



Issues related to Ownership of PT Practices in NJ

While the NJ State Board of Physical Therapy Examiners (BPTe) has not been permitted to regulate corporate practice, they have continually expressed great concern over this issue. Attempts at regulating corporate practice date back to their Sunset Review in 1996, when they were forced to reserve section of their proposed regulations. They again attempted to address this issue in 1997, when they drafted regulations on "Permissible business structures, prohibition on referral fees and fee splitting; professional misconduct".

All of these attempts were blocked at various points in the regulatory review process. The most frequent reason that the BPTe has been given for why action has been blocked is that the Division of Consumer Affairs is awaiting such a proposal from the Board of Medical Examiners, and all other boards should await their action as well.

This issue has now once again been brought to the forefront, due to multiple inquiries being made to the BPTe regarding ownership of PT services by Non-PTs. In addition, some payers are looking to exploit some apparent legal ambiguity on the matter, by challenging the business structure of some PT practices in NJ. We became aware of this trend in November of 2002, and brought this to the attention of the NJ Chapter of APTA.

These developments gave new impetus to address this issue, and we submitted a request for clarification of permissible business structure, as did APTANJ, to the NJ State Board of PT Examiners. Accordingly, at their meeting on 4/22/03, the BPTe acknowledged that, due to recent court rulings and the new Physical Therapy Statute, this issue merits new consideration. This position was again made clear when the Board acknowledged, in 4/04, that the laws in NJ are not silent on the issue of practice structure.

In March of 2004, we became aware of a new development regarding this ownership issue. A payer, Prudential Property & Casualty Insurance Company, has filed suit against a NJ PT practice to recover 6 years worth of reimbursement made to the practice. The basis of the suit is that this practice is illegally structured as an S-Corporation and includes a lay shareholder. We have had extensive discussions with counsel for this practice, and have been informed that the judge in this case may dismiss the count regarding the S-Corporation status. He is unlikely, however, to dismiss the count dealing with lay ownership, as this appears to be a clear violation of the NJ Professional Services Corporation statute.



Now, the NJ State of Medical Examiners has proposed rules that would recognize the Limited Liability Company (LLC) as a permissible form of practice structure for physicians. In this proposal, they make reference to existing laws, regulations, and court opinions on the subject, and make clear that the LLC "shall be composed solely of health care professionals, each of whom is duly licensed or otherwise authorized to render the same or closely allied professional service within this State."

Despite the lack of regulation by the BPTTE, there are a number of relevant facts to be considered in examining the issue of Non-PTs holding a financial interest in NJ Physical Therapy practices.

The newly revised PT Practice Act (P.L. 2003, c. 18) gives clear indications that the legislature intends for the BPTTE to regulate the employment arrangements of PTs and PTAs, as well as whether or not entities can engage in the practice of physical therapy. The law now states that only "natural persons" can engage in the practice of Physical Therapy, and be licensed to do so. (C. 45:9-37.13)

In addition, the law now clearly prohibits the, "division, transferring, assigning, rebating or refunding of fees received for professional services..."(C. 45:9-37.21). This provision does permit, "physical therapists who are members of a professional association or other business entity, properly organized pursuant to law, from making a division of fees among themselves...". The issue of properly organized entities will be addressed later in this summary.

The final relevant reference related to corporate practice in the new law, can be found at C.45:9-37.34e. It reads as follows:

"24. No person other than a natural person shall be licensed as, hold itself out to be licensed as, or practice as, a physical therapist or a physical therapist assistant. Every physical therapist or physical therapist assistant employed by a corporation or other business entity shall assume professional responsibility for the practice of physical therapy or acting as a physical therapist assistant that is provided under the auspices of the corporation or other business entity. The board shall establish regulations to effectuate the provisions of this section, which shall include, but shall not be limited to, a statement of the responsibilities of licensees under this section."

This provision allows the BPTTE to regulate how licensees will conduct themselves in situations where they are employed by an entity. In addition, it makes clear that there can be no avoidance of responsibility, or liability on the part of the PT, for the actions of the entity.



In reviewing this new law, it should be readily apparent that the legislature intends to increase the degree and reach of regulation regarding physical therapists and physical therapy practice.

The actions by the legislature are amplified by two particular court decisions over the past 3 years. Both of these decisions dealt with the organization of Chiropractic practices, but their principles are directly transferable to Physical Therapy practices as well. In order to fully understand these decisions, it is important to take into consideration the statute upon which they are based. This statute is commonly referred to as the Professional Services Corporation Statute, which is contained in Title 14A.

The most relevant portions of this statute are outlined below.

14A:17-3. Terms defined

3. *Terms defined. As used in this act, the following words shall have the meanings indicated:*

(1) *"Professional service" shall mean any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and which prior to the passage of this act and by reason of law could not be performed by a corporation. By way of example and without limiting the generality thereof, the personal services which come within the provisions of this act are the personal services rendered by certified public accountants, architects, optometrists, professional engineers, land surveyors, land planners, chiropractors, **physical therapists**, registered professional nurses, dentists, osteopaths, physicians and surgeons, doctors of medicine, doctors of dentistry, podiatrists, chiropodists, veterinarians and, subject to the Rules of the Supreme Court, attorneys-at-law;*

(2) *"Professional corporation" means a corporation which is organized under this act for the sole and specific purpose of rendering the same or closely allied professional service as its shareholders, each of whom must be licensed or otherwise legally authorized within this State to render such professional service;*

(3) *"Closely allied professional service" means and is limited to the practice of (a) architecture, professional engineering, land surveying and land planning and (b) **any branch of medicine and surgery, optometry, physical therapy, registered professional nursing, and dentistry;***

Review of this statute makes it clear that this law, as cited in the two court cases referenced below, applies not only to Chiropractic and Medicine, but Physical Therapy as well.



The first of these cases is "Liberty Mutual Ins. Co. v. Hyman (334 N.J. Super 400), decided June 26, 2000

The text of this decision contains the following:

"General Business Corporations cannot engage in the practice of medicine or chiropractic."

And:

"Chiropractors could only incorporate as professional services corporations."

In addition, it states that if a general business corporation were:

"deemed to be lawful, it will have succeeded in creating a health care practice structure that is capable of extraordinary abuse, yet free of regulatory oversight..."

Finally:

*"The Legislature has carved several statutory exceptions from this common law ban against the corporate practice of professional services to **permit hospitals, nursing homes and certain other 'ambulatory care' facilities to operate as general business corporations.** The rationale for this exception is that the adverse influences and countervailing interests peculiar to a business corporation are minimized and overshadowed by their public necessity, by a public need to assure institutional continuity, and by the fact that **such entities are regulated and inspected by the State Department Health and Senior Services.**"*

The obvious message in this case is that the State intends to regulate the practice of health care, and will not allow any setting or entity to avoid such regulation. As stated earlier, while the references made in this decision specify medicine and chiropractic, the statute serving as the basis for this decision includes physical therapists.

An identical opinion is rendered in the second case, Prudential Property and Casualty v. Greenberg, decided March 2, 2001.

The following comes from this decision:

"The practice structure of a general business corporation to perform medical services or chiropractic is contrary to the long-standing jurisprudence in this state and elsewhere holding that professional services such as law and medicine may not be practiced in the corporate format..."



Also:

"In Limongelli v. New Jersey State Board of Dentistry, 137 N.J. 317 (1993) the Supreme Court considered...the legality of a general business corporation to render dental services. Significantly, the court noted that a general business corporation cannot engage in the practice of dentistry. Id at 331. For the same reason, a general business corporation cannot engage in the practice of chiropractic.

Based on the totality of the information above, and in the absence of clarification from the NJ State Board of PT on the permissibility of PTs forming LLCs, it would appear that PT providers should not incorporate in any format other than a Professional Corporation (P.C.) or Professional Association (P.A.). In fact, it would appear that any practice already incorporated in a format other than a P.C. or P.A., might be considered to be illegally incorporated, and could be subject to sanctions by the State of NJ, or have their reimbursement challenged.

It must be stated emphatically that the information contained in this summary, and the opinions expressed herein, cannot and should not be construed to be legal advice. Such legal advice can only be obtained from a duly licensed and authorized attorney. The intent of this summary is to simply present information and references for formulating a professional opinion on the issue of ownership of PT practices in NJ.

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