empting language of section 102 (subd. 12[f]). (See *Matter of the City of Lackawanna v. State Board of Equalization and Assessment*, 21 A.D.2d 318, 321, 250 N.Y.S.2d 369, 371.) In this test the evidence dictates a finding that the cost of disassembly and relocation of the system on any tax status date in issue would be economically impractical.

The Court grants respondents' cross motion and finds that both the disputed cold storage area and equipment described on the assessment cards of the respondent board of assessors are assessable.

100 Misc.2d 542

PEOPLE of the State of New York

v.

Samuel J. ROTH, M.D., Spyros Karas, M.D., Joel Karen, M.D., S. Peter Ravitz, M.D., Barry Schwibner, M.D., Frank Oliveto, M.D., Frank Hudak, M.D., Seth Kaufman, M.D., and Surgical Specialties Association of New York, Inc., Defendants.

Nassau County Court.

Aug. 10, 1979.

Individual physicians and one surgical association were indicted for combining in restraint of furnishing of services, in violation of the Donnelly Act. On a motion for dismissal, the County Court, Marie G. Santagata, J., held that all indicia of professionalism noted by Court of Appeals, in opinion interpreting Donnelly Act, applied equally to medicine as to law, and the Act did not apply to practice of medicine.

Motion granted to extent of dismissing indictment on grounds of exemption from Donnelly Act; in other respects motion denied as moot.

1. Courts ⇐91(1), 92

Considered reasoning of court of final resort on proposition raised by counsel and deliberately passed on by court is not mere dicta but must be taken by courts of inferior jurisdiction as binding.

2. Monopolies ⇐12(11)

All indicia of professionalism noted by Court of Appeals in opinion interpreting Donnelly Act, applied equally to medicine as to law, and Act did not apply to practice of medicine. General Business Law §§ 340, 340, subd. 1, 341; Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; Education Law §§ 130, 131.

3. Constitutional Law ⇐70.1(7)
Monopolies ⇐12(11)

Conduct of physicians, in their concerted refusal to deal, was in nature of boycotts, and was reprehensible notwithstanding what might be valid complaints of physicians against applications of Workmen's Compensation Law and No-Fault Insurance Law, but remedy was within the legislative, not judicial, province. General Business Law §§ 340, 340, subd. 1, 341; Workers' Compensation Law § 13–b; Insurance Law § 678.

Robert Abrams, Atty. Gen. of the State of New York, New York City, John M. Desiderio, Asst. Atty. Gen., Chief, Anti-Monopolies Bureau, New York City, for the People of the State of New York.

Kostelanetz & Ritholz, New York City, Kase & Druker, Mineola, for defendant Kaufman.

Weingard & Broudny, New York City, for defendants Ravitz and Schwibner.

Harvey Paticoff, New York City, for defendant Karen.

O'Brien & Keefe, Rockville Centre, for defendant Oliveto.

Irving Anolik, New York City, for defendants Roth, Karas, Hudak and SSANY.

Kent, Masterson, Brown, Lexington, Ky., Mudge Rose Guthrie & Alexander, New York City, for amicus curiae, Association of America Physicians & Surgeons.

Andrews, Davis, Legg, Bixler, Milsten & Murrah, Inc., Oklahoma City, Okl., for amicus curiae, Private Medical Care Foundation, Inc.

LeBoeuf, Lamb, Lieby & Macrae, New York City, for amicus curiae, Medical Society of the State of New York.

MARIE G. SANTAGATA, Judge.

This is a motion by the defendants for an order dismissing this indictment pursuant to Criminal Procedure Law Section 210.20.

The defendants are charged with a Combination in Restraint of the Furnishing of Services, in violation of the Donnelly Act, General Business Law §§ 340, 341. There are eight individual-physician defendants and one association defendant, Surgical Specialties Association of New York, Inc. (hereinafter "SSANY").

The indictment charges the defendants, *inter alia*, with "concertedly resigning their authorizations to treat non-emergency Workmen's Compensation patients, and concertedly refusing to treat non-emergency No-Fault patients."

Amicus curiae briefs in support of the motion have been submitted by the Medical Society of the State of New York, the Association of American Physicians and Surgeons, Inc., and the Private Medical Care Foundation, Inc.

FACTS

The facts are substantially undisputed.

The Workers' Compensation Law, Section 13–b, requires that only physicians authorized by the Compensation Board treat workers who are injured during the course of their employment. Fees are governed by a minimum fee schedule adopted by the Board. The No-Fault Insurance Law (Insurance Law Sec. 678) enacted by the Legislature in 1977 adopted the minimum fee schedule of the Compensation Board as the maximum fee schedule to be paid to physicians for the treatment of persons injured in automobile accidents.

In 1975 many physicians who were dissatisfied with the Compensation Board communicated their complaints to the Chairman of the Board and members of the Legislature. Individual physicians resigned from the Compensation panels. Their complaints included the failure of the Board to answer correspondence or authorize necessary treatment; the unreasonable delays or failure to approve payment of fees; the requirement of duplicitous paper work and coercion in forcing them to accept inadequate fees.

The defendant physicians and others organized SSANY in 1977 with the objective of urging the modification of the Compensation fee schedule and the elimination of administrative abuses from the system. As the efforts to obtain legislative action failed, the physicians concertedly agreed to resign their authorizations to treat work-related or automobile accident injuries. Over 250 physicians in the Long Island area became unavailable to render non-emergency medical aid to workers and accident victims. This situation prevails to this date.

The Attorney General of the State of New York, upon learning of the numerous complaints from residents who were refused medical services, commenced an investigation. This Indictment is the result of that investigation.

ISSUE

The defendants have advanced several arguments in support of this motion to dismiss the indictment.

This Court will consider the only one which is necessary to its decision. It is an issue of first impression, to wit: Is the medical profession exempt from the provisions of the Donnelly Act?

CONTENTIONS

The defendants contend that as members of a learned profession they are exempt from the provisions of the Donnelly Act (*supra*). They rely on the New York Court of Appeals decision of *Matter of Freeman*, 34 N.Y.2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480 (1974).

The Attorney General responds that the references to the Donnelly Act in *Freeman*

(*supra*) are dicta; that the Donnelly Act is the "Little Sherman Antitrust Act" (*State v. Mobil Oil Corp.*, 38 N.Y.2d 460, 381 N.Y.S.2d 426, 344 N.E.2d 357); and, therefore, this Court should be guided by the holding enunciated by the United States Supreme Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572.

SHERMAN ACT

The Sherman Act (the federal antitrust law) does not contain a specific exemption in favor of any profession. An analysis of the judicial application of the Act reveals that the Courts have not created an exemption in favor of any profession. Instead, Federal Courts have evaluated each case on its merits, using as a test a rule of reason to determine whether the activity was anti-competitive and an unreasonable restriction on interstate commerce, thereby constituting a violation of the Sherman Act. *National Society of Professional Engineers v. U. S.*, 435 U.S. 679, 691, 98 S.Ct. 1355, 55 L.Ed.2d 637; Handler, Antitrust in 1978, 78 Col.L.Rev. No. 7, pages 1363–74.

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788, 95 S.Ct. 2004, 44 L.Ed.2d 572, the Supreme Court stated that there is a heavy presumption against implicit exemptions. *U. S. v. Philadelphia Natl. Bank*, 374 U.S. 321, 350–1, 83 S.Ct. 1715, 10 L.Ed.2d 915. It gave neither blanket inclusion nor blanket exclusion to the professions, holding that the conduct of mandatory price-fixing was anti-competitive and an unreasonable restraint in interstate commerce, and therefore violative of the Act. The Court based its decision on the activity and not upon whether it was business, trade or profession. Because of the activity alleged herein, a concerted refusal to deal in the nature of a boycott, there is no doubt that if the Sherman Act were controlling in this case, it would mandate the denial of this motion. *American Medical Ass'n v. United States*, 317 U.S. 519, 63 S.Ct. 326, 87 L.Ed. 434; *United States v. Oregon State Bar*, D.C., 385 F.Supp. 507.

DONNELLY ACT

The Donnelly Act, New York's antitrust law which was enacted in 1899, is a codification of prior common law and statutory law. *In re Davies* (1901) 168 N.Y. 89, 61 N.E. 118. Presently it declares void and illegal against public policy "every contract, agreement, arrangement or combination, whereby . . . competition or the free exercise of any activity in the conduct of any business, or trade or commerce or in the furnishing of any service in this state is or may be restrained." General Business Law, § 340, subd. 1.

The Act does not contain a specific exemption in favor of any profession. The only judicial application of the Act to the professions is *Matter of Freeman*, 34 N.Y.2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480, which involved the question of whether a Surrogate, in fixing a fee, was unduly influenced by a minimum fee schedule of the local Bar Association. One of the parties asserted that a minimum fee schedule was regulated by the Donnelly Act. The Court of Appeals ruled on that issue without considering whether the conduct was proscribed under the Act but rather relying upon the distinction between the profession and a business or trade. It stated unequivocally a profession is not a business and therefore exempt from the provisions of the Donnelly Act.

In rendering its decision, it was aware of the lower Court holding in *Goldfarb*, D.C., 355 F.Supp. 491. It specifically distinguished the Federal decision, stating that the question presented dealt solely with the relationship of the State antitrust law to the statutory scheme for regulating the practice of law.

The Court concluded that neither by statutory language, legislative history or legislative intent did the Donnelly Act apply to the legal profession. It held that the legal profession was exempt from the Act.

[1] The considered reasoning of a court of final resort on a proposition raised by counsel and deliberately passed on by the Court is not mere dicta but must be taken by the courts of inferior jurisdiction as binding. The holding of the majority in *Freeman* (supra) is not dicta. *Matter of Freeman* (*supra*), concurring opinion Wachtler, J., 34 N.Y.2d at 12, 355 N.Y.S.2d at 343, 311 N.E.2d at 486.

[2] The issue before this Court is not distinguishable. There is no valid distinction in the interpretation of the Donnelly Act between the legal and medical professions. All the indicia of professionalism noted by the Court of Appeals clearly apply equally to medicine as to law (Educ. Law Arts. 130 & 131). *Matter of Freeman, supra*, 34 N.Y.2d p. 7, 355 N.Y.S.2d p. 338, 311 N.E.2d p. 482.

Historically, the Legislature did not intend that the medical profession be subject to the Act. (Report of the Special Committee to study the New York Antitrust Laws of the New York State Bar Association, Section on Antitrust Law 1957.) The statutory language limited the Act to any business or trade and the 1933 amendment that extended the Act to include service was not intended to include service rendered by the professions. (Bennett, The Recent Amendment to the Donnelly Act, 5 N.Y. State Bar Assn. Bulletin, 384, 389 [1933]). *Matter of Freeman, supra.*

Consequently, by virtue of the statutory language, legislative history and intent and the judicial interpretation of the Act, it is concluded that the medical profession is exempt from the Donnelly Act.

This Court has reviewed the rulings in *Matter of Green v. Attorney General*, N.Y. L.J., pg. 14, col. 2, 2/23/78, Supreme Court, Nassau County, Pantano, J. Index # 362 78; and *Matter of Hirschorn v. Attorney General*, 93 Misc.2d 275, 402 N.Y.S.2d 520. Neither ruling involved a criminal prosecution, but rather motions by potential witnesses to quash subpoenas issued by the Attorney General in connection with investigations under Sec. 340 of the General Business Law. These cases held quite properly that an investigation by the Attorney General into possible antitrust activity was a proper inquiry. It did not consider whether the physicians were subject to the provisions of the Donnelly Act and any such reference was pure dicta and not competent to overrule *Matter of Freeman, supra.*

CONCLUSION

[3] In this Court's view, the conduct of the physicians, the concerted refusal to deal, is in the nature of a boycott, and reprehensible notwithstanding what may be valid complaints. *State of New York v. Horsemen's Benevolent and Protective Association*, 55 A.D.2d 251, 389 N.Y.S.2d 868 (1976).

The concerted refusal to treat the injured and the maimed prevents those innocent victims from receiving medical care from the only ones qualified by training and education to render such care. There are no do it yourself kits" for those requiring orthopedic, plastic or neurological treatment. The social harm inflicted is immeasurable and outweighs any individual inequities. The public is made to suffer in what is essentially an economic battle—a fight over money, which is inconsistent with the physician's oath to humanity.

It is also important to note that an administrative agency or board cannot be permitted to function without an adequate review of grievances lodged against it.

This Court is without remedy. The Legislature is not so limited. The problem presented is far too serious to be ignored and should be addressed without delay.

Accordingly, the omnibus motion is granted to the extent that the Indictment is dismissed on the grounds that the medical profession is exempt from the Donnelly Act. In all other respects it is denied as moot.

100 Misc.2d 601

The PEOPLE of the State of New York

v.

Robert CARUSO, Defendant.

Supreme Court, Extraordinary Special and Trial Term, Kings County.

Aug. 10, 1979.

Defendant, who was indicted for second-degree grand larceny and presenting a false insurance claim, moved to dismiss