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## ILLINOIS DENTISTS INCORPORATED?

### INTRODUCTION

The authority for professionals to incorporate has long been recognized in Illinois.<sup>1</sup> While the trend nationwide has been toward allowing all professionals to incorporate, an unusual series of events in Illinois has curiously led to a different result with regard to the field of dentistry.

The propriety of permitting persons engaged in the practice of dentistry to incorporate was first recognized in the Illinois Medical and Surgery Act of 1909.<sup>2</sup> This right remained unchanged until 1933 when the Illinois Legislature provided, in section 18(a) of the Dental Practice Act (hereinafter referred to as the D.P.A.), that: "No corporation shall practice dentistry. . . ."<sup>3</sup> This statutory restriction upon dentists withstood attempted invalidation on the grounds that such legislation was special and therefore unconstitutional.<sup>4</sup>

The D.P.A. was attacked as being special legislation in the 1935 case of *Winberry v. Hallihan*.<sup>5</sup> The thrust of the attack was that section 18(a) of the D.P.A. applied only to the dental profession, thus arbitrarily discriminating against individuals practicing dentistry. After first recognizing that it was within the police power of the state legislature to insist upon maintaining the personal liability of individual professionals,<sup>6</sup> the Illinois Supreme Court affirmed the General Assembly's right to deny corporations the privilege of practicing any profession, and upheld the constitutionality of the statute stating:

The Legislature was not compelled to treat alike all those classes [medical institutes and clinics, drug stores, optical and similar professional establishments] and was not bound to strike at all evils at the same time, in the same act, or in the same way. It may deal with the different professions according to the needs of society in relation to each profession. There is no basis for the charge of an unconstitutional discrimination.<sup>7</sup>

On September 15, 1969, the legislature enacted the Professional Service Corporation Act (hereinafter referred to as P.S.C.A.)<sup>8</sup> This statute allowed a corporation to render profes-

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<sup>1</sup> Act of June 11, 1909, § 18, [1909-10] Ill. Laws 282.

<sup>2</sup> *Id.*

<sup>3</sup> ILL. REV. STAT. ch. 91, § 72a (Act of July 7, 1933); § 1, [1933] Ill. Laws 708 added § 18a to Act of June 11, 1909, §§ 1 *et seq.*, [1909-10] Ill. Laws 277.

<sup>4</sup> *Winberry v. Hallihan*, 361 Ill. 121, 197 N.E. 552 (1935).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 127, 197 N.E. at 555.

<sup>7</sup> *Id.* at 130, 197 N.E. at 557.

<sup>8</sup> ILL. REV. STAT. ch. 32, § 415-1 *et seq.* (1971), *eff.* Sept. 15, 1969.

sional services; and it purported to embrace all groups required to be licensed or obtain other legal authorization, in order to practice their profession.<sup>9</sup>

The 1969 P.S.C.A.<sup>10</sup> ostensibly changed the law by allowing corporations to engage in the practice of dentistry. Whether this is a correct interpretation of the statute shall subsequently be examined; but accepting the suggestion that the 1969 statute repealed the D.P.A.'s 1933 prohibition, it would appear that in 1969 the legislature intended to allow corporations to practice dentistry. However, in 1972, the legislature approved Public Act 77-2713, an amendment to the D.P.A.,<sup>11</sup> in order to conform the penalties under that Act with the Uniform Code of Corrections.<sup>12</sup> The inconsistencies arising from this amendatory act may be most consequential to those persons practicing dentistry, who, since 1969, have incorporated or intend to incorporate their practice. These statutory inconsistencies must be dealt with either by the legislature or the judiciary in order to resolve the apparent conflicts.

The purpose of this paper is merely to present the existing conflicts and give various interpretations concerning them.

#### MAY DENTISTS INCORPORATE UNDER THE PROFESSIONAL SERVICE CORPORATION ACT?

At the time when the P.S.C.A. was approved,<sup>13</sup> a corporation was not prohibited from rendering most professional services.<sup>14</sup> A statutory exception to this general rule was the prohibition against a corporation engaging in the practice of dentistry.<sup>15</sup> Since the adoption of the P.S.C.A., however, dentists have been incorporating their practices, and this course of action has not yet been judicially challenged. It has been universally assumed by the legal community that the P.S.C.A. repealed section 18(a) of the D.P.A., thus authorizing dentists to incorporate.

Section 415-2 of the P.S.C.A. provides that:

It is the legislative intent to provide for the incorporation of an individual or group of individuals to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization . . .<sup>16</sup>

Section 415-4 provides in part that:

This Act shall take precedence in the event of any conflict with

<sup>9</sup> See text accompanying notes 25-26 *infra*.

<sup>10</sup> ILL. REV. STAT. ch. 32, § 415-1 *et seq.* (1971).

<sup>11</sup> ILL. REV. STAT., 1972 Supp., ch. 91, § 72a (Amended by P.A. 77-2713, § 1, *eff.* Jan. 1, 1973).

<sup>12</sup> ILL. REV. STAT., 1972 Supp., ch. 38, § 1001-1-1 *et seq.*

<sup>13</sup> ILL. REV. STAT. ch. 32, § 415-1 *et seq.* (1971).

<sup>14</sup> See text accompanying notes 1-3 *supra*.

<sup>15</sup> See text accompanying notes 4-7 *supra*.

<sup>16</sup> ILL. REV. STAT. ch. 32, § 415-2 (1971).

provisions of the Business Corporation Act or other laws . . . .

. . . . .  
The provisions of this Act shall not be considered as repealing, modifying or restricting the applicable provisions of law regulating the several professions except insofar as such laws are in conflict with the provisions of this Act, however, *the provisions of this Act shall take precedence over any law which prohibits a corporation from rendering any type of professional services.*<sup>17</sup>

The foregoing provisions apparently effectuated the repeal of the prohibition of section 18(a) of the D.P.A.<sup>18</sup> In order to substantiate this conclusion, it is necessary to examine certain rules of statutory construction.

In order to be an express repeal, the act to be repealed must be identified or designated in the repealing statute.<sup>19</sup> Thus, the *express general* repealing clause of the P.S.C.A., to the effect that all inconsistent prior enactments are repealed,<sup>20</sup> is not an express repeal. It follows that the pertinent provisions of the P.S.C.A. attempted to effectuate an *implied* appeal.

There is a presumption by the courts against implied repeals;<sup>21</sup> therefore, if the inconsistency between a later act and an earlier one is not fatal to the operation of either, the two shall stand together and no repeal will be effected.<sup>22</sup> When a general codification of the law is enacted which apparently repeals prior special laws (although not special in the constitutional sense) one authority on statutory construction, Sutherland, provides the following constitutional guidelines:

The enactment of a general law broad enough in its scope and application to cover the field of operation of a special or local statute will generally not repeal a statute which limits its operation to a particular phase of the subject covered by the general law . . . . An implied repeal of prior statutes will be restricted to statutes of the same general nature, since the legislature is presumed to have known of the existence of prior special or particular legislation, and to have contemplated only a general treatment of the subject matter by the general enactment. Therefore, where the later general statute does not present an irreconcilable conflict the prior special statute will be construed as remaining in effect as a qualification of or an exception to the general law.

However, since there is no rule of law to prevent the repeal of a special by a later general statute, prior special or local statutes may be repealed by implication from the enactment of a later general statute where the legislative intent to effectuate a repeal is unequivocally expressed. A repeal will also result by implica-

<sup>17</sup> *Id.* at § 415-4 (emphasis added).

<sup>18</sup> ILL. REV. STAT., 1972 Supp., ch. 91, § 72a.

<sup>19</sup> C. SANDS, SUTHERLAND, STATUTORY CONSTRUCTION, Vol. 1A, § 23.08 (4th ed. 1972) [hereinafter cited as SUTHERLAND].

<sup>20</sup> ILL. REV. STAT. ch. 32, § 415-4 (1971).

<sup>21</sup> SUTHERLAND, *supra* note 19, § 23.10.

<sup>22</sup> *Id.* § 23.09.

tion when a comprehensive revision of a particular subject is promulgated . . . .<sup>23</sup>

Sutherland further states that:

The enactment of a code operates to repeal all prior laws upon the same subject matter where, because of its comprehensiveness, it inferentially purports to be a complete treatment of the subject or where by express declaration in the code it is prescribed the sole governing statutory law upon that particular subject.<sup>24</sup>

The P.S.C.A. is a general law granting authority to incorporate to *any type* of professional service. The legislature has expressly stated its intent to repeal all prior inconsistent statutes;<sup>25</sup> and this expression impliedly includes section 18(a) of the D.P.A. which prohibits dentists from incorporating — clearly inconsistent with the provisions of the P.S.C.A. Thus, it can reasonably be inferred that the P.S.C.A., when it was passed, effectuated the repeal of section 18(a) of the 1933 D.P.A.

There is another possible interpretation of the P.S.C.A. which, if employed, will result in an opposite conclusion. The P.S.C.A. may be interpreted as providing only the means by which a professional service may incorporate. Since the P.S.C.A. does not enumerate the professional services includable in its provisions, it may be inferred that the Act only intended to provide a means by which a professional service may incorporate, and not to change the law as to *which* professions may operate as a corporation.

This interpretation, however, is inconsistent with the language of section 415-4 which states that: “[T]he provisions of this Act shall take precedence over any law which prohibits a corporation from rendering *any type* of professional services.”<sup>26</sup>

Since, when construing a statute, every word used by the legislature must be given effect, it seems clear that the Illinois Legislature intended to include the dental profession within the provisions of the P.S.C.A. Dentistry is a profession as defined by section 415-3.4,<sup>27</sup> and as such, should not be excluded from the operation of the P.S.C.A.

Therefore, it must be concluded that this latter interpretation is inconsistent with the general legislative purpose to allow *any type* of professional service to operate as a corporate entity.

<sup>23</sup> *Id.* § 23.15.

<sup>24</sup> *Id.* § 23.14.

<sup>25</sup> ILL. REV. STAT. ch. 32, § 415-4 (1971).

<sup>26</sup> *Id.* (emphasis added).

<sup>27</sup> ILL. REV. STAT. ch. 32, § 415-3.4 (1971) provides that:

‘Professional Corporation’ means a corporation organized under this Act solely for the purpose of rendering one category of professional service and which has as its shareholders, directors, officers, agents and employees (other than ancillary personnel) *only individuals who are duly licensed by this State* to render that particular category of professional service . . . . (emphasis added).

Thus, it appeared that the legislature had expressed its intent to repeal, and had effectuated the repeal, of section 18(a) of the D.P.A.; and it may have been concluded that corporations could engage in the practice of dentistry following September 5, 1969. However, subsequent legislative action seems to indicate that the law with respect to dentistry has again changed direction.

#### SECTION 18(a) OF THE DENTAL PRACTICE ACT REVIVED

As was previously stated, the amendatory act of 1933 changed the 1909 Medical and Surgery Act by incorporating therein the provisions of section 18(a) making it unlawful for any person or persons to practice dentistry under the name of a corporation, company, association or trade name. In 1969, the P.S.C.A. was approved, and thus the law appeared to be settled that corporations could engage in the practice of dentistry in Illinois.

In 1972, however, the Illinois Legislature approved Public Act 77-2713, "An Act to amend Sections . . . 18(a) of 'An Act to regulate the practice of dental surgery and dentistry in the State of Illinois . . .'"<sup>28</sup> This amendatory act was passed solely to conform the penalties established in section 18(a) of the D.P.A. to the Uniform Code of Corrections. The substantive provisions of the 1933 Act remained unchanged. Rules of statutory construction seem to indicate that by amending the D.P.A., the legislature has *reenacted* the law prohibiting incorporation by dentists, and has *repealed* that part of the P.S.C.A. which gave dentists the right to incorporate.<sup>29</sup>

The reenactment of a statute which has been repealed . . . by implication from later legislation upon the subject matter invalidates the previous repeal and restores the statute to effective operation. Likewise, where a statute has been amended and changed by a later enactment, the reaffirmation of the statute in its original form operates to repeal any inconsistent amendments and modifications which have been engrafted upon the statute since its original enactment . . . .

The reenactment of a statute is a continuation of the law as it existed prior to the reenactment insofar as the original provisions are repeated without change in the reenactment. Consequently, an intermediate statute which has been superimposed upon the original enactment as a modification of its provisions is likewise not repealed by the reenactment of the original statute, but is construed as being continued in force to modify the reenacted statute in the same manner that it did the original enactment. However, this immunity from repeal is extended only to those

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<sup>28</sup> P.A. 77-2713, § 1, *eff.* Jan. 1, 1973.

<sup>29</sup> SUTHERLAND, *supra* note 19, § 22.22 provides that: "On the basis that the latest declaration of the legislature prevails, the inconsistent provisions of the prior statute . . . are treated as repealed."

provisions of intermediate acts which are consistent with the reenactment, and therefore, *any provisions in the intermediate act which are inconsistent with the reenactment are repealed.*<sup>30</sup>

Thus, to the extent that the P.S.C.A. repealed the 1933 D.P.A., the P.S.C.A. is repealed and the D.P.A. reinstated. That is to say, section 415-4 of the P.S.C.A. which gave "any type" of professional service the right to incorporate is repealed to the extent that it allowed dentists to incorporate. Public Act 77-2713 recites verbatim the language of section 18(a) of the D.P.A. except as to the prescribed penalties; and it is obvious, as was suggested earlier, that the language of the P.S.C.A. is entirely inconsistent with the prohibitions of the D.P.A. Thus, in light of the 1972 reenactment of section 18(a), the P.S.C.A. no longer affords to dentists the authority to incorporate.

Since amendatory statutes will not be given retroactive effect unless a contrary legislative intent is shown,<sup>31</sup> and since no contrary intent is shown here, the amendatory act should not affect those dentists who have incorporated prior to January 1, 1973, the effective date of the 1972 Act. However, it is now well-advised to counsel dentists not to incorporate until further legislative action has been taken.

#### *The Constitutionality of Public Act 77-2713*

As was noted earlier, the original section 18(a) of the D.P.A. withstood attack as being special legislation in the case of *Winberry v. Hallihan*.<sup>32</sup> The Illinois Supreme Court recognized that such regulation was within the police power of the state legislature and that the legislature was not compelled to treat all classes of professionals alike.

It should be noted that when the *Winberry* case was decided, there were no statutes either authorizing or prohibiting doctors, optometrists, etc., from incorporating. Thus, the Illinois Supreme Court had little difficulty in holding that the Act was not special legislation.

Today, *all* professional services may incorporate except those engaged in the practice of dentistry or dental surgery. Public Act 77-2713 prohibits dentists from incorporating. The prohibitory statute was reenacted subsequent to the passage of the general statute, the P.S.C.A., which affords "any type" of professional the right to operate in corporate form. Therefore, a judicial attack under Article IV section 13 of the 1970 Illinois

<sup>30</sup> *Id.* §§ 23.28-23.29 (emphasis added).

<sup>31</sup> E. CRAWFORD, *THE CONSTRUCTION OF STATUTES* 622 (1940 ed.).

<sup>32</sup> 361 Ill. 126, 197 N.E. 552 (1935). See text accompanying note 5 *supra*.

Constitution<sup>33</sup> may be warranted. Though a strong presumption prevails as to the constitutionality of a statute, a judicial attack upon Public Act 77-2713, now chapter 91, section 72(a) of the Illinois Revised Statutes, may be successful in securing a judicial determination that the prohibitory legislation is arbitrarily discriminating.

#### CONCLUSION

As was mentioned at the outset, the question of whether dentists may legally operate in corporate form must finally be resolved either by further legislative action or by judicial construction, once the 1972 reenactment is constitutionally tested. Until either of those two events occur, the status quo seems clear — dentists may not operate in the corporate form in Illinois.

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<sup>33</sup> ILL. CONST. art. IV, § 13 (1970) provides that:

The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter of judicial determination.