

# OFFICIAL STATEMENT

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## **STATEMENT ON WASHINGTON STATE SUPREME COURT DECISION ON COLUMBIA PHYSICAL THERAPY, INC. VS. BENTON FRANKLIN ORTHOPEDIC ASSOCIATES, P.L.L.C.**

On March 18, 2010, the Washington Supreme Court unanimously ruled in favor of a practice owned by medical doctors (MDs) in a lawsuit challenging its right to employ physical therapists (PTs) to whom the MDs refer patients. The challenge was brought by Columbia Physical Therapy, Inc. (Columbia), a PT-owned professional service corporation, against Benton Franklin Orthopedic Associates, P.L.L.C. (BFOA), a professional limited liability company owned by MDs.

The Court's opinion is accessible online at:  
<http://www.courts.wa.gov/opinions/pdf/817341.opn.pdf>.

Columbia challenged the legality of BFOA's arrangement with its PT employees on three basic grounds. It argued:

- that BFOA was engaged in the corporate practice of physical therapy, in violation of state law,
- that its MDs were violating the anti-rebate statute, and
- that BFOA committed unfair or deceptive practices in violation of the state's Consumer Protection Act (CPA).

### **Corporate Practice**

Columbia argued that BFOA's employment of PTs was unlawful under Washington common law concerning the corporate practice of a profession and the Professional Service Corporation Act (PSCA). The argument begins with the proposition that, in general, state law does not permit a corporation or other business entity to practice a profession by means of employing licensed professionals – unless some law authorizes an exception to the general rule. BFOA argued that Washington law limits only who may own a professional business, not who it may employ, a position that the Supreme Court rejected.

However, the Court went on to conclude that the PSCA does authorize an MD-owned business to employ PTs. It reasoned that the purpose of the PSCA is to enable individuals to incorporate to “render the same professional service” that they are licensed to provide and that it authorizes the formation of a corporation by professionals “duly licensed . . . to render the same professional services.”

The dispositive question, in the Court's view, was whether BFOA, by employing physical therapists, is engaged in a business other than the practice of medicine. The Court ruled in BFOA's favor because it concluded that "[p]hysical therapy is one aspect of the practice of medicine." It reasoned that the broad definition of the practice of medicine in the medical practice act "readily encompasses all the acts constituting the statutory definition of the practice of physical therapy." The Court's concluded that physical therapy is part of the practice of medicine and is part of the "same professional service" that MDs are licensed to practice.

### **Anti-rebate Statute**

The Court agreed with Columbia that, in general, the anti-rebate statute, 19.68 RCW, does apply to a referring physician who has an ownership interest in the business to which patients are referred. However, the statute has an exemption covering profits earned by an employee of a firm that flow to the firm's owners, provided that the owners practice in the firm.

The Court reasoned that profits from professional services rendered by employees of a firm are not "unearned" by the owners, within the meaning of RCW 19.68.101(1), if the owners practice as part of the firm. The MDs who own BFOA practice as part of the firm, and therefore any profit they receive as a result of referrals to the firm's PT employees is not "unearned" within the meaning of the statute's prohibition. Columbia argued that the MD owners of BFOA would have to personally supervise the company's PT employees in order to take advantage of RCW 19.68.040, but the Court ruled that the anti-rebate statute contained no supervision requirement.

### **Consumer Protection Act**

With regard to Columbia's Consumer Protection Act claim, the Court held, as a matter of law, that the act of telling patients that they could receive physical therapy only from BFOA's PTs "if proved, would constitute an unfair or deceptive practice." Likewise, the Court held that the act of pointing to BFOA's physical therapy location in response to a patient's question about where he could take his prescription for physical therapy, absent other circumstances, would constitute an unfair or deceptive practice. [Opinion, p. 22.]

Because there was a factual dispute as to whether BFOA had committed the acts alleged by Columbia, the Court affirmed the trial court's refusal to grant BFOA's motion for summary judgment.

### **APTA & PTWA Involvement**

Although Columbia did not consult with the APTA before filing suit, the APTA and the Physical Therapy Association of Washington (PTWA) did consult with Columbia's legal counsel after the complaint was filed. Along with APTA and PTWA, the Private Practice Section of APTA, the Private Practice Special Interest Group of PTWA, and individual members and practices have also supported Columbia's lawsuit. Both the APTA and the Washington Chapter filed amicus curiae briefs with the Washington Supreme Court supporting Columbia. The APTA's brief was prepared in large part by its in-house legal staff, working in concert with local Washington counsel, and the Washington Chapter retained counsel to prepare its amicus brief. The APTA's Board of Directors approved a grant to provide financial assistance to PTWA to support Columbia's lawsuit. The Chapter used the

grant to finance its amicus curiae brief, with the balance going to help pay Columbia's legal fees.

### **Comments**

The APTA and PTWA are disappointed with the result in the Columbia case, particularly the Supreme Court's rulings on the corporate practice and anti-rebate issues. The APTA respectfully disagrees with the Court's analysis, especially its holding that physical therapy is merely a part of the practice medicine. Although the Court's opinion obviously is adverse to the APTA's efforts to minimize referral for profit, the precedent is binding only in the state of Washington. The APTA continues to oppose referral for profit arrangements.

In addition, the Court's opinion does not negate the studies and research that shows physician-ownership of physical therapist services leads to higher costs, increased utilization, and decreased patient choice. As noted by the Court, it is an unfair and deceptive practice for a referring physician to tell patients that they can only receive physical therapy only from a PT clinic in which the referring physician has an ownership interest. While the APTA values collaborative and collegial relationships between physicians and physical therapists and believes they are vital, such relationships can be established without the conflict of interest that is created through physician-ownership of physical therapist services.