

Mergers and Acquisitions

N.J. Health-Care Transaction Attorneys Urge Vigilance on Deals

Attorneys who advise on corporate transactions in New Jersey should ensure their clients' health-care provider deals result in organizations led by a health-care practitioner or they could face fraud claims and disciplinary actions, health-care transaction attorneys tell Bloomberg BNA.

They pointed to a state supreme court decision, *All-state Ins. Co. v. Northfield Med. Ctr., P.C.*, 2017 BL 148804, N.J., No. 076069A-27 September Term 2015, 5/4/17, that said an attorney and a chiropractor may have violated the state's Insurance Fraud Prevention Act by establishing a joint medical and chiropractic practice that was ostensibly controlled by the chiropractor and not the medical doctor.

Health-care attorneys who spoke to Bloomberg BNA said they are reviewing all recent transactions and advising that the corporate structure of any joint ownership in future deals stays within the allowed limits of the state supreme court's decision. The attorneys warned the results of flouting the court's ruling could range from disciplinary action against the attorneys or physicians to a determination that all claims the practice submitted to an insurer were false claims and should be repaid to the insurer.

Decision Changing Deals John D. Fanburg, an attorney with Brach Eichler LLC in Roseland, N.J., told Bloomberg BNA he has already seen some deals change as a result of the New Jersey court's decision.

"I have been involved in a private equity transaction that post-dated this case, and the traditional form of the agreement between the medical practice and the acquirer had to be significantly modified to come as close as possible to the requirements of this decision," he said.

"It's very important that attorneys not take a wait-and-see attitude with this decision that could end up causing them or their clients major problems down the line," Michael F. Schaff, an attorney with Wilentz, Goldman & Spitzer PA in Woodbridge, N.J., told Bloomberg BNA.

"You have to be careful, have to re-evaluate your clients' current situations and look for aspects of the corporate structure may be affected by the decision and may need to be changed," said Schaff, who counsels health-care providers in New Jersey on corporate and business matters and sits on a Bloomberg BNA advisory board.

Corporate Practice of Medicine The New Jersey Supreme Court's decision involved a multidisciplinary practice that employed medical doctors and had been incorporated by a New Jersey-licensed chiropractor, John Scott Neuner. Neuner used a management company to contract with the medical practice, a structure that allowed him to retain control of the practice while ostensibly complying with the state's corporate practice of medicine regulations.

The New Jersey State Board of Medical Examiners has established regulations prohibiting the corporate practice of medicine. Under those regulations, a medical doctor with a general scope of practice may not be employed by a licensee with a more limited scope of practice, such as a chiropractor. Most states have passed similar laws and regulations, restricting ownership of medical practices to only licensed physicians.

As a result this decision, while limited in scope to transactions in New Jersey, should serve as a warning to health-care providers in other jurisdictions looking to combine medical practices with nonmedical services.

"New Jersey is not that different from other jurisdictions where a lot of these transactions have occurred," Fanburg said. "But it really depends on the state; for example, in New York, the rules on how medical practices are structured are much more strict in some ways than they are in New Jersey, but in Pennsylvania it's a lot looser."

Fanburg emphasized that attorneys who advise on corporate structures for health-care deals would be well advised to examine their state's corporate practice of medicine restrictions.

Practice Matters, Not Just Papers All of the attorneys who spoke to Bloomberg BNA emphasized the need for the day-to-day management of a medical practice to follow the control structures set out in the documents that established the practice.

"The real issue is who is controlling the health-care practice, and if it's an unlicensed party that takes precedence no matter what is written down in the documents," Grace Mack, an attorney with Wilentz, Goldman & Spitzer PA in Woodbridge, N.J., said. Mack emphasized, however, that the courts will start by interpreting the company's documents, so it is of paramount importance to have the proper corporate structure written down.

Fanburg said even corporate structures that look good on paper could be found to violate the law. "The court will often look at the day-to-day actions, who's doing the hiring, who's doing the firing," he said.

"It's clearly not uncommon for a medical practice to have a business person rather than a doctor who is re-

sponsible for the business side of the practice. But the question will be asked, does that manager have final say, or does any decision need to be signed off on by the doctor,” he added.

Possibility for Clarification The limits of the state supreme court’s decision could be cleared up by the New Jersey Board of Medical Examiners (BME) issuing guidance on this point, but the attorneys who spoke to Bloomberg BNA said it would be unwise to wait for that.

“We are expecting the BME to update its rules and regulations to provide certain guidance on how these types of deals can be structured,” Fanburg said. “But it is going to take a long time, and in the meantime arrangements involving medical practices need to be updated to make sure the control rests with a licensed physician.”

According to the attorneys, if a practice doesn’t meet the requirements of the state supreme court’s decision, an insurer could initiate action to recover any claims the practice filed, as the products of a fraudulent entity. However, the doctors and attorneys are at risk too.

“The other risks are that the physicians that lend their names could potentially be exposed to disciplinary action,” Schaff said. “Also, the attorney that gave the

advice is potentially exposed under this ruling to a claim of assisting in fraud,” he added.

According to Mack, the tension between the business people who want to get deals done and the attorneys who want to make sure the deals pass legal muster is one of the largest obstacles to tackle.

“We are all being very cautious in dealing with it, walking on an edge and making sure we are careful,” Schaff said. “We talk in terms of best practices and it’s hard when you are dealing with business people who are generally more risk tolerant.”

“It’s like walking on a wall where you have sharp sticks on one side and soft pillows on the other,” Schaff said. “It is the little things that you and your clients do while putting together a transaction that steer you either toward the sharp sticks or the soft pillows, and it isn’t easy to navigate.”

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