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Legal Update

The Washington Supreme Court Issues a Decision in *Columbia Physical Therapy, Inc., P.S. v. Benton Franklin Orthopedic Associates, P.L.L.C., et al.*

By: Emily R. Studebaker

On March 18, 2010, the Washington Supreme Court issued a decision in *Columbia Physical Therapy, Inc., P.S. v. Benton Franklin Orthopedic Associates, P.L.L.C., et al.*, clarifying the application of Washington's corporate practice of medicine doctrine and Professional Service Corporation Act as well as Washington's Anti-Rebate Statute to certain healthcare arrangements.

Background

Columbia Physical Therapy, Inc. ("Columbia") is a professional service corporation owned by a group of physical therapists. It filed a lawsuit against Benton Franklin Orthopedic Associates, P.L.L.C. ("BFOA"), a professional limited liability company owned by physicians and employing physical therapists. The physician-owners of BFOA refer patients to physical therapists employed by BFOA. Columbia asserted that the arrangement violates the corporate practice of medicine doctrine and Professional Service Corporation Act, the Anti-Rebate Statute, and the Consumer Protection Act. The court rejected Columbia's claims, except for its claim under the Consumer Protection Act, which it remanded to the trial court for a determination of certain issues of fact. The court's analysis of Columbia's claims clarifies the application of these laws to certain healthcare arrangements.

Corporate Practice of Medicine Doctrine and Professional Service Corporation Act Claim

Columbia claimed that BFOA's employment of physical therapists violates Washington's corporate practice of medicine doctrine. The corporate practice of medicine doctrine provides that, absent legislative authorization, a business entity may not employ medical professionals to practice their licensed professions. The doctrine exists to protect the relationship between the medical professional and the patient. In *Columbia*, there was no dispute that BFOA was a physician-owned business entity that employed physical therapists. Applying the principles of the corporate practice of medicine doctrine, BFOA was engaged in the practice of medicine and physical therapy. Absent legislative authorization, such an arrangement would be impermissible. As the court explained, Washington does have such a legislative authorization.

In 1969, the legislature enacted the Professional Service Corporation Act ("PSCA")[1], carving out a narrow statutory exception to the corporate practice of medicine doctrine. Two provisions of the PSCA were central to the court's analysis. In RCW 18.100.010, the court explained, the legislature declared its intent in passing the PSCA "to provide for the incorporation of an

[1] See Chapter 18.100 RCW.

individual or group of individuals to render the same professional service" for which such individuals are required by law to be licensed (or obtain other legal authorization).[2] The court further explained, in RCW 18.100.050(1) the legislature authorized the formation of a professional service corporation by professionals "duly licensed or otherwise legally authorized to render the same professional services" for the purpose of rendering the professional service. From these provisions, the court concluded that the professional services for which a professional service corporation is incorporated, and in which it may therefore engage, are those for which the shareholders (or in the case of a professional limited liability company, members) are licensed. Therefore, the court explained that BFOA could not lawfully engage in any business other than the rendering of the professional service that its physician-owners were licensed to practice – medicine.

Thus, whether BFOA violated the corporate practice of medicine doctrine and the PSCA came down to a single question: did it engage in any business other than the practice of medicine? The court answered the question in the negative. Citing RCW 18.71.011(1), which defines the practice of medicine, the court concluded that physical therapy *is part of* the practice of medicine. By extension, the court concluded, it is part of the "same professional service" for which BFOA's physician-owners were licensed. Therefore, the court held that the PSCA authorizes physician employment of physical therapists. Since such employment violates neither the corporate practice of medicine doctrine nor the PSCA, the court rejected Columbia's claim.

Anti-Rebate Statute Claim

Columbia also claimed that the physician-members and the physical therapists of BFOA violated Washington's Anti-Rebate Statute[3] by receiving and paying unearned profits. Among other things, the Anti-Rebate Statute prohibits both paying and receiving anything of value, including unearned profits, in return for a referral of patients.[4] The purpose of the statute is to discourage unnecessary referrals, thereby lowering health care costs.

In *Columbia*, the physician-owners of BFOA referred patients to physical therapists employed by BFOA. They benefited from the referred services through the receipt of increased profits. The court determined that, absent an applicable exception, the arrangement violates the Anti-Rebate Statute, as any profit from the services rendered by the physical therapists would be considered "unearned" as to the referring physicians. This is because, under the Anti-Rebate Statute, a physician may receive compensation only for services rendered by that physician.[5]

Preliminarily, the court noted that the referring physician-owners provided their own professional services through the same entity as the physical therapists to whom they referred

[2] RCW 18.100.010.

[3] See Chapter 19.68 RCW.

[4] Wright v. Jeckle, 158 Wn.2d 375, 381, 379, 144 P.3d 301 (2006).

[5] RCW 19.68.040.

patients. Citing RCW 19.68.040 (which articulates the legislature's intent in enacting the Anti-Rebate Statute), the court stated that the statute was not designed to prohibit licensees practicing their profession together through a lawful business arrangement from receiving compensation for the professional services of other members of the firm. Consequently, the court explained, profits from professional services rendered by employees of a firm are not "unearned" by the owners, so long as the owners practice as part of that firm. Because the physician-owners of BFOA practiced as part of the firm employing the physical therapists, the court held that any profit the physician-owners received from their referrals to the physical therapists was not "unearned" and therefore did not violate the Anti-Rebate Statute.

Consumer Protection Act Claim

Lastly, Columbia claimed that BFOA violated the Consumer Protection Act ("CPA")[6] by engaging in practices that were unfair or deceptive. Specifically, it alleged that, when a patient advised his BFOA physician that he wanted a referral to a physical therapist at Columbia, the physician said he could not provide a referral anywhere other than BFOA's physical therapy facility. Columbia also alleged that a patient asked a BFOA physician where to go with his physical therapy referral, and the physician pointed to BFOA's physical therapy facility. The court held that, if proved, each of these acts might constitute an unfair or deceptive practice within the meaning of the CPA. Thus, even in the absence of any violation of the Anti-Rebate Statute, a physician who engages in "unfair or deceptive" practices when referring patients may nevertheless violate the CPA.

About the Author

Emily R. Studebaker focuses her practice on healthcare, counseling physicians and physician groups on a variety of legal matters, including regulatory compliance, business transactions and litigation of business disputes.

In the area of regulatory compliance, Ms. Studebaker counsels physicians on compliance with federal and state fraud and abuse laws, including the federal Anti-Kickback Statute and its safe harbors, the Stark Law and its exceptions, and related state self-referral laws. She also assists physicians in preparing and implementing corporate compliance plans designed to satisfy the requirements of the Federal Sentencing Guidelines and Office of Inspector General Guidelines.

For questions, please contact Emily Studebaker at estudebaker@gsblaw.com or (206) 816-1417.

[6] See Chapter 19.86 RCW.