

**STATE OF MICHIGAN
IN THE SUPREME COURT**

WILLIAM MILLER,

Plaintiff-Appellee,

ALLSTATE INSURANCE COMPANY,

Defendant,

Cross-Defendant-Appellant,

and

PT WORKS, Inc.

Cross-Plaintiff-Appellee.

Supreme Court No. 134393

Court of Appeals No. 259992

Wayne County Circuit Court No.
03 325 030 NF

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**BRIEF OF STATE BAR OF MICHIGAN-HEALTH CARE LAW SECTION AS
AMICUS CURIAE**

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STATEMENT OF INTEREST

In its November 21, 2007 Order granting the applications for leave to appeal in this matter, the Supreme Court of Michigan invited the Health Care Law Section of the State Bar of Michigan ("Section") to file a brief of *amicus curiae*.

The Section represents members of the State Bar who practice and serve the health care community. In this role, the Section advocates on behalf of the interests of health care providers concerning state and federal legislation and public policy. The Section is also an important educational resource for both the legal and health care communities.

This case presents issues that have a compelling impact on the ability of Michigan's health care providers to furnish and be properly compensated for medically necessary care furnished to patients injured in motor vehicle accidents. One of the main goals of Michigan's no-fault scheme is to encourage prompt payment for these services, regardless of fault. To this end, the law requires that services payable as no-fault benefits must be "lawfully rendered." Allstate Insurance Company argues that this requirement applies not only to licensure under the Public Health Code, but also formation under Michigan's corporate entity statutes.

Permitting insurers to challenge the corporate formation of entities that provide necessary health care services by licensed allied health professionals to accident victims would circumvent the purpose of Michigan's no-fault scheme. It would also give insurers regulatory power and authority that has by law been reserved to the State's executive branch.

STATEMENT OF JURISDICTION

For the purposes of this brief, *Amicus Curiae* accepts and relies on the Statement of Appellate Jurisdiction submitted by Cross-Plaintiff-Appellant, PT Works, Inc.

STATEMENT OF FACTS AND PROCEEDINGS

For the purposes of this brief, *Amicus Curiae* accepts and relies on the Statement of Facts and Proceedings submitted by Cross-Plaintiff-Appellant, PT Works, Inc.

SUMMARY OF ARGUMENT

This case involves two different statutes with two different purposes. Michigan's No-Fault Insurance Act, 1956 Mich Pub Acts 218, as amended ("No-Fault Act"), is designed to provide accident victims with adequate, assured, and prompt reparation for their losses and to alleviate the cost and inefficiency associated with a traditional fault-based tort system. *Nelson v Transamerica*, 441 Mich. 508; 495 NW2d 370 (1992); *see Kreiner v Fischer*, 471 Mich. 109, 115-117; 683 NW2d 611 (2004). Michigan's corporate entity statutes are designed to create and enable business organizations that, in turn, promote economic growth and development by shielding the entity's individual investors and owners from liability. Specifically, the Legislature created the Professional Services Corporation Act, 1962 Mich Pubs Acts 192, (hereinafter "PSCA") as a means for professional service providers to organize an entity for profit, so long as each of the shareholders are licensed to provide the services rendered by that corporation. *See* MCL 450.224.

A court should not—indeed, may not—read statutes together in a way that clearly the Legislature did not intend. *Ostroth v Warren Regency GP, LLC*, 263 Mich App 1, 13; 687 NW2d 309 (2004), *aff'd*, 474 Mich 36; 709 NW2d 589 (2006). Moreover, it is neither the province nor the duty of the judiciary to interpret two statutes in a manner that would vitiate the underlying purpose of at least one of those statutes. *Id.* (citing *Marquis v Hartford Accident & Indem*, 444 Mich 638, 644; 513 NW2d 799 (1994)). Contrary to what Allstate Insurance

Company argues, nothing in the language, history, or purpose of these two different statutory schemes indicates that Michigan's corporate formation statutes—in particular, the PSCA—may be used as a means to challenge the legality of services provided to automobile accident victims. Likewise, there is nothing in Michigan's No-Fault Act that points to the State's corporate entity laws as a means for insurers to avoid their contractual obligations to insured individuals.

As this case illustrates, there is still confusion and ambiguity inherent in Michigan's PSCA and Business Corporation Act, 1972 Mich Pub Acts 284 (hereinafter "BCA"). The decision of the Court of Appeals extends the "learned professions" doctrine in Michigan far beyond its original intent and purpose. The important task for the Michigan Legislature is to review the PSCA and the "learned professions" doctrine in Michigan to determine whether any aspects of these policies have any application or purpose in today's health care system. Certainly, this is a complex policy analysis, but it is perhaps one for which the time has come.

More importantly, allowing insurers to challenge the corporate formation of entities that provide access to necessary health care services for accident victims would circumvent the purpose of Michigan's No-Fault Act. That is, if "lawfully rendered" applies not only to professional licensure, but also to entity formation, accident victims seeking treatment for their injuries would be forced to undertake an exhaustive search for service providers that includes an investigation into corporate formation and ownership. Not only would this delay necessary care and treatment for injured individuals, it would also give insurers regulatory power and authority that has by law been reserved only to the State's executive agencies.

ARGUMENT

I. THE PROFESSIONAL SERVICES CORPORATION ACT SHOULD NOT BE INTERPRETED TO REQUIRE THAT ALL LICENSED HEALTH CARE PROVIDERS MUST BE INCORPORATED UNDER THAT ACT, TO THE EXCLUSION OF FORMATION UNDER THE BUSINESS CORPORATIONS ACT.

A primary issue before the Court is how expansive should the term, "professional service," be interpreted under the Professional Services Corporation Act, 1962 Mich Pub Act 192 ("PSCA") and whether an entity which provides professional services is required to form under the PSCA. Allstate Insurance Company ("Allstate") contends that this definition is not exclusive to the professions defined as rendering "professional services" and, as such, includes physical therapists and other allied health professionals¹ licensed under Article 15 of the Public Health Code, 1978 Mich Pub Acts 368. Such an interpretation extends the PSCA far beyond the scope of its underlying rationale, the corporate practice of medicine also referred to as the "learned professions" doctrine. Moreover, such an expansive application of the PSCA may in fact hinder, rather than encourage, access to health care and economic growth in Michigan by inhibiting the formation of business corporations and discouraging innovation in health care cost containment. The corporate practice of medicine is not prohibited by Michigan statute; rather, it has been developed around the state licensing and corporate formation acts with infrequent judicial interpretation.

¹ According to the Association of Schools of Allied Health Professionals, "Allied Health professionals are involved with the delivery of health or related services pertaining to the identification, evaluation and prevention of diseases and disorders; dietary and nutrition services; rehabilitation and health systems management, among others. Allied health professionals, to name a few, include dental hygienists, diagnostic medical sonographers, dietitians, medical technologists, occupational therapists, physical therapists, radiographers, respiratory therapists, and speech language pathologists." See www.asahp.org.

- A. *Based on principles of statutory construction, an analysis of the PSCA and the Business Corporations Act does not conclusively establish whether all allied health care professionals licensed under Article 15 of the Public Health Code must incorporate under the PSCA.*

When faced with a question of statutory interpretation, a court's "primary goal is to discern the intent of the Legislature by focusing on the best indicator of that intent, the language the Legislature adopted in the statute." *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 60; 718 NW2d 784 (2006) (citing *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004)). Whether the Legislature intended to require all allied health professionals and all licensed personnel that render services, even outside the sphere of health care, to organize exclusively under the PSCA is not apparent from the plain meaning of the definition.

1. Different textual analyses lead to different interpretations of the meaning of "Professional Service."

When the Legislature specifies a statutory definition, that definition generally "supersedes the commonly-accepted, dictionary or judicial definition." *Erlandson v Ret Com'n*, 337 Mich 195, 204; 59 NW2d 389 (1953); *see also Sanchez v Eagle Alloy, Inc*, 254 Mich App 651, 662; 658 NW2d 510 (2003), and *Campell v Sullins*, 257 Mich App 179, 187; 667 NW2d 887 (2003). However, as with any other portion of the statute, a court must still determine the plain meaning of that definition. In this case, the definition of "professional services" may have more than one "plain meaning."

Section 2 of the PSCA, MCL 450.222, defines "professional service" as,

a type of personal service to the public that requires as a condition precedent to the rendering of the service the obtaining of a license or other legal authorization. Professional service includes, but is not limited to, services rendered by certified or other public accountants, chiropractors, dentists, optometrists, veterinarians, osteopaths, physicians and surgeons, doctors of medicine, doctors of dentistry,

podiatrists, chiropodists, architects, professional engineers, land surveyors, and attorneys at law.

This definition of professional services includes more services than those rendered by health professionals. At issue is whether the application of the words, "including, but not limited to," in that definition would encompass those services rendered by allied health professionals. At the trial court level in the instant case, Chief Judge Colombo relied on the textual canon, *ejusdem generis*, to conclude that the list of "professional services" set forth in MCL 450.222 does not include physical therapy. (*See Op & Or* (Dec 3, 2003), attached as appx 44a of PT Works, Inc.'s Brief on Appeal). According to this canon of construction, a court gives meaning to both general and specific terms by treating the particular words as indicating the class, and the general words as indicating everything embraced in that class, though not specifically named in the particular words. *Huggett v Dep't of Nat Res*, 464 Mich 711, 718-719; 629 NW2d 915 (2001) (citing 2a Sands, Sutherland Statutory Construction § 417.17 (4th ed)).

Here, the general term is a "professional service to the public . . . that requires . . . a license or other legal authorization," while the specifically defined professions indicated what is embraced in that class by the statute. As Judge Colombo noted, and as PT Works, Inc. ("PT Works") now advocates, "physical therapists do not perform the same kind, class, character, or nature of professional services as the professions specifically enumerated in . . . MLC 450.222(c)." (J. Colombo Transcript, attached as appx 56a of PT Works, Inc's Brief on Appeal.) Citing the Public Health Code's definition of the "practice of physical therapy," Judge Colombo noted that physical therapists do not "identify underlying medical problems or etiologies, establish medical diagnosis, or prescribe treatment." (*Id.* (citing MCL 333.17801(1)(b)).) In sum, Judge Colombo concluded, "[c]omparing physical therapists with the medical professions specifically set forth in [this Section of the PSCA] leads to the inescapable conclusion that the

services provided by physical therapists are different in kind, class, character, and nature than the professional services provided by doctors, osteopaths, dentists, podiatrists, or chiropractors." (*Id.*)

Alternatively, if the words of a statute provide the most reliable evidence of the Legislature's intent, then the plain meaning of words and phrases, as well as their placement and purpose, must be critical to statutory interpretation. *Kreiner, supra* at 129 (citing *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001)). Here, the law explicitly states that professional services include, but are not limited to, those specifically enumerated services. See MCL 450.222. Thus, as the Court of Appeals noted, then, "[t]he plain language of the statute indicates that the list of professional services identified is not exclusive." *Miller v Allstate Ins Co*, 275 Mich App 649, 654; 739 NW2d 675 (2007) (on remand). Those professions identified are ones that have been historically associated with the learned professions doctrine and therefore, interpreting this statute to include occupations outside the doctrine does not comport with its plain meaning.

In any event, what is important for this Court to consider is that the tools of statutory construction lead to different conclusions when applied to the definition of "professional service" under the PSCA.

2. By its plain terms, the PSCA does not explicitly require a licensed health care provider to exclusively incorporate under that law.

Whether a health care provider is required to organize exclusively under the PSCA is not entirely clear, based on the language and structure of the PSCA. On remand, the Court of Appeals in the instant case concluded that corporation formation required under the PSCA prohibits formation under the BCA. *Id.* Section 4 of the PSCA, however, provides that "[o]ne or more licensed persons may organize under [the] act to become a shareholder or shareholders of a

professional corporation for pecuniary profit." MCL 450.224(1) (emphasis added). Use of the word "may" denotes a permissive, rather than a mandatory condition. *AFSCME Council 125 & Local 1416 v Highland Park Bd of Educ*, 214 Mich App 182, 186; 542 NW2d 333 (1995), *aff'd*, 457 Mich 74 (1998). Thus, if the Legislature had intended that formation under the PSCA is exclusive, it would have used "shall" or "must," to indicate mandatory formation. *See id.* Therefore, if one or more licensed persons intend to operate a business organization for profit, it appears from the language that they have the option of doing so under the PSCA.

The PSCA is a fairly limited statute that contains specific provisions relevant to certain professionals and the services they provide. The PSCA otherwise relies on the provisions of the BCA for requirements regarding the "non-professional" elements of such corporations—that is, the business aspects. In particular, Section 13 provides that the BCA is applicable to a professional corporation, except to the extent that a provision of the PSCA is in conflict (in which case, the PSCA controls). MCL 450.233. There is a similar provision in the BCA, which states that "[u]nless otherwise provided in, or inconsistent with, the act under which a corporation is or has been formed, this act applies to deposit and security companies, summer resort associations . . . cemetery, burial, and cremation associations, railroad, bridge, and tunnel companies, agricultural and horticultural fair societies, and professional service corporations formed under the professional service corporation act . . ." MCL 450.1123 (emphasis added). The BCA also states that the "entities specified in this subsection shall not be incorporated under this act (the BCA)." MCL 450.1123. Relying on this last sentence, the Court of Appeals concluded that PT Works was improperly organized under the BCA. *Miller, supra* at 654. However, an alternative reading of this statute—and the House of Representative's purpose in its current proposed amendments to this Section of the BCA—may lead to a different conclusion.

In 2001, the Legislature added the reference in the BCA to "professional service corporations formed under the Professional Service Corporation Act" in MCL 450.1123 to eliminate confusion regarding whether amendments made to the BCA in 1987 also applied to the PSCA.² In light of this purpose, and the fact that this provision applies to corporations "formed under the PSCA," a logical conclusion is that the prohibition on formation under this section of the BCA applies to entities already formed as professional services corporations. In other words, while the BCA's general provisions apply to professional services corporations, it nevertheless prohibits "dual formation" under both the PSCA and the BCA. By contrast, there is nothing in this section, or any other section of the BCA, which clearly states that licensed professionals may not incorporate under the BCA in the first place.

Because of this statutory ambiguity, the Court may find it instructive to consider extrinsic sources, including how the corporate practice of medicine developed and the historical context in which the PSCA was created, to determine its meaning and import. *Gilman v Northwest Airlines, Inc*, 230 Mich App 293, 295; 583 NW2d 536 (1998). In particular, this Court should examine the history and purpose of the corporate practice of medicine, also known as the "learned profession" doctrine, and why the Legislature created the PSCA as a means to allow learned professionals to incorporate.³

B. *The PSCA permits learned professionals to organize for profit.*

The Michigan Legislature created the PSCA as a means for licensed health care professionals to incorporate as a business entity. Before this enactment, the corporate practice of

² S Fiscal Agency, S Leg Analysis, SB 206 & 216, which were enacted as 2001 Mich Pub Acts 57 and 2001 Mich Pub Acts 58, respectively.

³ Notably, the Court of Appeals in *Miller* did not address the legislative and historical context of the "learned profession" doctrine in Michigan.

medicine doctrine, as evidenced in state licensing and policy directives, prohibited physicians from practicing medicine under the alleged control of a layperson. This legal doctrine has existed nationally in one form or another since the mid-nineteenth century. In Michigan, it has been interpreted and applied as the "learned profession" doctrine.⁴

1. The history and current applicability of the corporate practice of medicine doctrine should be considered by this Court.

In essence, the corporate practice of medicine doctrine "prohibits a corporate entity from providing medical services." Jeffrey F. Chase-Lubitz, *The Corporate Practice of Medicine Doctrine: An Anachronism in the Modern Health Care Industry*, 40 Vand L Rev 445, 447 (1987). The corporate practice of medicine doctrine emerged in the latter part of the nineteenth century as part of an attempt by the American Medical Association ("AMA") to legitimize the medical profession through the development of ethical guidelines to eliminate shady practitioners. Chase-Lubitz, *supra* at 450-455. Subsequent to these guidelines, the AMA advocated for state licensing statutes and judicial recognition of the doctrine to distinguish the profession from the quackery associated with such shady practitioners. Chase-Lubitz, *supra* at 450-455. The AMA had also expressed concern that the growing number of corporations that employed or contracted with physicians in the nineteenth century would interfere with professional autonomy and patient interests.

Because of the growing threat of corporate involvement in medicine during that time, the AMA issued additional guidelines that cemented the corporate practice of medicine doctrine. *See* Chase-Lubitz, *supra* at 458-464. In the early twentieth century, courts nationally also began to define the relationship between physicians and corporate entities, based on state licensing laws

⁴ This doctrine is still applied to lawyers as reflected in the Michigan Rules of Professional Conduct. *See* Mich Rules of Prof'l Conduct, r 5.4(b) & r 5.4(d).

that restricted the practice of medicine to individuals. Chase-Lubitz, *supra* at 464-467. Although these decisions were based on state licensing laws, the courts relied on public policy arguments including the concern of lay control over the physician's professional judgment, the commercialization of medical practice, the division of the physician's loyalty between patient and employer and the importance of patients' trust in their doctors. Jerry A. Bell, Jr. & Cyndi M. Jewell, *The Corporate Practice of Medicine Prohibition: Past, Present and Future, in Health Care Mergers and Acquisitions*, 161, 166 (ABA Health Law Forum 1995). "Policy considerations . . . provide the best rationale for a prohibition against corporate practice." Chase-Lubitz, *supra* at 467. These courts reasoned "that, because [state licensure statutes] pertain inherently and explicitly to individuals, such laws preclude corporations from engaging in medical practice in any sense of the word." Chase-Lubitz, *supra* at 465-466 (citing *People v United Med Serv, Inc*, 362 Ill 442; 200 NE 157 (1936), and *Parker v Bd of Dental Exam'rs*, 216 Cal 285; 14 P2d 67 (1932)).

The continued application of the corporate practice of medicine in today's environment has been criticized. Some legal commentators have called this doctrine an "anachronism" and a "dinosaur." Chase-Lubitz, *supra* at 445; *see also* Michael A. Dowell, *The Corporate Practice of Medicine Prohibition: A Dinosaur Awaiting Extinction*, 27 J Health & Hosp L, 369 (1994). The reason is that the policy considerations underlying the doctrine are no longer applicable, since hospitals and health maintenance organizations employ physicians and other health professionals. The health care industry has successfully organized its administrative functions separately from the clinical functions. In addition, the method of health care reimbursement has changed dramatically in the last twenty years to a managed care approach. In this managed care environment of reducing health care costs, multiple restraints on a physician's professional

independence have emerged. These include cost containment measures, such as quality management and utilization review, which may serve to reduce care (or alternatively, incent the right amount of care), clinical guidelines established to dictate best practices in treating a condition, and alternate types of reimbursement for care. Other examples include pre-authorization requirements in order to pay for care, case management for chronically ill patients (where a licensed allied health professional "manages" a patient for an insurer by checking that the patient is seeing the physician and taking prescribed medications) or capitation payments to physicians which is a fixed fee for all care to be provided to that patient. These common practices have been incorporated into the majority of insured plans, including no-fault insurance plans and Medicare, representing financial incentives to limit utilization while maintaining the delivery of quality health care. George T. Sinas, *Case Management and the Michigan No-Fault Law: A Look at the Legal Issues*, 79 Mich Bar J (Oct 2000).

Further, when hospitals, health maintenance organizations and other institutions employ physicians, the institutions fulfill the role of administrative manager and do not influence clinical decision-making. This permits health care professionals who do not desire to be burdened with administrative responsibilities to practice their art exclusively. To ensure clinical independence, health care attorneys frequently include provisions in employment or independent contractor contracts which affirmatively state that the administrator shall not interfere with the clinical judgment of the health care professional. In Michigan, hospitals, federally qualified health centers, correctional facilities, and employers with occupational medicine clinics employ physicians.

The regulatory landscape in health care is also contrary to the policies underlying the corporate practice of medicine. Many regulations endorse the concept of physician employment.

For instance, the federal criminal anti-kickback statute prohibits any person from offering, receiving or paying any remuneration in return for referrals of services payable by Medicare or a State health care program. 42 USC 1320a-7b(b). Within the statute itself, there is an exception for any remuneration paid by an employer to an employee for such referrals if the employee has a bona fide employment relationship with the employer in the provision of covered items or services. 42 USC 1320a-7b(b)(3). A safe harbor was promulgated pursuant to this statute that contains a similar exception. 42 CFR 1001.952(i). The federal Stark law, which prohibits a physician from making referrals to an entity with whom the physician has a financial relationship also has an exception for employment relationships. 42 USC 1395nn. Michigan law specifically recognizes the Stark law exceptions as safe harbors from professional disciplinary action, thereby protecting institutional employment of physicians. MCL 333.16221.

Even the Internal Revenue Service ("IRS") recognizes physician employment and will require an employer to reclassify an independent contractor physician under certain conditions for purposes of federal taxation. The IRS published examination guidelines in June of 1992 for IRS auditors to use while performing audits of tax-exempt hospitals which contained guidelines to investigate a hospital's employment tax issues specifically with respect to the status of physicians. In addition, in 1995, the IRS ruled that certain independent contractor physicians would be reclassified as employees for purposes of federal income tax withholding because such physicians were employees, not independent contractors, even though the hospital did not control the physicians' clinical decisions. *See* IRS, Tech Adv Mem 9535001 (Mar 14, 1995); IRS Tech Adv Mem 9535002 (Mar 29, 1995); IRS, Priv Ltr Rul 9335055 (Jun 9, 1993).

Finally, in reviewing the historical context of the corporate practice and the erosion of its policy support, it is also noted that the Federal Trade Commission ("FTC") has determined that

some of the AMA ethical guidelines have anticompetitive effects. *In re Am Med Ass'n*, 94 FTC 701, 1029 (1979), *aff'd as modified*, 638 F2d 443 (CA 2, 1980), *aff'd*, 455 US 676 (1982). In this case, the AMA had an ethical principle against lay interference with the practice of medicine that had been interpreted to forbid physicians from working for corporations owned or managed by non-physicians. *Id.* The FTC successfully challenged the ethical guideline as anticompetitive and the AMA was required to revise it to provide that a physician is free to choose with whom to serve, with whom to associate, and the environment in which to provide medical services. *Id.* In another effort, albeit unsuccessfully, the FTC challenged California's state law in prohibiting the corporate practice of optometry by pointing to two of its studies indicating that such prohibition resulted in increased prices to consumers, reduced consumer access to vision care, and provided no quality related consumer benefits as a consequence. *California State Bd of Optometry v FTC*, 910 F2d 976 (DC, 1990), *reh'g denied*, 924 F2d 243 (DC, 1991).

2. Because the PSCA codifies many of the elements of the corporate practice of medicine doctrine, it has been consistently interpreted to apply only to those health professions that are among the "learned professions."

Before the PSCA was enacted, this Court recognized that the "learned professions"—law, medicine, and dentistry—require a high degree of knowledge and a personal relationship between the practitioner and his or her client or patient. *People v Carroll*, 274 Mich 451, 456; 264 NW 861 (1936), and *Sloman v Bender*, 189 Mich 258, 263; 155 NW 581 (1915). This Court recognized that it is well within the police power of a state to regulate these professions "to protect the public from ignorance, unskillfulness, unscrupulousness, deception, and fraud." *Carroll, supra* at 454 (citing *Winslow v Kansas State Bd of Dental Exam'rs*, 115 Kan 450; 223 P 308, 309 (1924)). Aspects of professional practice the state could control and regulate included

the ownership and operation of firms and entities providing these services, as well as the qualifications of those who provided such services. *Id.* at 456. For instance, in *People v Carroll*, the statute at issue was a precursor to the PSCA that required owners of dental parlors and other establishments providing services in the learned professions to be licensed in those professions (235 Mich Pub Acts 1933).

Before the PSCA was enacted, individuals providing services in the learned professions could not incorporate. *See Kline v Kline*, 104 Mich App 700, 703; 305 NW2d 297, 299 (1981). When the Michigan Legislature enacted the PSCA in 1962, it created an "exception" to existing law and the corporate practice of medicine doctrine by allowing learned professionals to incorporate. *Id.* Moreover, the Legislature "invested [these] professional corporations with most of the properties of other business corporations." *Id.* at 704. For instance, while a professional corporation may take advantage of tax benefits available to other corporations, its owners are not shielded from liability for certain torts committed by its employees, including professional malpractice. *Id.* Specifically, Section 6 of the PSCA states that any officer, shareholder, agent, or employee of a professional services corporation "remain[s] personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional service on behalf of the corporation" MCL 450.226 (emphasis added). This Section also provides that nothing in the PSCA "shall be interpreted to abolish, repeal, modify, restrict or limit the law . . . applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service and to the standards for professional conduct." MCL 450.226.

The Michigan Attorney General and the State's Corporation Division have consistently interpreted the term "professional service" to encompass only those services provided by the learned professions. In a 1980 opinion, the Attorney General distinguished between corporations organized for the purpose of practicing a learned profession and other types of professions, by explaining the rationale for the learned profession doctrine and how the PSCA furthers this policy. OAG, No 5676 (1980). Specifically, the Attorney General noted that the "provisions of [the PSCA] address each of the four points" of the doctrine:

- (1) Laymen should not be permitted, directly or indirectly by virtue of the corporate form, to practice medicine;
- (2) Necessary confidential and professional relationships existing between a physician and his patient could be destroyed by lay shareholders interested only in a profit;
- (3) The limited liability of the corporate form is not appropriate where the client must place such a high degree of trust and confidence in the physician; and
- (4) It is impossible for a corporation to fulfill the licensing and ethical requirements medical practice demands.

Id. (citing 47 J Urban L 674, 685-686 (1969)).

Nine years later, in a similar opinion, the Attorney General opined that the "'learned professions' have been generally recognized as law, medicine, and divinity." OAG, No 6592 (1989). While noting that the "modern usage" of this term has been enlarged and extended, the Attorney General also pointed out that Michigan's Corporation and Securities Bureau had focused its application of the "learned professions" doctrine on only a subset of licensed professions, including osteopaths, psychiatrists, certified public accountants and dentists. *Id.* Hence, while the learned professions could only incorporate under the PSCA, providers of all other professional services—as defined by the PSCA—could incorporate under either the BCA or the PSCA. Notably, like the current PSCA, the law in effect at that time listed a number of

professional services, such as medicine and law, but did not—by its express terms—limit its application to those enumerated professions.⁵

3. The Court of Appeals in *Miller* expands the "Learned Professions" Doctrine—and the PSCA—beyond the scope of its intent and purpose.

Until *Miller*, only members of the learned professions were required to incorporate under the PSCA; all other entities rendering professional services were permitted to form under either the PSCA or the BCA. Moreover, neither the Attorney General nor the Corporations Division had previously interpreted the PSCA to require that all entities providing professional services must be incorporated under that act, to the exclusion of the general business corporation act. *See* OAG, No 4627 (1968).

The Court of Appeals in *Miller* purports to require all licensed occupations to form as professional services corporations. However, the Department of Labor and Economic Growth (formerly the Corporations and Securities Bureau) ("DLEG"), in consultation with the Attorney General, adopted a narrow application of this decision. That is, all services specifically listed as "professional services" in Section 2 of the PSCA fall into one of three categories: (1) health professions licensed under Article 15 of the Public Health Code; (2) occupations referred to as "professions" in their licensing statutes; and (3) occupations for which the licensees are held to standards of professional conduct.⁶ *See* MCL 450.222. Hence, following *Miller*, DLEG requires

⁵ At that time, Section 2(a) of the PSCA defined "professional service" as follows:
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. By way of example and without limiting generality thereof, the personal services which come within the provisions of this act are the personal services rendered by certified or other public accountants, chiropractors, dentists, optometrists, veterinarians, osteopaths, physicians, and surgeons, doctors of medicine, doctors of dentistry, podiatrists, chiropodists, architects, professional engineers, land surveyors, and attorneys at law.

⁶ *See* http://www.michigan.gov/documents/cis/Website_update_re_Miller111_203547_7.pdf.

occupations within these three categories only to form as professional service corporations. All occupations and trades not otherwise referred to as "professions" are not required to form under the PSCA; rather, they may continue to elect to form under either the PSCA or the BCA.

Notwithstanding DLEG's current position, it is important to point out that not all health care occupations required to be licensed under Article 15 of the Public Health Code, including allied health professionals such as physician assistants, social workers, and physical therapists, are "learned professions." Moreover, not all services for which an individual must be licensed under Article 15 rise to the level of a "learned profession." According to Michigan's Constitution, a majority of the members of an appointed examining or licensing board of a profession must be members of that profession. Const 1963, art 5, § 5. In a 2004 opinion, the Attorney General considered what constitutes a "profession" within the meaning of this section. Importantly, the Attorney General concluded that "[t]he word 'occupation' is broader in scope than the word 'profession.'" OAG, No 7163 (2004). "All professions are occupations, but not all occupations are professions. Licensing alone does not transform an occupation into a profession" *Id.* (emphasis added).

In another 2004 opinion, the Attorney General concluded that the practice of chiropractic—even though included in the definition of "professional service"—is much narrower than the practice of medicine or surgery. OAG, No 7151 (2004). This conclusion is supported by Article 15 of the Public Health Code, which defines the "practice of chiropractic" as specifically excluding "the performance of incisive surgical procedures, the performance of an invasive procedure requiring instrumentation, or the dispensing or prescribing of drugs or medicine." MCL 333.16401. Moreover, this Court held in *Bradford v O'Connor Chiropractic*

Clinic, 465 Mich 946; 637 NW2d 505 (2002), that a chiropractor has no duty to make a medical diagnosis and, in fact, is precluded from doing so.

While physical therapists provide valuable and needed services to patients requiring such services, they have not been included in the definition of the "learned professions." The level of education, training, and experience required for physical therapy differs from that required of physicians. The scope of practice also differs. Patients may only receive physical therapy based on an order issued by a licensed physician. MCL 333.17820. In addition, the Public Health Code specifies that physical therapy does not include the identification of underlying medical problems or etiologies, establishment of medical diagnoses, or the prescribing of treatment. MCL 333.17801(1)(b). Physical therapy, like many allied health occupations, does not rise to the level of skill, conduct, and practice that constitutes the practice of medicine under Michigan law. Rather, these allied health professionals complement the practice of medicine.

Before the Court of Appeals' decision in *Miller*, no court in Michigan had specifically addressed whether physical therapy constituted a "learned profession." Outside of Michigan, the Minnesota Supreme Court in 2006 took notice that no state court had addressed whether physical therapy falls within the corporate practice of medicine doctrine. *Isles Wellness, Inc v Progressive Northern Ins Co*, 703 NW2d 513, 522-523 (Minn 2005). In *Isles Wellness*, three clinics providing chiropractic, physical therapy and massage therapy services sought to recover payment for services provided to patients insured by automobile no-fault insurers, including Allstate Indemnity Co. The insurers challenged those claims on the ground that the clinics were formed and operated in violation of the corporate practice of medicine doctrine and, hence, were not entitled to reimbursement for services. *Id.* at 515.

In considering these claims, the court reviewed Minnesota's statutes regarding the licensure and practice of physical therapy, as well as the State's corporation statutes and the corporate practice of medicine doctrine.⁷ The court concluded that the prohibition against the corporate practice of medicine does not apply to physical therapy. Specifically, the Minnesota Court noted that, "[w]hile physical therapy constitutes healing, in contrast to medical doctors and chiropractors, physical therapists do not enjoy unfettered independent medical judgment." *Id.* at 523. The court also noted that "[b]ecause of these restrictions, the practice of physical therapy—and consequently, the exercise of a physical therapist's independent judgment—is more limited than the practice of medicine or chiropractic." *Id.* Significantly, the court concluded that "the public policy concerns regarding a conflict of interest between the health care provider and the lay person or entity are lessened as the physical therapist is treating under the order of referral or periodic review of other specified health care providers."⁸ *Id.*

C. *Requiring all providers licensed under Article 15 of the Public Health Code to incorporate under the PSCA will disrupt access to health care in Michigan.*

Over the years, state public health agencies began to recognize allied health professionals through licensure, certification, and training, as integral to the health care system. Allied health professionals are individuals who assist, facilitate, or complement the work of physicians and other specialists in the health care system. *See, e.g.,* 34 CFR 674.51(1). These professionals, such as physician assistants and certified registered nurse anesthetists, are often referred to as

⁷ Like the PSCA, the Minnesota Professional Firms Act "specifically permits the formation of professional corporations to practice certain specified professions, including chiropractic, provided all ownership interests are held by licensed professionals." *Isles Wellness, supra* at 518 (citing Minn State 319B.07, subd 1).

⁸ More broadly, the *Isles Wellness* court concluded that the corporate practice of medicine "doctrine has limits. In other words, the doctrine does not automatically embrace every form of health care or therapy." *Isles Wellness, supra*, at 522.

physician "extenders." They are increasingly utilized to deliver treatment and care to patients. For example, physician assistants assist in surgery, conduct physical examinations, and may even write prescriptions for certain drugs, so long as certain protocols are followed. MCL 333.17048(5); Mich Admin Code r 338.2304; Mich Admin Code r 338.108a. Some physician "extenders" are also permitted to bill third party payers directly for their services, instead of through a physician. However, not all "extenders" have an independent scope of practice, even though they are licensed under the Public Health Code. For many of these allied health professionals, they provide patient care services only through physician delegation and general supervision of clinical tasks. MCL 333.16215; MCL 333.17001(g); MCL 333.17048.

Nonetheless, the use of physician "extenders" and allied health professionals improve efficiency and reduce the cost of care. Spending on health care in this country is staggering—over \$2 trillion dollars annually, over \$5 billion a day, representing sixteen and one-half percent (16.5%) of our nation's Gross Domestic Product. S. Keehan et al, *Health Spending Projections Through 2017: The Baby-Boom Generation Is Coming to Medicare*, 2 *Health Affs* 145-155 (2008). Because these allied health professionals are trained to attend to the certain health care needs, patients ultimately have better access to care and incur less costs.

Requiring physical therapists, physician assistants, and other licensed health care professionals to become "owners" of a for-profit entity under the PSCA is inconsistent with the historical justification of the corporate practice of medicine doctrine. That justification included legitimizing the profession and eliminating quackery. Such concerns do not exist with physical therapy given the regulatory scheme in Michigan balanced with third-party payor policies. Physical therapists may desire employment by a for-profit entity to avoid individual responsibility for the capitalization of the business, and the continued financial and

administrative performance of the entity. This creates barriers for such allied health professionals to practice and conceivably could reduce access to necessary health care, increase overall health care costs and provide no concomitant quality benefit.

Further, adopting a broad application of the PSCA to include such allied health professional services, as Allstate advocates, may even hinder, rather than encourage, access to care and economic growth in Michigan. Every employer organized under the BCA (or other statute) that employs allied health professionals licensed under Article 15 of the Public Health Code, and that operates for profit, would be required to immediately reorganize. Such reorganizations likely would create unintended taxable events. Some reorganizations would be impossible for certain providers, such as pharmacies that employ pharmacists. In Michigan, many pharmacies are operated by foreign publicly-traded corporations, such as CVS, Walgreen's, Costco, and Rite-Aid.⁹ These chains employ pharmacists who, if determined to render "professional services," would be required to incorporate under the PSCA. All shareholders would be then required to be licensed pharmacists to the detriment of the current shareholders, which frankly would not happen. Consequently, access to health care will suffer if these providers can no longer legally operate in this State. Under Allstate's theory, Allstate hypothetically should have also denied claims for any prescriptions dispensed to its insured, Mr. Miller, which were otherwise payable as a no-fault benefit. Moreover, if Allstate engages in case management, it may be susceptible to corporate reorganization requirements as well.

⁹ A foreign corporation can not obtain a Certificate of Authority to transact business in Michigan if the business may not be conducted by a Michigan corporation formed under the BCA. However, a foreign corporation providing a professional service for which a Michigan corporation must form under the PSCA may be permitted to form a Michigan professional service corporation as a subsidiary if the foreign corporation is a "licensed person" under MCL 450.222(a).

- D. *Current proposed amendments to the BCA and PSCA by the Michigan House of Representatives would clarify the application of these laws, but would also expand the learned professions doctrine to include chiropractors and physical therapists.*

Following the Court of Appeals' most recent decision in this matter, the Michigan House of Representatives sought to clarify in both the PSCA and the BCA what professions constitute the "learned professions," and whether professionals rendering those services must incorporate under the PSCA. As originally introduced, House Bills 5356 and 5357, which would amend the BCA and the PSCA, respectively, would delete from the current definition of "professional service" the phrase "includes, but is not limited to, services rendered by certified or other public accountants, chiropractors, dentists, optometrists, veterinarians, osteopaths, physicians and surgeons, doctors of medicine, doctors of dentistry, podiatrists, chiropodists, architects, professional engineers, land surveyors, and attorneys at law." HB 5356; HB 5357. The proposed definition would continue to refer to a "professional service" as a type of personal service to the public that requires a condition precedent to the rendering of the service the obtaining of a license or other legal authorization. HB 5356; HB 5357.

These bills would also create a new definition of "services in a learned profession" that is consistent with the Legislature's original intent and Attorney General opinions: this term would apply to services rendered by a dentist, an osteopathic physician, a physician, a surgeon, a doctor of divinity or other clergy, or an attorney-at law. Those professionals in a learned profession would be required to incorporate under PSCA, while those rendering all other professional services could elect to incorporate under PSCA or BCA. *See* H Fiscal Agency, H Leg Analysis, HB 5356 & HB 5358 (Nov 28, 2007).

Before passing the House on December 5, 2007, House Bills 5356 and 5357 were amended to add chiropractors, physical therapists, and optometrists to the definition of "services

in the learned profession." This amendment, like the Court of Appeals' decision in *Miller*, would expand the application of the learned profession doctrine in Michigan to include providers whose training, skill, and clinical function arguably do not rise to the same level for physicians and dentists. To date, the Senate has not voted on these bills.

II. SERVICES PROVIDED BY LICENSED HEALTH CARE PROVIDERS ARE "LAWFULLY RENDERED" UNDER THE NO-FAULT ACT, AND THERE IS NO PRIVATE RIGHT OF ACTION FOR AN INSURER TO ENFORCE CORPORATE FORMATION STATUTES.

MCL 500.3157 provides that "[a] physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the products, services and accommodations rendered." Nothing in the language, history, or purpose of either the No-Fault Act or Michigan's corporate entity statutes provides insurers the ability to challenge the organization of health care providers. Likewise, there is nothing in Michigan's No-Fault Act that points to the State's entity laws as a means for insurers to interpret "lawfully rendered" to avoid their contractual obligations to insured individuals. A health care provider's failure to properly form under either the PSCA or the BCA is a technical violation of the law, enforceable only by those empowered to take action.

A. *Services provided by licensed health care providers, regardless of the corporate form, are "lawfully rendered" under the No-Fault Act.*

Michigan's No-Fault Act requires that treatment for automobile accident victims must be "lawfully rendered." This applies only to the rendition of services by a licensed individual at the

point of service delivery. Contrary to what Allstate argues, it does not apply to the validity of corporate formation.

1. Applying the "lawfully rendered" requirement to corporate formation would undermine the purposes of Michigan's No-Fault Act.

The goal of Michigan's No-Fault Act is to provide accident victims with adequate, assured, and prompt reparation for their losses. *Nelson, supra* at 508. The Act is also designed to alleviate long payment delays and the necessity to access an overburdened court system typically associated with a fault-based tort scheme. *See Kreiner, supra* at 115-117. The language and meaning of Michigan's statute is clear: "the injured person's insurance company is responsible for all expenses incurred for medical care, recovery, and rehabilitation as long as the service, product or accommodation is reasonably necessary and the charge is reasonable." *Id.* at 114 (citing MCL 500.3107(1)(a)). Further, the No-Fault Act provides that "[a] physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance . . . may charge a reasonable amount for the products, services and accommodations rendered." MCL 500.3157.¹⁰

As the Court of Appeals originally pointed out in *Miller*, the "plain and unambiguous language [of the no-fault act] requires that the treatment itself be lawfully rendered." (emphasis added) *Miller v Allstate Ins Co*, 272 Mich App 284, 286-288; 726 NW2d 54 (2006). The Legislature chose to "focus on the act of actually engaging in the performance of services . . . rather than on some underlying corporate formation issues that have nothing to do with the

¹⁰ Allstate points out that the statute also refers to hospitals, clinics, and institutions, and it argues that "lawfully rendered" cannot refer to professional licensure only because doing so would "render nugatory" the statutory reference to these other providers. However, what Allstate fails to consider is that hospitals and other "institutions" or facilities are also required to be licensed, under Article 17 of the Public Health Code (Facilities and Agencies).

rendering of treatment." *Id.* Hence, under the No-Fault Act, "[a] clinic or institution is lawfully rendering treatment when licensed employees are caring for and providing services and treatment to patients despite the possible existence of corporate defects irrelevant to treatment." *Id.* (emphasis added).

Focusing on the lawfulness of an entity's corporate structure would circumvent the purposes of Michigan's no-fault scheme. *See id.* As the Court of Appeals correctly noted on remand,

[T]he Legislature's focus on the lawfulness of rendering treatment as opposed to the lawfulness of an entity's corporate structure indicates the Legislature's desire not to burden individuals seeking medical treatment, ostensibly covered by insurance, from having to engage in an extensive and in-depth review and analysis regarding an entity's formation and related incorporation issues.

Id. at 658.

Although the No-Fault Act requires that medical services be "necessary," and the amount charged for those services "reasonable," the law does not give insurers a means to "police" how health care providers are formed or incorporated. To the contrary, that regulatory function is reserved for the State and its agencies.

2. Allowing a no-fault insurer to avoid its contractual obligations because of a "technical violation" of an ambiguous corporate law creates a significant "windfall" for the insurer.

Even if the requirement that services be "lawfully rendered" applies to issues of corporate formation, this amounts only to a technical violation that does not otherwise allow insurers to avoid contractual obligations to their policyholders. Allstate claims that, even if it does not have to pay no-fault benefits, the insured individual somehow should not be held financially responsible. Allstate cites not authority for this position. To the contrary, when an insurer

denies payment, the insured is "left holding the bill," unless the health care provider and the insurer have agreed to hold the patient harmless. No such contract exists in this case.

In *Isles Wellness Inc v Progressive Northern Ins Co*, 725 NW2d 90 (Minn 2006), the Minnesota Supreme Court was asked to determine whether a "violation of the corporate practice of medicine doctrine voids all contracts between the client and its patients' insurers as a matter of public policy."¹¹ *Id.* at 91. The court found that "categorically voiding the contracts would not serve the public policy reasons underlying the corporate practice of medicine doctrine,"¹² and, therefore, a court "will not void a contract unless it is established that the corporation's actions show a knowing and intentional failure to abide by state and local law." *Id.* at 94 (emphasis added). Moreover, the Minnesota Supreme Court concluded that "this approach fairly balances the protection of insurers from fraudulent medical providers and the prevention of a windfall to an insurer from minor technical violations of the doctrine." *Id.*

In this case, there are no facts to suggest that PT Works engaged in a "knowing and intentional failure to abide by" the law. If there were an allegation of fraud, or if the physical therapists who provided Mr. Miller's treatment were not licensed under Article 15 of the Public Health Code, then there may be some question as to the quality of that treatment. However, absent these facts, whether the entity is properly organized under the PSCA, or improperly organized under the BCA, does not change the quality, safety, or lawfulness of the treatment that the patient receives.

¹¹ The only distinction between this case and the case at bar is that the Minnesota Supreme Court did not appear to be bound by a statutory framework like that at issue in this case. *Isles Wellness, supra*. However, this distinction does not undermine the reasoning that the Minnesota Supreme Court used in finding in favor of the improperly incorporated provider.

¹² "Permitting insurance companies to avoid liability under their insurance contracts does little to protect patients from the 'specter of lay control over professional judgment.'" *Id.* (citing *Isles Wellness, Inc. v. Progressive N Ins Co*, 703 NW2d 513 (Minn 2005)).

Allstate cites decisions from New York and New Jersey for the proposition that “cases in other jurisdictions, which have addressed the issue of the corporate practice of medicine in the context of no fault benefits, have disqualified corporate entities that are not incorporated under their [professional corporation acts], where the shareholders were not licensed.” Allstate Ins Co, Brief on Appeal, p 24. Allstate argues that improper incorporation negatively impacts the quality of care provided and reduces accountability for the provision of services. *Id.* However, Allstate fails to address important differences between those cases and the case at bar.

For example, Allstate cites a decision from the Court of Appeals of New York, which held against the providers in large part because of the fraudulent formation of the medical service corporation. *State Farm Mut Auto Ins Co v Mallela*, 4 NY3d 313, 319; 794 NYS2d 700 (2005). In that case, physicians established the corporations, but had no direct involvement in their medical operations. The court relied on a specific regulation promulgated by the Superintendent of Insurance which “excluded from the meaning of 'basic economic loss,' payments made to unlicensed or fraudulently licensed providers.” *Id.* at 320.¹³

Similarly, the New Jersey cases are distinguishable. In *Allstate Ins Co v Orthopedic Evaluations, Inc*, 300 NJ Super 510; 693 A2d 500 (1997), the Superior Court of New Jersey found that the New Jersey Automobile Reparation Reform Act required that “healthcare service authorized by the Act, in order to be eligible for recognition, must also comply with any other significant qualifying requirements of law that bear upon rendition of this service.” *Id.* at 516. By contrast, the Michigan No-Fault Act does not expressly include this requirement, nor have any Michigan interpreted it as such.

¹³ Both New York cases cited by Allstate, *State Farm Mut Auto Ins Co v Mallela*, 4 NY3d 313, 319; 794 NYS2d 700 (2005), and *Allstate Ins Co v. Belt Parkway Imaging, PC*, 813 NYS2d 867 (2006), involved situations where a physician “sold or lent the use of his name and medical license” to an unlicensed individual in order to make it appear that the corporation was properly incorporated under New York’s Business Corporation Law.

In *Liberty Mutual Insurance Company v Hyman*, 334 NJ Super 400, 759 A2d 894 (2000), the Superior Court of New Jersey reached its decision based in part on the New Jersey Supreme Court's "recent[] acknowledge[ment of] the corporate practice of medicine doctrine and its underlying rationales," *Id.* at 409-410, as well as its fear that a provider would be free from oversight if the owners of the improperly incorporated entity were not licensed. *Id.* at 404 ("Indeed, if Easton's corporate structure 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, regardless of the nature or gravity of the conduct in which a non-licensee owner has previously or may engage."). Unlike the New Jersey Supreme Court, the Michigan Supreme Court has not acknowledged the existence of the corporate practice of medicine doctrine in this State since the enactment of the PSCA.

Finally, *Material Damage Adjustment Corporation v Open MRI of Fairview*, 352 NJ Super 216; 799 A2d 731 (2002), is not persuasive on this issue. That case involved an ambulatory care facility that provided services before obtaining a license from the New Jersey Department of Health and Human Services. *Id.* at 220. Allstate's only accurate statement regarding these cases is that courts have denied reimbursement from no-fault insurers, but Allstate has failed to address why any of these cases support the same conclusion in this case.

B. *There is no private right of action, such that an insurance company may directly or indirectly challenge an entity's corporate formation.*

Even if a health care provider is improperly incorporated, there is no private right of action such that an insurance carrier, like Allstate, may directly—or indirectly—challenge the provider's corporate formation. The Attorney General has standing to bring this issue before Michigan courts, and DLEG may enforce proper formation through review and query of

corporate filing documents. In addition, specific corporate parties may challenge aspects of formation.¹⁴ However, there is no basis in Michigan law—either in the corporate entity statutes or the no-fault act itself—to suggest that insurers have this right.

“[T]he question whether a statute creates a private right of action is ultimately 'one of [legislative] intent, not one of whether this Court thinks that it can improve upon the statutory scheme that [the legislature] enacted into law.'" *Boscaglia v Mich Bel Tel Co*, 420 Mich 308, 317; 362 NW2d 642 (1984) (citing *Univs Research Ass'n, Inc v Coutu*, 450 US 754, 770; 101 S Ct 1451; 67 L Ed 2d 662 (1981)). When the Legislature creates a statutory duty, the accompanying remedy for a violation of that duty is exclusive of all others. *Pompey v Gen Motors Corp*, 385 Mich 537, 552; 189 NW2d 243 (1971) (citations omitted).

A very limited exception to this rule permits a court to fashion a judicial remedy that is cumulative to express statutory remedies if the statutory remedies are “plainly inadequate.” *Mack v Detroit*, 254 Mich App 498, 501; 658 NW2d 492 (2002) (on remand). However, in Michigan this exception has been applied only in the context of traditional civil rights statutes where statutory remedies were plainly inadequate. *Pompey, supra* at 553-557.¹⁵ The BCA provides exclusive remedies for lack of corporate power and failure to properly incorporate under the Act. Specifically, Section 271 allows (a) a shareholder to enjoin a corporation from acting or transferring property; (b) the corporation itself to procure a judgment against an incumbent or former officer or director for his or her unauthorized actions; and (c) the Attorney General to dissolve a corporation or to “enjoin it from the transacting of unauthorized business.”

¹⁴ Shareholders, officers and directors of a corporation and members and managers of a limited liability company have specific authority to challenge the entity's lack of power or capacity to act. MCL 450.1271; MCL 450.4515.

¹⁵ E.g., *McCabe v Atchison, T & SFR Co*, 235 US 151; 35 S Ct 69; 59 L Ed 169 (1914), *St John v Gen Motors Corp*, 308 Mich 333; 13 NW2d 840 (1944), & *Bolden v Grand Rapids Operating Corp*, 239 Mich 318; 214 NW 241 (1927).

MCL 450.1271. Certainly, these remedies are not plainly inadequate under Michigan jurisprudence.

In this case, PT Works was incorporated in 1995—over twelve years ago—under the name of Rehab Works, Inc. It has openly conducted business in this state under both names, which clearly reflect the nature of the services it provides. The Department of Consumer and Industry Services, the predecessor of DLEG, never challenged the incorporation of Rehab Works under the BCA. In fact, DLEG has accepted every annual report that PT Works has filed since its incorporation. If the Attorney General's office had any concern that PT Works was improperly formed, it could have brought suit to enjoin the entity. To date, it has not. Allowing Allstate and other insurers to challenge corporate formation, and to avoid their contractual duties while doing so, effectively permits these insurers to take on a regulatory and enforcement role that is exclusively reserved to Michigan's executive branch.

CONCLUSION

Regardless of the ambiguity in Michigan's corporate entity statutes, and the questionable application of the "learned professions" doctrine in today's health care system, what is clear is that the physical therapy services provided to Mr. Miller were “lawfully rendered.” Allowing Allstate to challenge claims for these services on the ground that the provider was improperly incorporated would elevate what may be a technical violation of law, at most, to a means for Allstate and other insurers to circumvent their contractual obligations to their insureds. Ultimately, this would undermine the purposes of Michigan's No-Fault Act, to the detriment of the citizens of this State.

Respectfully submitted,

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By: _____

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