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OPINION	:	No. 84-805
of	:	December 20, 1984
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THE HONORABLE DON ROGERS, MEMBER OF THE CALIFORNIA STATE ASSEMBLY, has requested an opinion on the following question:

Does the sale of pharmaceutical products and devices to nonprofit clinics funded by the Office of Family Planning fall within the Section 13c exemption of the Robinson-Patman Act when such products are purchased for resale to Medi-Cal and "private pay" patients in competition with private pharmacies?

CONCLUSION

The sale of pharmaceutical products and devices to nonprofit clinics funded by the Office of Family Planning falls within the Section 13c exemption of the Robinson-Patman Act when such products are purchased for resale to Medi-Cal and "private pay" patients in competition with private pharmacies.

ANALYSIS

Under the Clayton Act, as amended by the Robinson-Patman Act, it is unlawful "to discriminate in price between different purchasers of commodities of like grade and quality . . . ." (15 U.S.C. § 13(a).) An exemption from this prohibition is provided for nonprofit organizations:

> "Nothing in section 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit." (15 U.S.C. § 13c.)

The question presented for resolution is whether this statutory exemption (also known as the Nonprofit Institutions Act; hereafter "section 13c") is applicable to the sale of pharmaceutical products and devices to a nonprofit medical clinic funded by the Office of Family Planning (hereafter "Office") where the products and devices are resold to patients of the clinic as part of the family planning services rendered. We conclude that it is.

The Office is statutorily responsible for providing "medical knowledge, assistance and services relating to the planning of families." (Welf. & Inst. Code, § 14501, subd. (a).) Such services include diagnosis, medical treatment, and the furnishing of contraceptive supplies. (Welf. & Inst. Code, § 14503.) The program is designed to serve those persons eligible to receive some form of public economic assistance. (See Welf. & Inst. Code, § 14503.)

The Office provides the services through public and private clinics with which it has contractual agreements. (See Welf. & Inst. Code, § 14501, subd. (i).) The Office funds approximately 150 clinics statewide for services rendered to income-eligible patients. Some of the clinics also receive federal and local government funds as well as private grants to cover their expenses.

The clinics limit their services to family planning matters. Their purpose is to provide a means by which women and men may determine the number, timing, and spacing of their children and to assist in reducing the incidence of maternal and infant morbidity and mortality by promoting the health and education of parents and potential parents.

Of all patients receiving family planning services at the clinics, 86 percent receive some form of general public assistance, 7 percent are Medi-Cal beneficiaries (for which the Medi-Cal program is charged), and 7 percent are economically ineligible for any

kind of government aid.[1] None of the persons are "walk-in" customers; each must be a current patient to receive the services offered including the furnishing of pharmaceutical supplies.

The controversy at issue centers primarily on the practice of one oral contraceptive manufacturer that sells its product to the clinics at a "special rate" negotiated by the Office. The manufacturer charges the clinics 60 cents for a patient's one-month supply, while charging local pharmacies $8.50 for the same product amount.

The question is limited to the patients who are Medi-Cal beneficiaries and those who are ineligible to receive any government aid. For both of these groups private pharmacies would be "in competition" with the family planning clinics in the dispensing of drugs. The Medi-Cal program reimburses the clinics for the pharmaceutical supplies dispensed to its beneficiaries in the same manner as it would any other private pharmacy. (See Welf. & Inst. Code, § 14105.7; Cal. Admin. Code, tit. 22, § 51513.) This reimbursement for the oral contraceptive in question is $9.95 for a one-month supply or, if less, the price normally charged the "public" by the clinic. The "public" here would be the private pay patients who are charged from $1 to $9 depending upon the clinic and product amount.

The income-eligible patients pay a "copayment fee" of from $2 to $10 (depending upon income and family size) for various types of services rendered including the dispensing of oral contraceptive supplies. For those clinics receiving federal funds, no charge is made to patients with incomes below the federal poverty level. The Office of Family Planning pays the clinics $4 for furnishing oral contraceptives (for a supply of 3 to 12 months) to income-eligible patients.

We first observe that the medical clinics are "charitable institutions not operated for profit." (§ 13c.) They are operated exclusively to provide medical treatment, promote health, and benefit the community as a whole, especially the needy, without profit or gain to private individuals. (See *De Modena* v. *Kaiser Foundation Health Plan, Inc.* (9th Cir. 1984) 743 F.2d 1388, 1391-1392; see also *Federation Pharmacy Services* v. *C.I.R.* (8th Cir. 1980) 625 F.2d 804, 807; *Northern Cal. Cent. Services, Inc.* v. *U. S.* (Ct. Cl. 1979) 591 F.2d 620, 626; *Lundberg* v. *County of Alameda* (1956) 46 Cal.2d 644, 649; *Scripps etc. Hospital* v. *California Emp. Com.* (1944) 24 Cal.2d 669, 675-676; *Santa Catalina Island Conservancy* v. *County of Los Angeles* (1981) 125 Cal.App.3d 221, 236.)

[1] These latter 7 percent are the "private pay" patients mentioned in the question. Some clinics only accept low-income patients.

The question may thus be reduced to whether the purchase of the oral contraceptive drugs by the clinics is "of their supplies for their own use" within the meaning of section 13c.

In *Abbott Labs* v. *Portland Retail Druggists* (1976) 425 U.S. 1 the United States Supreme Court analyzed this issue with regard to the purchase of drugs by nonprofit hospitals. It noted that prior court decisions had strictly construed exemptions from the Robinson-Patman Act. (*Id.*, at pp. 11-12.)[2] The court then took what it described as a "middle view" that while not all purchases would be exempt when made by a section 13c institution, the exemption was applicable where the use was "part of and promotes the [entity's] intended institutional operation." (*Id.*, at p. 14.) In the hospital setting, application of this test by the court allowed the exemption to cover drugs dispensed by the hospital to (1) inpatients for personal use in treatment at the hospital, (2) patients admitted to the hospital's emergency facilities for personal use in treatment there, (3) outpatients for personal use on the premises, and (4) physician staff, employees, medical students, and dependents of these members of the hospital "family" for their personal use. (*Id.*, at pp. 14-18.)[3]

In *De Modena* v. *Kaiser Foundation Health Plan, Inc.*, *supra*, 743 F.2d 1388, the Ninth Circuit applied the *Abbott* test to the purchase of drugs by a health maintenance organization (which provides medical care to its member subscribers in return for monthly dues):

> "In *Abbott Labs*, the Court generated its categorical rules by first determining the basic institutional function of a non-profit, fee-for-service hospital and then deciding which sales fit within this institutional function and which did not. Thus, to follow the true mandate of *Abbott Labs* we should not simply adopt the categorical rules set forth in that decision, but

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[2] The Robinson-Patman Act, however, has had its share of criticism, "both for its effects and for the policies that it seeks to promote." (*Jefferson County Pharm. Assn.* v. *Abbott Labs.* (1983) 460 U.S. 150, 170; see *Great Atlantic & Pacific Tea Co.* v. *FTC* (1979) 440 U.S. 69, 80, 83, fn. 16; *Automatic Canteen Co.* v. *FTC* (1953) 346 U.S. 61, 63, 74; *Standard Oil Co.* v. *FTC* (1951) 340 U.S. 231, 249, fn. 15; *Champaign-Urbana News, Etc.* v. *J.L. Cummins* (7th Cir. 1980) 632, F.2d 680, 688.)

[3] The fact that the resale price for the drug or other "supplies" is more than its purchase price is irrelevant for purposes of section 13c. The only issues in considering whether the exemption is applicable are (1) is it a section 13c institution by being both non-profit and charitable and (2) are these supplies for the institution's own use. (See *Abbott Labs.* v. *Portland Retail Druggists*, *supra*, 425 U.S. 1, 18-19, fn. 10; *De Modena* v. *Kaiser Foundation Health Plan, Inc.*, *supra*, 743 F.2d 1388, 1391-1394.)

should instead determine the basic institutional function of the Kaiser-Permanente Medical Care Program and then decide which sales are in keeping with this function.

"Health maintenance organizations (HMO's), such as Kaiser-Permanente, are designed to provide a complete panoply of health care to their members. [Citation.] Whereas fee-for-service hospitals provide health care on a temporary and usually remedial basis to their patients, HMO's provide continuing and often preventive health care for their members. [Citation.] Given this extra- ordinary broad institutional function, any sale of drugs by an HMO to one of its members falls within the basic function of the HMO. Consequently, we must conclude that drugs purchased by an HMO, such as Kaiser-Permanente, for resale to its members are purchased for the HMO's 'own use' within the meaning of the Nonprofit Institutions Act and thus qualify for protection under the act.

"We believe that this result is in keeping with the intent of the 75th Congress which drafted the Nonprofit Institutions Act. Although the exact intent of Congress is less than crystal clear from a reading of the legislative history, [citation], at least one Justice has concluded that the Act was passed because 'Congress was primarily interested in directly aiding nonprofit institutions by lowering their operating expenses, but not interested in indirectly aiding such institutions by providing them with the means of raising additional money.' *Abbott Labs,* 425 U.S. at 23, 96 S.Ct. at 1318 (Marshall, J., concurring). If that principle is applied to this case, it supports a finding that all drugs purchased by an HMO for resale to its members fall within the Nonprofit Institutions Act. There can be no question that allowing HMO's to purchase drugs that are resold to members at lower prices directly helps the HMO by lowering the operating expense it must incur to provide this aspect of health care to its membership." (*Id.*, at pp. 1393-1394, fn. omitted.)

In *Burge* v. *Bryant Public Sch. Dist. of Saline County* (E.D. Ark. 1980) 520 F.Supp. 328, 331-332, affd. on other grounds (8th Cir. 1981) 658 F.2d 611, the district court applied the *Abbott* test to the purchase of photographs by a public school:

"Applying this mode of analysis to the present case, we must conclude that just because Bryant School District is a nonprofit institution does not mean that any and all purchases made by or through it are exempt from the Robinson-Patman Act. Paraphrasing *Abbott Labs*, we must determine whether or not the photographic purchases involved herein were purchases

of supplies for their own use. In construing 'their own use', we must determine what reasonably may be regarded as use by the school in the sense that such use is a part of and promotes the school's intended institutional operation in the overall education of its students.

". . . . . .

". . . . The defendants advance a number of 'school purposes' including use of the photographs for school bulletin boards and importantly the formulation of a yearbook. It is true that the students make individual purchases for their own use and benefit. However, it cannot be ignored that the uses and purchases advanced by the school district are legitimate and serve important roles in the education of the students. The photographs are an intricate part of the annual yearbook, which is part of the curriculum within the defendant school district. The Court recognizes the harmonious and unifying impact which these photographic exercises and projects can have on the students (e.g. individual classrooms, service organizations, journalism students). At the very least, a dual 'purpose' or 'use' exists for these photographs, and the Court finds that there is sufficient use by the defendant school district so as to enable them to come within the purview of the Nonprofit Institutions Act and thereby be exempt from the alleged Robinson-Patman Act violation. The fact that there exists such a dual purpose does not *ipso facto* mean that the non-school purpose must be controlling on the question of whether or not the Nonprofit Institutions Act applied. To paraphrase the court in [*Logan Lanes, Inc.* v. *Brunswick Corporation* (9th Cir. 1976) 378 F.2d 212, 217; see *Abbott Labs.* v. *Portland Retail Druggists*, *supra*, 425 U.S. 1, 18-19, fn. 10] even if such other non-school use 'is substantial this does not necessarily establish that the purchases were not made for the use of the' school district."

In the setting of a family planning medical clinic, the dispensing of oral contraceptives is clearly "a part of and promotes the [clinic's] intended institutional operation." While not all purchases by the clinics would be exempt, such as for a thrift shop (see *Cedars of Lebanon Hosp.* v. *County of Los Angeles* (1950) 35 Cal.2d 729, 745-746) or for a book store where the books do not relate to family planning (see *Abbott Labs.* v. *Portland Retail Druggists*, *supra*, 425 U.S. 1, 18-19, fn. 10; *Student Book Company* v. *Washington Law. Book Co.* (9th Cir. 1955) 232 F.2d 49, 50-51, fn. 5), here the drugs are the primary means used in carrying out the charitable endeavor of the clinics. Furnishing

the drugs is the very reason for the existence of the clinics as "charitable institutions not operated for profit."[4]

The drugs, then, are the type of supplies that the medical clinics purchase "for their own use" under section 13c in performing their eleemosynary work. It makes no difference for purposes of the exemption that the patients are receiving public assistance, or Medi-Cal benefits, or are private pay patients.

In answer to the question presented, therefore, we conclude that the sale of pharmaceutical products and devices to nonprofit clinics funded by the Office of Family Planning fall within the section 13c exemption of the Robinson-Patman Act when such products are purchased for resale to Medi-Cal and private pay patients in competition with private pharmacies.

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[4] Whether the purchase and resale of the pharmaceutical products and devices by the clinics would also be outside the scope of the Robinson-Patman Act under an immunity theory because of the state's funding and involvement in this furnishing of medical treatment to indigents, a traditional governmental function (see *Jefferson County Pharm. Assn*. v. *Abbott Labs.*, *supra*, 460 U.S. 150, 153-154), is beyond the scope of this opinion.