Clarity is not a usual adjective describing the law. In particular, the law regarding the corporate practice of physical therapy has been muddled by seeming overlapping statutes and lack of direction from regulators and even by legal advisors. Now, these ‘thousand points of light’ have gained focus from some recent actions in New Jersey.

New Jersey courts have affirmed that which should have been clear to Physical Therapists and their attorneys:

1. New Jersey physical therapy practices **must** be set up as either a sole proprietorship, partnership or professional corporation;
2. New Jersey physical therapy practices **must not** be owned, in part or in whole, by non-licensed professionals. For example, non-licensed spouses, grandparents and business people, among others, may not be owners.

The rationale of New Jersey court decisions, and the underlying statutes and regulations, rest on serious considerations. Non-licensee owners are not bound by the professional standards of licensees, and as a result, patient care may be at risk. Secondarily, the sharing of profits among non-licensees and licensees constitutes fee splitting, and is, per se, not legal.

While these points seem straightforward, many advisors, such as lawyers and accountants, have not been too clear on these issues and their ramifications, since many Physical Therapy practices are set up as regular business corporations, some with non-licensed owners. Adding insult to injury, the mix of licensed and non-licensed owners opens the door for payers to bring a lawsuit against practice under the New Jersey Insurance Fraud Prevention Act (“Fraud Act”), the underlying fraud being the mixed ownership structure. The Fraud Act provides that an insurance company can recover compensatory damages including attorney’s fees and costs. Treble, or triple damages, may also be recovered under certain circumstances.

**Why such apparent confusion?**

The ownership issue has been one of constant confusion and frequent misconception for physical therapists, as well as for regulators of physical therapy, for a number of years. This confusion is compounded by the fact state laws are so variable on the matter of who “owns” physical therapy, and by extension a physical therapy “practice”. Perhaps a little background on so-called “corporate practice” might help to illuminate the issues. Attempts to regulate, if not prohibit, the corporate practice of physical therapy in New Jersey date back to at least 1996. At that time, the New Jersey State Board of Physical Therapy Examiners (“BPTE”) proposed regulations addressing the issue. This was done as part of their “Sunset Review”, required every 5 years. They were forced, however, to reserve the sections of their proposed regulations that dealt with Corporate Practice. They again attempted to address this issue in 1997, when they drafted regulations on “Permissible business structures, prohibition on referral fees and fee splitting; professional misconduct”.

All of these attempts seem to have been blocked at various points in the regulatory review process. The most frequent reason for inaction given was that the BPTE had been blocked by the Division of Consumer Affairs, which was awaiting such a proposal from the Board of Medical Examiners.
This issue has repeatedly been brought to the forefront, due to multiple inquiries made to the BPTE regarding ownership of physical therapy services by non-physical therapists. In addition, some payers are looking to exploit some apparent legal ambiguity on the matter, by challenging the business structure of some Physical Therapy practices in New Jersey. We first became aware of this trend in November of 2002, based upon payer inquiries made to PT regarding their practice structure.

These developments gave new impetus to requests to the BPTE for clarification of permissible practice structure. In apparent response to these inquiries, the BPTE acknowledged at their meeting on April 22, 2003 that, due to recent court rulings and the new Physical Therapy Statute, this issue merited new consideration. Their position was again made clear when the Board acknowledged, in April of 2004, that the laws in New Jersey are not silent on the issue of practice structure, even though the issue may not have been directly addressed in the Physical Therapy Practice Act.

It is important to note while there were no previous court decisions dealing directly and specifically with the issue of ownership of physical therapy services, there have been decisions based on the Professional Services Corporation Act, which includes physical therapists.

In Liberty Mutual Ins. Co. v. Hyman (334 N.J. Super 400), decided June 26, 2000, the court said, “General Business Corporations cannot engage in the practice of medicine or chiropractic,” and “Chiropractors could only incorporate as professional services corporations.” In addition, the decision stated that if a general business corporation 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…”

Lastly, the decision said, “The Legislature has carved several statutory exceptions from this common law ban against the corporate practice of professional services to permit hospitals, nursing homes and certain other ‘ambulatory care’ facilities to operate as general business corporations. The rationale for this exception is that the adverse influences and countervailing interests peculiar to a business corporation are minimized and overshadowed by their public necessity, by a public need to assure institutional continuity, and by the fact that such entities are regulated and inspected by the State Department Health and Senior Services.” (emphasis added)

The obvious message in this case is that the State intends to regulate the practice of health care, and will not allow any setting or entity to avoid such regulation. As stated earlier, while the references made in this decision specify medicine and chiropractic, the statute serving as the basis for this decision includes physical therapists.

An identical opinion is rendered in the second case, Prudential Property and Casualty v. Greenberg, decided March 2, 2001: “The practice structure of a general business corporation to perform medical services or chiropractic is contrary to the long-standing jurisprudence in this state and elsewhere holding that professional services such as law and medicine may not be practiced in the corporate format,…”

In Limongelli v. New Jersey State Board of Dentistry, 137 N.J. 317 (1993) the Supreme Court considered the legality of a general business corporation to render dental services. Significantly, the court noted that a general business corporation cannot engage in the practice of dentistry. Id at 331. For the same reason, a general business corporation cannot engage in the practice of chiropractic.
**Recent Court Action**

Since the year 2000, a number of payers have either threatened and/or filed suit against New Jersey physical therapy practices to recover up to six years of reimbursement made to the practices. The basis of these actions has been that the physical therapy practices were illegally structured as S-Corporations and included lay shareholders. These actions represent an extension to physical therapy in the long line of New Jersey cases relating to ownership and corporate structure.

**Structuring a Physical Therapy Practice: Sole Proprietorship or a Professional Corporation**

One such New Jersey Court held that it is violative of New Jersey statutes and regulations, as well as the New Jersey Corporate Practice of Medicine Doctrine, for a physical therapy practice to be incorporated under the New Jersey Business Corporation Act, (“Business Corporation Act”), N.J.S.A. 14A:1-1, et seq. N.J.S.A. 14A:2-1 provides that in order to lawfully incorporate as a general business corporation, an entity must not be permitted to incorporate under any alternative statute unless the alternative statute permits the entity to also incorporate as a general business corporation. In 1969 the New Jersey legislature adopted the Professional Service Corporation Act, (“PSCA”), N.J.S.A. 14A:17-1 to 18 that provides that a general business corporation cannot provide professional services. “Professional service” is defined in N.J.S.A. 14A:17-3 as follows:

(1) “Professional service” shall mean 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 and which prior to the passage of this act and by reason of law could not be performed by a corporation. By way of example and without limiting the generality thereof, the personal services which come within the provisions of this act are the personal services rendered by certified public accountants, architects, optometrists, ophthalmic dispensers and technicians, professional engineers, land surveyors, land planners, chiropractors, **physical therapists**, registered professional nurses, dentists, osteopaths, physicians and surgeons, doctors of medicine, doctors of dentistry, podiatrists, veterinarians and, subject to the Rules of the Supreme Court, attorneys-at-law; (emphasis added) (2) “Professional corporation” means a corporation which is organized under this act for the sole and specific purpose of rendering the same or closely allied professional service as its shareholders, each of whom must be licensed or otherwise legally authorized within this State to render such professional service; (emphasis added) (3) “Closely allied professional service” means and is limited to the practice of (a) architecture, professional engineering, land surveying and land planning and (b) any branch of medicine and surgery, optometry, opticianry, **physical therapy**, registered professional nursing, and dentistry; (emphasis added)

That Court held that for a group of licensed physical therapists to practice together in a corporate format, they must incorporate under the Professional Service Corporation Act. That holding was entirely consistent with previous New Jersey courts which have long held that general business corporations cannot provide professional services. See Unger v. Landlords Management Corporation, 114 N.J. Eq. 68 (Ch. 1933) and In re Education Law Center Inc., 86 N.J. 124 (1981). To do so is violative of the New Jersey prohibition of the Corporate Practice of Medicine Doctrine.

A physical therapist who wants to set up a practice has two options: set up either as a sole proprietorship OR as a professional corporation. A general business corporation is not an option. A physical therapist operating as a non-incorporated entity may only be partners with another licensee. A professional corporation can only be comprised of licensees. Non-licensees may not be a part of the entity. However, nothing in either the New Jersey Business Corporate Act N.J.S.A. 14A:1-1 et seq. or the New Jersey Professional Service Corporate Act N.J.S.A. 14A:2-1 et seq. prohibits the formation of a management services organization (“MSO”), often an adjunct to a professional practice. This must be a general business corporation.
One problem that often arises concerns the individual therapist who is employed by a physical therapy practice. Must the therapist set up a PC even when employed by the physical therapy practice? No, because the PSCA permits the therapist to operate as a sole proprietor. The therapist, however, must have a contract between the therapist’s sole proprietorship and the physical therapy practice which employs the therapist, but other than that, the therapist need not go any further. This requirement for a contract is specified in the Physical Therapist Licensing Act of 1983, and is discussed further on in this article.

Another Problem with Unlicensed Owners: Fee Splitting

An unlicensed owner of a corporation cannot employ or supervise licensed professionals such as physical therapists because this arrangement necessarily involves fee splitting, which is prohibited. The prohibition on fee splitting contained in N.J.S.A. 45:9-37.21 provides the following prohibition:

No physical therapist or physical therapist assistant shall engage directly or indirectly in the division, transferring, assigning, rebating or refunding of fees received for professional services or pay or accept fees or commissions for referrals for professional services; however, nothing in this section shall be construed to prohibit physical therapists who are members of a professional association or other business entity, properly organized pursuant to law, from making a division of fees among themselves as determined by contract to be necessary to defray joint operating costs or pay salaries, benefits, or other compensation to employees. (emphasis added)

The ramifications of this statute are multiple: A physical therapist or physical therapist assistant shall not split fees with a non-licensee means that a non-licensee cannot share in the profits of the professional practice. In addition, the unlicensed owner of a corporation cannot employ or supervise licensed professionals, such as physical therapists. New Jersey courts have long supported this position by referring to the New Jersey Administrative Code N.J.A.C. 13:35-6.16(f) (3) (i), which provides that a practitioner with a plenary license shall not be employed by a practitioner with a limited license. A leading New Jersey case often referred to is Prudential Property & Casualty Insurance Company v. Midlantic Motion X-ray, Inc., 325 N.J. Super. 54 (Law Div. 1999) in which a chiropractor owned a mobile diagnostic testing facility and employed a plenary licensed physician to perform interpretations of testing. The Court in Midlantic Motion X-ray, Inc. held that the provider and the service combination as established between them constituted a violation of the statute and thereby rendered them ineligible to receive payments for services rendered to patients seeking PIP benefits from motor vehicle accidents. The regulations in the reported New Jersey cases deal with the interrelationship between unlicensed or licensed persons and plenary licensed persons in the medical field. Clearly the analogy can and is being carried over to the relationship between unlicensed persons and licensed physical therapists.

Every physical therapist providing physical therapy services, whether employed by a practice or not, is considered to be operating his or her own individual practice. Fee sharing may only be accomplished pursuant to N.J.S.A. 45:9-37.21, which provides, among other things, that in order for a physical therapist to share fees with an employing physical therapy practice, there needs to be two things in place: (1) a contract with the employer for purposes of sharing fees and (2) the employer with whom the therapist is sharing his or her fees is required to be owned solely by licensed professionals. The result is very simple and straightforward: the practicing physical therapist is not permitted to contract with a company organized improperly (see below) and is prohibited from entering into a contract with a non-licensee to share revenue from his or her physical therapy services.

Structuring Non-Licensee Involvement

Many New Jersey physical therapy practice entities may have lay ownership in one form or another. One might wonder whether there is a proper way to involve lay people with licensed physical therapists in such
entities. In order to answer this question, one must first understand the distinction between a Physical Therapy practice and the management of same.

A layperson, or any non-physical therapist for that matter, can never practice physical therapy. Therefore, these non-physical therapists neither “own” the physical therapy practice, nor do they own the professional services rendered in that practice. The layperson may own a management service organization (“MSO”), which provides such things as office space, equipment, supplies, non-licensed personnel, and billing and collecting services. Payment for such non-professional services, however, must be on a fee-for-service basis and not on a percentage basis. Such percentage-based agreements are often particularly tempting for the MSO because the potential revenue is unlimited, and it is likewise tempting for the Physical Therapist because their fee will vary with revenue, reducing cash flow concerns.

While such arrangements may appear to reduce financial risk to the PT, the net result of the arrangement is improper fee-splitting and the creation of a de facto partnership in the physical therapy practice. If such a partner is not a licensee, the arrangement itself, based upon NJ court decisions, will be afoot of the law, creating potentially serious legal consequences for all.

Playing Jeopardy with Patients and Licenses

The real harms of non-licensee ownership are jeopardy to New Jersey consumers and threats to the licenses of the physical therapists. Licensed physical therapists are required to govern their conduct in accordance with New Jersey Board of Physical Therapy Examiners, (“Board”), regulations that are designed to protect the consumer. Non-licensees often do not feel compelled to follow the Board regulations because they believe that they themselves are not subject to the Board’s regulations.

The risks to licensees in working for nonlicensees is well demonstrated by the following true fact scenario: A licensee physical therapist was terminated by her nonlicensee owner (who also was operating a general business corporate to provide physical therapy services) because the licensee was concerned with issues of fee splitting and fee advertising. During an unemployment appeal the nonlicensee owner testified that he had no responsibility to operate his business in accordance with the Board’s regulations and therefore was within his rights to terminate the employment of the licensee notwithstanding the licensee’s concerns about possible regulatory violations. This demonstrates all too clearly the inherent conflict between licensees and their nonlicensee employers: licensees are required to adhere to Board regulations while nonlicensees perceive themselves as not bound to do so. We may view this as a conflict in ethics; however, it is very simply a conflict in regulatory oversight: the licensee acknowledges required deference to the Board’s regulations; the nonlicensee does not.

Risks to Physical Therapy Practice Entities

There are multiple risks to the physical therapy practice that is either set up with lay ownership and/or incorporated as a general business corporation. The greatest risk is that a health insurance payer will seek restitution of all payments made and treble damages including counsel fees. Under the New Jersey Insurance Fraud Prevention Act, (“Fraud Act”), N.J.S.A. 17:33A-4(a) (1), a person or practitioner violates the act if he “Presents or causes to be presented any written or oral statement as part of or in support of a claim or payment or other benefit ... knowing that the statement contains any false or misleading information concerning any fact or thing material to the claim.” The Fraud Act provides that an insurance company can recover compensatory damages including attorney’s fees and costs and treble, or triple damages, may also be recovered under certain circumstances.
Risks to Individual Physical Therapists

Risks abound for physical therapists who permit their attorneys to choose a business entity that is improper, either with respect to ownership and/or practice structure. Physical therapists leave themselves open to claims of fraud if their attorneys select the wrong business entity. The measure of damages may be quite extensive if, as in this most recent case, the insurance company seeks (a) a return of monies paid to the improper entity, (b) a refusal to pay for any additional treatment to insureds, even though the treatment was authorized, (c) punitive damages in fraud and (d) attorneys’ fees and costs. These are the possible exposures against the physical therapist by the insurance carrier from selecting the wrong business entity.

A non-licensee can certainly consider a management service organization arrangement with the non-licensee owning the MSO as a general business corporation and contracting to provide nonprofessional services for the professional corporation that is solely owned by licensed professionals, provided that the parameters discussed above are carefully established and that the two business entities are clearly independent of each other.

In summary, failing to recognize the multiple implications of the Professional Service Corporation Act, and statutory fee splitting prohibitions may carry a high price tag for Physical Therapists. Ignorance on such issues could have fatal consequences for a practitioner and practice entity. When deciding issues of corporate structure and ownership, state statutes must be your first line of inquiry.