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Injunctions

UNLICENSED PRACTICE OF LICENSED TRADE, ART OR PROFESSION

Right of Licensed Practitioner to Enjoin Such Activity

Three decades ago the right of an individual licensed practitioner to enjoin the unlicensed practice of his trade, art, or profession was a legal non-entity.\(^1\) In fact, equity would not act to prevent the unlicensed activity even when suit was brought against the encroaching offender by state and public officials.\(^2\) It made no difference what theory the plaintiff pleaded, refusal to give injunctive relief uniformly being based on the fact that the licensing statute made unlicensed practice a criminal offense, and thus provided adequate remedy at law.

The first rejection of the old concept occurred in 1931 when an Ohio court granted injunctive relief to an attorney against the illegal practice of law.\(^3\) The court reasoned that the members of the legal profession have an interest in their practice amounting to a property right in the nature of a franchise, which made the attorney a proper party to bring action for the benefit of the attorneys as a class. The existence of a penal statute prohibiting the unauthorized practice of law did not provide an adequate remedy so as to bar equitable relief.

As might be expected, there has been subsequent disagreement as to whether the individual licensee has the right to restrain the unlawful practice of his trade, art, or profession. Two recent cases reaching opposite conclusions are illustrative of the current conflict on this issue. The Supreme Court of Illinois decided in *Burden v. Hoover*\(^4\) that licensed chiropractors had a property right in their practice which would entitle them to secure equitable relief against the unlicensed practice of chiropractic. But in *New Jersey State Bar Ass'n v. Northern New Jersey Mortgage Associates*\(^5\) the Supreme Court of New Jersey held...

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4. 9 Ill. 2d 143, 137 N.E.2d 59 (1956).
5. 22 N. J. 184, 123 A.2d 498 (1956).
that while the bar association could enjoin the illegal practice of law, the individual attorney had no right to bring such an action. It is the purpose of this Note to explore where injunctive relief has been sought and to evaluate the rationale of the courts in either granting or denying relief.

The practitioner desiring injunctive relief must first establish the inadequacy of available legal remedies. Usually this is not difficult but in some instances injunctive relief has been denied on the ground that the statutory remedy provided in the licensing act afforded sufficient protection for the individual as well as the state. A brief survey of the available legal remedies, however, indicates their deficiencies. Damages would be highly speculative, and there would be no assurance of future protection if damages were recovered. The unlicensed party can be denied recovery for work unlawfully done but this affords no relief to the licensed practitioner. Since the primary purpose of these suits is to put an end to the unlawful practice, it seems apparent that an injunction is the only satisfactory judicial remedy. Although a regular criminal proceeding or a quo warranto action might accomplish the desired result, the time required to secure a favorable judgment makes both of these remedies less desirable.

The mere fact that the unlicensed activity constitutes a crime is not an absolute bar to equitable jurisdiction. As noted in several recent cases, a court of equity, while powerless to enjoin a crime as such, has inherent power to enjoin acts causing irreparable injury to property rights and acts equivalent to a public nuisance although these acts are also punishable as crimes. This concept has best been demonstrated in suits by the state or its agencies to enjoin unlicensed practices amounting to public nuisances. States or their licensing boards have been successful in enjoining the unlicensed operation of: an employment agency, a real estate brokerage, and a junk yard.

6 Arkansas State Board of Architects v. Clark, 291 S.W.2d 262 (Ark. 1955); People ex rel Shepardson v. Universal Chiropractors Ass'n, 302 Ill. 228, 134 N.E. 4 (1922) (overruled in part by Burden v. Hoover, see note 1 supra).


9 Smith v. Taylor, 289 S.W.2d 134 (Mo. App. 1956).

10 Schur v. Santa Monica, 300 P.2d 831 (Cal. 1956).


as well as the unlawful practice of dentistry,\textsuperscript{14} naturopathy,\textsuperscript{15} medicine,\textsuperscript{16} chiropractic,\textsuperscript{17} optometry,\textsuperscript{18} and plumbing.\textsuperscript{19} However, in other cases, injunctive relief has been denied in actions to enjoin unlicensed photography,\textsuperscript{20} unlicensed practice of architecture,\textsuperscript{21} barbering without a certificate of registration,\textsuperscript{22} and the unlicensed practice of chiropractic.\textsuperscript{23} The rationale followed when an injunction is granted is that the activity complained of amounts to a public nuisance and the legal remedy does not offer sufficient protection for the public interest.

Turning to the question of the individual’s right to enjoin the unlawful practice of a profession, the courts have followed three basic theories in granting relief to the complaining practitioner. By the first and most predominant theory, the license of the practitioner is considered as a franchise or property right which is entitled to equitable protection. The second theory treats the illegal practice as a public nuisance and allows the licensee relief upon showing his special injury. The third and least used theory is that the unlicensed party is an unfair competitor from whom the licensed practitioner is entitled to be protected.

The property right theory as presently accepted by many courts, was expressly rejected by several earlier decisions. The Indiana court refused to accept the franchise idea under any circumstances: “It cannot be held . . . that the right of any person to practice his or her profession, under a license issued pursuant to a statute enacted by the legislature . . . comes within any legal definition of a franchise.”\textsuperscript{24} In refusing equitable relief it was reasoned that the licensing statute provided a penal sanction which was considered to be an adequate remedy. Also,


\textsuperscript{15} State \textit{ex rel} McCulloh v. Polhemus, 51 N.M. 282, 183 P.2d 153 (1947).

\textsuperscript{16} Dean v. State \textit{ex rel} Board of Medical Registration and Examination, 233 Ind. 25, 116 N.E.2d 503 (1954).

\textsuperscript{17} Louisiana State Board of Medical Examiners v. Mooring, 86 So.2d 641 (La. 1956); \textit{contra}, People \textit{ex rel} Shepardson v. Universal Chiropractors Ass’n, supra, note 6.

\textsuperscript{18} Busch Jewelry Co. v. State Board of Optometry, 216 Miss. 475, 62 So.2d 770, \textit{cert. denied}, 346 U.S. 830 (1953).

\textsuperscript{19} Martin v. Thompson, 253 S.W.2d 15 (Ky. 1952).

\textsuperscript{20} Montana State Board of Examiners in Photography v. Keller, 120 Mont. 364, 185 P.2d 503 (1947); Matthews v. Lawrence, 212 N.C. 537, 193 S.E. 730 (1937).

\textsuperscript{21} Arkansas State Board of Architects v. Clark, 291 S.W.2d 262 (Ark. 1955).

\textsuperscript{22} Richmond v. Miller, 70 N.D. 157, 292 N.W. 633 (1940).

\textsuperscript{23} State v. Maltby, 108 Neb. 578, 188 N.W. 175 (1922).

\textsuperscript{24} State v. Green, 122 Ind. 492, 14 N.E. 352, 357 (1887).
since the licensing statute was enacted for the public welfare, any benefit to a licensed practitioner was thought to be only incidental. "The circle of competition may be narrowed by excluding unlicensed competitors, but that is not the purpose of the law."25

This restrictive view was rejected in the leading case of Dworken v. Apartment House Owners Ass’n,26 the first case to grant injunctive relief on the application of an individual licensed practitioner. An attorney’s right to practice law was held to be a property right similar to a franchise and entitled to equitable protection. Shortly thereafter a similar franchise property right was recognized in granting injunctive relief to a licensed physician despite the fact that the unauthorized activity amounted to a public offense.27

Some courts have had difficulty accepting the franchise theory because of the notion that a franchise must be exclusive to merit equitable protection. In one of these cases it was admitted that lawyers enjoy a franchise but it was held that a license to practice chiropody was not a franchise.28 The court also referred to the licensing statute involved, stating that it was not enacted for the benefit of the licensees. To the contrary, however, it has been implied that the only proper party to bring suit is the individual practitioner, because he is the only party whose property rights are being violated. Neither the state nor the association has any property rights in the matter. Therefore, the court concluded that only individual optometrists had full capacity to bring suit to enjoin the unlawful practice of optometry.29

Some courts have granted injunctive relief on the basis of the franchise alone without definitely holding it to be a property right.30 As stated in an Illinois case, "... an attorney is the proper party to bring the suit, and ... an injunction is the proper remedy for the unauthorized practice of law."31

Other courts have not been so liberal in granting relief, placing a strict interpretation on those licensing acts which do not expressly allow anyone other than the public authorities to prosecute a violation. In an interesting discussion of this attitude, the New Hampshire Supreme Court pointed out that,

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30 Depew v. Wichita Retail Credit Ass’n, 141 Kan. 481, 42 P.2d 214 (1935); Paul v. Stanley, 168 Wash. 371, 12 P.2d 401 (1932).
"The rights of the individual plaintiffs are to be ascertained first by a construction of the statute, and secondly by equitable principles. After examining the statute in order to discover whether the licensees were given any new rights or any right to freedom from competition by unlicensed persons, the court held that the individual plaintiffs had no property rights and no right to bring suit.

One of the more recent cases which refused to grant relief approached the problem from a slightly different tack. While acknowledging the older concept of franchise, the court set forth its current view:

The more recent attitude here has been that admission to our bar is a privilege granted in the interests of the public to those who are morally fit and mentally qualified, solely for the purpose of protecting the unwary and the ignorant from injury at the hands of persons unskilled or unlearned in the law . . . .

In holding that the individual attorneys had no standing to maintain an action for injunctive relief, the court also referred to the licensing statute enacted for the benefit of the public. "[T]he licensing of law practitioners is not designed to give rise to a professional monopoly . . . ." A somewhat similar rationale was followed in another recent case involving optometrists where it was held that there was nothing in the licensing act which could be construed to give the individual licensed optometrist the right to maintain an action, because the act was concerned primarily with the public welfare. Adopting the same line of reasoning, an Oklahoma court declared that the county attorney was the only party qualified to bring suit to enforce the "healing arts acts." Thus, it seems that the reasoning of the New Hampshire court is gaining ascendence in several jurisdictions.

This trend is not universally accepted, however: a recent Illinois decision granted injunctive relief against the unlicensed practice of chiropractors, stressing the importance of the plaintiff's property rights and noting, too, the benefit to the public resulting from the injunction. The court made it clear that: " . . . whether the right to practice the profession be called a franchise, a license or a privilege, it is certainly a valuable in-

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37 Burden v. Hoover, 9 Ill. 2d 143, 137 N.E.2d 59 (1956).
terest that should, in justice, be entitled to protection."

To sum up, there is a definite conflict among the jurisdictions as to the validity of the franchise rationale and the propriety of granting injunctive relief to the aggrieved individual practitioner. In view of the constant expansion of equity jurisdiction, which now includes personal rights among the subjects meriting injunctive protection, there should be no objection to the granting of relief to the licensee whether his license is considered a franchise, a property right, or a mere privilege. As illustrated by the reasoning of the stricter jurisdictions, however, it seems logical to look at the statute conferring or qualifying the right to practice the art or profession in question, in order to ascertain its beneficial object and consequent location of the power of enforcement.

The second theory followed by the courts in granting injunctive relief considers the unlicensed activity as a public nuisance and permits the licensee to obtain an injunction upon showing special injuries. It is obvious that the plaintiff proceeding under this theory has a more difficult case to prove because mere violation of a statute is not always nuisance per se. In addition, it sometimes is difficult to prove special injuries in a case of this nature.

Usually the unlicensed practice of the healing arts is found to be a public nuisance because of the possible danger to the public health and welfare if untrained and unskillful persons are permitted to engage in such practice. Several courts, however, have refused to enjoin the lawful practice of the healing arts if no actual peril is shown. Some decisions have held that since the statute was enacted for the public benefit, the individual practitioner has no special rights and must prove his special damages just as an ordinary plaintiff must in order to secure injunctive relief. Outside of the healing arts, unlicensed activity usually does not amount to a public nuisance. Public officials and professional associations have been refused relief in their attempts to enjoin the unlicensed practice of architecture.

38 Id. at 62.
40 Several states have passed statutes which provide that a person who violates the law requiring a license for practice of his profession can be restrained by permanent injunction. The statutes generally specify the proper parties to bring such an action, ARIZ. CODE ANN. § 67-1107 (e) (Supp. 1952); IOWA CODE § 147.83 (1954), held valid in State v. Fray, 214 Iowa 53, 241 N.W. 663 (1932); ORE. REV. STAT. § 677.040 (1953).
41 People ex rel. Bennett v. Laman, 277 N.Y. 368, 14 N.E.2d 439, 444 (1938).
42 E.g., Dean v. State, 151 Ga. 371, 106 S.E. 792 (1921).
43 Arkansas State Board of Architects v. Clark, 291 S.W.2d 262 (Ark. 1956).
photography, chiropractic, barbering, and veterinary.

The usual policy of the courts in these cases is to consider both the importance of complainant’s property right and the harmful effect of the unlawful activity on the public rather than to decide on one factor alone. Actually the inexact terminology often used by the courts makes it difficult to determine whether a particular decision is based on the franchise or the nuisance theory or a combination of the two.

The third rationale suggested by the courts is that a licensed practitioner has an interest in his practice which should be protected from unfair competition by unlicensed practitioners. Although this theory is seldom utilized, it appears to be valid when viewed in the light of other unfair competition cases. Its infrequency probably is due to the fact that the courts which recognize the property right theory in effect protect the licensee from unfair competition when they enjoin the unlicensed activity. Undoubtedly the courts believe that it is unnecessary to go any further than recognizing the property right when that alone furnishes a sufficient basis for injunctive relief.

In granting an injunction to licensed optometrists, a Michigan court stated the unfair competition theory concisely:

Suit may be brought by parties engaged in a profession or business to enjoin unfair trade and practice which would be injurious to their interests, and the fact that such practices are punishable by criminal penalties is immaterial.

An attorney was refused relief in another case because he failed to allege any unlawful competition. It seems that this theory is more reasonable than the property right theory, for it requires proof of adverse effects on the licensee before relief is granted rather than basing recovery on the mere fact of a technical infringement such as was done in several property right cases.

After noting the various cases granting injunctive relief against the unauthorized practice of the professions, trades, and arts it is clear that this form of equitable relief is highly desirable for many reasons. It prohibits the unlawful activity immediately and permanently, in some instances even before

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45. People ex rel. Shepardson v. Universal Chiropractors' Ass'n, 302 Ill. 228, 134 N.E. 4 (1922).
47. Missouri Veterinary Medical Ass'n v. Glisan, 230 S.W.2d 169 (Mo. 1950).
the offense has actually been committed. The rapidity with which a violater of an injunction can be punished acts as an extremely effective deterrent to continued unlawful activity. Since in many cases there is no punishment if the restraining order is obeyed, equity puts the offender in a better position than a criminal proceeding which carries with it the penalty of fine or imprisonment. A criminal action is not barred by the equity proceedings, but normally no criminal prosecution follows if the offender ceases his unlawful practice.

The most notable disadvantage of granting equitable relief is the denial of a jury trial for the offender, not only at the time the injunction is granted, but also during any prosecution for violation of the injunction. Another fault is present if a civil rather than a criminal contempt proceeding is instituted: the special immunities and evidence requirements of a criminal trial are bypassed.

These advantages and disadvantages are equally applicable to actions brought by individuals, associations, or governmental agencies. One manifest danger in permitting individuals to enjoin unlicensed practice is that the defendant may be subjected to unwarranted harassment by a litigant motivated by purely personal reasons.

As pointed out in some decisions, allowing the individual the right to enjoin violations of the licensing act endows him with a quasi-monopoly. Oftentimes the injury complained of is slight or nonexistent and there has been no harm to the community, but the licensee is permitted to enjoy an exclusive competitive position. Of course, in a large number of cases the public has benefited from the injunction granted to an individual because the unlawful activity was actually harmful. Moreover, an individual practitioner is more likely to know about any unauthorized practice because it affects him more directly than it affects the public officials.

A possible solution to the conflict of interests inherent in this problem would be to permit the individual practitioner to file a complaint with the board of licensors for their consideration. Then the board could hold an informal hearing to determine whether the matter merited taking legal action. If the board decided there was sufficient evidence of a violation, it would bring the action itself, with a greater possibility of success than the individual would have because there would be no need to prove special injuries. On the other hand if the board decided against any action, the individual practitioner should not be permitted to bring suit unless it can be shown that the board was lax and negligent in performing its duties or that the board acted arbitrarily in refusing to consider the complaint.

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