

SOME DOCTORS FED UP WITH MSO MODEL



James D. Wall, Esq.
Co-Managing
Partner
Waldrep Wall
Babcock &
Bailey PLLC

As shrinking reimbursement and heightened regulation force doctors to join hospital systems or practices managed by management services organizations (MSOs), some doctors are pushing back. A recent California lawsuit filed by a group of physicians against an MSO may be the canary in the coal mine.

THE MSO MODEL

California, like about three dozen other states including North Carolina, has prohibitions restricting the corporate practice of medicine (CPOM). These states prohibit lay corporations from owning medical practices. There is a popular model that “works around” these prohibitions. MSOs often become affiliated with medical practice through a management services agreement (MSA). The MSA typically provides that the MSO will provide all administrative and non-clinical support needed by the medical practice in exchange for a significant fee. On its face, this has appeal: let the physicians practice medicine and leave the administrative headaches to someone else. In this model, the medical practice is often owned by a “friendly physician,” who is called friendly because of the physician’s ties to the MSO. The MSA will acknowledge that the medical practice has control over all matters clinical. The MSO controls everything else. Since the MSO is not a medical practice, it can be owned by private equity or any other lay investors.

THE CALIFORNIA LAWSUIT

In the California suit (*American Academy of Emergency Medicine Physician Group, Inc. v. Envision Healthcare Corporation, et al*), a company that provides administrative and business services to physician groups has alleged that an MSO has violated the California restrictions on the corporation practice of medicine. While the corporate practice of medicine is a creature of state law and this suit would affect those in California, one could argue that the MSO model itself is at issue.

In the lawsuit, the plaintiff alleges that the defendant MSO used various entities that “exist only on paper” to undertake functions the law permits only physicians to

undertake, such as employing physicians or providing medical coverage for hospitals. It further alleges that the MSO possesses the direct and indirect power to direct or cause the direction of the management and policies of the professional corporations which is contrary to law.

The plaintiff also alleges that MSO uses “friendly physicians” to control hundreds if not thousands of medical groups. Plaintiff also alleges that the MSO installs executives or officers in the professional medical corporations who are bound by side agreements to sell the entities to the MSO if requested for nominal amounts. The plaintiff alleges that the bylaws of these professional entities prevent the removal of the MSO officers as officers or directors of the medical practice. The plaintiff also alleges that the MSO ensures corporate control of the professional entities by requiring the physicians’ owners to execute agreements limiting their authority. These restrictions include a restriction on the issuance of dividends, the creation of additional stock, the selling of the medical group, or the transfer of shares. The plaintiff has alleged that there are other indicia of MSO control including the MSO negotiating third-party payor contracts and deciding whether the medical practice can enter into such contracts, the MSO determining fees to be charged patients, the MSO making coding decisions, and the MSO keeping all revenues after physician salaries are paid. Given these indicia of ownership, the plaintiff argues that the MSO is the functional owner of the medical practices.

SO WHAT?

Even if the allegations in the Complaint are proven true, one could ask “so what?” That is, if state law requires a professional practice to be owned by licensed professionals, that requirement appears to have been met. Further, if state law does not restrict the types of board members, then a professional corporation can appoint lay directors. The “so what?” equivalent in litigation is a motion to dismiss. In this case, the defendants filed a motion to dismiss, which was denied.

FRIENDS OF THE COURT

What is also interesting in this California case is that two organizations have filed for permission to submit *Amicus Curiae* briefs (amicus curiae means “friend of the court” and is used when a non-party has a strong interest in the matter and wants to influence the outcome). The American College of Emergency Physicians (ACEP), which states that it is the nation’s largest nonprofit professional association focused on furthering the professional development of emergency physicians, requested and received permission to file a brief in the matter. It argues in support of plaintiff: “ACEP firmly believes that medical decisions must be made by physicians and opposes any practice structure that threatens physician autonomy, the patient-physician relationship, or the ability of the physician to place the needs of patients over profits.” It further asserts that medical practices, not lay companies, should control (i) a patient’s medical records, (ii) hiring and firing of physicians and allied health staff, (iii) decisions regarding coding, and (iv) approving the selection of medical equipment and supplies.

Additionally, the California Medical Association (CMA) requested and received permission to file a brief in the matter. CMA describes itself as having served as “the voice of California’s house of medicine to advocate for the medical professional against intrusions and transgressions...” CMA further states in its motion that “it springs from a fundamental public policy to protect and preserve the independence of

physicians’ professional judgment in the care of their patients, free from external forces that can interfere with the physician-patient relationship.” Both advocacy groups have filed briefs supporting the plaintiff.

CANARY IN THE COAL MINE OR ANOMALY?

This case may signal the next wave of lawsuits by physician advocacy groups against MSOs. What is interesting about this case is that the manner in which many MSOs do business is under attack. That is, the plaintiff complains that the MSO is exercising undue control over professional entities even though the underlying documents may satisfy the mandates of state law. Further, it is eyebrow-raising that the plaintiffs in this case did not request monetary damages; they merely requested that the court enjoin the MSO from continuing to act as it had been acting. The trial date is set for early 2024. Because of the lack of a request for monetary damages, and the suit challenges the way of doing business for many MSOs, it would seem the likelihood of settlement would be remote. ❖

