

# New Jersey Law Journal

VOL. CLXXXIX—NO.3—INDEX 207

JULY 16, 2007

ESTABLISHED 1878

## HEALTH CARE LAW

### Structuring a Physical Therapy Practice

Physical therapy practices must be professional corporations owned by licensees

By David S. Barmak

A physical therapy practice must be set up as either a sole proprietorship or a professional corporation (PC). New Jersey physical therapy practices must not be owned, in part or in whole, by nonlicensed individuals. For example, nonlicensed spouses, grandparents, police officers and business people, among others, may not be owners.

An unpublished Superior Court decision held that it is violative of New Jersey statutes and regulations, as well as the New Jersey Corporate Practice of Medicine Doctrine, for a physical therapy practice to be incorporated under the New Jersey Business Corporation Act, (Business Corporation Act), N.J.S.A. 14A:1-1, et seq. *High Point Safety and Insurance Company et al v. SportsCare Institute, Inc. et al*, (unpublished), Docket No. MRS-L-03407-03 (March 16, 2006).

This case is important because many physical therapy practices in New Jersey do not comply: they are set up as gener-

---

*Barmak is with the Law Offices of David S. Barmak of Skillman. He represented SportsCare Institute, Inc. in the case discussed in the article.*

al business corporations under New Jersey Statutes Title 14A. One result of using a general business entity is that nonlicensees are under no duty to comply with professional regulations that protect the well-being of patients and physical therapy licensees.

In 1969, the New Jersey legislature adopted the Professional Service Corporation Act, (PSCA), N.J.S.A. 14A:17-1 to 18, which prohibits a business corporation from providing professional services. Physical therapy is included in the definition of a "professional service."

SportsCare Institute, Inc. was incorporated under The New Jersey Business Corporation Act, N.J.S.A. 14A:1-1, et seq., by the attorney hired to form the business entity. As set forth in N.J.S.A. 14A:2-1, in order to lawfully incorporate as a general business, the entity must not be permitted to incorporate under any alternative statute unless the alternative statute permits the entity to also incorporate as a general business corporation. This provision makes it clear that this statute does not apply if another statute controls the operation of the entity (e.g. Professional Service Corporation Act).

A physical therapist who wants to set up shop has two options: 1) set up the practice either as a sole proprietorship; or 2) as a professional corporation. A physical therapist operating as a nonincorporated entity may only be partners with another licensee. A professional corporation can only be comprised of

licensees. Nonlicensees may not be a part of the entity. Nothing, however, in either statute prohibits the formation of a marketing services organization (MSO), often an adjunct to a professional practice. An MSO must be a general business corporation.

One problem that often arises concerns the individual therapist who is employed by a physical therapy practice. Must the therapist set up a PC even when employed by the physical therapy practice? No, because the PSCA permits the therapist to operate as a sole proprietor. The therapist must have a contract between the therapist's sole proprietorship and the physical therapy practice that employs the therapist, but other than that, the therapist need not go any further.

An unlicensed owner of a business corporation cannot employ or supervise licensed professionals, such as physical therapists, because this arrangement necessarily involves fee splitting, which is prohibited by N.J.S.A. 45:9-37.21. The ramifications of this statute are multiple; a nonlicensee cannot share in the profits of the professional practice and the unlicensed owner of a corporation cannot employ or supervise licensed professionals, such as physical therapists.

The court in *High Point Safety* supported this proposition by referring to the New Jersey Administrative Code N.J.A.C. 13:35-6.16(f)(3)(i), which provides that a practitioner with a plenary license shall not be employed by a prac-

itioner with a limited license. The Court went on to cite the case of *Prudential Property & Casualty Insurance Company v. Midlantic Motion X-ray, Inc.*, 325 N.J. Super. 54 (Law Div. 1999), in which a chiropractor owned a mobile diagnostic testing facility and employed a plenary licensed physician to perform interpretations of testing. In that case, the court held that the provider and the service combination constituted a violation of the statute and thereby rendered them ineligible to receive payments for services rendered to patients seeking PIP benefits from motor vehicle accidents. In citing *Midlantic Motion X-ray, Inc.*, the court in *High Point Safety*, held that “[W]hile the regulations in cases deal with the interrelationship between unlicensed or licensed persons and plenary licensed persons in the medical field, certainly, the analogy can be carried over to the relationship between unlicensed persons and licensed physical therapists.”

Every physical therapist, whether employed by a practice or not, is considered to be operating his own individual practice. Fee sharing may only be accomplished pursuant to N.J.S.A. 45:9-37.21, which provides, *inter alia*, that for a physical therapist to share fees with an employing physical therapy practice, there needs to be two things in place: 1) a contract with the employer for purposes of sharing fees; and 2) licensed professionals must solely own the employer with whom the therapist is sharing his fees. The result is very simple and straightforward: the practicing physical therapist is not permitted to contract with a company organized improperly (see below) and is prohibited from entering into a contract with a nonlicensee to share revenue from his physical therapy services.

Many New Jersey physical therapy practices have lay ownership. What is the proper way to involve lay people with licensed physical therapists? The layperson may own a management service organization, (MSO), which provides, *inter alia*, office space, equip-

ment, supplies, nonlicensed personnel, and billing and collecting services. Payment for such services must be on a fee for service basis and *not* on a percentage basis. A percentage basis is particularly tempting because the potential revenue for the MSO is unlimited.

Licensed physical therapists are required to govern their conduct in accordance with New Jersey Board of Physical Therapy Examiners, regulations that are designed to protect the consumer. Nonlicensees often do not feel compelled to follow the board regulations because they believe that they themselves are not subject to the board's regulations.

There are multiple risks to the physical therapy practice that is either set up with lay ownership and/or incorporated as a general business corporation. The greatest risk is that a health insurance payer will seek restitution of all payments made and treble damages including counsel fees. Under the New Jersey Insurance Fraud Prevention Act, N.J.S.A. 17:33A-4(a) (1), a person or practitioner violates the act if he “Presents or causes to be presented any written or oral statement as part of or in support of a claim or payment or other benefit ... knowing that the statement contains any false or misleading information concerning any fact or thing material to the claim.” The Fraud Act provides that an insurance company can recover compensatory damages including attorney's fees and costs. Treble damages may also be recovered under certain circumstances.

The court in *High Point Safety* found unique facts that differed from existing New Jersey case law. The court found that *Material Damage Adjustment Corp. v. Open MRI of Fairview*, 352 N.J. Super. 216 (Law Div. 2002), which dealt with a facility that was not licensed at all was not on point because the case at bar dealt with a facility that was improperly incorporated and had an unlicensed owner acting together with two licensed owners. The court also found that *Prudential v. Greenberg*, an unpublished decision

by the same court decided by Judge Villanueva on Sept. 10, 2002, was not on point because that case dealt with just the issue of improper incorporation, whereas the case at bar had the additional issues of a nonlicensee as an owner of the physical therapy practice, his compensation and whether he violated the fee-splitting statute N.J.S.A. 45:9-37.21.

Risks abound for the attorneys who choose a business entity for clients and/or licensed physical therapists improperly, either with respect to ownership and/or practice structure. Attorneys leave themselves open to claims of malpractice if they select the wrong business entity. The measure of damages may be quite extensive if, as in *High Point Safety*, the insurance company seeks: (a) a return of monies paid to the improper entity; (b) a refusal to pay for any additional treatment to insureds even though the treatment was authorized; (c) punitive damages in fraud; and (d) attorney's fees and costs. The possible exposure to those claims against the client by the insurance carrier might then be foisted on the attorney who caused the problem simply by selecting the wrong business entity.

If a nonlicensee client's objective is to own a physical therapy practice, the attorney must advise the client that that objective can not be met under New Jersey law and regulation. The attorney certainly can propose a management service organization arrangement with the nonlicensee, owning the MSO as a general business corporation and contracting to provide nonprofessional services for the professional corporation that is solely owned by licensed professionals, *provided* that the parameters discussed above are carefully established and that the two business entities are clearly independent of each other.

Failing to recognize the multiple implications of the Professional Service Corporation Act may carry a high price tag. Whether you are dealing with physical therapists or other licensed professionals, this statute should be your first line of inquiry. ■