Survived *Miller?* Think Again

By Theresamarie Mantese and Gregory Nowakowski

Introduction

There is presently a vigorous debate, in Michigan and nationally, over how health care providers should be formed, and then operated after formation. In Michigan, it is clear that professionals deemed to be practicing as "learned professions" (physicians, osteopaths, psychiatrists, dentists, ophthalmologists, and psychologists)[1] must practice in professional entities. Yet, for many other health professions (physical therapists, social workers, and veterinarians), the answer is not at all clear. This problem has been highlighted recently by *Miller v Allstate Ins Co,*[2] in which a no-fault auto insurer claimed that it was not required to pay for services, such as physical therapy, provided by licensed health professionals practicing in non-professional business entities.

The potential implications of *Miller* arise at a time when many providers have unique health care delivery systems. To illustrate, there is a fast-growing trend toward health care providers practicing in non-health care locations such as retail businesses (including drug stores, grocery stores, and mass-merchandise stores) on a walk-in basis, usually staffed by nurse practitioners.[3] This reality has important implications for matters such as how the services are billed, who is deemed to be providing the services, and whether licensed professionals practicing without physician supervision in these locations practice beyond the scope of their professional licenses.

Particularly in this environment, it is not enough for attorneys to simply apply traditional corporate law principles in the formation and structuring of a health care entity. *Miller* has raised awareness that health care entities must adhere to the corporate practice of medicine doctrine at the time of formation and throughout operation. The prohibition of the corporate practice of medicine may be best described as a public policy decision that the employment by general business corporations of physicians or other licensed professionals may interfere with professional judgment.[4] The prohibition emphasizes that, to avoid health care commercialization and layperson control over medical decision-making, general business corporations must not engage in the practice of medicine.[5]

Miller did not change current Michigan law related to entity formation. Yet the controversy does offer some crucial insights. This article will discuss the legal issues raised in *Miller* and provide suggestions for approaching health care entity formation and operations based on *Miller*'s lessons.

fast facts

Miller v Allstate *held that only the attorney general has standing to challenge corporate existence.*

Miller *offers more lessons than attorneys may think.*

The security provided by Miller *is likely the calm before the storm.*

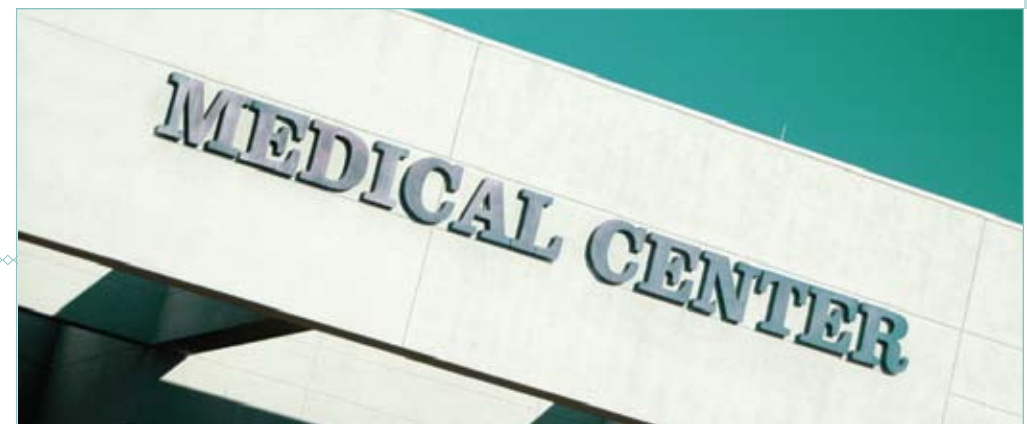
The Controversy

In *Miller,* no-fault insurers attempted to challenge whether health care providers were properly organized under state corporate formation statutes. They argued that if the health care providers were not properly formed, the insurers were not obligated to pay for medical services, as such services were not "lawfully" rendered under the No Fault Statute, MCL 500.3157.[6] Specifically, the no-fault insurer claimed that it did not have to pay for physical therapy services because the services were provided by a physical therapy clinic illegally formed under the Michigan Business Corporation Act (MBCA),[7] not as a professional corporation.[8] The insurer argued that the physical therapy clinic could not properly be organized under the MBCA,[9] and that the clinic could only be formed as a professional entity under the Michigan Professional Service Corporation Act (PC Act)[10] or the Michigan Limited Liability Company Act (PLLC Act).[11] In response, the clinic argued that it was permitted to form under the MBCA.

The Michigan Supreme Court was asked to address the issue of whether *all* health professionals licensed under the Michigan Public Health Code (whether in the learned professions or not) are legally required to organize as professional entities, or whether these individuals have the option of organizing under the MBCA.[12]

Michigan statutes have always *permitted* non-learned professions (such as physical therapists, social workers, and veterinarians) to incorporate as professional entities because these professions are licensed under the Michigan Public Health Code, Article 15 (Occupations), MCL 333.16101 *et seq.* These professions *may also* incorporate under the MBCA because Michigan *common law* does not prohibit such incorporation of these professions (unlike the learned professions). Years of common law have mandated that the learned professions must organize as professional entities.[13]

The Michigan Supreme Court did not address these issues and instead held that the insurer lacked standing to challenge corporate existence—only the attorney general could challenge corporate existence.[14] The Michigan Supreme Court's holding that only the State may challenge the propriety of a health care provider's corporate status still leaves the basic question of corporate filings to be addressed by practitioners.



Approaches to Entity Formation

Miller did not create new law in Michigan regarding entity formation. The case did, however, raise legal issues that practitioners should consider when forming entities. One approach to these issues may be to advise that *all* health professionals licensed under the Public Health Code[15] (whether a learned profession or not) should be formed only as professional entities. This approach has merit. Formation under the PC Act or PLLC Act accomplishes many of the same goals of the MBCA: (1) professional entities are generally treated as corporations for tax purposes,[16] (2) licensed professionals are able to protect themselves from the general debts and obligations of their practice, and (3) licensed professionals are able to protect themselves from negligence of shareholders[17] or members[18] (of course, the shield does not extend to protect licensed professionals from their own negligent acts).[19]

Another approach may be to advise that licensed professionals who are not learned professions should be formed as business entities. Shareholders or members would be limited if they formed as professional entities, as they must be licensed to render a professional service[20] under the Public Health Code.[21] The shareholders or members *must also* be licensed or authorized to perform exactly the *same* professional services as those provided by the corporation. The MBCA offers more flexibility in this regard. It allows laypersons or non-professionally licensed persons to have an ownership interest in the organization. For example, laypersons would be permitted to have an ownership interest in the entity if the entity is formed under the MBCA. This may be important to the generation of capital, marketing, and business acumen necessary to establish or maintain a health care business.

Miller: Lessons Learned

Attorneys must be cognizant of the costs and benefits of formation under both the professional and non-professional statutes. However, the inquiry (and current debate) should not be limited simply to formation issues. Decisions at formation can have long-lasting effects on an entity's survival. *Miller* perhaps best illustrates this point. Indeed, the challenge to payment under no-fault contracts arose not at formation, but some time after services were provided by the entity.

While there exist several business planning issues beyond the scope of this article, a few must be drawn out in light of the *Miller* discussion. They include issues concerning (1) shareholders and ownership, (2) payers, and (3) scope of practice.

Shareholders and Owners

One lesson drawn from *Miller* is that a health care entity formed under the MBCA may be flagged for more intense legal scrutiny throughout its operation. Thus, attorneys forming health care entities under the MBCA should carefully consider whether non-professionals have any control over the provision of health care services.

Licensed professionals forming an entity under the MBCA should take precautions to ensure that non-licensed shareholders do *not* participate in health care services or patient-related issues because they are not trained to perform such services. To allow non-professional shareholders to participate in health care services or direct patient-care decisions is the essence of the corporate practice doctrine—shielding business judgment from influencing medical or health care judgment. The "prohibition on corporate employment of licensed health care professionals has been based on a corporation's inability to satisfy the training and licensure requirements set out in state statutes and related public policy considerations."[22] This can raise suspicions about quality of care and costs for services, as well as many other issues. Thus, the more insulated non-licensed shareholders are from control over patient-care decision-making, the more likely the entity will survive corporate practice challenges.

A definable separation should be made among the providers, the entity, and the non-licensed shareholders or personnel. The Public Health Code defines the scope of practice for all licensed providers.[23] These definitions are useful for creating the legal instruments to define the relationships of non-professionals and licensed professionals. It is advisable that the duties of non-licensed professionals and their compensation should correlate to the services provided. These issues may be carefully defined in appropriate legal documents. Just as attorneys cannot split fees with non-licensed professionals because of interference with legal judgment, non-licensed health care employee-shareholders should not be paid based on professionally licensed services.[24] Contracts with non-licensed shareholders that clearly separate duties and payment may also be useful to separate the services of non-professionals and licensed professionals.

Payer Issues: Long-Term Problems with Formation

Miller has also raised the specter that if health care entities do not have legitimate, bona fide professional and non-professional relationships (which often start at formation), they risk implicating fraud and abuse laws, including the federal Anti-Kickback Statute[25] (for improperly billing services to third-party payers, Medicaid, Medicare, and other federal health care programs) and the Stark Law[26] (for improper physician referrals). Even in circumstances in which a licensed health care professional hires another licensed health care professional, improper separation can cause legal problems. For example, many Medicare policies require entities—such as ambulatory surgical centers—to contract with medical directors. In recent years, the government has heightened scrutiny and aggressive enforcement efforts against providers who engage in illegal kickback practices and violations of the Stark Law by entering into "sham" medical directorship agreements.

In one such case, CoxHealth and Ferrell-Duncan Clinic settled a whistleblower lawsuit involving medical director agreements that paid the clinic's medical directors large amounts in return for little or no services (non-fair market compensation). Lester E. Cox Medical Centers ("Cox," part of CoxHealth) and Ferrell-Duncan Clinic entered "into medical directorship agreements that were not in writing, paid more than fair market value, and paid based on the volume of referrals. [Ferrell] also entered into a physician services agreement with Cox that included in the physician salary calculation the revenue earned from the pharmaceuticals and DME [durable medical equipment] provided to Medicare patients treated by [Ferrell] physicians and Cox."[27]

These cases were settled with the Office of Inspector General paying $60 million and $1 million to CoxHealth and Ferrell-Duncan Clinic, respectively. Each party also signed a corporate

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integrity agreement with the government that functions as a compliance plan to correct the deficiencies.[28] This case emphasizes the general principle that attorneys should be careful to verify that compensation paid to professionals or non-professionals in the operations of a health care entity should be calculated based on fair market value for services provided, and not based, directly or indirectly, on referrals.[29]

Scope of Practice

Attorneys forming entities must also ensure that licensed professionals practice within the scope of their licenses. *Miller* indirectly raised this issue when the insurer claimed that physical therapy services were unlawfully performed due to improper entity formation.[30] The *Miller* court rejected this claim on standing grounds.[31] The relevant facts in the case showed that only licensed physical therapists provided services to patients. If the facts were otherwise, *Miller* may have been decided differently.

Michigan courts have traditionally recognized that third-party payers must pay for medical services only if licensed professionals comply with licensing requirements.[32] In advising corporate entities, attorneys should carefully examine whether job descriptions, employment agreements, and other contractual relationships between licensed professionals conform to licensing requirements. *Miller* set the groundwork for third-party payers to re-focus their efforts to determine whether medical services are lawful and should be paid.

Conclusion

In the end, *Miller* re-focuses the traditional legal challenges for entity formation to other contexts. The security provided by *Miller* is likely the calm before the storm. ■

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FOOTNOTES

1. Learned professions include attorneys, physicians, osteopaths, psychiatrists, dentists, ophthalmologists, psychologists, and certified public accountants. OAG, No 6592, p 168 (July 10, 1989). See also *Sloman v Bender,* 189 Mich 258, 263; 155 NW 581 (1915); OAG, No 4899 (October 23, 1975).
2. *Miller v Allstate Ins Co,* 481 Mich 601 (2008).
3. See *Health Care in the Express Lane: Retail Clinics Go Mainstream,* available at <http://www.marykatescott.com/pdf/HealthCareInTheExpressLaneRetailClinics2007.pdf>. All websites cited in this article were accessed February 25, 2009.
4. OAG, No 6592 (July 10, 1989). See *People v Carroll,* 274 Mich 451; 264 NW 861 (1936).
5. OAG, No 6770 (1993).
6. *Universal Acupuncture Pain Services, PC v State Farm Mut Auto Ins,* 196 F Supp 2d 378 (SD NY, 2002) (acupuncture); *Isles Wellness, Inc v Progressive Northern Ins Co,* 703 NW2d 513 (Minn, 2005) (chiropractic, physical therapy, and massage); *Active Spine Centers, LLC v State Farm Fire and Cas Co,* 911 So 2d 241 (Fla App, 2005) (chiropractic); *Allstate Ins Co v Belt Parkway Imaging, PC,* 823 NYS2d 9 (NY App, 2006) (diagnostic imaging).
7. MCL 450.1101 *et seq.*
8. *Miller, supra* at 605.
9. MCL 450.1101 *et seq.*
10. MCL 450.221 *et seq.*
11. The Michigan Limited Liability Company Act, MCL 450.4101 *et seq.* (LLC Act), covers business LLCs and Professional LLCs, or PLLCs. Article 9 applies to PLLCs. For ease of reference, this article will refer to Article 9 of the LLC Act as the PLLC Act.
12. While *Miller* was on appeal, the Michigan legislature considered a three-bill package, House Bills 5356–5358, in 2008 to amend Michigan's corporate formation law. A summary of the bills is available at <http://www.legislature.mi.gov/documents/2007-2008/billanalysis/Senate/pdf/2007-SFA-5356-S.pdf>.
13. See, e.g., *Sloman v Bender, supra* at 263; OAG, No 4899, p 182 (October 23, 1975); OAG, No 6592 (July 10, 1989).
14. *Miller, supra* at 604.
15. See MCL 450.222(c); MCL 450.4902(b) (definition of professional service).
16. See Rev Rule 77-31, 1977-1 CB 409. See also O'Neal & Thompson, Close Corporations and LLCs: Law and Practice (3d ed), § 2:8.
17. MCL 450.1317.
18. MCL 450.4905.
19. *Burrows v Bidigare/Bublys, Inc,* 158 Mich App 175, 184; 404 NW2d 650 (1987) superseded by statute on other grounds. *Echelon Homes, LLC v Carter Lumber Co,* not reported in NW2d, 2008 WL 3540210, *2 (Mich App, 2008).
20. MCL 450.224(3).
21. MCL 333.1101 through 333.25211.
22. *Isles Wellness, supra* at 517.
23. See *Allstate Ins Co v Lewerenz, et al,* unpublished opinion per curiam of the Court of Appeals, issued October 19, 2006 (Docket No 261296); and *Allstate Ins Co v A&A Medical Transp Services Inc,* unpublished opinion per curiam of the Court of Appeals, issued January 23, 2007 (Docket No 260766).
24. Fee splitting is generally done in return for referrals, which may violate fraud and abuse laws, including 42 USC 1320a-7b (Anti-Kickback Statute) or 42 USC 1395nn (Stark Law).
25. 42 USC 1320a-7(b) provides that *any* remuneration to *recommend* or *refer* service may constitute an illegal kickback.
26. 42 USC 1395nn.
27. Settlement Agreement, available at <http://news-leader.com/assets/pdf/DO1214281030.pdf>. See also *Q and A about CoxHealth Settlement,* available at <http://www.kspr.com/news/local/25765544.html>.
28. Corporate Integrity Agreements (CIA) can be found on the OIG website. The CIA for Lester E. Cox Medical Center is available at <http://oig.hhs.gov/fraud/cia/agreements/lester_e_cox_medical_centers_07212008.pdf>.
29. 42 CFR 411.351 (designated health services include clinical laboratory services; physical therapy, occupational therapy, speech-language pathology services, radiology, and certain other imaging services; radiation therapy services and supplies; durable medical equipment and supplies; parenteral and enteral nutrients, equipment, and supplies; prosthetics, orthotics, and prosthetic devices and supplies; home health services; outpatient prescription drugs; and inpatient and outpatient hospital services).
30. *Miller, supra* at 604.
31. *Miller, supra* at 616.
32. See *Hoffmann v Auto Club Ins Ass'n,* 211 Mich App 55, 64; 535 NW2d 529 (1995). If the treatment was not lawfully rendered, it is not a no-fault benefit and payment for treatment is not reimbursable. *Cherry v State Farm Mut Auto Ins Co,* 195 Mich App 316, 320; 489 NW2d 788 (1992).