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The State of South Carolina

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January 10, 1995

The Honorable Timothy F. Rogers
Member, House of Representatives
Box 5151
Columbia, South Carolina 29250

Dear Representative Rogers:

You have requested an opinion on the following questions with respect to construction of the Provider Self-Referral Act of 1993:

(1) May a physician who owns shares of stock in a publicly-held corporation which does not constitute a prohibited "investment interest" under the Act refer patients for diagnostic services to an entity owned by that corporation?

(2) Under the facts presented, are the referring physicians required to disclose their permissible investment interest to patients pursuant to Section 44-113-40 of the Act?

The answer to your first question is "yes". The answer to your second question is "no".

LAW/ANALYSIS

These issues were addressed in part in an opinion dated December 8, 1994. In interpreting the Provider Self-Referral Act of 1993, we stated:

> As plainly written, the prohibition against a health care provider referring a patient "for the provision of designated

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> health services to an entity in which the health care provider is an investor or has an investment interest" does not apply where the facts comport with Subsection (A)(2).

Specifically, by the express terms of Section 44-113-30 (A)(2), the prohibition against patient referrals from a provider who has an investment interest or is an investor in the entity to which the referral is made, is inapplicable where the provider's investment interest is in registered securities purchased on a national exchange or over-the-counter market and issued by a publicly-held corporation whose shares are traded on a national exchange or an over-the-counter market and whose total assets at the end of the most recent fiscal quarter exceeded 50 million dollars. Accordingly, we concluded that a physician's ownership of shares of common stock in a publicly-held company whose subsidiary provides "designated health services" as defined by Section 44-113-20 (4) did not constitute a prohibited "investment interest" pursuant to Section 44-113-30 of the Provider Self-Referral Act. Thus, physicians who own only common stock issued in a publicly-held corporation as defined in Section 44-113-30 (A)(2) may refer patients to an entity owned by that publicly-held corporation.

You now question whether the particular health care provider is also required to provide patients with a written disclosure form disclosing the physician's investment interest in the entity prior to referral thereto. The question arises because the investment interest was acquired prior to June 15, 1993. Apparently, the suggestion has been made that if the investment interest was acquired prior to that date, disclosure is required pursuant to the express provisions of Section 44-113-40 before referral can be made. However, we do not so read the Act.

Section 44-113-40 expressly imposes the additional requirement of disclosure to the patient by the physician upon two types of permitted investment interests. One such permitted interest is pursuant to Section 44-113-30 (A)(3).[1] A provider with an

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[1] Section 44-113-30 (A)(3) provides that:

> (3) with respect to an entity other than a publicly-held corporation described in subsection (A)(2) and a referring provider's investment interest in the entity, each of the following requirements are met:
>
> (a) no more than fifty percent of the value of the investment interests are held by investors who are

(continued...)

investment interest described in Subsection -30 (A)(3) may refer a patient to that entity if, before the referral, the patient is given written disclosure of the investment interest, his right to obtain services elsewhere, the names and addresses of at least two alternative providers, and a schedule of typical fees for the services. Section 44-113-40 (A). In addition, the patient must sign a disclosure form. Section 44-113-40 (B).

The Act provides only one other instance in which disclosure of a permitted investment interest is required. Section 44-113-40 also imposes the requirement of disclosure if the investment interest was "grandfathered" pursuant to Section 44-113-20 (d) because it was acquired before June 15, 1993. The question thus becomes one of applying the Act to the situation where the investment interest is in a publicly-held corporation as described in Section 44-113-30 (A)(2), and was acquired prior to June 15, 1993. More precisely, the issue is whether the Section -40 mandate of disclosure is applicable for referral to an investment interest otherwise permitted pursuant to Section 44-113-30 (A)(2) simply because it was acquired prior to the June 15, 1993 date.

Examination of Section 44-113-40 and the Act as a whole makes it clear that the Legislature was concerned that referrals to certain investment interests were not in the public interest without the additional safeguard of disclosure to the patient. The provider's holding an investment interest in entities such as a closely-held corporation or partnership

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[1](...continued)

in a position to make referrals to the entity;

(b) the terms under which an investment interest is offered to an investor who is in a position to make referrals to the entity are no different from the terms offered to investors who are not in a position to make referrals;

(c) the terms under which an investment interest is offered to an investor who is in a position to make referrals to the entity are not related to the previous or expected volume of referrals from that investor to the entity;

(d) there is no requirement that an investor make referrals or be in a position to make referrals to the entity as a condition for becoming or remaining an investor.

was one such concern. Thus, even where the provider's investment interest in such entities was sufficiently small and removed so as to meet the requirements of Section 44-113-30 (A)(3), thereby making the prohibition against referrals "not applicable," disclosure was still deemed necessary prior to referral.

In addition, the Legislature was obviously concerned about the "grandfathered" investment interest particularly where that interest was not of the type enumerated in Subsections -30 (A)(1) and (A)(2). Thus, even though the Legislature sought to achieve equity with respect to those investment interests acquired before June 15, 1993, by excepting such interests from the definition of "investment interest", it nevertheless included these earlier-acquired interests within Section 44-113-40's disclosure requirements. Logically, the reason for such inclusion is to insure that referrals to such earlier-acquired interests not otherwise permitted pursuant to Section 44-113-30 (A)(1) or (A)(2) would then be permitted, so long as the disclosure requirements of Section -40 were met. Thus, the Legislature achieved a balance with respect to referrals of those investment interests acquired prior to June 15, 1993, which would otherwise be prohibited under the Act, through the imposition of a disclosure requirement.

This purpose in requiring disclosure in these instances was clearly expressed in the Act's preamble. Section 1 of the Act states in part:

> ... The General Assembly also recognizes, however, that it may be appropriate for providers to own entities providing health care services and to refer patients to these entities, as long as certain safeguards are present in the arrangement. It is the intent of the General Assembly to provide guidance to health care providers and entities providing health care services and to protect the citizens of South Carolina from unnecessary and costly health care expenditures. (emphasis added).

However, it is apparent that the Act treats an investment interest in a publicly-held corporation differently from the two foregoing instances. It is important to note that Subsection -30 (A)(2) is nowhere mentioned in the disclosure requirement found in Section -40 [neither is Section -30 (A)(1)]. It is evident from such omission that the Legislature deemed referrals to publicly-held corporations whose shares are traded on a national exchange or over-the-counter market, whose assets are substantial, and there is also an investment interest therein as presenting far less need for disclosure than a similar referral to other business entities such as close corporations. As is often said with respect to closely-held corporations, "a few shareholders are in control of corporate policy and are in a position to benefit personally from such policy." Black's Law Dictionary, "Close

Corporation," 5th ed., p. 308. Appropriately, the Legislature thought that the provider referring a patient to such entities in which that provider was an investor should disclose the nature of such interests to the patient.

In construing any statute, it is well recognized that the true guide is the statute as a whole considered in light of its manifest purpose. City of Cola. v. Niagara Fire Ins. Co., 249 S.C. 388, 154 S.E.2d 674 (1967). All parts of a statute must be given effect, State ex rel. McLeod v. Nessler, 273 S.C. 371, 256 S.E.2d 419 (1979), and harmonized with one another to render them consistent with the general purpose of the act. Crescent Mfg. Co. v. Tax Commission, 129 S.C. 480, 124 S.E. 761 (1924). When the Legislature has expressed its intention in one part of an act, it must be presumed that such intention is applicable to all parts. State v. Sawyer, 104 S.C. 342, 88 S.E. 894 (1916).

Moreover, an absurd construction of a statute is to be avoided. State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964). In addition, it is well settled that the enumeration of particular things in a statute excludes the idea of something else not mentioned ("expressio unius est exclusio alterius"). Pa. Nat. Mut. Cas. Ins. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984).

Applying the foregoing rules of statutory construction to the question at hand, it is apparent to us that the Legislature did not intend to impose the Section -40 disclosure requirements upon referrals to investment interests governed by Subsection (A)(2) of Section 30 even where such interests were acquired prior to June 15, 1993. It would be absurd to conclude that an interest acquired after June 15, 1993 did not require disclosure for referrals thereto, but such disclosure was required if that interest was acquired prior to such time. The interest is precisely the same except for the date of the calendar. Likewise, if disclosure were required for publicly-held corporations described in Subsection (A)(2) of Section -30, it would make no sense for the Legislature to have declared that the prohibition against referral "does not apply" to such publicly-held corporations, as it did in Section 44-113-30 (A)(2), and then make no mention whatever of Subsection (A)(2) [or (A)(1)] in the Section -40 disclosure provision. If the Legislature wished to distinguish between investment interests acquired in a publicly-held corporation before June 15, 1993, and those acquired afterwards, it would have been a simple matter to say so. Rather than the statute's distinguishing on the basis of when the investment interest in a publicly-held corporation was acquired for purposes of determining whether or not disclosure was required, we believe a sensible reading is that the Legislature intended to exempt altogether publicly-held corporations from the Section -40 disclosure requirements if the mandate of Section 44-113-30 (A)(2) has been met. The fact that

Section -40 makes no mention of Subsection (A)(2) of Section -30 strongly reinforces this conclusion. See, Pa. Nat. Mut. Cas. Ins. v. Parker, supra.[2]

CONCLUSION

Therefore, we conclude that Section 44-113-40 is inapplicable to referrals to publicly-held corporations described in Section 44-113-30 (A)(2). Accordingly, it is our opinion that a physician who owns shares of stock in a publicly-held corporation which meets the requirements of Section 44-113-30 (A)(2) may refer patients for diagnostic services to an entity owned by that corporation. Moreover, if the investment interest in the publicly-held corporation meets the requirements of Section 44-113-30(A)(2), the referring physicians are not required to disclose their permissible investment interest pursuant to Section 44-113-40 of the Provider Self-Referral Act of 1993 even though the interest was acquired prior to June 15, 1993.

Very truly yours,

Robert D. Cook
Deputy Attorney General

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[2] We would note also that Section 44-113-40 specifically references Section 44-113-30 (A)(3) ['if the referral is permitted under Section 44-113-20 (10)(d) or Section 44-113-30 (A)(3) ..."]. Section 44-113-30 (A)(3) specifically excludes a "publicly-held corporation described in Subsection (A)(2) ...". We would argue that this reference to subsection (A)(3) (with its exclusion of Subsection (A)(2)) is further evidence that Section -40 is inapplicable to Subsection (A)(2) corporations.