IN THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS AT HOUSTON

NO. 01-08-00324-CV

CRYSTAL CASSIDY, THE AMERICAN ACADEMY OF EMERGENCY MEDICINE, THE TEXAS ACADEMY OF EMERGENCY MEDICINE and RICHARD J. YBARRA,

Appellants,

v.

TEAMHEALTH, INC., TEAMHEALTH, P.A., MEMORIAL HERMANN HEALTHCARE SYSTEM, ACS PRIMARY CARE PHYSICIANS SOUTHWEST, P.A., AND TEAMHEALTH WEST

Appellees

On Appeal from the 80TH Judicial District Court of Harris County, Texas
Trial Court Cause No. 2007-39019

TEXAS MEDICAL ASSOCIATION'S *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT'S BRIEF

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

STATEMENT OF INTEREST

The Texas Medical Association ("TMA") submits this *amicus curiae* brief in support of Appellants' brief and urges the Court grant the relief it requests. The Trial Court's opinion on standing is problematic for physicians attempting to comply with Texas law, because it improperly restricts the use of a fundamental means of examining the legality of contracts suspected of violating the corporate practice of medicine prohibition, namely the civil court system through a declaratory judgment action.

Historically, TMA has been a staunch supporter of both the continued enforcement of the prohibition on the corporate practice of medicine and the compelling public policy foundation of that doctrine, which centers on promoting the highest standard of patient care by minimizing the conflicts of interests that are inherent when physicians face dual loyalties between patients and a corporate employer or master. In furtherance of its commitment to holding patient care as paramount over corporate financial interests and motives, TMA files this *amicus curiae* brief.

Amicus TMA is a private, voluntary, nonprofit association of Texas physicians and medical students. TMA was founded in 1853 to serve the people of Texas in matters of medical care, prevention and cure of disease, and improvement of public health. Today, its maxim continues in the same direction: "Physicians Caring for Texans." Its more than 43,000 members practice in all fields of medical specialization. It is located in Austin and has 119 component

county medical societies around the state. TMA's key objective is to improve the health of all Texans. Towards this end, TMA files this amicus curiae brief to underscore the importance of: (1) physician independence in rendering quality, conflict-free care to patients and (2) ascertaining the propriety and legality of contracts related to and affecting patient care.

TMA bears all costs associated with the preparation of this brief. No fee has been paid or is to be paid for this brief.

SUMMARY OF THE ARGUMENT

Under Texas law, physicians are required to satisfy certain licensure requirements in order to legally practice medicine within the state. These requirements are central to regulating the practice of medicine and to ensuring the public's trust in the profession. Importantly, only "persons" are eligible to obtain licenses to practice medicine in Texas. This goes hand in hand with the notion that only *individuals*, not corporations, are capable of meeting certain moral fitness requirements and of being appropriately disciplined by the state's regulatory body (i.e., the Texas Medical Board) for acts constituting the practice of medicine.

As a result of the Texas Legislature's clear and manifest intent to limit the practice of medicine to individuals and an express public policy goal of holding the patient's health interests above the financial interests of a lay corporation, the prohibition on the corporate practice of medicine was developed in Texas (with analogs in many other states). The prohibition on the corporate practice of

medicine was first acknowledged in Texas case law in 1956 and continues its strong tradition of promoting the independent medical judgment of physicians to this day.

In the case at bar, Appellants have raised the significant issue of the interpretation and application of the statutes from which the corporate practice of medicine prohibition has been incorporated into Texas law. More specifically, Appellants seek a declaratory judgment stating that Appellees' contractual arrangements have violated the statutory bases of the prohibition on the corporate practice of medicine. The Trial Court declined to make such a ruling (or to even examine the issue) by virtue of its holding that all the Appellants lacked standing to challenge the contractual arrangements at issue.

The Trial Court's holding on the standing issue is in error because each Appellant has properly demonstrated standing through its pleadings and offer of proof. Additionally, if the Trial Court's opinion stands, it effectively removes much of the teeth of the prohibition on the corporate practice of medicine by limiting judicial examination of alleged violations. Without judicial intervention and recourse through the formal discovery process, many corporations may be able to shield discovery and proof of violations of the corporate practice of medicine prohibition from current or prospective contracting parties (including physicians) through artful drafting and/or structuring of their contractual arrangements.

Further, physicians seeking to comply with the prohibition on the corporate

practice of medicine may unwittingly violate the law without proper guidance through the court system, thereby placing their licenses at risk of adverse action by the Texas Medical Board. In the end, both physicians and patients may be harmed by a lack of judicial examination of alleged violations of the corporate practice of medicine doctrine. Conversely, only the bottom line of corporations will be served if the Trial Court's ruling is upheld. Surely, this was not the result anticipated or intended by standing laws.

The Court is, therefore, respectfully requested to reverse the Trial Court's jurisdictional ruling in light of Appellants' proper pleading and offer of proof of standing, as well as the far-reaching policy implications of the Trial Court's decision and the holding's potential to undermine the public's trust in the medical profession if corporate concerns begin to impinge on a physician's independent medical judgment and the proper discharge of his fiduciary duties to his patient.

ARGUMENT AND AUTHORITIES

1. Appellants have properly pleaded and proved standing.

Under Texas law, plaintiffs may properly seek a declaratory judgment only when a justiciable controversy exists between the parties. *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 163-64 (Tex. 2004). In other words, the Declaratory Judgment Act requires the presence of a real controversy between the parties, which is capable of being determined via the requested relief (i.e. the declaratory judgment). *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995).

In the case at bar, all Appellants have demonstrated the presence of a justiciable controversy and have satisfied the basic standing requirements for the relief sought. First, Appellant Ybarra properly pleaded and offered proof of his standing in this case based upon his status as a physician who contracted with Appellee ACS Primary Care Physicians Southwest, P.A ("ACS"). Since Dr. Ybarra is a contracting party, it is clear that he has a personal stake in the instant controversy in terms of protecting his independent medical judgment, finances and medical license. All of these matters will be significantly impacted by a determination of the legality or illegality of the relevant contracts.

Further, Dr. Ybarra's proper standing is demonstrated by prior case law (i.e. *Penny v. Orthalliance*) in the analogous area of corporate practice of dentistry in which a similar action, seeking a declaration regarding the legality of certain contracts under the Texas Dental Practices Act, was brought before the U.S. District Court for the Northern District of Texas. *Penny v. Orthalliance, Inc.*, 255 F. Supp. 2d 579 (N.D. Tex. 2003). In *Penny*, the Court examined the contractual arrangements between three dentists, their professional corporations, and Orthalliance (a consulting and management services firm). *Id.* at 579-80. The Court held that the contractual arrangements in question were illegal and invalid due to the improper interrelationship of the contracts between and among the parties, which permitted the defendant management firm to practice dentistry without a license in violation of the Dental Practices Act. *Id.* at 582-83. This type of analysis and declaration is precisely the relief requested by Dr. Ybarra with

regard to the Medical Practices Act. As a contracting party, similar to the dental surgeon plaintiffs in the *Penny* case, Dr. Ybarra clearly has standing to pursue such a declaration from the Trial Court.

Next, Appellant Cassidy has also demonstrated proper standing as indicated by her status as a privileged and practicing physician at Appellee Memorial Hermann Hospital System. Appellant Cassidy is not a contractual party to the ACS contract; however, she has an interest in determining whether she may be unwittingly aiding and abetting the corporate practice of medicine. Thus, she clearly has a personal stake in the instant case as well.

Finally, Appellant American Academy of Emergency Medicine ("AAEM") has standing, because it is has properly met the three-pronged test established for associations suing on behalf of their members. More specifically, this test requires that the following three factors be satisfied: (1) the association's members would otherwise have standing to sue on their own; (2) the interests that the association seeks to protect are germane to the organization's purpose, and (3) neither the claim nor the relief sought requires the participation of individual members in the lawsuit. *South Texas Water Authority v. Lomas*, 223 S.W.3d 304, 308 (Tex. 2007).

In the case at bar, Appellant AAEM has shown that it satisfies the first prong (i.e. member standing), because it has members who: (1) have entered into contracts with Appellees (such as Appellant Ybarra), (2) who were offered contracts by Appellees (such as Appellant Cassidy), and (3) who practice at

hospitals under contract with the TeamHealth entities. These individuals all clearly have an interest in the legality of the applicable contracts and should have standing to determine their respective legal statuses under the contracts.

Next, AAEM satisfies the second prong regarding corporate purposes relevant to interests in the lawsuit, because AAEM's mission and vision statements clearly support the independence of emergency physicians in medical decision-making; to wit, AAEM's mission statement states that "the practice of emergency medicine is best conducted by a specialist in emergency medicine." American Academy of Emergency Medicine, AAEM MISSION STATEMENT, *available at* http://www.aaem.org/aboutaaem/mission.php (last visited Sept. 25, 2008). Similarly, among the principles in AAEM's vision statements are the following two statements: (1) "The role of emergency medicine management companies should be to help physicians manage their practice. The practice should be owned by and controlled by the physicians and not by a management company," and (2)"Emergency medicine state and national professional societies should actively encourage enforcement of existing corporate practice of medicine statutes, and should seek such legislation in other states." American Academy of Emergency Medicine, AAEM VISION STATEMENT, *available at* http://www.aaem.org/aboutaaem/visionstatement.php (last visited Sept. 25, 2008). From these statements, it is clear that AAEM has an established interest in the corporate practice issues involved in the instant case.

Finally, AAEM satisfies the third prong of the associational standing test

(i.e. no participation of individual members necessary), because the contracts in question are presumed to be largely standard or boilerplate in nature, aside from variations with regard to compensation. Further, the corporate structure underlying each contract is believed to be the same. Thus, a ruling as to one contract's satisfaction or violation of Texas law on the corporate practice of medicine should apply with equal force to all other AAEM member contracts.

2. **The availability of declaratory judgment actions to physicians and professional societies is vital to discovering and proving violations of the corporate practice of medicine doctrine due to the complex structuring of such contractual arrangements.**

The prohibition on the corporate practice of medicine has long-standing legal support in the state of Texas, as well as in numerous other states. In fact, the great majority of states prohibit the corporate practice of medicine. *Sampson v. Bapt. Mem. Hosp. System,* 940 S.W.2d 128, 137 n.6 (Tex. App.–San Antonio 1996), *rev'd on other grounds,* 969 S.W.2d 945 (Tex. 1998); BNA HEALTH LAW & BUSINESS SERIES §2800.04 (2005); *Right of corporation or individual, not himself licensed, to practice medicine, surgery, or dentistry through licensed employees,* 103 A.L.R. 1240.

In Texas, the prohibition on the corporate practice of medicine has several statutory bases. In particular, the Texas Legislature has attempted to safeguard the integrity of the medical profession by enacting statutes that: (1) create specific licensing requirements for physicians, (2) prohibit the unauthorized practice of medicine, and (3) prohibit lay corporations from seeking to perform the licensed

functions of physicians. TEX. OCC. CODE ANN. §§151.002(11)-(13), 155.001 *et seq.* (Vernon 2004); TEX. OCC. CODE ANN. §§ 164.052(a)(13),(17), 165.151(a), 165.152, 165.153 (Vernon 2004); TEX. OCC. CODE ANN §165.156 (Vernon 2004), TEX. BUS. CORP. ACT, Art. 2.01(B)(2)(Vernon 2003).

Historically, most courts have examined the prohibition on the corporate practice of medicine as derived by negative implication from the licensing acts that prevent a corporation from meeting the standards for a medical license. *Garcia v. Tex. State Bd. of Med. Exam'rs,* 384 F. Supp. 434, 438 (W.D.Tex. 1974), *aff'd* 421 U.S. 995 (1975); *Parker v. Bd. of Dental Exam'rs of State of Calf.,* 14 P.2d 67, 71 (Cal. 1932); BNA HEALTH LAW & BUSINESS SERIES §2800.04 (2005). In order to act as a physician, one must generally be licensed by the state of Texas and Texas restricts such licenses to "persons." *See* TEX. OCC. CODE ANN. §§151.002(11)-(13), 155.001 (Vernon 2004). Additionally, to be eligible to practice medicine certain moral fitness requirements must be met. TEX. OCC. CODE ANN. §155.003(a)(2)(Vernon 2004). It has been reasoned that a corporation cannot satisfy these critical licensing requirements and, therefore, cannot generally practice medicine.

The prohibition was buttressed by public policies against (1) lay control of independent medical judgment, (2) the exploitation of the medical profession by commercial or financial interests, and (3) dividing the physician's loyalty and responsibilities between patient and employer. *Garcia,* 384 F. Supp. at 437-39; BNA HEALTH LAW & BUSINESS SERIES §§2280.03, 2800.04 (2005); Andre

Hampton, *Resurrection of the Prohibition on the Corporate Practice of Medicine: Teaching an Old Dog New Tricks,* 66 U. CIN. L. REV. 489, 497 (Winter 1998) ("Hampton"); Brian Monnich, *Bringing Order to Cybermedicine: Apply the Corporate Practice of Medicine to Tame the Wild Wild Web,* 42 B. C. L. REV. 455, 470 (March 2001) ("Monnich"). The concern was that such corporate medicine would compromise the public's health and safety in the pursuit of profit. Monnich, p. 470.

Recently, the Supreme Court of Texas reaffirmed Texas' well-established prohibition against the corporate practice of medicine. *See St. Joseph Hosp. v. Wolff,* 94 S.W.3d 513, 539-540 (Tex. 2002)(rejecting the proposition that the corporate practice of medicine prohibition automatically precludes vicarious liability). The Court's acknowledgment of the corporate practice of medicine doctrine in the *Wolff* case is consistent with the decisions of multiple Texas courts that have repeatedly concluded that our state's medical licensing statutes effectively prohibit the unlicensed practice of medicine by a corporation. *Garcia,* 384 F. Supp. at 437-38; *Flynn Bros., Inc. v. First Med. Assoc.,* 715 S.W. 2d 782, 785 (Tex. App.–Dallas 1986, writ ref'd n.r.e.); *Penny v. Orthalliance, Inc.,* 255 F. Supp.2d 579, 581-83 (N.D.Tex. 2003); *Watt v. Tex. State Bd. of Med. Exam'rs,* 303 S.W.2d 884, 887-88 (Tex. Civ. App.–Dallas 1957, writ ref'd n.r.e.), *cert. denied,* 356 U.S. 912 (1958); *Rockett v. Tex. State Bd. of Med. Exam'rs,* 287 S.W.2d 190, 191-92 (Tex. Civ. App–San Antonio 1956, writ ref'd n.r.e.).

In fact, Texas' prohibition on the corporate practice of medicine is widely

considered among the most stringent in the nation. Monnich, p. 466, n. 106. However, the robust nature of Texas' prohibition is severely compromised if there is no transparency in the structure and implementation of contractual arrangements that are subject to the prohibition and no judicial scrutiny of these contracts through declaratory judgment actions and the attendant formal discovery process.

Since the prohibition of the corporate practice of medicine has become more widely known in Texas, corporations have presumably attempted to comply with the mandates of the law by structuring arrangements in a manner such that a lay corporation does not *directly* split fees with a physician or employ the physician. However, potential *indirect* violations continue to pose a problem and, due to their complicated nature, necessitate judicial scrutiny. More specifically, attempts to avoid direct violations of the corporate practice doctrine have led to common trilateral contractual arrangements between management services/staffing companies, physician professional associations, and hospitals. However, these complicated arrangements, if not properly structured and implemented, may indirectly run afoul of the prohibition on the corporate practice of medicine doctrine as demonstrated by the *Flynn Brothers* case. 715 S.W.2d at 785.

In *Flynn Brothers*, the Flynn brothers individually and as a corporate entity (i.e. Flynn Brothers, Inc.) appealed the trial court's take-nothing judgment on, inter alia, the Flynn brothers' counterclaims against Dr. Adcock stemming from contractual arrangements for emergency department staffing of a hospital in

Dallas. *Id.* at 783. More specifically, Dr. Adcock and the Flynn brothers initially had a proposed partnership agreement to staff the emergency room department of St. Paul Hospital; however, upon learning of the partnership's violation of the corporate practice of medicine doctrine (since profits and losses would be split between the Flynns, who were not licensed physicians, and Dr. Adcock), they restructured their arrangement in an attempt to comply with the Medical Practices Act. *Id.*

Under the new arrangement, Dr. Adcock's professional corporation obtained the staffing contract with St. Paul. The Flynns (rather than entering into the verboten partnership agreement with Dr. Adcock) formed a separate lay corporation (Flynn Brothers, Inc. or "FBI"), which then entered into an exclusive management agreement with Adcock's P.C. to administer the St. Paul contract. *Id.* Despite the division in corporate statuses and an obvious attempt to comply with the corporate practice doctrine, FBI exercised much control over Adcock's P.C under the terms of the management contract. For example the contract permitted FBI to: (1) receive 66.7% of the net profits of Adcock's P.C., (2) solicit other hospital contracts on behalf of Adcock's P.C. (3) select staff to work at the contracting hospitals, and (4) limit Adcock's transfer of interest in his own P.C. so that it could not be sold to FBI's detriment. *Id.* at 783-784. Further, FBI exercised additional control over Adcock's P.C. as evidenced by FBI's commingling of funds between the two corporations, pledging of the P.C.'s assets for FBI's loan, and depositing all revenues from Adock's P.C. directly into FBI's checking

account. *Id.*

Upon a dispute arising as to the transfer of Dr. Adcock's interest in the P.C., Dr. Adcock sued FBI for breach of contract and other claims. *Id.* at 784. FBI then counterclaimed. The trial court entered a take-nothing judgment for both parties, but granted Adcock injunctive relief and an accounting from FBI. *Id.* On appeal, the Court examined the validity of the contracts under the corporate practice of medicine doctrine with an eye towards the practical effect of the contract, not just the express language. Upon its review, the Court concluded that "although it is true that Dr. Adcock was an 'employee' of FBI under the arrangement, the practical effect was the same." *Id.* at 785. Thus, FBI was using Adcock's license indirectly to practice medicine. *Id.* Perhaps more pointedly, the Court stated:

> the parties admit that the whole contractual scheme was developed to do indirectly that which they freely concede they could not do directly under the Medical Practices Act. The design, effect and purpose of the management agreement contravenes the Medical Practices Act and therefore will not be enforced by the courts of this state. *Id.*

The *Flynn Brothers* case, therefore, demonstrates three important points. First, it indicates that indirect violations are, nonetheless, violations of the Medical Practices Act's provisions on corporate practice of medicine. Second, it indicates that the court looks to the effect of the overall contractual scheme in order to determine the validity of the relevant contracts. And, third, it demonstrates the complexity of arrangements designed to circumvent corporate practice violations.

In the case at bar, judicial scrutiny and discovery is even more critical, because an added layer of complexity is present. Unlike Dr. Adcock in the *Flynn Brothers* case, the contracting physicians in the instant case are not members of the P.A. (ACS) that has contracted with the management/staffing company (Team Health).[1] Thus, the physicians contracting with ACS are not a party to the ACS-TeamHealth management contract and do not have all the information related to the management contract's implementation necessary to fully assess the effect of the overall contractual scheme. All relevant information is not likely to be available without the benefit of proceeding with the declaratory judgment action, which has been denied by the Trial Court's jurisdictional ruling.

If the Trial Court's ruling stands and contracting physicians (such as Appellant Ybarra), prospective contracting physicians (such as Appellant Cassidy, prior to ACS rescinding its offer to her), physicians with staff privileges in contracting facilities (such as Appellant Cassidy), and physician professional societies (such as AAEM) are all precluded from accessing the court system to access discoverable documents and acquire a declaratory judgment on the legality of applicable contractual arrangements (as the Trial Court's ruling would imply), then these arrangements could potentially go unchecked to the detriment of Texas'

[1] As Appellants note in their brief, "according to the Texas Secretary of State, as of June 15, 2007 (which was the same date that TeamHealth began staffing and managing the Memorial Hermann hospitals), Richard Carvolth is the Member, Director, President, Vice-President, Secretary and Treasurer for ACS. According to the TeamHealth website, Mr. Carvolth is also the CEO for Defendant TeamHealth West, a division of TeamHealth, Inc...."

patients. Surely, artful corporate structuring and drafting of contracts (as indicated in *Flynn Brothers*) was not intended to permit a loophole to a finding of a violation of the corporate practice of medicine prohibition. The effect of the contractual scheme is the true issue and, therefore, must be examined.

3. Without granting standing to physicians and professional societies in declaratory judgment actions, a disequilibrium exists as to enforcement of the corporate practice doctrine against physicians and lay corporations.

Aside from the court system, the remaining sources most likely to scrutinize the arrangements would likely be the Texas Attorney General (AG) and the Texas Medical Board (TMB).[2] Neither of these state actors is the optimal body for examining these issues. First, the Texas Attorney General is unlikely to investigate potential violations of the corporate practice of medicine doctrine without receiving a complaint regarding such arrangement. And, the parties to the contracts who would normally be the individuals most likely to complain about violations (i.e. physicians who are concerned about lay control of their medical judgment) are unlikely to complain to the AG due to potential negative ramifications to their licenses and finances.

Further, the TMB's authority is primarily over the licensed physician who

[2] Note that the Secretary of State of the State of Texas could also refuse to issue a corporate charter to a lay unincorporated organization seeking incorporation in order to practice (directly or indirectly) medicine. *See, e.g., Garcia*, 384 F. Supp. 436-40 (in which a lay unincorporated organization unsuccessfully challenged the constitutionality of Texas corporate practice of medicine laws and unsuccessfully sought injunctive relief to require the Secretary of the State of Texas to issue a corporate charter to the organization.)

enters into the illegal contract, not the corporation. Under the Texas Medical Practice Act, the TMB has the express authority to seek injunctive relief for violations of the Act. TEX. OCC. CODE ANN. §165.051 (Vernon 2004). Presumably, this authority could potentially extend to enjoining violations of the Act by lay corporations; however, the TMB is more likely to conduct investigations with an eye towards disciplining the physician who violates the statutory provisions, rather than the corporation. This is true, because the vast majority of the TMB's work consists of pursuing complaints against licensed physicians, not against others who violate the Texas Medical Practice Act.

Thus, the Trial Court's ruling creates the unjust result of the physician being the party with the most risk when entering into a questionable contract, yet being in the worst position to determine the validity of the contract (since he does not have access to all the relevant documents and contracts). And, if the physician's license is revoked due to a violation of the corporate practice of medicine prohibition, this could obviously be career ending. Even a lesser restriction imposed on the physician's license would be quite damaging to his career, since it may be reportable to the National Practitioner Databank (i.e. the databank that all hospitals must search when credentialing physicians for hospital privileges under the Health Care Quality Improvement Act). 42 U.S.C. §§11132(a), 11135.

Thus, it is clear that the Trial Court's ruling creates an imbalance in the risk levels carried by physicians and corporations for corporate practice violations (if

the TMB is the only remaining active enforcer of the prohibition against the corporate practice of medicine). And, if the Trial Court's ruling stands and lay corporations no longer have to fear their contracts being declared void due to a violation of the corporate practice of medicine doctrine, there is little remaining incentive for these corporations to comply with the mandates of the law. This leaves physicians at risk for TMB discipline if they sign illicit contracts and patients at risk for receiving care compromised by corporate profit motives.

4. Due to the continued enforcement of the prohibition on the corporate practice of medicine by the Texas Medical Board against physicians, it is imperative that physicians and professional societies have a means of assessing potential violations through declaratory judgment actions.

The first corporate practice of medicine case law in Texas stemmed from appeals of disciplinary orders imposed on physicians by the Texas Board of Medical Examiners ("TBME"), the predecessor of the Texas Medical Board. *See Rockett*, 287 S.W.2d 190(in which the appellate court affirmed the district court's decision in support of the TBME's cancellation of Dr. Rockett's medical license due to his violation of the Medical Practice Act's provision prohibiting physicians from allowing unlicensed individuals (i.e. a lay clinic) to use their license); *see also Watt*, 303 S.W.2d 884 (upholding the district court's judgment in support of the TBME's suspension of the license of Dr. Watt for 18 months due to his employment by a lay cancer clinic in violation of the corporate practice of medicine doctrine). The TMB's enforcement of the corporate practice of medicine doctrine as applied to *physicians* continues from its inception in the 1950s well

into the current decade. For example, on August 15, 2003, the TMB and a physician entered into an Agreed Order for the physician's voluntary surrender of her license due to allegations that she "violated the corporate practice of medicine doctrine by entering into a business relationship with a nonphysician to operate a clinic in a manner that aided and abetted the unlicensed practice of medicine." Texas Medical Board Bulletin, Vol. 1, No.2, Spring 2004, p. 9, *available at* http://www.tmb.state.tx.us/news/Spring04/MedBdNLSpr04.pdf. Similarly, on March 28, 2003 the Board entered into an Agreed Order with a physician agreeing to a public reprimand, $5,000 penalty and certain restrictions on his license due to allegations of violating the corporate practice of medicine doctrine. Texas Medical Board Bulletin, Vol. 1., No.1, June-July 2003, p. 17, *available at* http://www.tmb.state.tx.us/news/Fall03/TMBnewsletterJunJul03.pdf

From these examples, it is clear that physicians face a very real threat of adverse action being taken against their medical licenses if they violate the prohibition on the corporate practice of medicine. This fact, coupled with the marked information imbalance between the contracting physicians and the lay management/staffing companies, makes it critical that physicians have an avenue to challenge questionable contractual arrangements through declaratory judgment actions, both in their own capacity and through their professional societies. Yet, the Trial Court has denied standing to both contracting physicians and professional societies.

Thus, if the Trial Court's holding stands, Texas physicians will be forced to make the Hobson's choice between forgoing contracting at all or risking adverse action on their licenses by agreeing to contracts of questionable legality. With the prevalence of exclusive contracts for hospital-based physicians, this may be a choice between risky work and no work at all. Forcing physicians to make this decision is unjust in terms of the physician's risk of adverse action to his license. Additionally, signing a questionable contract may be inconsistent with the physician's ethical mandate of placing patient care before his own financial interests. *See* Texas Medical Association, *Board of Councilors' Ethics Opinion: Health Facility Ownership, Incentive Payments and Conflicts of Interests available at*: http://www.texmed.org/Template.aspx?id=392#HEALTH (stating "Under no circumstances may the physician place his own financial interest above the welfare of his patients. ...When a conflict develops between the physician's financial interests and the physician's responsibilities to the patient, the conflict must be resolved to the patient's benefit.").

CONCLUSION

The Trial Court's ruling on standing should be reversed due to Appellants' proper pleading and proof of standing, as well as the negative policy implications of the ruling. The Trial Court's ruling undercuts the foundation of the legal concept of standing in general and the prohibition on the corporate practice of medicine in particular, because it enables corporations to use standing to shield

themselves from the discovery of potentially illegal actions.

Standing was designed to ensure that only those individuals with a justiciable interest are able to pursue claims. Presumably, the concept of standing was not designed to prevent proper discovery, scrutiny, and determination of the contractual status of individuals and the legality of such contracts. In the case at bar, Appellants have demonstrated that they each have the contemplated justiciable interest necessary to confer proper jurisdiction on the Trial Court. Thus, the legal threshold for standing has been satisfied.

Further, the interests of Texas' patients should be paramount and supersede the concerns of a lay corporation when contractual issues implicate the corporate practice of medicine doctrine. In corporate practice cases, a larger issue is at stake than merely a contract. The maintenance of independent medical judgment of the physician and proper treatment of Texas patients is also at issue. It is imperative that these issues are fully addressed. If the Trial Court's ruling is upheld, physician interests will not be served. Patient interests will not be served. Only corporate interests will be served. For all of the foregoing reasons, the Court is respectfully requested to reverse the Trial Court's ruling on standing to permit the Appellants to proceed with their declaratory judgment action.

Respectfully submitted,

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