

Pace Law Review

Volume 2
Issue 2 Summer 1982

Article 4

June 1982

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Recommended Citation

Dean A. Cambourakis, *People v. Roth: Should Physicians Be Exempt from New York Antitrust Law*, 2 Pace L. Rev. 273 (1982)

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***People v. Roth*: Should Physicians Be Exempt from New York Antitrust Law?**

I. Introduction

In *People v. Roth*,¹ the New York Court of Appeals affirmed a decision² which gave physicians a blanket exemption from New York's principal antitrust law, the Donnelly Act.³ In two prior cases,⁴ however, the same court recognized the principle of counterpart conformity⁵ which requires the New York courts to interpret the Donnelly Act consistently with federal court interpretations of the Sherman Act,⁶ the principal federal antitrust law. Since the Sherman Act, as interpreted by the courts, offers no blanket exemption to physicians and other learned professionals,⁷ the *Roth* court completely ignored its prior decisions requiring consistent interpretations.

In *Roth*,⁸ eight physicians and their medical association were charged with a combination in restraint of the furnishing of services, in violation of the Donnelly Act which prohibits "combination(s) [of trade] whereby . . . [c]ompetition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service . . . is or may be restrained"⁹ It was alleged that the defendant physicians

1. 52 N.Y.2d 440, 420 N.E.2d 929, 438 N.Y.S.2d 737 (1981).

2. *People v. Roth*, 100 Misc. 2d 542, 419 N.Y.S.2d 851 (Nassau County Ct. 1979), *aff'd*, 74 A.D.2d 1008, 425 N.Y.S.2d 904 (2d Dep't 1980), *aff'd*, 52 N.Y.2d 440, 420 N.E.2d 929, 438 N.Y.S.2d 737 (1981).

3. N.Y. GEN. BUS. LAW §§ 340-47 (McKinney 1968 & Supp. 1981). Sections 344 and 346 were repealed in 1933. 1933 N.Y. Laws ch. 804, §§ 3, 5.

4. *State v. Mobil Oil Corp.*, 38 N.Y.2d 460, 344 N.E.2d 357, 381 N.Y.S.2d 426 (1976) and *Aimcee Wholesale Corp. v. Tomar Prods., Inc.*, 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968).

5. Counterpart conformity is the principle whereby New York courts interpret the Donnelly Act in agreement with federal court interpretations of the Sherman Act, 15 U.S.C. §§ 1-7 (1976). See *infra* text accompanying notes 41-46.

6. 15 U.S.C. §§ 1-7 (1976).

7. See *infra* notes 31, 33 and text accompanying notes 34-37.

8. *People v. Roth*, 100 Misc. 2d 542, 419 N.Y.S.2d 851 (Nassau County Ct. 1979).

9. N.Y. GEN. BUS. LAW § 340(1) (McKinney 1968).

violated the Act by refusing to provide professional services to nonemergency workers' compensation and no-fault insurance patients.¹⁰ The trial court,¹¹ the appellate division,¹² and the court of appeals¹³ all ruled in favor of the defendants, holding that the medical profession is exempt from the Donnelly Act.

In ruling for the defendants, all three courts relied exclusively on *In re Freeman*.¹⁴ In that case it was urged that a County Bar Association's minimum fee schedule fixed the fee level for legal services in that county and thus violated the Donnelly Act.¹⁵ In holding that the law is a profession, not a business or trade regulated by the Donnelly Act, the *Freeman* court announced a broad learned professions exemption from liability under the Act.¹⁶ The *Roth* court and the two lower courts viewed the exemption announced in *Freeman* as absolute, and granted the medical profession a blanket exemption.¹⁷

Part II of this note examines the development of the learned professions exemption from liability under both federal and New York antitrust law. Part III states the legislative and judicial underpinnings of the principle of counterpart conformity. Part IV presents the factual background of the *Roth* case. Part V sets forth the reasoning of the New York Court of Appeals in *Roth*, and Part VI critically analyzes this reasoning. The note concludes that *Roth* was erroneously decided due to the *Roth* court's refusal to use counterpart conformity and its failure to view the learned professions exemption announced in *Freeman* as a limited exemption.

10. *People v. Roth*, 100 Misc. 2d at 543, 419 N.Y.S.2d at 852.

11. *Id.* at 547, 419 N.Y.S.2d at 854.

12. *People v. Roth*, 74 A.D.2d 1008, 425 N.Y.S.2d 904 (1980).

13. *People v. Roth*, 52 N.Y.2d at 447, 420 N.E.2d at 930, 438 N.Y.S.2d at 738.

14. 34 N.Y.2d 1, 311 N.E.2d 480, 355 N.Y.S.2d 336 (1974).

15. *Id.* at 5, 311 N.E.2d at 482, 355 N.Y.S.2d at 337. By fixing the fee level, fee competition would be eliminated; thus it would be a restraint on competition. The *Freeman* court, however, stated that since the practice of law is a profession, it is not included within the terms "business or trade" as used in the Donnelly Act's prohibition of restraints on competition in the conduct of business, trade, or commerce. *Id.* at 8-9, 311 N.E.2d at 483-44, 355 N.Y.S.2d at 340.

16. See *infra* note 27 and accompanying text.

17. See *supra* notes 11-13 and accompanying text.

II. Context of the Learned Professions Exemption

The Sherman Act was passed in 1890.¹⁸ Its purpose is to destroy combinations of trade designed to stifle competition.¹⁹ The Act does not expressly exempt any profession. The federal courts, however, have formulated a learned professions exemption based on dicta from several cases.²⁰ These cases suggest that the practice of a learned profession²¹ is not "trade or commerce" under the Act;²² therefore, members of the learned professions do not fit the language of section one²³ and are exempt from liability under it.

The Donnelly Act was enacted in 1899.²⁴ Its purpose is to promote free and open competition in commerce and industry.²⁵ Like the Sherman Act, the Donnelly Act does not expressly ex-

18. Sherman Act, ch. 647, §§ 1-7, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1976)).

19. Senator Sherman, the sponsor of the bill which eventually became the Sherman Antitrust Act, gave a speech explaining the bill's political and legal theory before the Senate on March 21, 1890. In that speech, Sherman stated: "This bill . . . [seeks] . . . only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer." 21 CONG. REC. 2457 (1890).

20. *E.g.*, *United States v. National Assoc. of Real Estate Boards*, 339 U.S. 485, 490-91 (1950) (dicta) ("[w]herever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a *trade*.") (quoting *The Nymph*, 18 F. Cas. 506, 507 (C.C.D. Me. 1834) (No. 10,388)) (emphasis added); *Federal Trade Comm'n v. Raladam Co.*, 283 U.S. 643, 653 (1931) (dicta) ("medical practitioners . . . follow a profession and not a trade . . ."); *Federal Baseball Club v. National League of Prof. Baseball Clubs*, 259 U.S. 200, 209 (1922) (dicta) ("a firm of lawyers sending out a member to argue a case . . . does not engage in . . . commerce because the lawyer . . . goes to another State."). Thus, the Supreme Court has distinguished a profession from a trade.

21. The classical definition of "learned professions" encompasses only the three disciplines of theology, law, and medicine. Herndon, *Competition Policy and the Professions*, 48 A.B.A. ANTITRUST L. J. 1533, 1533 (1980). Nevertheless, the term "learned professions" has evolved to include accountants, engineers, pharmacists, and others. *Id.*

22. Section one of the Sherman Act provides: "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 declared to be illegal." 15 U.S.C. § 1 (1976) (emphasis added).

23. *Id.*

24. 1899 N.Y. Laws ch. 690, §§ 1-7 (current version at N.Y. GEN. BUS. LAW §§ 340-47 (McKinney 1968 & Supp. 1981)).

25. See generally La Torella, *New York's Donnelly Antitrust Act — Its Origins, Enforcement and Future Development*, 21 N.Y.L.F. 167, 167-74 (1975) (for a discussion of the purpose of the Donnelly Act).

empt any profession. In the case of *In re Freeman*,²⁶ however, the New York Court of Appeals announced a broad learned professions exemption from liability under the Donnelly Act.²⁷

It was not until *Goldfarb v. Virginia State Bar*²⁸ that the federal courts addressed the issue whether the practice of a learned profession fell within section one of the Sherman Act. In *Goldfarb*, the petitioner clients argued that a County Bar Association's minimum fee schedule for real estate title examinations violated section one of the Sherman Act.²⁹ The Supreme Court held for the petitioners.³⁰ The net result of *Goldfarb* was that the Court explicitly rejected a total exemption from antitrust

26. 34 N.Y.2d 1, 311 N.E.2d 480, 355 N.Y.S.2d 336 (1974).

27. The specific holding in *Freeman* was that the Donnelly Act does not apply to the legal profession; however, the court in *Freeman* implied that its holding covered the learned professions in general. In considering the issue whether the legal profession is a business or trade as that term is used in the Donnelly Act, the *Freeman* court noted:

A profession is not a business. It is distinguished by the requirements of extensive formal training and learning, admission to practice by a qualifying licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, a system for discipline of its members for violation of the code of ethics, a duty to subordinate financial reward to social responsibility, and, notably, an obligation on its members, even in non-professional matters, to conduct themselves as members of a *learned*, disciplined, and honorable occupation. These qualities distinguish professionals from others whose limitations on conduct are largely prescribed only by general legal standards and sanctions, whether civil or criminal . . . The history and purpose of the legal profession and the professional associations supports the view that the profession is not included within the terms "business or trade" as used in section 340 of the General Business Law.

Id. at 7-8, 311 N.E.2d at 483, 355 N.Y.S.2d at 339-40 (emphasis added). Thus, it can be inferred that the *Freeman* court considered any learned profession with a rigorous system of self-regulation to be exempt from the Donnelly Act.

The exemption announced in *Freeman* is not absolute. The language that "concerted conduct to produce as a primary purpose a certain minimum financial reward would be unprofessional," *id.* at 11, 311 N.E.2d at 485, 355 N.Y.S.2d at 342, indicates that if members of the learned professions act in concert to promote their own economic self-interest, then they should not be allowed to avoid liability under the Donnelly Act by using their professional status as a defense.

28. 421 U.S. 773 (1975). For a full discussion of the *Goldfarb* decision see Stiehl, *Goldfarb v. Virginia State Bar: Legal Ethics and the Search for Homeostasis in Antitrust Law*, 22 N.Y.L.S. L. Rev. 699 (1977).

29. *Goldfarb v. Virginia State Bar*, 421 U.S. at 778.

30. In ruling that the minimum fee schedule was a restraint on competition, the Court emphasized the fact that title examinations are indispensable in financing real estate purchases. Since only an attorney licensed to practice in Virginia could legally examine titles, the Court reasoned that consumers could not turn to alternative sources for the necessary service. *Id.* at 782-83.

regulation for the learned professions³¹ and implicitly recognized a limited learned professions exemption.³² Since *Goldfarb*, federal courts have been inclined to bring the learned professions within the scope of the Sherman Act.³³ For example, in *Ballard v. Blue Shield of Southern West Virginia, Inc.*,³⁴ the Fourth Circuit ruled that the professional status of physicians alone did not exempt them from the Sherman Act.³⁵ Specifically, the defendant physicians, together with a medical association that sold health insurance, engaged in a group boycott designed to deny health insurance coverage for chiropractic services.³⁶ The Fourth Circuit held that such a boycott violated the Sherman Act.³⁷

In New York, the only case after *Freeman* which has addressed the issue of the learned professions exemption is *People v. Roth*.³⁸ Despite *Goldfarb* and its progeny,³⁹ the *Roth* court announced a blanket exemption from liability under the Donnelly Act for the medical profession.⁴⁰

31. The Supreme Court in *Goldfarb* stated, in response to the Virginia State Bar Association's contention that the learned professions should be granted a total exclusion from the antitrust laws, that Congress did not intend any such sweeping exclusion. *Id.* at 787.

32. The *Goldfarb* Court noted:

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

Id. at 788-89 n. 17.

33. In *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679 (1978), the Court held that the Society's canon of ethics prohibiting its members from submitting competitive bids for engineering services violated section one of the Sherman Act. *Id.* at 686-96. In *Boddicker v. Arizona State Dental Ass'n*, 549 F.2d 626 (9th Cir. 1977), the Ninth Circuit held that the membership requirements of the American Dental Association and its constituent societies were not beyond the reach of the Sherman Act. *Id.* at 628-30.

34. 543 F.2d 1075 (4th Cir. 1976).

35. *Id.* at 1079.

36. *Id.* at 1077-79.

37. *Id.* at 1079.

38. 52 N.Y.2d 440, 420 N.E.2d 929, 438 N.Y.S.2d 737 (1981).

39. See *supra* note 33 and accompanying text.

40. *People v. Roth*, 52 N.Y.2d at 447, 420 N.E.2d at 930, 438 N.Y.S.2d at 738.

III. Counterpart Conformity

The Donnelly Act was revised in 1957. Today's statute is essentially the product of that revision which was based on a special committee report by the New York State Bar Association.⁴¹ That report clearly indicates that it was the intention of the committee that the Donnelly Act be considered the counterpart of the Sherman Act and that interpretations of the Donnelly Act be consistent with both federal antitrust principles as they existed in 1957, as well as future interpretations of the Sherman Act.⁴²

In *Aimcee Wholesale Corp. v. Tomar Products, Inc.*,⁴³ the New York Court of Appeals considered the Donnelly Act a virtual copy of the Sherman Act and followed federal antitrust policy in reaching its decision to prohibit the resolution of New York antitrust controversies through commercial arbitration.⁴⁴ In *State v. Mobil Oil Corp.*,⁴⁵ the court of appeals looked again to federal antitrust law. Reasoning that price discrimination in the federal antitrust field was covered not by the Sherman Act, but rather by legislation supplemental to the Sherman Act, the

41. N.Y.S. BAR ASS'N ANTITRUST SECTION, REPORT OF THE SPECIAL COMMITTEE TO STUDY THE NEW YORK ANTITRUST LAWS (1957) [hereinafter cited as SPECIAL COMMITTEE REPORT]. The legislation recommended by this committee was approved by Governor Averell Harriman on April 24, 1957. See 1957 N.Y. Laws at 1881-82.

42. In considering proposed changes in the Donnelly Act the special committee wrote:

The changes which we advocate are designed merely to simplify and not to alter in any respect the coverage and meaning of the statute save to make clear that it relates to *all* subjects of commerce, or in other words, that it embraces the same economic activities as the Sherman Act.

SPECIAL COMMITTEE REPORT, *supra* note 41, at 10 (emphasis in original).

In considering the substantive adequacy of the Donnelly Act the special committee wrote:

The Donnelly Act has been on the books for close to sixty years and the substitution of Sherman law wording would produce more confusion than it would allay. Moreover, the state decisions seem to rest on the same fundamental concepts as does the federal law, and the differences between state and federal jurisprudence are insubstantial. In the few instances where the state law seems to diverge from federal, the state decisions are often generations old. Should the same issues arise again, they would presumably be decided in the light of modern antitrust concepts which have been developed federally.

SPECIAL COMMITTEE REPORT, *supra* note 41, at 8.

43. 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968).

44. *Id.* at 626, 237 N.E.2d at 225, 289 N.Y.S.2d at 971.

45. 38 N.Y.2d 460, 344 N.E.2d 357, 381 N.Y.S.2d 426 (1976).

court held that the Donnelly Act does not extend to price discrimination.⁴⁶

IV. *People v. Roth*

The defendant physicians in *Roth* were authorized by the Workers' Compensation Board to treat workers injured during the course of their employment.⁴⁷ Fees for treating such patients were governed by a fee schedule adopted by the compensation board.⁴⁸ New York's No-Fault Insurance Law⁴⁹ adopted the same fee schedule;⁵⁰ thus, the compensation board's fee schedule also governed fees awarded to physicians who treated persons injured in automobile accidents.⁵¹ After becoming dissatisfied with the compensation board, the defendant physicians organized the Surgical Specialties Association of New York, Inc.⁵² The purpose behind the organization of the SSANY was to urge the legislature to modify the compensation fee schedule and to eliminate the system's abuses.⁵³ The defendants, unsuccessful in their attempt to obtain legislative action, concertedly agreed to resign their authorizations to treat work-related or automobile accident-related injuries.⁵⁴ Eventually, over 250 physicians in the area became unavailable to provide nonemergency medical aid to workers and accident victims.⁵⁵

46. The *Mobil* court stated:

Price discrimination . . . is not and never has been within the purview of the Sherman Act. By the adoption of the Clayton Act in 1914 the Congress sought by supplementing the Sherman Act to prohibit price discrimination in specified circumstances In 1936 the Clayton Act was amended in turn by the Robinson-Patman Act (49 U.S. Stat. 1526, now U.S. Code, tit. 15, section 13), *inter alia*, to provide comprehensive Federal regulation of price discrimination. It is clear to us that reference to the history of and practice under the Federal antitrust laws demonstrates that if our Donnelly Act is to be considered a counterpart of the Sherman Act it does not extend to price discrimination as such.

State v. Mobil Oil Corp., 38 N.Y.2d at 463, 344 N.E.2d at 359, 381 N.Y.S. 2d at 428 (citation omitted).

47. *People v. Roth*, 100 Misc. 2d at 543, 419 N.Y.S.2d at 852.

48. *Id.*

49. N.Y. INS. LAW § 678 (McKinney 1977).

50. *People v. Roth*, 100 Misc. 2d at 543, 419 N.Y.S.2d at 852.

51. *Id.*

52. *Id.* [hereinafter the SSANY].

53. *Id.*

54. *Id.*

55. *Id.* at 543-44, 419 N.Y.S.2d at 852.

The indictment against the defendant physicians was the result of an investigation undertaken by the New York Attorney-General's Office after it learned of numerous complaints from residents who were refused nonemergency medical services.⁵⁶ Specifically, the indictment charged the defendant physicians with "concertedly resigning their authorizations to treat non-emergency Workers' Compensation patients, and concertedly refusing to treat non-emergency No-Fault patients."⁵⁷ The trial court granted the defendants' motion to dismiss the indictment.⁵⁸ The appellate division and the court of appeals affirmed.⁵⁹

V. Decision of the Court

The New York Court of Appeals faced the issue whether the medical profession should be exempt from the Donnelly Act. In deciding that the medical profession does not fall within the scope of the Donnelly Act, the majority emphasized the *Freeman* rule⁶⁰ which exempts, almost totally, the learned professions from liability under the Act.⁶¹ The *Roth* majority minimized the importance of *Goldfarb* by stating that it was a federal court ruling interpreting a federal statute.⁶² The majority reasoned that such a ruling has no direct bearing on a state court's analysis of an analogous provision enacted by the state legislature.⁶³

Although the majority did not address directly the issue of counterpart conformity, it said an argument could be made that the Donnelly Act should be reexamined in light of *Goldfarb*.⁶⁴ The majority found this argument untenable,⁶⁵ stating that the

56. *Id.* at 544, 419 N.Y.S.2d at 852.

57. *Id.* at 543, 419 N.Y.S.2d at 852.

58. *Id.* at 547, 419 N.Y.S.2d at 854.

59. *See supra* note 2.

60. *People v. Roth*, 52 N.Y.2d at 447, 420 N.E.2d at 929, 438 N.Y.S.2d at 737.

61. *See supra* note 27 and accompanying text.

62. *People v. Roth*, 52 N.Y.2d at 447-48, 420 N.E.2d at 930, 438 N.Y.S.2d at 738.

63. The *Roth* court stated: "As we noted in *Freeman*, the ruling of a Federal court interpreting a Federal statute has no direct bearing upon a State court's analysis of an analogous provision enacted by the State legislature . . ." *Id.* at 447, 420 N.E.2d at 930, 438 N.Y.S.2d at 738.

64. *Id.* at 448, 420 N.E.2d at 930, 438 N.Y.S.2d at 738.

65. *Id.*

Freeman rule should not be abandoned merely because a federal court had reached a different conclusion about an analogous federal statute.⁶⁶

Judge Jones's concurrence stated that, through counterpart conformity, the medical profession falls within the scope of the Donnelly Act, but that the indictment against the defendant physicians should have been dismissed on constitutional grounds.⁶⁷ First, in regard to counterpart conformity, Judge Jones relied heavily on the special committee report,⁶⁸ which contains a detailed discussion of the legislative history of the 1957 revision of the Donnelly Act. He reasoned that the committee's report discloses a legislative intent to have the New York courts interpret the Donnelly Act in accordance with federal court interpretations of the Sherman Act.⁶⁹ Since *Freeman*, which granted the learned professions an almost total exemption from liability under the Donnelly Act, is inconsistent with *Goldfarb*, which announced that the learned professions are not entitled to such a broad exemption under the Sherman Act, Judge Jones reasoned that the principle of counterpart conformity compelled the overruling of *Freeman*.⁷⁰

Judge Jones stated that the indictment against the defendants should have been dismissed on constitutional grounds and not on the *Freeman* rule.⁷¹ He asserted that holding the Donnelly Act applicable to the defendants would have violated the fair warning requirement announced by the Supreme Court in *Bouie v. City of Columbia*.⁷² Under this fair warning requirement, "a criminal statute must give fair warning of the conduct it makes a crime" ⁷³ In *Roth*, the defendant physicians be-

66. The *Roth* court stated: "[W]e can see no sound reason to abandon the *Freeman* rule merely because a Federal court has reached a different conclusion about an analogous Federal statute . . ." *Id.*

67. *Id.* at 448-53, 420 N.E.2d at 930-33, 438 N.Y.S.2d at 738-41 (Jones, J., concurring).

68. See *supra* note 41 and accompanying text.

69. *People v. Roth*, 52 N.Y.2d at 448-50, 420 N.E.2d at 930-31, 438 N.Y.S.2d at 738-39 (Jones, J., concurring).

70. *People v. Roth*, 52 N.Y.2d at 451-52, 420 N.E.2d at 932, 438 N.Y.S.2d at 740 (Jones, J., concurring).

71. *Id.* at 452, 420 N.E.2d at 933, 438 N.Y.S.2d at 741 (Jones, J., concurring).

72. 378 U.S. 347 (1964).

73. *Id.* at 350-51. In *Bouie*, the petitioners, a group of blacks, entered a drugstore, which extended service to blacks at all departments except the restaurant department,

lieved — due to the *Freeman* court's interpretation of the Donnelly Act — that the Act did not apply to them. The retroactive application of Judge Jones's interpretation of the Donnelly Act would have deprived them of a fair warning that they were no longer exempt from the Act. Judge Jones concluded that such a deprivation would be inconsistent with *Bowie*, and that the indictment against the defendants should have been dismissed on that constitutional ground.⁷⁴

VI. Analysis of the Decision

The acceptance by the *Roth* majority of the learned professions exemption announced in *Freeman* is in direct conflict with the present trend in federal antitrust law denying the learned professions an exemption.⁷⁵ Relying on *stare decisis*, the majority stated: “[W]e can see no sound reason to abandon the *Freeman* rule merely because a Federal court has reached a different conclusion about an analogous Federal statute”⁷⁶ This clearly indicates how rigidly the majority adhered to *Freeman*. Yet, the majority opinion overlooked *Mobil*⁷⁷ and *Aimcee*⁷⁸

and took seats in a restaurant booth without having received any notice that the department was barred to blacks. The petitioners were asked to leave, but refused to do so and were convicted of violating a South Carolina criminal trespass statute proscribing entry upon the lands of another after notice prohibiting such entry. In affirming the petitioners' convictions, the South Carolina Supreme Court construed the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave. The United States Supreme Court held that the South Carolina Supreme Court, by giving retroactive application to its new construction of the statute, had deprived petitioners of their right to a fair warning of a criminal prohibition, and had thus violated the due process clause of the fourteenth amendment. *Id.* at 348-63. The holding in *Bowie* applies to cases involving the Donnelly Act since that Act imposes criminal penalties for violations of it. Specifically, section 341 of the Donnelly Act provides:

Every person or corporation . . . who shall make . . . any such contract, agreement, arrangement or combination . . . or who shall do any act pursuant thereto . . . is guilty of a class E felony.

N.Y. GEN. BUS. LAW § 341 (McKinney Supp. 1981).

74. *People v. Roth*, 52 N.Y.2d at 452-53, 420 N.E.2d at 933, 438 N.Y.S.2d at 741 (Jones, J., concurring).

75. See *supra* notes 31, 33 and text accompanying notes 34-37.

76. *People v. Roth*, 52 N.Y.2d at 448, 420 N.E.2d at 930, 438 N.Y.S.2d at 738.

77. *State v. Mobil Oil Corp.*, 38 N.Y.2d 460, 344 N.E.2d 357, 381 N.Y.S.2d 426 (1976).

78. *Aimcee Wholesale Corp. v. Tomar Prods., Inc.*, 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968).

which — as Judge Jones mentioned in his concurring opinion — recognize the principle of counterpart conformity requiring the court to look to federal antitrust law when interpreting the Donnelly Act.⁷⁹ As the opinion of Judge Jones is based on a thorough analysis of the applicable law, it is the stronger and better reasoned opinion.

It could be contended, as the majority in *Roth* pointed out, that *Goldfarb* has no effect in New York since a state court is the ultimate arbiter of its own law. The use of counterpart conformity by the New York Court of Appeals in *Mobil* and *Aimcee*, and the legislative history⁸⁰ of the present Donnelly Act, make it clear, however, that the *Roth* court could just as easily have decided not to exempt the medical profession from the Donnelly Act. The majority could have pointed to *Ballard*,⁸¹ which, like *Roth*, involved a group boycott by physicians. Since the Fourth Circuit, in *Ballard*, brought the defendant physicians within the scope of the Sherman Act, the New York Court of Appeals, using counterpart conformity, could have brought the defendant physicians in *Roth* within the scope of the Donnelly Act.

A close reading of the *Freeman* decision reveals the language that “concerted conduct to produce as a primary purpose a certain minimum financial reward would be unprofessional.”⁸² This language amounts to an unprofessional conduct exception to *Freeman*’s general rule that learned professionals are exempt from liability under the Donnelly Act. The defendant physicians’ behavior in *Roth* clearly comes under this exception to *Freeman* since their concerted refusal to provide services was aimed at protesting low fee schedules and, thus, advancing their own economic self-interest. Therefore, under this analysis, the defendant physicians in *Roth* should have been held subject to the Donnelly Act.

The reason the *Roth* majority failed to use this analysis is that it considered the *Freeman* learned professions exemption a blanket exemption, precluding an examination of the defendant

79. See *supra* note 46 and text accompanying notes 43-46.

80. See *supra* notes 41-42 and accompanying text.

81. *Ballard v. Blue Shield of S. W. Va., Inc.*, 543 F.2d 1075 (4th Cir. 1976).

82. *In re Freeman*, 34 N.Y.2d at 11, 311 N.E.2d at 485, 355 N.Y.S.2d at 342.

physicians' behavior. The quoted exception to *Freeman*, however, clearly indicates that, under *Freeman*, the behavior of the defendant learned professionals must be examined to determine whether they acted unprofessionally. The *Roth* court, therefore, should not have granted the defendant physicians a blanket exemption simply because they happened to be members of a learned profession.

On the basis of the foregoing, it is readily apparent that the reasoning of the *Roth* court is faulty for two reasons. First, by rejecting *Goldfarb*, the *Roth* court turned its back on the current view of the relationship between the learned professions and the antitrust laws. Second, by considering the *Freeman* learned professions exemption a blanket exemption, the *Roth* court manufactured a rule it could rely on to exempt the defendant physicians. It is dangerous to impute a motive to a court; however, it is this author's opinion that the *Roth* court exempted the defendant physicians simply because it wanted to do so.

VII. Conclusion

The New York Court of Appeals, in *People v. Roth*, held that physicians are totally exempt from New York's principal antitrust legislation, the Donnelly Act. This is a departure from federal antitrust law, the Sherman Act, under which physicians and other learned professionals are not totally exempt from liability. Prior decisions by the New York Court of Appeals and the legislative history of the Donnelly Act indicate that interpretations of the Donnelly Act should be consistent with interpretations of the Sherman Act. Therefore, under the principle of counterpart conformity, the defendant physicians in *Roth* should not have been exempted from the Donnelly Act.

Further, the defendant physicians in *Roth* should have been held subject to the Donnelly Act under the exception to *Freeman* condemning as unprofessional concerted conduct with the primary purpose of financial reward. The concerted activity of these physicians, designed to advance their own economic self-interest, was clearly unprofessional. Therefore, they should not have prevailed by using their professional status as a defense.

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