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## **Percentage Contracts Found Illegal in New York and Illinois**

By Editorial Staff

### **Illinois**

The case was *E & B Marketing Enterprises, Inc. v. James W. Ryan, M.D.* The case was heard on appeal in the First District (2nd Division) court of appeals. The opinion was filed February 5, 1991.

Dr. James Ryan entered into a contract with E & B Marketing. E & B was to help market Dr. Ryan's practice and gain patients in exchange for "a consultant's fee of 10 percent on all billings collected by [Ryan] in connection with such referrals."

Dr. Ryan refused to pay E & B Marketing, who filed a collection suit against him. The court voided the contract and E & B appealed. The appellate court found that this type of "fee-splitting" was in violation of the Medical Practice Act in Illinois. It also found that the method of payment to E & B "had no effect on the illegality of the underlying fee-splitting contract" (209 Ill. 3d 626).

Finally, the court found that the contract violated public policy. The contract required Dr. Ryan to pay E & B a percentage of his fees for surgery, physical therapy, and other services rendered. In its opinion, the court cited a statement from a previous case (*Marvin N. Benn & Associates, Ltd. v. Nelsen Steel & Wire, Inc.* 1982, 107 Ill. App. 3d 442, 446, 437 N.E.2d 900):

"An agreement is against public policy if it is injurious to the interests of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or is at war with the interests of society or in conflict with the morals of the time."

Larry Beard, an Illinois attorney who represents over 100 chiropractors who have filed lawsuits against Practice Management Associates, Inc. (PMA), was asked what effect this case could have on the litigation that his clients have filed against PMA in Illinois:

"We expect that this case will have major implications. We have always maintained that the state of Illinois has had a statute which prohibited doctors from splitting their fees with anyone. We feel that this will cause those contracts to be both illegal and unenforceable. We were delighted with the courts reasoning which places the emphasis on the needs of the patients.

"It appears that any chiropractor with a PMA contract may be violating the Medical Practices Act if they continue to split their fees with PMA. It is clear that chiropractors are not allowed to give non-treating entities a percentage of their fees."

When Dr. Peter Fernandez, D.C., President of PMA, was asked how the finding of this case would effect the lawsuits filed by his former clients against PMA, he stated:

"You asked me to advise you of PMA's position regarding the relevance of the Illinois Appellate Court's recent decision in the E & B Marketing Enterprises vs. Ryan. PMA does not believe this decision should have any impact on its business or its contracts with its clients.

"The case, which of course applies only to doctors with offices in Illinois, merely holds that a company cannot recover compensation from a doctor in return for obtaining specific patient referrals for the doctor. PMA is not in the business of obtaining specific patient referrals, and so is not compensated for any specific patients referred to its clients. PMA furnishes chiropractic office management consulting services and is paid either by flat fee, or in proportion to the success of its clients' entire business. Its contracts expressly provide that "PMA receives no specific share of patients' fees ... [and] does not and will not enter into the referral, diagnosis, or treatment of any of [PMA's clients] patients ... Indeed, the United States District Court in Atlanta, Georgia recently relied on this language in PMA's contracts in rejecting arguments that these contracts were unlawful "fee-splitting" arrangements. The United States District Court in Santa Ana, California similarly ruled that PMA's contracts are not unlawful "fee-splitting" arrangements because PMA's clients do not get patients referred to them by PMA.

"If PMA's contracts were forbidden merely because it receives payments from doctors for rendering non-medical services to them, the same reasoning would invalidate every contract between a doctor and any vendor of non-medical services, such as accountants, lawyers, and janitors. This would of course be absurd. Common sense dictates that there is nothing improper in PMA's being compensated in proportion to the benefits its clients receive from PMA's management consulting services. The E & B Marketing case does not hold otherwise."

Michael J. Schroeder, Esq., one of the few attorneys to ever represent chiropractors against PMA and gain an acceptable settlement, stated:

"This ruling simply confirms what many legal commentators have been saying for years, that practice management contracts which take a percentage of a doctor's gross collections necessarily involve professional fee-splitting. As the Illinois Court held, these sorts of contracts are void or voidable in most states. Any Illinois chiropractor who finds themselves party to a percentage contract should seek independent legal advice."

### **New York**

On April 2, 1991, the Florida Circuit Court for Pinellas County granted a request for summary judgment made by a New York chiropractor who is being sued by PMA in Florida. The court ordered that:

"The practice starter agreement is null and void under New York law (Education Law S6509-A, McKinney's Consolidated Laws of New York, Annotated) because it constitutes illegal fee splitting."

While the Florida court has found the PMA contract void for all New York chiropractors, PMA has argued that it still should be paid for the value of the services it provided to its client (quantum meruit). In order for PMA to receive any payment on its contracts with New York chiropractors, PMA will have to prove in court the actual value of its services.

PMA has appealed the summary judgment. The appellate court probably won't hear the case before November 1991.

According to Jean Simons, Esq., a Florida attorney who represents over 120 PMA clients as well as the New York chiropractor who won the summary judgment:

"New York has strict fee-splitting statutes which have been well supported by the New York courts. The Florida court has recognized the right of New York to regulate medical practices within that state by granting this summary judgment declaring the PMA percentage contract invalid for a chiropractor who practices in New York."

### **Conclusion**

With the issue of the legality of percentage contracts being argued by almost 500 former PMA clients in courts across the country, it appears that some states in fact may have laws prohibiting such contracts. In addition to Illinois and New York, Minnesota, Wisconsin, and many other states may also outlaw percentage contracts as illegal fee-splitting.



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