchandising having no connection with drugs, and that no professional judgment or discrimination is required or used in making sales of Bayer Aspirin Tablets."[11] Here the two basic reasons for the decision are seen, in that Bayer Aspirin Tablets could be found to be a proprietary medicine under the criteria used by the Court, and secondly, that there is no reason to distinguish drug stores and supermarkets in the sale of Bayer Aspirin since they are sold in the same manner.

Drug stores and supermarkets have become engaged in a competitive battle in recent years which has been due to their efforts to seek a larger market. Now that this battle has reached the courtrooms, it seems likely that similar litigation will flourish. It is interesting to note that in view of this competition, plus

7. N.Y. Educ. Law § 6816(2): "Except as to the labeling of poison and to adulterating, misbranding and substituting, it (Art. 137) shall not apply; . . . c. to the sale of proprietary medicines except those proprietary medicines which are poisonous, deleterious and/or habit forming."
8. 272 Fed. 505 (S.D.N.Y. 1921).
9. Wrigley's Stores, supra note 5.
10. Loblaw, Inc., supra note 6, at 111, 181 N.E.2d at 625, 226 N.Y.S.2d at 686.
11. Loblaw, Inc., supra note 6, at 113, 181 N.E.2d at 626, 226 N.Y.S.2d at 689.

the absence of any definitive framework concerning proprietary medicines in New York, the Court of Appeals specifically declined to base their holding upon more definite grounds, including an all-inclusive definition of proprietary medicines, in order to limit the necessity of future litigation in this area. This statute is a health measure enacted under the police powers of the state. While such a measure should not be a mere pretext to confer upon one group a competitive advantage, this consideration enters primarily into the constitutionality of the statute, i.e., whether or not there is a reasonable relation to public health.[12] While the Court undoubtedly reaches the right result, and furnishes some authority for future litigation, the opinion introduces another indefinite element—economic considerations—into the issue, where the issue itself is not delimited by a clear New York rule.

B. B. F.

REVOCATION OF PHYSICIAN'S LICENSE FOR DECEIT IN REPORTS TO THIRD PARTIES

The appellant was found guilty of fraud and deceit in the practice of medicine and of unprofessional conduct after a formal hearing before a subcommittee of the Medical Committee on Grievances. He was charged with submitting false and exaggerated medical reports and bills to an attorney, to insurance companies, and to the Transit Authority. The findings of fact were supported by substantial documentary evidence and testimony. The evidence also tended to show that such acts continued until 1956. The Medical Committee on Grievances confirmed such findings with all nine members present voting guilty, and appellant's license to practice medicine was revoked. This determination was unanimously confirmed by the Appellate Division. On appeal, *held*, affirmed. Nothing in the statute under which appellant was found guilty limits discipline to cases where the fraud is perpetrated directly on the patient. Where the fraud is practiced on anyone and it affects a public interest, the physican is subject to discipline. A unanimous vote of the Grievance Committee, where a quorum is present, is sufficient to find a physician guilty. *Wassermann v. Board of Regents*, 11 N.Y.2d 173, 182 N.E.2d 264, 227 N.Y.S.2d 649 (1962).[1]

A physician may have his license revoked or suspended when found "guilty of fraud or deceit in the practice of medicine"[2] or when the "physician is or has been guilty of unprofessional conduct."[3] The law further provides that anyone who "holds himself out" as a doctor is practicing medicine within the

12. See Defiance Milk Products Co. v. Du Mond, 309 N.Y. 537, 132 N.E.2d 829 (1956).

1. 13 A.D.2d 591, 212 N.Y.S.2d 884 (3d Dep't 1961).
2. N.Y. Educ. Law § 6514(2)(a).
3. N.Y. Educ. Law § 6514(2)(g).