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STATE OF WASHINGTON

COLUMBIA PHYSICAL THERAPY, INC.,

Petitioner,

v.

BENTON FRANKLIN ORTHOPEDIC ASSOCIATES, ET AL.,

Respondents.

**BRIEF OF RESPONDENTS**

Michael H. Church  
WSBA #24957  
Matthew T. Ries  
WSBA #29407  
STAMPER RUBENS, P.S.  
720 West Boone, Suite 200  
Spokane, Washington 99201  
(509) 326-4800

Howard R. Rubin  
Kenneth J. Pfahler  
Christopher L. Harlow  
SONNENSCHN NATH &  
ROSENTHAL LLP  
1301 K Street, N.W.  
Suite 600, East Tower  
Washington, D.C. 20005  
(202) 408-6400

Attorneys for Respondents

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### **Introduction**

Petitioner Columbia Physical Therapy, Inc. ("Columbia") seeks to rewrite Washington's statutory and common law to protect the financial turf of certain physical therapy companies at the expense of patient choice and access to quality health care services. At stake is the ability of patients throughout Washington to receive post-surgical and other medically necessary physical therapy from licensed physical therapists who work as employees of the patients' orthopedic surgeons. The provision of physical therapy in an orthopedic group practice is consistent with Medicare rules and regulations and currently is available to patients across the country. Physical therapy provided in an orthopedic group practice is convenient for patients, affords them better and more continuous care, improves communication between physician and therapist, and enhances the effectiveness of the health care system through an integrated, cross-disciplinary approach to the delivery of medical care.

Through its lawsuit against Respondents Benton Franklin Orthopedic Associates and the medical group's physician owners and physical therapist employees (collectively, "Benton Franklin"), Columbia hopes to eliminate competition from orthopedic medical groups that provide their patients with physical therapy services in their own facilities. Columbia seeks to create a monopoly over these services for independent

physical therapy clinics. The problem for Columbia is that none of the statutes or common law doctrines on which Columbia relies supports its argument.

The Anti-Rebate Statute (RCW 19.68) prohibits rebates or kickbacks, neither of which is even alleged here. As this Court explained in defining the scope of the Anti-Rebate Statute,

the statute does not prevent a patient from paying a health care provider for services rendered or prescriptions received. Nor does it prevent a health care provider from making a profit on furnishing goods or care to patients.

*Wright v. Jeckle*, 158 Wn.2d 375, 381, 144 P.3d 301, 304 (2006).

Consistent with *Wright*, Benton Franklin's employment of licensed physical therapists does not violate the Anti-Rebate Statute.

The Professional Service Corporations Act (RCW 18.100), heavily relied upon by Columbia, does not address the question presented here – namely, whether a medical practice is legally precluded from hiring physical therapists as employees. The Act addresses who may *own* professional service corporations, not who such corporations may *employ*. Similarly, the common law corporate practice of medicine doctrine on which Columbia relies is aimed at preventing lay ownership of medical practices – also not a topic at issue here.

Columbia also brought a claim under the Consumer Protection Act (RCW 19.86), yet Columbia has not alleged the violation of any act or statute that the legislature has determined constitutes an unfair or deceptive act in trade or commerce. Nor has Columbia proffered any evidence that the alleged statements on which it bases its Consumer Protection Act claims – that patients would receive better medical oversight with physical therapy furnished in the facilities of their orthopedic surgeon’s medical practices, or that certain aspects of their care would be more convenient – are actually untrue. The reason for this is straightforward: Columbia is really complaining about the way Benton Franklin has chosen to conduct its practice, and actions “motivated by legitimate business concerns” are “not the kind of conduct within the scope of RCW 19.86.020.” *State v. Black*, 100 Wn.2d 793, 803, 676 P.2d 963, 969 (1984).

Physician employment of physical therapists is a common practice in this and just about every other state, and is permitted under the federal laws and regulations governing the Medicare and Medicaid programs. It is good public policy (and, frankly, just plain common sense). There is no good reason why this widely accepted practice should be scrapped in favor of an *ad hoc*, judicially-created alternative, unsupported by a fair and contextual reading of the statutory enactments of the legislature, and

unprompted by any compelling public policy need. Nothing in the law of this State, including its statutory enactments, prohibits this practice or requires this Court to grant a monopoly to companies such as Columbia over the business of physical therapy in Washington. Accordingly, Benton Franklin respectfully asks this Court to find that it may continue to provide its patients with physical therapy at the medical group's facilities through the group's licensed employee physical therapists.

#### **Assignments of Error**

##### **A. Assignments of Error**

1. The trial court erred when it denied the Respondents' motion for summary judgment on Columbia's Anti-Rebate Statute claim, RCW 19.68 *et seq.*

2. The trial court erred when it denied the Respondents' motion for summary judgment on Columbia's Consumer Protection Act claim, RCW 19.86 *et seq.*

3. The trial court erred when it did not grant the Respondents' motion for summary judgment on Columbia's claim under the corporate practice of medicine doctrine.

##### **B. Issues Pertaining To Assignments of Error**

1. Does an entirely physician-owned professional limited liability company ("PLLC") violate the prohibition on "a rebate, refund,

commission, unearned discount or profit by means of a credit or other valuable consideration in connection with the referral of patients” set forth in the Anti-Rebate Statute (RCW 19.68) by providing physical therapy services to its patients through employees who are licensed physical therapists?

2. Does the provision by an entirely physician-owned PLLC of physical therapy services to its patients through employees who are licensed physical therapists constitute “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce” in violation of the Consumer Protection Act (RCW 19.86.020)?

3. Does the corporate practice of medicine doctrine prohibit physical therapists from being employed by a PLLC that is owned entirely and solely by duly licensed physicians?

### **Statement of the Case**

#### **A. The Undisputed Facts**

The trial court should have granted summary judgment for Benton Franklin on all counts (rather than only on Columbia’s claim under the Professional Service Corporations Act), because each of Columbia’s claims are legally flawed and there are no genuine issues of material fact. We set forth here the few undisputed facts relevant to this appeal.

Benton Franklin Orthopaedic Associates, P.L.L.C. (“BFOA”) is a Washington professional limited liability company that operates orthopedic medicine clinics in the cities of Kennewick and Pasco. (CP 349, 804). Doctors Thomas R. Burgdorff, Arthur E. Thiel, and Christopher A. Kontogianis formed BFOA on November 19, 1999. (CP 350, 401). The doctors formed the medical practice to provide the full range of “medical services, care and treatment to patients of the Company.” (CP 385, 412). In addition to the three physician founding members, doctors David W. Fischer and Heather L. Phipps have joined BFOA as managing members. (CP 349). Thus each of the five owners of BFOA is a medical doctor duly licensed to practice in Washington. (CP 526). BFOA employs three salaried physical therapists, including Mr. Kump and Mr. West. (CP 1045, 1046, 1062).<sup>1</sup> BFOA bills physical therapy services using the individual provider numbers of the therapists. (CP 1047, 291). Only about a third of BFOA’s patients who need physical therapy receive their physical therapy from BFOA. (CP 469).

#### **B. Procedural Posture**

In the trial court both Columbia and Benton Franklin moved for summary judgment. Benton Franklin moved for summary judgment on all

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<sup>1</sup> In its opening brief, Columbia describes Kump and West as employees of “BFOA’s physician-owned physical therapy clinic.” To be clear, Kump and West are employees of Benton Franklin Orthopedic Associates, P.L.L.C. (CP 939, 941).

four of Columbia's claims, on the grounds that Columbia had failed to establish triable factual issues sufficient to avoid summary judgment on its claims for violation of the Anti-Rebate Statute, the Professional Service Corporations Act, the common law practice of medicine doctrine and the Consumer Protection Act. Columbia moved for summary judgment on its claims under the Anti-Rebate Statute, the Professional Service Corporations Act, and the corporate practice of medicine doctrine. Columbia did not move for summary judgment on its Consumer Protection Act claim.

The parties' cross motions resulted in two orders of the Benton County Superior Court, by Judge Dennis D. Yule, on December 17, 2007. The Superior Court granted, in part, Benton Franklin's motion for summary judgment, dismissing Columbia's claim based on the Professional Service Corporations Act. (CP 42 ¶ 1). The Superior Court denied Benton Franklin's motions for summary judgment on the Anti-Rebate Statute and the Consumer Protection Act. (CP 42 ¶ 3).

The Superior Court denied Columbia's summary judgment motion on Columbia's Anti-Rebate Statute and Professional Service Corporations Act claims. With respect to the Anti-Rebate Statute claim, the court determined that there was "an issue of fact as to whether defendants could satisfy the supervision requirement under RCW 19.68.040." (CP 35 ¶ 3).

The Superior Court declined to rule on the application of the common law corporate practice of medicine doctrine. (CP 42 ¶ 2). As a result, the court neither granted nor denied Benton Franklin's and Columbia's competing summary judgment motions on Columbia's corporate practice of medicine claim. *Id.*

Based on these summary judgment rulings, the parties stipulated that discretionary review was appropriate, seeking rulings of law from the appellate court that could obviate the need for a trial on one or more of Columbia's claims. On December 17, 2007, Judge Yule certified the summary judgment orders for discretionary review. (CP 34-36). The parties then filed cross motions for discretionary review in the Court of Appeals, which Commissioner Joyce J. McCown denied on March 12, 2008. The parties filed a joint motion to modify, which the Court of Appeals, Division III, denied on May 23, 2008.

On June 23, 2008, the parties filed a Joint Motion for Discretionary Review with this Court. On September 3, 2008, this Court granted the Joint Motion.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

This Court reviews summary judgment rulings and questions of law *de novo*. *Potter v. Washington State Patrol*, 165 Wn.2d 67, 78, 196

P.3d 691, 697 (2008). The Court may affirm the trial court on “any theory established in the pleadings and supported by proof,” even where the trial court did not rely on the theory. *Wilson Court Ltd. P’ship v. Tony Maroni’s, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590, 594 (1998).

A defendant is entitled to summary judgment when it can show an absence of evidence supporting an element essential to the plaintiff’s claim. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992) (citing *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182, 188 (1989)). Indeed, a defendant is merely required to challenge the sufficiency of the plaintiff’s evidence on any material issue. *Las*, 66 Wn. App. at 198. The burden then shifts to the nonmoving party (here, Columbia) to set forth specific facts by affidavit or other evidence that demonstrate the existence of a genuine issue. *Id.*; *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 654, 869 P.2d 1014, 1016 (1994).

## **II. COLUMBIA SEEKS A MONOPOLY AT THE EXPENSE OF PATIENT CARE**

Columbia seeks a court-imposed monopoly. It wants this Court to eliminate the healthy competition that currently exists in the State’s physical therapy market – a market that inevitably enhances patient choice and fosters quality of care – in favor of therapist-owned physical therapy clinics only. But while Columbia and the other therapist-owned physical

therapy operations in the State would surely benefit financially from that change of affairs, the adoption of Columbia's position would have a deleterious impact on the care of Washington's patients.

Consider a patient who has just had surgery on his knee. Being able to receive his physical therapy within his own orthopedic surgeon's practice will often enable the patient, who may be in great physical discomfort, from having to travel a greater distance to undergo his therapy sessions. It will be much easier for the patient's surgeon and physical therapist to routinely exchange information about the patient's progress, which will permit mid-course corrections to the therapy, facilitate changes in prescription medicines if necessary, reduce the possibility for communication errors, and potentially permit the physician to decide to end therapy earlier. Since all information about the patient is on one computer system, paperwork and staff time should be reduced. And, most significantly, physical therapy provided at the orthopedic surgeon's office enables the surgeon, when necessary, to observe the patient's progress during therapy sessions.

All of these practical benefits to patients would be lost if Columbia's positions were adopted. The patient's ability (indeed, freedom) to choose these benefits will be removed from him or her. This reality, unsurprisingly, is unacknowledged in Columbia's brief. Instead,

Columbia argues that barring physician employment of physical therapists is necessary to prevent over-referrals of patients for therapy. But Columbia has adduced no evidence of over-utilization by Benton Franklin. Columbia has not proffered any empirical data showing that over utilization of in-practice physical therapy referrals is occurring in the State of Washington, and we are aware of no such evidence.<sup>2</sup> Columbia is seeking to manufacture an unnecessary and draconian solution to a problem of supposed physician abuse that we have no reason to believe exists.

A physician referral to physical therapy is not unlike a physician recommending that a patient return to the physician for a follow-up visit: abuse is always possible by the unscrupulous. But banning desirable treatment options – which are readily available today in Washington and

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<sup>2</sup> Columbia claims that in a recent decision, the Supreme Court of South Carolina described the “problem of physician owned physical therapy services,” and then offers a nearly two page quote from the decision in *Sloan v. South Carolina Bd. of Physical Therapy Exam’rs*, 636 S.E.2d 598 (2006), about the supposed evils associated with the employment of physical therapists. (Pet’r. Br. 13). Columbia misuses the opinion, however, which is clear that the *Sloan* court was merely describing the position taken by the American Physical Therapy Association (“APTA”) in its amicus brief in support of the plaintiff in the case. *Sloan*, 636 S.E.2d at 603. Importantly, after quoting from the APTA’s brief, the court went on to note that “the American Association of Orthopaedic Surgeons (AAOS) views physical therapy as an ancillary service offered by physicians and contends POPTS [physician owned physical therapy services] benefit patients, physicians, and therapists.” The court then quoted from AAOS’s lengthy rebuttal of the APTA’s views. *Id.* The *Sloan* court simply was describing the positions of the parties, nothing more, and neither Columbia nor Benton Franklin can fairly contend that the *Sloan* court took a position on either side of the health care policy question of whether physician owned physical therapy services are good for patient care or the health care system.

across the entire country – is not an appropriate or proportionate response to a perceived (but unestablished) potential for abuse.<sup>3</sup> Moreover, it is of course for the legislature, not financially interested party litigants, to make such a policy decision if it is to be made. The legislature has not enacted laws prohibiting physician employment of physical therapists but rather, as described below, has passed laws permitting such employment.

Of course, banning physical therapy furnished within a medical group's practice would have the negative consequence of eliminating competition for clinics owned by non-physicians, including other physical therapists. This result highlights the inconsistency in Columbia's position. While Columbia opposes physicians furnishing physical therapy services through licensed physical therapists employed by the physicians' medical groups because the physicians supposedly cannot be trusted, Columbia endorses physical therapists owning clinics despite the same financial incentive to over-utilize services. Banning physician-employed physical therapy does nothing to ensure that over-utilization does not occur; rather, it merely eliminates those clinics that actually provide the greatest patient

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<sup>3</sup> It is telling that Medicare rules and regulations (which are interlaced with numerous anti-abuse protections) not only permit physicians to furnish their patients with physical therapy in their group practices (through employed therapists), but allow physicians to do so as a service that is "incident to" (*i.e.*, an integral extension of) the physician-owners' medical services. 42 U.S.C. § 1395nn; 42 C.F.R. 411.350 - 411.389.

protections, where physicians can more effectively monitor physical therapy, and increases the likelihood that ineffective or inefficient physical therapy clinics not only will remain in business, but may be the sole recourse for patients in small or rural communities.

**III. THE TRIAL COURT ERRED BY DENYING  
SUMMARY JUDGMENT TO BENTON FRANKLIN  
ON COLUMBIA'S CLAIMS UNDER THE ANTI-  
REBATE STATUTE**

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The Superior Court erred by denying Benton Franklin's motion for summary judgment on Columbia's claim under the Anti-Rebate Statute. Based on the undisputed facts of this case, Columbia cannot state a claim that Benton Franklin violated Washington's Anti-Rebate Statute by employing physical therapists and having those therapists furnish therapy to the medical group's patients. The Statute forbids rebates, refunds, commissions and unearned discounts or profits. RCW 19.68.010(1). Having your patient receive physical therapy from your own employee and earning a profit from the provision of those healthcare services does not constitute a "rebate." Nor is it a "kickback." There is no "unearned profit," but rather an *earned* profit. An orthopedic group employing duly licensed physical therapists offends none of the provisions of the Anti-Rebate Statute. Indeed, if the opposite were true, then every professional corporation, including Columbia, would arguably implicate the Anti-

Rebate Statute when it operated through employed professionals, be they employed physicians or therapists.

The Superior Court did not deny Benton Franklin's summary judgment motion on any of these bases. Rather, the court appears to have been concerned about whether there were triable issues of fact concerning the Benton Franklin orthopedic surgeons' supervision of their physical therapists under RCW 19.68.040. (CP 35 ¶ 3). RCW 19.68.040 does not contain a supervision requirement, however, and there are no supervision requirements imposed by the Anti-Rebate Statute. The trial court's ruling was error and should be reversed.

**A. RCW 19.68 Prohibits Rebates and Kickbacks, Not Profiting from Services Provided By Licensed Employees**

Benton Franklin's employment of physical therapists is permitted under subchapter 19.68.040 of the Anti-Rebate Statute, which states that chapter 19.68 is not intended "to prohibit a licensee who employs another licensee to charge or collect compensation for professional services rendered by the employee licensee." This carve-out from RCW 19.68 expressly permits the arrangement at issue here. The licensed orthopedic physicians who collectively own BFOA have hired three duly licensed physical therapists. The licensed employer may charge and collect

compensation for the professional services rendered by the licensed employee. The facts here fit precisely within RCW 19.68.040.<sup>4</sup>

Columbia does not give a fair reading to section 19.68.040. Columbia asks the Court to read section 19.68.040 to mean that only one doctor holding a license can hire another licensee, while a group of licensed doctors practicing together cannot hire a licensed employee. Columbia offers no explanation why the statute should be read in this unduly narrow and unnatural way. There certainly is nothing in the language of RCW 19.68.040 to suggest that it be read this way. We cannot conceive why an intention would be ascribed to the legislature to permit a solo practitioner to hire licensees, while forbidding group practices from making such hires. Certainly such an interpretation of the statute would be inconsistent with the way medicine is practiced in the State of Washington (and, frankly, throughout the United States), where it is routine for physician groups to hire a variety of licensees.

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<sup>4</sup> RCW 19.68.040 provides in full:

It is the intent of this chapter, and this chapter shall be so construed, that persons so licensed shall only be authorized by law to charge or receive compensation for professional services rendered if such services are actually rendered by the licensee and not otherwise: PROVIDED, HOWEVER, That it is not intended to prohibit two or more licensees who practice their professions as copartners to charge or collect compensation for any professional services by any member of the firm, or to prohibit a licensee who employs another licensee to charge or collect compensation for professional services rendered by the employee licensee.

Columbia's interpretation would produce the absurd result that respondent Dr. Burgdorff could employ another licensee, and respondent Doctors Kontogianis, Thiel, Fischer and Phipps each could individually hire another licensee, but when they band together as a cohesive practice (and thereby are likely both to have a greater need and means to hire licensed employees and the ability to utilize such employees more effectively), they may not employ a licensed employee. This Court will "avoid readings of statutes that lead to strained or absurd results." *Wright v. Jeckle*, 158 Wn.2d 375, 379-80, 382, 144 P.3d 301, 304, 305 (2006); *Glaubach v. Regence BlueShield*, 149 Wn.2d 827, 833, 74 P.3d 115, 118 (2003).

Columbia contends that "the plain language of RCW 19.68.040 indicates that the legislature intended the 'employee' exception to apply only in situations where a licensee employs *similarly licensed* individuals." (Pet'r. Br. 42 (emphasis in original)). But the plain language of RCW 19.68.040 says no such thing. It says that nothing in the chapter is intended "to prohibit *a licensee who employs another licensee*"; there is no mention whatsoever about the two having to be *similarly* licensed. (RCW § 19.68.040 (emphasis added)). Columbia claims that this clause is conditioned by the previous clause, which states that section 19.68.040 is not intended to "prohibit two or more licensees who practice

their profession as copartners.” But the clauses are written in the disjunctive, joined by the word “or.” RCW § 19.68.040. Therefore, it is presumed that the legislature meant to address alternative possibilities, not possibilities conditioned on each other. *Tesoro Ref. & Mktg. Co. v. Dep’t of Revenue*, 164 Wn.2d 310, 319, 190 P.3d 28, 33 (2008).

If the legislature had wanted to limit the carve-out to similarly licensed employees, it easily could have said so. When ascertaining legislative intent, we begin with the plain language and meaning of the statute’s text. *Cf. National Elec. Contractors Ass’n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481, 486 (1999). The plain meaning of section 19.68.040 is that “a licensee” may employ “another licensee,” without restrictions on the type of licensees involved.

Columbia claims that Section 19.68 prevents Benton Franklin from profiting from the professional services performed by its employees. Again, Columbia misreads the statute. Several subsections of 19.68 prohibit paying or receiving anything of value in connection with referrals, for example. But as this Court recently held, Section 19.68 does not

prevent a health care provider from making a profit on furnishing goods or care to patients. We arrive at this conclusion based upon the purposes, structure, and words of this and related statutes. *Id.* Our conclusion is reinforced by common sense.

We recognize that the word “profit” in the statute can give the reasonable reader pause. But a single word in a statute should not be read in isolation. Context matters. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995) (“a word is known by the company it keeps (the doctrine of *noscitur a sociis*)”); *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005). Read in context, RCW 19.68.010 prohibits taking an “unearned . . . profit” from a third party, such as “when a licensed health care professional is paid an *unearned profit* by another person who was permitted to furnish/sell something to a patient that had been prescribed by the professional.” Amicus Br. Wash. State Med. Ass’n at 12 (emphasis added). Thus, the statute would prohibit a doctor from receiving an “unearned profit” (or “kickback”) from a pharmacist to whom a doctor referred a patient.

*Wright v. Jeckle*, 158 Wn.2d at 381, 144 P.3d at 304-05.

BFOA is not taking a kickback, or “unearned profit,” when a BFOA orthopedic surgeon refers a patient to one of the medical practice’s employed physical therapists, Messrs. Kump or West. BFOA earns a profit only when Messrs. Kump or West provide a service, physical therapy treatment, to the patient. The other sections of the Anti-Rebate Statute confirm that there is nothing impermissible about BFOA making a profit from the physical therapy performed by Messrs. Kump and West. “RCW 19.68.020, like 010, prohibits profits earned from referring patients, *not profits from treating patients or providing goods or services.*” *Wright*, 158 Wn.2d at 381, 144 P.3d at 305 (emphasis in original). By definition, the “profits” that BFOA makes from Mr. Kump’s and Mr.

West's physical therapy services are profits from providing a therapeutic service to patients. Messrs. Kump and West are BFOA's salaried employees. (CP 1045, 1046, 1062). As we have addressed above, RCW 19.68.040 specifically provides that BFOA may profit from services performed by its employees. This conclusion is bolstered by the fact that in enacting the federal health care program anti-kickback statute (the federal statute which makes it a felony to offer, pay or accept kickbacks in connection with Medicare, Medicaid and other federally funded programs),<sup>5</sup> the United States Congress provided a specific exception that affords immunity for payments made by an employer to a bona fide employee.<sup>6</sup>

**B. RCW 19.68 Must Be Read *In Pari Materia* With RCW 74.09.240, Which Permits Benton Franklin's Employment of Physical Therapists**

Chapter 19.68 plainly is aimed at preventing kickbacks, not at preventing medical professionals from profiting from the goods and services that they, or their employees, provide to their own patients. *Wright*, 158 Wn.2d at 381, 144 P.3d at 305. RCW 74.09.240, which makes it a felony to receive kickbacks in connection with items and services subject to Medicaid or public assistance reimbursement, provides

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<sup>5</sup> 42 U.S.C. § 1320a-7b(b)(2).

<sup>6</sup> 42 U.S.C. § 1320a-7b(b)(3).

further support for this conclusion. RCW 74.09.240 expressly supersedes the criminal provisions of chapter 19.68 when the service or good involved is reimbursable by public assistance. As this Court has observed, it “seems the legislature intended for these two antikickback provisions to work in harmony with each other: if the provider was not reimbursed [by the State] for any items or services, the criminal provisions of chapter 19.68 RCW apply; if there is state reimbursement, RCW 74.09.240 applies.” *Wright v. Jeckle*, 58 Wn.2d at 382-83, 144 P.3d at 305.

In RCW 74.09.240 the Washington legislature expressly incorporated into its prohibition of in-practice physical therapy referrals the exceptions set forth in the federal physician self referral law (commonly known as the “Stark Law”), 42 U.S.C. § 1395nn, and its accompanying regulations. RCW 74.09.240(3)(a) provides:

“(3)(a) *Except as provided in 42 U.S.C. 1395nn* [the Stark Law], physicians are prohibited from self-referring any client eligible under this chapter for the following designated health services to a facility in which the physician or an immediate family member has a financial relationship:

. . . (ii) Physical therapy services.”

RCW 74.09.240(3)(c) adds that “The department is authorized to adopt by rule amendments to 42 U.S.C. 1395nn enacted after July 23, 1995.”

Under the Stark Law, a physician may not refer a Medicare patient for designated health services, including physical therapy, to an entity with which the physician has a financial relationship, unless an exception applies. 42 U.S.C. § 1395nn; 42 C.F.R. 411.350-411.389. The Stark Law includes a specific exception that permits physician group practices to furnish their patients with certain ancillary services (including physical therapy) in one or more of the group's facilities, provided that certain conditions are met. 42 C.F.R. § 411.355(b)(1). All of the Stark Law conditions are met here. BFOA's physical therapy is provided in a location that satisfies the Stark Law's location requirements. (*Id.*; CP 1058, 1061). BFOA bills physical therapy services (in its own name) as directly provided by the therapist, using the therapist's Medicare Personal Identification Number ("PIN") or National Provider Identifier ("NPI") number. (CP 1047, 291). Physical therapy services billed in this manner require no physician supervision to fall within the in-office ancillary service exception.<sup>7</sup>

Therefore, under RCW 74.09.240, which incorporates into Washington law the Stark Law exceptions, BFOA is expressly permitted

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<sup>7</sup> See Medicare and Medicaid Programs, "Physician's Referral to Health Care Entities With Which They Have Financial Relationships," 66 Fed. Reg. at 856-01, 880 (Jan. 4, 2001); Centers for Medicare & Medicaid Services, Medicare Claims Processing Manual (Pub. 100-04), § 30.2 *et seq.*

to hire licensed physical therapists, make referrals to them, bill for their services, and earn a profit thereby. Columbia, however, is proposing two sets of referral standards for Washington orthopedists: one when public assistance is paying the bill and another when a private payor is involved. Imposing such a double standard makes no sense. It would be contrary to the intent of the legislature and common sense to reach a conclusion in this case that is at odds with federal Stark Law and doing so would sow confusion in the medical industry and substantially and impermissibly burden Washington's orthopedists and other physicians. This result would disserve the public and create two standards of care depending on a patient's payor source of reimbursement, while advancing no interest of the public health system or its patients.

**C. The Trial Court Erred By Denying Summary Judgment Based On Factual Disputes Over A Supervision Requirement**

The trial court appears to have read a supervision requirement into RCW 19.68.040. (*See* CP 35 ¶ 3). The court found that this presented an issue of fact, precluding summary judgment. (*Id.*). But RCW 19.68 contains no supervision requirement of its own, and there is no separate statutory supervision requirement for orthopedists or physical therapists.

It is likely that the Superior Court was reading into RCW 19.68.040 the supervision requirements discussed in *Day v. Inland Empire*

*Optical, Inc.*, 76 Wn.2d 407, 456 P.2d 1011 (1969). Columbia argued below, and urges again here, that the *Day* requirements should be exported from the context of *Day* – ophthalmologist supervision of opticians – into the context of orthopedic surgeons employing physical therapists. This is a misapplication of *Day's* holding. The supervision requirements discussed in *Day* were explicitly grounded in the obligations imposed by RCW 18.34.010, the statute governing licensed ophthalmologists. *Day v. Inland Empire*, 76 Wn.2d at 419, 456 P.2d at 1018. This Court only arrived at its conclusions about supervision in *Day* by reading 19.68 and 18.34.010 in *pari materia* to conclude that the legislature intended a requirement of supervision in the circumstances presented by *Day*. There is no basis for extending the *Day* supervision requirements, arising from the particular statutory scheme governing ophthalmologist supervision of opticians, to physician supervision of physical therapists.

To the contrary: the physicians of BFOA are in compliance with the requirements of Washington law because the Stark Law, which this state has adopted as its own in RCW 74.09.240, does not require supervision in these circumstances. Nevertheless, BFOA provides meaningful supervision of its physical therapists. BFOA utilizes electronic medical records, so that all treatment records are on one server and instantly accessible both to the doctors and the physical therapists.

(CP 945, 1062). So, for example, a therapist's treatment plan is input into the electronic medical records and is immediately available for the doctor's review, with the result that BFOA's doctors comment on treatment plans, while (in the experience of BFOA's therapists) the non-BFOA doctors do not. (CP 1060-61). BFOA physicians also can actively supervise their employee therapists by giving direct and immediate feedback, personally observing performance, and actively monitoring the therapy provided to patients. (CP 945, 1047). This oversight enables BFOA physicians to quickly adjust a patient's physical therapy regimen to ensure complete and rapid recovery. (CP 945). When appropriate, BFOA doctors are personally present at physical therapy sessions. (CP 1047). Because the physical therapists are BFOA employees, the performance of each of the physical therapists is carefully evaluated by BFOA's doctors. (CP 1046).

The critical point, however, for purposes of this Court's review of Judge Yule's summary judgment ruling, is that the supervision requirements from *Day* do not apply here. Thus there is no need for a trial to evaluate the level of supervision provided by BFOA's orthopedic surgeons.

**D. Columbia's Reliance on *Day* and *Sloan* Is Misplaced**

Columbia relies heavily on this Court's decision in *Day v. Inland Empire Optical, Inc.*, 76 Wn.2d 407, 456 P.2d 1011 (1969). But as Columbia observes (at page 33 of its brief), *Day* involved whether ophthalmologists (who practiced as the Spokane Eye Clinic) with an ownership interest in a separate corporation (Inland Empire Optical Company) could "receive *unearned* profits in connection with a referral to" a licensed professional employed by that separate corporation. *Day*, 76 Wn.2d at 418-19, 456 P.2d at 1018-19 (emphasis added). When considering RCW 19.68, the *Day* court focused on the fact that the defendant ophthalmologists owned "all of the capital stock of Inland Empire Optical Company and their consequential control over it." *Id.*, 76 Wn.2d at 418, 456 P.2d at 1018.

*Day* did *not* present the factual circumstance presented here: referrals by physicians who practice as a single professional service corporation (Benton Franklin Orthopedic Associates, P.L.L.C.) to other licensed professionals (physical therapists) who are employees of the same corporation, with an *earned* profit based on billings for the services actually performed by the employee physical therapists.

The *Day* Court sought to ensure that chapter 19.68 was “construed so that licensed medical practitioners charge and receive compensation only for professional services actually performed.” *Id.*, 76 Wn.2d at 419, 456 P.2d at 1018. This is exactly what BFOA’s structure achieves. BFOA charges and receives compensation only for professional services actually performed by its employed professionals: for the medical services provided by the orthopedic surgeons and for physical therapy incident thereto performed by the licensed physical therapists. It can be assumed that this is why the federal Stark Law permits exactly the arrangement at issue here with respect to physical therapy services, but would not permit the arrangement described in *Day*.

Columbia also relies upon the 2006 South Carolina Supreme Court decision in *Sloan v. South Carolina Board of Physical Therapy Examiners*, 370 S.C. 452, 636 S.E.2d 598 (2006), which determined that physicians could not employ physical therapists in that state. (Pet’r. Br. 13, 33-34). Columbia claims that *Sloan* is “remarkably similar” to this case and involved a “nearly identical” statute. (Pet’r. Br. 13, 33). In fact, the decision in *Sloan* applied a South Carolina statute containing radically different language than Washington’s Anti-Rebate Statute. The South Carolina statute – known as the Physical Therapy Act – specifically regulates the conduct of and compensation paid to physical therapists.

Among the conduct prohibited in the statute is the payment of “wages” to a physical therapist by “a person who referred a patient.” *Sloan*, 370 S.C. at 464, 636 S.E.2d at 604 (*quoting* S.C. Code Ann. § 40-45-110(A)(1)) (emphasis added). The inclusion of “wages” presumptively precludes a physician’s employment of a physical therapist.

Conversely, RCW 18.74, which governs physical therapy in this state, contains no equivalent prohibition. Instead, it provides that “[n]othing in this chapter restricts the ability of physical therapists to work in the practice setting of their choice.” RCW 18.74.140.<sup>8</sup> Nor does the Anti-Rebate Statute prohibit physicians paying wages to physical therapists: to the contrary, RCW 19.68.040 states that it “is not intended to prohibit” a “licensee who employs another licensee to charge or collect compensation for professional services rendered by the employee licensee.” And, as explained above, the Anti-Kickback statute (RCW 74.09.240) endorses BFOA’s employment of Mr. Kump and Mr. West. The *Sloan* opinion, based on a fundamentally different set of choices made by the legislature of a distant state, has no relevance to this Court’s interpretation of Washington’s statutory scheme.

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<sup>8</sup> Significantly, the president (and principal owner) of Columbia testified that RCW 18.74.140 permits a physical therapist to work for anybody he chooses, including doctors. (CP 198). Columbia’s chairman of the board likewise testified that a physical therapist can work as an employee of doctors if he chooses. (CP 221).

In summary, Columbia has failed to present a legally cognizable claim under the Anti-Rebate Statute. The trial court's denial of Benton Franklin's summary judgment motion should be reversed and the case remanded with instruction for the trial court to enter summary judgment in favor of Benton Franklin.

**IV. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S HOLDING THAT THE PROFESSIONAL SERVICE CORPORATIONS ACT DOES NOT PROHIBIT BENTON FRANKLIN FROM EMPLOYING LICENSED PHYSICAL THERAPISTS**

**A. The Professional Service Corporations Act Governs Who May Own Physician Practices, Not Who Physician Practices May Employ**

Columbia contends that the Professional Service Corporations Act prevents physicians from employing physical therapists. In fact, the Professional Service Corporations Act only limits who can own a professional service corporation, not who can be employed by such a corporation. Critically, this case does not involve joint ownership of a professional service corporation by physicians and physical therapists, but only the employment of physical therapists by a professional service corporation owned exclusively by physicians.

The Professional Service Corporations Act authorizes physicians to form corporate entities, provided that those corporate entities are organized by an "individual or group of individuals duly licensed . . . to

render the same professional services within this state.” RCW 18.100.050(1). Such groups of individuals may become “shareholders of a professional corporation for pecuniary profits . . . for the purposes of rendering professional service.” (*Id.*). The Professional Service Corporations Act does not contain one word about whom such a corporation may employ. (RCW 18.100 *passim*). It is undisputed here that Benton Franklin is owned only by licensed physicians. (CP 349-50, 385, 412, 526). The physical therapists are salaried employees who have no ownership interest or equity in the company. (CP 1045, 1046, 1062).

The trial court clearly recognized this distinction and granted summary judgment to Benton Franklin on that ground. In the words of the Superior Court, a professional services corporation is prohibited only from engaging “in any business other than the rendering of the professional services for which it was incorporated.” (RP, Sept. 12, 2007, at 59:8-11) (citing RCW 18.100.080). The record reflects that Benton Franklin was formed to provide the full range of “medical services, care and treatment to the patients of the company.” (CP 385, 414).

Judge Yule’s ruling reflects this evidence. (RP Sept. 12, 2007, at 59:12-15). As the court explained:

I do not think there’s any dispute that physicians could not form a professional service corporation and then enter the accounting business, hire accountants or hire attorneys or

hire other non health-care professionals, but with respect to physical therapists, the fact notwithstanding that they are addressed in a separate section in (5)(b), this statute really addresses the act of incorporation, and for whatever reason the legislative history is interesting but inconclusive, but for whatever reason the legislature chose to restrict the formation of these professional service corporations for physical therapists and occupational therapists to those two disciplines, but I do not conclude that the statutory scheme under 18.100 prohibits or is violated by the employment by Benton Franklin Orthopedic Associates of physical therapists, and, therefore, I deny the motion for summary judgment of the plaintiffs on that issue and grant the motion for summary judgment of the defendants with respect to that claim.

(RP Sept. 12, 2007, at 59:21-60:14).

Columbia asserts that the Professional Service Corporations Act and the Anti-Rebate Statute “are interrelated and all [sic] must be considered together in resolving this appeal.” (Pet’r. Br. 10). Columbia offers no authority for this far from self-evident proposition. In fact, it is the Anti-Rebate Statute and the Anti-Kickback Statute that are plainly interrelated, and must be read consonantly, as this Court suggested in *Wright v. Jeckel*, 58 Wn.2d at 382-83, 144 P.3d at 305. The Anti-Rebate Statute and the Professional Service Corporations Act, by contrast, are no more inter-related than the Anti-Rebate Statute and the myriad of other laws and regulations governing the medical profession in this State, particularly because the Professional Service Corporations Act does not

address referrals, or profit, or who may be employed by a medical practice.

Columbia asserts that the “Professional Service Corporations Act derogates from the common law practice doctrine by allowing professionals to practice as a corporation; it must accordingly be strictly construed.” (Pet’r. Br. 10; *see also* Pet’r. Br. 24, 25). Strict construction means reading the words of a statute in their narrowest, literal sense. *Pacific Nw. Annual Conf. United Methodist Church v. Walla Walla County*, 82 Wn.2d 138, 141, 508 P.2d 1361, 1363 (1973). When a statute’s language is clear, that is the beginning and end of the inquiry. *Berger v. Sonnenland*, 144 Wn.2d 91, 105, 26 P.3d 257, 264 (2001). Strictly construed, the plain language of the Professional Service Corporations Act says nothing about whom a physician may employ nor does the Act limit the services a physician can provide. The Act is about formation and ownership of professional service corporations, and accommodates the common law’s concern that corporations controlled by non-professionals might interfere with the judgment of professionals rendering services – no more, no less.

**B. RCW 18.100.050 Does Not Limit Who May Practice Together in a Professional Service Corporation**

Columbia asserts that because RCW 18.100.050(5)(a) lists certain

types of licensed or certified health care professionals who “*may own stock in* and render their individual professional services through one professional service corporation” (emphasis added), licensed health care professionals not listed in the subparagraph thereby are excluded from working as employees of the professionals who are listed. But 18.100.050(5)(a), like the rest of RCW 18.100, deals with forming a professional services corporation and limiting those who may own that corporation – not with whom the corporation may employ or whether ancillary services can be performed. Each subparagraph of section 18.100.050, for instance, discusses who “may own stock” in the corporation.

The statute’s focus on formation and ownership is reflected in the House Bill Report for SSB 6150, which was enacted as RCW 18.100.050(5)(a). The House Committee on Health Care observed that the “basis for concern that led to the Corporate Practice of Medicine” doctrine and the Professional Service Corporations Act “was the potentiality of non-professional corporate control over professional judgment, divided loyalty of physician between patient and employer, and commercial exploitation of the medical practice.” (CP 48, Majority Report of the House Committee on Health Care). The legislation was intended to relax the restrictions of the corporate practice of medicine doctrine, which “have

had a chilling effect on members' of different health care professions ability to organize for the purpose of improving efficiencies as demanded by the current health care market." (*Id.*). The legislative history of RCW 18.100, including 18.100.050(5)(a), does not discuss concerns about rebates, kickbacks, overutilization, the physician's supposed incentive to self-refer, or any of the other threats that Columbia posits in its brief.

Columbia contends that the Professional Service Corporations Act's legislative history demonstrates the legislature's intent to keep physical therapy separate from the other healthcare professions. (Pet'r. Br. 28-30). But the legislative history of 18.100.050(5)(a) contains no hint that the legislature was troubled by the prospect of the specialties (including physical therapy) not listed in subparagraph 050(5)(a) practicing together with those that are listed. To the contrary, the list of specialties that found its way into 050(5)(a) was self selected. Only the "licensed or certified health care professions that wanted the ability to join with differently credentialed professions have been included in this legislation." (CP 56).

Nor is there any expression of a legislative desire to keep physical therapy separate from the other healthcare professions after the adoption of SB 6150 (which became RCW 18.100.050(5)(a)). Columbia supports its argument with a page and a half litany of bills that failed to pass or

were vetoed. But non-passage of a bill is not indicative of legislative intent. “Myriad reasons” may explain a bill’s failure and “nonpassage says nothing about the legislature’s intent with respect to the subject matter of the bill.” *Danny v. Laidlaw Transit Servs., Inc.*, 193 P.3d 128, 134 n.3, 165 Wn.2d 200, 213 n.3 (Wash. 2008), citing *Red Lion Broad. Co. v. Federal Communications Comm’n*, 395 U.S. 367, 381 n.11 (1969) (“unsuccessful attempts at legislation are not the best of guides to legislative intent”). Courts “refuse to speculate about the reasons for nonpassage,” because there “are simply too many possibilities for us to reach the conclusion” that a bill did not pass for a specific reason. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 453 n.4 (1993).

In this factual context, the most that RCW 18.100.050(5)(a) and (b) mean is that orthopedic surgeons and physical therapists cannot co-own a professional service corporation. To conclude that they cannot practice together is without basis in the words of the statute, the legislative history, or common sense. Under Columbia’s analysis the orthopedists of Benton Franklin could hire and practice with massage therapists, marriage counselors or midwives, all of whom are included in the 18.100.050(5)(a) categories, but not with physical therapists. There is no reason to believe that the legislature intended this absurd result, especially since physical

therapy has long been considered (under the Federal Social Security Act, for example) as an extension of (or incident to) a physician's services.<sup>9</sup> Accordingly, the Court should affirm the trial court's grant of summary judgment in favor of Benton Franklin on Columbia's Professional Service Corporations Act claim.

**V. THE COURT SHOULD REMAND FOR ENTRY OF SUMMARY JUDGMENT IN FAVOR OF BENTON FRANKLIN ON COLUMBIA'S CLAIM UNDER THE CORPORATE PRACTICE OF MEDICINE DOCTRINE**

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The Superior Court did not rule on Benton Franklin's motion for summary judgment on Columbia's common law corporate practice of medicine claim. However, summary judgment is appropriate because, like the Professional Service Corporations Act, the common law doctrine addresses ownership of a medical practice, not whom such a practice may employ.

Columbia claims that pursuant to the common law, no unlicensed person or entity may engage, through licensed employees, in the practice of physical therapy, and corporations (in Columbia's view) can only provide physical therapy services to the public with specific legislative authorization. (Pet'r. Br. at 15-23). The implication is that, without RCW

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<sup>9</sup> See Social Security Act, 42 U.S.C. §§ 1395x(s)(2) & 1395y(a)(2); cf. *Wright*, 158 Wn.2d at 379-80, 382, 144 P.3d at 304, 305.

18.100.050(5)(b), every physical therapist would have to be a solo practitioner.

Columbia misconstrues the doctrine. The corporate practice of medicine doctrine does not address whom physicians may employ in their practices. As this Court made clear in *Morelli v. Eshan*, 110 Wn.2d 555, 756 P.2d 129 (1988), this common law doctrine addresses who may *own* a medical practice, not whom that practice may employ. The *Morelli* Court struck down a partnership between a physician and a layperson, relying upon the express conclusion that the corporate practice of medicine doctrine was intended “to prevent lay participation in a professional partnership.” *Morelli*, 110 Wn.2d at 562, 756 P.2d at 132. “It would be anomalous if, by simply structuring an organization as a limited partnership, rather than a corporation, lay businessmen could participate in a business that provided the same professional services.” *Id.*

Columbia quotes one sentence from *Morelli*, out of context, to argue that BFOA could not employ Mr. Kump and Mr. West because “Washington corporations ‘cannot engage in the practice of a learned profession through licensed employees unless legislatively authorized.’” (Pet’r. Br. at 15, *quoting Morelli*, 110 Wn.2d at 561, 756 P.2d at 131 (1988)). But the legislature *has* legislatively authorized BFOA’s employment of licensed physical therapists, by enacting RCW

74.09.240(3)(c), which provides that when permitted under 42 U.S.C. § 1395nn, a physician may make a referral to a physical therapy facility in which the physician has an interest. As explained above, 42 U.S.C. § 1395nn and its regulations permit BFOA's employment and billing practices with respect to the physical therapists. Even under Columbia's view of *Morelli*, then, it cannot be said that the corporate practice of medicine doctrine has been violated by Benton Franklin.

In addition to *Morelli*, Columbia's assertions about the corporate practice of medicine doctrine rely almost entirely upon the Court of Appeals' decision in *Fallahzadeh v. Ghorbanian*, 119 Wn. App. 596, 82 P.3d 684 (2004), and dicta from this Court's 1943 opinion in *Standard Optical Co. v. Superior Court*, 17 Wn.2d 323, 135 P.2d 839 (1943). But as in *Morelli*, the Court of Appeals in *Fallahzadeh* made clear that the dispositive issue in its decision, as in *Standard Optical*, was lay ownership of a medical practice:

Regardless of whether Fallahzadeh [a lay businessman] was employed by the practice, he still retained a substantial beneficial interest in the practice's profits. In this respect, the lease is no different than *Boren's* conditional sales contract, which also guaranteed to the sellers a steady income stream from the practice. Furthermore, Fallahzadeh reserved significant rights under the lease as landlord. He had sole and exclusive discretion to approve any changes, modifications, or alterations. Thus, his absence from the practice's day-to-day operations did not affect his ability to control certain aspects of Ghorbanian's

practice, such as making physical improvements to the premises that might be necessary for patient care. It is exactly these public health and welfare concerns that were discussed in *Standard Optical* as the basis for invalidating the employment relationship.

The ethics of any profession is based upon personal or individual responsibility. One who practices a profession is responsible directly to his patient or his client. Hence he cannot properly act in the practice of his vocation as an agent of a corporation or business partnership whose interests in the very nature of the case are commercial in nature.

*Fallahzadeh*, 119 Wn. App. at 603-04, 82 P.3d at 687 (citing *Standard Optical*, 17 Wn.2d at 332, 135 P.2d at 839).

Columbia also relies upon Governor Locke's partial veto in 1997 of Substitute House Bill 1620, which would have abrogated the corporate practice doctrine, and misleadingly quotes a fragment of a sentence from the Governor's message about "unscrupulous individuals" and "insurance fraud" to suggest that the Governor had expressed concern about the factual situation presented here. (Pet'r. Br. at 16-17). But Governor Locke's veto message confirms that his concerns, and his veto, involved who could *own* a medical practice, not whom that practice could *employ*:

The corporate practice of medicine doctrine states that a corporation cannot engage in the practice of a learned profession through licensed employees unless legislatively authorized. (*Morelli* at 561). In essence, the doctrine prevents non-doctors from being shareholders in corporations, partners in partnerships, or members of limited liability companies formed to practice medicine.

(CP 70).

Columbia's argument is predicated on the assumption that at common law physical therapists could not engage in a corporate practice or hire others, but only practice on their own, and that doctors could not hire physical therapists or bill for their services. But physical therapy is a "physician service" under Medicare and, indeed, is billed using the physician fee schedule. (Centers for Medicare & Medicaid Services, Medicare Claims Processing Manual (Pub. 100-04), ch. 5, part B, "Outpatient Rehabilitation and CORF/OPT Services," section 10, part B). Thus, it is entirely common, and approved by Medicare and the federal Stark Law, for doctors to provide physical therapy to their patients and bill the therapy as a physician service. If physicians can provide physical therapy directly under the most common set of rules governing doctors across this nation (and which pursuant to RCW 74.09.240 govern specifically in Washington, too), then Columbia cannot plausibly contend that at common law only individual physical therapists had the right to perform therapy in solo settings.

The common law practice of medicine doctrine does not address, much less prohibit, whom a medical practice may employ. It addresses lay ownership of professional practices. In Columbia's view of the doctrine, *no* licensees could practice together under the doctrine, including

licensed orthopedic physicians. We submit this is not and never was the common law. Accordingly, the case should be remanded to the trial court with instruction to enter summary judgment for Benton Franklin on Columbia's common law corporate practice of medicine claim.

**VI. THE TRIAL COURT SHOULD HAVE GRANTED SUMMARY JUDGMENT TO BENTON FRANKLIN ON COLUMBIA'S CONSUMER PROTECTION ACT CLAIM**

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The Superior Court erred by not dismissing Columbia's claim under the Consumer Protection Act (the "CPA"). This is Columbia's statement of that claim in its Third Amended Complaint:

Defendants' business practices violate Washington's Consumer Protection Act. Specifically, Defendants engaged in unfair acts and methods of competition when they created a physical therapy corporation and/or opened a physical therapy office to which they could refer patients. Defendants unlawfully refer patients to their own physical therapy office, thus unfairly reducing the referrals to other area physical therapists, including Plaintiff Columbia.

(CP 529 ¶ 4.3).

This allegation fails to state a claim under the CPA. A CPA claim may be asserted on either of two bases: "[1] a per se violation of a statute or [2] an unfair or deceptive practice unregulated by statute but involving the public interest." *Blake v. Fed. Way Cycle Ctr.*, 40 Wn. App. 302, 308, 698 P.2d 578, 581-82 (1985).

Columbia argued below that BFOA's business arrangements

created an inherent capacity to deceive patients and were unfair to patients and competitors. This is either an allegation of a per se unfair trade practice or an allegation of a “deceptive practice.”

If Columbia is trying to allege a per se CPA violation, it has failed to do so. Before non-compliance with a statute violates the CPA, the legislature must declare that violation of the statute constitutes an “unfair or deceptive” practice. “A per se unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 786, 710 P.2d 531, 536 (1986). Neither the Anti-Rebate Statute nor the Professional Service Corporations Act contains such a declaration. See RCW 19.68, 18.100; cf. *Hangman Ridge*, 105 Wn.2d at 786-87, 710 P.2d at 536. “The Legislature, not this court, is the appropriate body to establish that interaction by declaring a statutory violation to be a per se unfair trade practice.” *Id.* Nor has the legislature declared a violation of the common law corporate practice of medicine doctrine to constitute an unfair or deceptive act in trade or commerce.

This Court has “eschewed the use of judicially created per se violations of the Consumer Protection Act.” *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 742, 733 P.2d 208, 212 (1987). Thus even

assuming *arguendo* that Columbia were to prevail on its statutory or common law claims, that alone would be insufficient as a matter of law to sustain a CPA claim.

Nor has Columbia presented evidence of an “unfair or deceptive practice” by Benton Franklin. Instead, it offers only a few alleged statements to patients that it claims violate the CPA while not being “derivative” of its other claims. For these statements to violate the CPA, Columbia must establish five elements about them. They must be (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) that affects the public interest; (4) is injurious to Columbia’s business or property; and (5) that proximately causes plaintiff’s injuries. *Hangman Ridge*, 105 Wn.2d at 780, 710 P.2d at 532.

“Implicit in the definition of ‘deceptive’ under the CPA is the understanding that the practice misleads or misrepresents something of material importance.” *Holiday Resort Cmty. Ass’n v. Echo Lake Assocs., LLC*, 134 Wn. App. 210, 226, 135 P.3d 499, 507 (2006); *see also, e.g., Money Savers Pharmacy, Inc. v. Koffler Stores (W.) Ltd.*, 37 Wn. App. 602, 612, 682 P.2d 960, 965-66 (1984); *see also Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 734, 167 P.3d 1162, 1166 (2007). For a deception to be actionable under the CPA, the alleged act must have “the capacity to deceive a substantial portion of the population.” *Hangman Ridge*, 105

Wn.2d at 785, 710 P.2d at 535. The determination of whether specific conduct satisfies the CPA's requirement for deceptiveness is a "question of law." *Holiday Resort*, 134 Wn. App. at 226, 135 P.3d at 507. As a result, such a claim is susceptible to summary judgment and cannot be sustained absent evidence of a deceptive practice or material misrepresentation.

By way of background, on average nearly 700 BFOA patients require physical therapy each year. (CP 469). In order to choose the physical therapist that is best for their patients, BFOA doctors follow a strict protocol prior to making a referral. First, doctors ask their patients if they are currently seeing or have a preference for a specific therapist. (CP 943). If not, the doctor and patient discuss therapy locations that might be convenient relative to the patient's home or place of employment. (CP 943, 959).

Patients that express no preference following this discussion are given a list of two dozen local therapists – a list that notably includes Columbia. (CP 313, 336, 1335, 1340). Patients remain free to choose *any* physical therapist or decline therapy altogether. (CP 313, 337, 959-60). In fact, as Columbia's own expert acknowledged, *two-thirds* of BFOA patients needing physical therapy actually went elsewhere. (CP 469). The record shows that, far from being "deceptive," BFOA provided its patients

with the information they needed to make informed choices among physical therapy providers.

Accordingly, Benton Franklin moved for summary judgment on the CPA claim, asserting that Columbia lacked evidence to support elements of its CPA claim, including particularly the deception element. (CP 911-16). The burden then shifted to Columbia to set forth specific facts, by affidavit or evidence, to show a genuine issue of fact on this score. *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 654, 869 P.2d 1014, 1017 (1994).

Columbia failed to meet its burden. Columbia offered evidence of two types of supposedly “deceptive” statements. Columbia contended that it was “deceptive” for BFOA to suggest that patients receiving physical therapy from Benton Franklin enjoy closer proximity to their treating physician, thereby offering superior medical oversight. (CP 823). But Columbia offered no evidence that such statements, if made, were untrue. In fact, it makes empirical sense that localizing follow-up treatment enables treating physicians to be closely and continuously involved with patients and thereby provide superior care. Rather than a “material misrepresentation,” this suggestion merely communicates the intuitive fact that patients benefit from closer, more convenient, and better supervised care.

Columbia also alleged that BFOA “deceptively” informed its patients that certain aspects of their care would be made more convenient by receiving physical therapy at Benton Franklin. According to Columbia, it was “deceptive” for Benton Franklin to inform its patients that because their records were already resident in its computer system certain scheduling and prescription issues would be easier to address. (CP 823). Once again, Columbia offered no evidence that such statements, if made, were untrue. Nor could it have, considering that patient records are stored in Benton Franklin’s computer system (CP 942), rendering administrative matters related to patient care intrinsically easier and more convenient.

In the absence of evidence that the alleged statements were in fact misleading or contained misrepresentations, Columbia’s CPA claim fails. *Hangman Ridge*, 105 Wn.2d at 785, 710 P.2d at 535. To violate the CPA, statements such as those allegedly made by BFOA physicians must be patently “false” or “unfounded.” *Potter v. Wilbur-Ellis Co.*, 62 Wn. App. 318, 327-28, 814 P.2d 670, 674 (1991); *Keyes v. Bollinger*, 31 Wn. App. 286, 291, 640 P.2d 1077, 1081 (1982). Columbia has proffered no evidence that the statements allegedly made by the respondent physicians were “false” or “unfounded.” Columbia has adduced no evidence that BFOA did not provide greater medical oversight than would otherwise have been available, or that the medical group does not actually store

patient records in its computer system, or that this storage does not facilitate administrative ease and doctor-patient proximity. Moreover, as we have already noted, *Columbia's* expert witness concluded that two-thirds of BFOA patients needing therapy actually went elsewhere to get it (CP 469); even if we assume for sake of argument that the statements were made, and assume that they were false, they plainly did not have the capacity to deceive Benton Franklin's own patients – much less a “substantial portion of the population,” as this Court has required. *Hangman Ridge*, 105 Wn.2d at 785, 710 P.2d at 535.

Rather than demonstrating that there is a material dispute over the truth or falsity of the doctors' supposed statements, Columbia complains that Benton Franklin's business model reduces the number of patients Columbia treats. (CP 470-71, 827-28). This contention is insufficient to sustain a claim under the CPA. Actions “motivated by legitimate business concerns” are “not the kind of conduct within the scope of RCW 19.86.020.” *State v. Black*, 100 Wn.2d 793, 803, 676 P.2d 963, 969 (1984). It is undisputed that BFOA adopted its current business structure in the conduct of the “development and preservation of business,” and

therefore is not a violation of the CPA. *Travis v. Wash. Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 408, 759 P.2d 418, 424 (1988).<sup>10</sup>

Without evidence that the supposed statements were deceptive or were material misrepresentations, Columbia's claim is merely the complaint of a business competitor disappointed with a reduced market share. The CPA does not exist to remedy such disappointment. Columbia has failed to satisfy requirements necessary to sustain a CPA claim, and Benton Franklin respectfully requests this Court to remand to the trial court for entry of summary judgment against Columbia on its CPA claim.

#### **CONCLUSION**

For the foregoing reasons, Benton Franklin respectfully requests this Court to find that BFOA's furnishing of physical therapy services through employed physical therapists, including Mr. Kump and Mr. West, does not violate the Anti-Rebate Statute, the Consumer Protection Act, the Professional Service Corporations Act or the common law corporate practice of medicine doctrine. Benton Franklin asks this Court to (1) affirm the trial court's grant of summary judgment to Benton Franklin on Columbia's claim under the Professional Service Corporations Act, (2)

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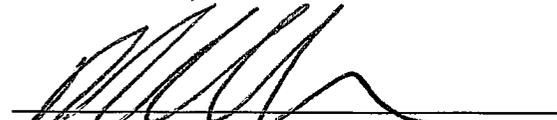
<sup>10</sup> As even Columbia recognizes, BFOA was under no obligation, contractual or otherwise, to make a certain number of physical therapy referrals to Columbia. (CP 230).

reverse the trial court's denial of summary judgment for Benton Franklin on Columbia's claims under the Anti-Rebate Statute and the Consumer Protection Act, and (3) remand this case to the trial court for entry of summary judgment in favor of Benton Franklin on Columbia's claims based on the Anti-Rebate Statute, the Consumer Protection Act and the common law corporate practice of medicine doctrine.

Respectfully submitted this 13<sup>th</sup> day of March, 2009

STAMPER RUBENS, P.S.

By:

  
Michael H. Church, WSBA #24957  
Matthew T. Ries, WSBA #29407

SONNENSCHN NATH & ROSENTHAL LLP

By:

  
Howard R. Rubin (admitted pro hac vice)  
Kenneth J. Pfaehler (admitted pro hac vice)  
Christopher L. Harlow (admitted  
pro hac vice)

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served in the manner noted below a copy of the **Brief of Respondents** on the following individuals:

Darrin Bailey \_\_\_\_\_ U.S. Mail, Postage Prepaid  
Danford Grant \_\_\_\_\_ Hand Delivered  
Stafford Frey Cooper XX Overnight Mail  
601 Union Street, Ste. 3100 \_\_\_\_\_ Telecopy (Facsimile)  
Seattle, WA 98101 \_\_\_\_\_ Email:  
Fax: (206) 624-6885

Dated this 13<sup>th</sup> day of March, 2009, at Spokane,  
Washington.

  
\_\_\_\_\_  
LeAnn F. Blair

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BY RONALD R. CARPENTER  
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# APPENDIX

**A-1**

## Chapter 19.68 RCW Rebating by practitioners of healing professions

### Chapter Listing

#### RCW Sections

19.68.010 Rebating prohibited — Disclosure — List of alternative facilities.

19.68.020 Deemed unprofessional conduct.

19.68.030 License may be revoked or suspended.

19.68.040 Declaration of intent.

#### Notes:

Hearing instrument fitter/dispensers: RCW 18.35.110.

Physicians, surgeons, dentists, oculists, optometrists, osteopaths, chiropractors, drugless healers, etc.: Title 18 RCW.

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#### 19.68.010

##### Rebating prohibited — Disclosure — List of alternative facilities.

(1) It shall be unlawful for any person, firm, corporation or association, whether organized as a cooperative, or for profit or nonprofit, to pay, or offer to pay or allow, directly or indirectly, to any person licensed by the state of Washington to engage in the practice of medicine and surgery, drugless treatment in any form, dentistry, or pharmacy and it shall be unlawful for such person to request, receive or allow, directly or indirectly, a rebate, refund, commission, unearned discount or profit by means of a credit or other valuable consideration in connection with the referral of patients to any person, firm, corporation or association, or in connection with the furnishings of medical, surgical or dental care, diagnosis, treatment or service, on the sale, rental, furnishing or supplying of clinical laboratory supplies or services of any kind, drugs, medication, or medical supplies, or any other goods, services or supplies prescribed for medical diagnosis, care or treatment.

(2) Ownership of a financial interest in any firm, corporation or association which furnishes any kind of clinical laboratory or other services prescribed for medical, surgical, or dental diagnosis shall not be prohibited under this section where (a) the referring practitioner affirmatively discloses to the patient in writing, the fact that such practitioner has a financial interest in such firm, corporation, or association; and (b) the referring practitioner provides the patient with a list of effective alternative facilities, informs the patient that he or she has the option to use one of the alternative facilities, and assures the patient that he or she will not be treated differently by the referring practitioner if the patient chooses one of the alternative facilities.

(3) Any person violating this section is guilty of a misdemeanor.

[2003 c 53 § 147; 1993 c 492 § 233; 1973 1st ex.s. c 26 § 1; 1965 ex.s. c 58 § 1. Prior: 1949 c 204 § 1; Rem. Supp. 1949 § 10185-14.]

#### Notes:

**Intent -- Effective date -- 2003 c 53:** See notes following RCW 2.48.180.

**Findings -- Intent -- 1993 c 492:** See notes following RCW 43.20.050.

**Short title -- Severability -- Savings -- Captions not law -- Reservation of legislative power -- Effective dates -- 1993 c 492:** See RCW 43.72.910 through 43.72.915.

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#### 19.68.020

##### Deemed unprofessional conduct.

The acceptance directly or indirectly by any person so licensed of any rebate, refund, commission, unearned discount, or profit by means of a credit or other valuable consideration whether in the form of money or otherwise, as compensation for referring patients to any person, firm, corporation or association as set forth in RCW 19.68.030, constitutes unprofessional conduct.

[1965 ex.s. c 58 § 2; 1949 c 204 § 2; Rem. Supp. 1949 § 10185-15.]

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**19.68.030**

**License may be revoked or suspended.**

The license of any person so licensed may be revoked or suspended if he has directly or indirectly requested, received or participated in the division, transference, assignment, rebate, splitting or refunding of a fee for, or has directly or indirectly requested, received or profited by means of a credit or other valuable consideration as a commission, discount or gratuity in connection with the furnishing of medical, surgical or dental care, diagnosis or treatment or service, including X-ray examination and treatment, or for or in connection with the sale, rental, supplying or furnishing of clinical laboratory service or supplies, X-ray services or supplies, inhalation therapy service or equipment, ambulance service, hospital or medical supplies, physiotherapy or other therapeutic service or equipment, artificial limbs, teeth or eyes, orthopedic or surgical appliances or supplies, optical appliances, supplies or equipment, devices for aid of hearing, drugs, medication or medical supplies or any other goods, services or supplies prescribed for medical diagnosis, care or treatment, except payment, not to exceed thirty-three and one-third percent of any fee received for X-ray examination, diagnosis or treatment, to any hospital furnishing facilities for such examination, diagnosis or treatment.

[1965 ex.s. c 58 § 3. Prior: 1949 c 204 § 3; Rem. Supp. 1949 § 10185-16.]

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**19.68.040**

**Declaration of intent.**

It is the intent of this chapter, and this chapter shall be so construed, that persons so licensed shall only be authorized by law to charge or receive compensation for professional services rendered if such services are actually rendered by the licensee and not otherwise: PROVIDED, HOWEVER, That it is not intended to prohibit two or more licensees who practice their profession as copartners to charge or collect compensation for any professional services by any member of the firm, or to prohibit a licensee who employs another licensee to charge or collect compensation for professional services rendered by the employee licensee.

[2000 c 171 § 57; 1949 c 204 § 4; Rem. Supp. 1949 § 10185-17.]

**A-2**

**RCW 74.09.240****Bribes, kickbacks, rebates — Self-referrals — Penalties.**

(1) Any person, including any corporation, that solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind

(a) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under this chapter, or

(b) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any goods, facility, service, or item for which payment may be made in whole or in part under this chapter,

shall be guilty of a class C felony; however, the fine, if imposed, shall not be in an amount more than twenty-five thousand dollars, except as authorized by RCW 9A.20.030.

(2) Any person, including any corporation, that offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person

(a) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made, in whole or in part, under this chapter, or

(b) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any goods, facility, service, or item for which payment may be made in whole or in part under this chapter,

shall be guilty of a class C felony; however, the fine, if imposed, shall not be in an amount more than twenty-five thousand dollars, except as authorized by RCW 9A.20.030.

(3)(a) Except as provided in 42 U.S.C. 1395 nn, physicians are prohibited from self-referring any client eligible under this chapter for the following designated health services to a facility in which the physician or an immediate family member has a financial relationship:

- (i) Clinical laboratory services;
- (ii) Physical therapy services;
- (iii) Occupational therapy services;
- (iv) Radiology including magnetic resonance imaging, computerized axial tomography, and ultrasound services;
- (v) Durable medical equipment and supplies;
- (vi) Parenteral and enteral nutrients equipment and supplies;
- (vii) Prosthetics, orthotics, and prosthetic devices;
- (viii) Home health services;
- (ix) Outpatient prescription drugs;
- (x) Inpatient and outpatient hospital services;
- (xi) Radiation therapy services and supplies.

(b) For purposes of this subsection, "financial relationship" means the relationship between a physician and an entity that includes either:

- (i) An ownership or investment interest; or
- (ii) A compensation arrangement.

For purposes of this subsection, "compensation arrangement" means an arrangement involving remuneration between a physician, or an immediate family member of a physician, and an entity.

(c) The department is authorized to adopt by rule amendments to 42 U.S.C. 1395 nn enacted after July 23, 1995.

(d) This section shall not apply in any case covered by a general exception specified in 42 U.S.C. Sec. 1395 nn.

(4) Subsections (1) and (2) of this section shall not apply to

(a) a discount or other reduction in price obtained by a provider of services or other entity under this chapter if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity under this chapter, and

(b) any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services.

(5) Subsections (1) and (2) of this section, if applicable to the conduct involved, shall supersede the criminal provisions of chapter 19.68 RCW, but shall not preclude administrative proceedings authorized by chapter 19.68 RCW.

[1995 c 319 § 1; 1979 ex.s. c 152 § 5.]

**A-3**

## Chapter 18.100 RCW Professional service corporations

### Chapter Listing

#### RCW Sections

- [18.100.010](#) Legislative intent.
- [18.100.020](#) Short title.
- [18.100.030](#) Definitions.
- [18.100.035](#) Fees for services by secretary of state.
- [18.100.040](#) Application of chapter to previously organized corporations.
- [18.100.050](#) Organization of professional service corporations authorized generally -- Architects, engineers, and health care professionals -- Nonprofit corporations.
- [18.100.060](#) Rendering of services by authorized individuals.
- [18.100.065](#) Authority of directors, officers to render same services as corporation.
- [18.100.070](#) Professional relationships and liabilities preserved.
- [18.100.080](#) Engaging in other business prohibited -- Investments.
- [18.100.090](#) Stock issuance.
- [18.100.095](#) Validity of share voting agreements.
- [18.100.100](#) Legal qualification of officer, shareholder or employee to render professional service, effect.
- [18.100.110](#) Sale or transfer of shares.
- [18.100.114](#) Merger or consolidation.
- [18.100.116](#) Death of shareholder, transfer to ineligible person--Treatment of shares.
- [18.100.118](#) Eligibility of certain representatives and transferees to serve as directors, officers, or shareholders.
- [18.100.120](#) Name -- Listing of shareholders.
- [18.100.130](#) Application of Business Corporation Act and Nonprofit Corporation Act.
- [18.100.132](#) Nonprofit professional service corporations formed under prior law.
- [18.100.133](#) Business corporations, election of this chapter.
- [18.100.134](#) Professional services -- Deletion from stated purposes of corporation.
- [18.100.140](#) Improper conduct not authorized.
- [18.100.145](#) Doctor of osteopathic medicine and surgery -- Discrimination prohibited.
- [18.100.150](#) Indemnification of agents of any corporation authorized.
- [18.100.160](#) Foreign professional corporation.

#### Notes:

Materials specifically authorized to be printed and distributed by secretary of state: RCW 43.07.140.

Revolving fund of secretary of state, deposit of moneys for costs of carrying out secretary of state's functions under this chapter: RCW 43.07.130.

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#### 18.100.010 Legislative intent.

It is the legislative intent to provide for the incorporation of an individual or group of individuals to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization.

[1969 c 122 § 1.]

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**18.100.020**  
**Short title.**

This chapter may be cited as "the professional service corporation act".

[1969 c 122 § 2.]

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**18.100.030**  
**Definitions.**

As used in this chapter the following words shall have the meaning indicated:

(1) The term "professional service" means 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 chapter and by reason of law could not be performed by a corporation, including, but not by way of limitation, certified public accountants, chiropractors, dentists, osteopaths, physicians, podiatric physicians and surgeons, chiropodists, architects, veterinarians and attorneys-at-law.

(2) The term "professional corporation" means a corporation which is organized under this chapter for the purpose of rendering professional service.

(3) The term "ineligible person" means any individual, corporation, partnership, fiduciary, trust, association, government agency, or other entity which for any reason is or becomes ineligible under this chapter to own shares issued by a professional corporation. The term includes a charitable remainder unitrust or charitable remainder annuity trust that is or becomes an ineligible person for failure to comply with subsection (5)(b) of this section.

(4) The term "eligible person" means an individual, corporation, partnership, fiduciary, qualified trust, association, government agency, or other entity, that is eligible under this chapter to own shares issued by a professional corporation.

(5) The term "qualified trust" means one of the following:

(a) A voting trust established under RCW 23B.07.300, if the beneficial owner of any shares on deposit and the trustee of the voting trust are qualified persons;

(b) A charitable remainder unitrust as defined in section 664(d)(1) of the internal revenue code or a charitable remainder annuity trust as defined in section 664(d)(2) or 664(d)(3) of the internal revenue code if the trust complies with each of the following conditions:

(i) Has one or more beneficiaries currently entitled to income, unitrust, or annuity payments, all of whom are eligible persons or spouses of eligible persons;

(ii) Has a trustee who is an eligible person and has exclusive authority over the share of the professional corporation while the shares are held in the trust, except that a cotrustee who is not an eligible person may be given authority over decisions relating to the sale of shares by the trust;

(iii) Has one or more designated charitable remaindermen, all of which must at all times be domiciled or maintain a local chapter in Washington state; and

(iv) When distributing any assets during the term of the trust to charitable organizations, the distributions are made only to charitable organizations described in section 170(c) of the internal revenue code that are domiciled or maintain a local chapter in Washington state.

[1997 c 18 § 1; 1983 c 51 § 2; 1969 c 122 § 3.]

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**18.100.035****Fees for services by secretary of state.**

See RCW 43.07.120.

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**18.100.040****Application of chapter to previously organized corporations.**

This chapter shall not apply to any individuals or groups of individuals within this state who prior to the passage of this chapter were permitted to organize a corporation and perform personal services to the public by means of a corporation, and this chapter shall not apply to any corporation organized by such individual or group of individuals prior to the passage of this chapter: PROVIDED, That any such individual or group of individuals or any such corporation may bring themselves and such corporation within the provisions of this chapter by amending the articles of incorporation in such a manner so as to be consistent with all the provisions of this chapter and by affirmatively stating in the amended articles of incorporation that the shareholders have elected to bring the corporation within the provisions of this chapter.

[1969 c 122 § 4.]

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**18.100.050****Organization of professional service corporations authorized generally — Architects, engineers, and health care professionals — Nonprofit corporations.**

(1) An individual or group of individuals duly licensed or otherwise legally authorized to render the same professional services within this state may organize and become a shareholder or shareholders of a professional corporation for pecuniary profit under the provisions of Title 23B RCW for the purpose of rendering professional service. One or more of the legally authorized individuals shall be the incorporators of the professional corporation.

(2) Notwithstanding any other provision of this chapter, registered architects and registered engineers may own stock in and render their individual professional services through one professional service corporation.

(3) Licensed health care professionals, providing services to enrolled participants either directly or through arrangements with a health maintenance organization registered under chapter 48.46 RCW or federally qualified health maintenance organization, may own stock in and render their individual professional services through one professional service corporation.

(4) Professionals may organize a nonprofit nonstock corporation under this chapter and chapter 24.03 RCW to provide professional services, and the provisions of this chapter relating to stock and referring to Title 23B RCW shall not apply to any such corporation.

(5)(a) Notwithstanding any other provision of this chapter, health care professionals who are licensed or certified pursuant to chapters 18.06, 18.225, 18.22, 18.25, 18.29, 18.34, 18.35, 18.36A, 18.50, 18.53, 18.55, 18.57, 18.57A, 18.64, 18.71, 18.71A, 18.79, 18.83, 18.89, 18.108, and 18.138 RCW may own stock in and render their individual professional services through one professional service corporation and are to be considered, for the purpose of forming a professional service corporation, as rendering the "same specific professional services" or "same professional services" or similar terms.

(b) Notwithstanding any other provision of this chapter, health care professionals who are regulated under chapters 18.59 and 18.74 RCW may own stock in and render their individual professional services through one professional service corporation formed for the sole purpose of providing professional services within their respective scope of practice.

(c) Formation of a professional service corporation under this subsection does not restrict the application of the uniform disciplinary act under chapter 18.130 RCW, or applicable health care professional statutes under Title 18 RCW, including but not limited to restrictions on

persons practicing a health profession without being appropriately credentialed and persons practicing beyond the scope of their credential.

[2001 c 251 § 29; 1999 c 128 § 1; 1997 c 390 § 3; 1996 c 22 § 1; 1991 c 72 § 3; 1986 c 261 § 1; 1983 c 100 § 1; 1969 c 122 § 5.]

**Notes:**

Severability -- 2001 c 251: See RCW 18.225.900.

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**18.100.060**

**Rendering of services by authorized individuals.**

(1) No corporation organized under this chapter may render professional services except through individuals who are duly licensed or otherwise legally authorized to render such professional services within this state. However, nothing in this chapter shall be interpreted to:

(a) Prohibit a person duly licensed or otherwise legally authorized to render professional services in any jurisdiction other than this state from becoming a member of a professional corporation in this state organized for the purpose of rendering the same professional services;

(b) Prohibit a professional corporation from rendering services outside this state through individuals who are not duly licensed or otherwise legally authorized to render professional services within this state; or

(c) Require the licensing of clerks, secretaries, bookkeepers, technicians, and other assistants employed by a professional corporation who are not usually and ordinarily considered by custom and practice to be rendering professional services to the public for which a license or other legal authorization is required.

(2) Persons engaged in a profession and otherwise meeting the requirements of this chapter may operate under this chapter as a professional corporation so long as each shareholder personally engaged in the practice of the profession in this state is duly licensed or otherwise legally authorized to practice the profession in this state and:

(a) At least one officer and one director of the corporation is duly licensed or otherwise legally authorized to practice the profession in this state; or

(b) Each officer in charge of an office of the corporation in this state is duly licensed or otherwise legally authorized to practice the profession in this state.

[1998 c 293 § 1; 1983 c 51 § 3; 1969 c 122 § 6.]

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**18.100.065**

**Authority of directors, officers to render same services as corporation.**

Except as otherwise provided in RCW 18.100.118, all directors of a corporation organized under this chapter and all officers other than the secretary and the treasurer shall be duly licensed or otherwise legally authorized to render the same specific professional services within this or any other state as those for which the corporation was incorporated.

[1998 c 293 § 2; 1983 c 51 § 7.]

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**18.100.070**

**Professional relationships and liabilities preserved.**

Nothing contained in this chapter shall be interpreted to abolish, repeal, modify, restrict or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service and the standards for professional conduct. Any director, officer, shareholder, agent or employee of a corporation organized under this chapter shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him or by any person under his direct supervision and control, while rendering professional services on behalf of the corporation to the person for whom such professional services were being rendered. The corporation shall be liable for any negligent or wrongful acts of misconduct committed by any of its directors, officers, shareholders, agents or employees while they are engaged on behalf of the corporation, in the rendering of professional services.

[1969 c 122 § 7.]

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#### **18.100.080**

##### **Engaging in other business prohibited — Investments.**

No professional service corporation organized under this chapter shall engage in any business other than the rendering of the professional services for which it was incorporated or service as a trustee as authorized by RCW 11.36.021 or as a personal representative as authorized by RCW 11.36.010: PROVIDED, That nothing in this chapter or in any other provisions of existing law applicable to corporations shall be interpreted to prohibit such corporation from investing its funds in real estate, personal property, mortgages, stocks, bonds, insurance, or any other type of investments.

[1984 c 149 § 170; 1969 c 122 § 8.]

##### **Notes:**

**Severability -- Effective dates -- 1984 c 149:** See notes following RCW 11.02.005.

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#### **18.100.090**

##### **Stock issuance.**

Except as otherwise provided in RCW 18.100.118, no professional corporation organized under the provisions of this chapter may issue any of its capital stock to anyone other than the trustee of a qualified trust or an individual who is duly licensed or otherwise legally authorized to render the same specific professional services within this or any other state as those for which the corporation was incorporated.

[1998 c 293 § 3; 1997 c 18 § 2; 1983 c 51 § 4; 1969 c 122 § 9.]

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#### **18.100.095**

##### **Validity of share voting agreements.**

Except for qualified trusts, a proxy, voting trust, or other voting agreement with respect to shares of a professional corporation shall not be valid unless all holders thereof, all trustees and beneficiaries thereof, or all parties thereto, as the case may be, are eligible to be shareholders of the corporation.

[1997 c 18 § 3; 1983 c 51 § 12.]

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**18.100.100****Legal qualification of officer, shareholder or employee to render professional service, effect.**

Unless a director, officer, shareholder, agent or employee of a corporation organized under this chapter who has been rendering professional service to the public is legally qualified at all times to render such professional services within at least one state in which the corporation conducts business, he or she shall sever all employment with, and financial interests in, such corporation forthwith. A corporation's failure to require compliance with this provision shall constitute a ground for the forfeiture of its articles of incorporation and its dissolution. When a corporation's failure to comply with this provision is brought to the attention of the office of the secretary of state, the secretary of state forthwith shall certify that fact to the attorney general for appropriate action to dissolve the corporation.

[1998 c 293 § 4; 1969 c 122 § 10.]

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**18.100.110****Sale or transfer of shares.**

No shareholder of a corporation organized as a professional corporation may sell or transfer his or her shares in such corporation except to the trustee of a qualified trust or another individual who is eligible to be a shareholder of such corporation. Any transfer of shares in violation of this section shall be void. However, nothing in this section prohibits the transfer of shares of a professional corporation by operation of law or court decree.

[1997 c 18 § 4; 1983 c 51 § 5; 1969 c 122 § 11.]

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**18.100.114****Merger or consolidation.**

A corporation organized under this chapter may merge or consolidate with another corporation, domestic or foreign, organized to render the same specific professional services, only if every shareholder of each corporation is eligible to be a shareholder of the surviving or new corporation.

[1998 c 293 § 6; 1983 c 51 § 8.]

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**18.100.116****Death of shareholder, transfer to ineligible person — Treatment of shares.**

- (1) If:
- (a)(i) A shareholder of a professional corporation dies;
  - (ii) A shareholder of a professional corporation becomes an ineligible person;
  - (iii) Shares of a professional corporation are transferred by operation of law or court decree to an ineligible person; or
  - (iv) A charitable remainder unitrust or charitable remainder annuity trust that holds shares of a professional corporation becomes an ineligible person; and
- (b) The shares held by the deceased shareholder or by such ineligible person are less than all of the outstanding shares of the corporation, then

the shares held by the deceased shareholder or by the ineligible person may be transferred to remaining shareholders of the corporation or may be redeemed by the corporation pursuant to terms stated in the articles of incorporation or by laws of the corporation, or in a private agreement. In the absence of any such terms, such shares may be transferred to any individual eligible to be a shareholder of the corporation.

(2) If such a redemption or transfer of the shares held by a deceased shareholder or an ineligible person is not completed within twelve months after the death of the deceased shareholder or the transfer, as the case may be, such shares shall be deemed to be shares with respect to which the holder has elected to exercise the right of dissent described in chapter 23B.13 RCW and has made written demand on the corporation for payment of the fair value of such shares. The corporation shall forthwith cancel the shares on its books and the deceased shareholder or ineligible person shall have no further interest in the corporation other than the right to payment for the shares as is provided in RCW 23B.13.250. For purposes of the application of RCW 23B.13.250, the date of the corporate action and the date of the shareholder's written demand shall be deemed to be one day after the date on which the twelve-month period from the death of the deceased shareholder, or from the transfer, expires.

[1997 c 18 § 5; 1991 c 72 § 4; 1983 c 51 § 10.]

#### 18.100.118

##### Eligibility of certain representatives and transferees to serve as directors, officers, or shareholders.

If all of the outstanding shares of a professional corporation are held by an administrator, executor, guardian, conservator, or receiver of the estate of a former shareholder, or by a transferee who received such shares by operation of law or court decree, such administrator, executor, guardian, conservator, receiver, or transferee for a period of twelve months following receipt or transfer of such shares may be a director, officer, or shareholder of the professional corporation.

[1983 c 51 § 11.]

#### 18.100.120

##### Name — Listing of shareholders.

Corporations organized pursuant to this chapter shall render professional service and exercise its authorized powers under a name permitted by law and the professional ethics of the profession in which the corporation is so engaged. The corporate name of a professional service corporation must contain either the words "professional service" or "professional corporation" or the abbreviation "P.S." or "P.C." The corporate name may also contain either the words "corporation," "incorporated," "company," or "limited," or the abbreviation "corp.," "inc.," "co.," or "Ltd." With the filing of its first annual report and any filings thereafter, professional service corporation shall list its then shareholders: PROVIDED, That notwithstanding the foregoing provisions of this section, the corporate name of a corporation organized to render dental services shall contain the full names or surnames of all shareholders and no other word than "chartered" or the words "professional services" or the abbreviation "P.S." or "P.C."

[1993 c 290 § 1; 1982 c 35 § 169; 1969 c 122 § 12.]

##### Notes:

Intent -- Severability -- Effective dates -- Application -- 1982 c 35: See notes following RCW 43.07.160.

#### 18.100.130

##### Application of Business Corporation Act and Nonprofit Corporation Act.

(1) For a professional service corporation organized for pecuniary profit under this chapter, the provisions of Title 23B RCW shall be

applicable except to the extent that any of the provisions of this chapter are interpreted to be in conflict with the provisions thereof, and in such event the provisions and sections of this chapter shall take precedence with respect to a corporation organized pursuant to the provisions of this chapter.

(2) For a professional service corporation organized under this chapter and chapter 24.03 RCW as a nonprofit nonstock corporation, the provisions of chapter 24.03 RCW shall be applicable except to the extent that any of the provisions of this chapter are interpreted to be in conflict with the provisions thereof, and in such event the provisions and sections of this chapter shall take precedence with respect to a corporation organized under the provisions of this chapter.

[1991 c 72 § 5; 1986 c 261 § 2; 1983 c 51 § 6; 1969 c 122 § 13.]

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#### **18.100.132**

##### **Nonprofit professional service corporations formed under prior law.**

A nonprofit professional service corporation formed pursuant to \*chapter 431, Laws of 1985, may amend its articles of incorporation at any time before July 31, 1987, to comply with the provisions of this chapter. Compliance under this chapter shall relate back and take effect as of the date of formation of the corporation under \*chapter 431, Laws of 1985, and the corporate existence shall be deemed to have continued without interruption from that date.

[1986 c 261 § 4.]

##### **Notes:**

\*Reviser's note: Chapter 431, Laws of 1985 enacted RCW 24.03.038, which was repealed by 1986 c 261 § 7.

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#### **18.100.133**

##### **Business corporations, election of this chapter.**

A business corporation formed under the provisions of Title 23B RCW may amend its articles of incorporation to change its stated purpose to the rendering of professional services and to conform to the requirements of this chapter. Upon the effective date of such amendment, the corporation shall be subject to the provisions of this chapter and shall continue in existence as a professional corporation under this chapter.

[1991 c 72 § 6; 1986 c 261 § 5.]

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#### **18.100.134**

##### **Professional services — Deletion from stated purposes of corporation.**

A professional corporation may amend its articles of incorporation to delete from its stated purposes the rendering of professional services and to conform to the requirements of Title 23B RCW, or to the requirements of chapter 24.03 RCW if organized pursuant to RCW 18.100.050 as a nonprofit nonstock corporation. Upon the effective date of such amendment, the corporation shall no longer be subject to the provisions of this chapter and shall continue in existence as a corporation under Title 23B RCW or chapter 24.03 RCW.

[1991 c 72 § 7; 1986 c 261 § 3; 1983 c 51 § 9.]

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**18.100.140****Improper conduct not authorized.**

Nothing in this chapter shall authorize a director, officer, shareholder, agent or employee of a corporation organized under this chapter, or a corporation itself organized under this chapter, to do or perform any act which would be illegal, unethical or unauthorized conduct under the provisions of the following acts: (1) Physicians and surgeons, chapter 18.71 RCW; (2) anti-rebating act, chapter 19.68 RCW; (3) state bar act, chapter 2.48 RCW; (4) professional accounting act, chapter 18.04 RCW; (5) professional architects act, chapter 18.08 RCW; (6) professional auctioneers act, chapter 18.11 RCW; (7) cosmetologists, barbers, and manicurists, chapter 18.16 RCW; (8) boarding homes act, chapter 18.20 RCW; (9) podiatric medicine and surgery, chapter 18.22 RCW; (10) chiropractic act, chapter 18.25 RCW; (11) registration of contractors, chapter 18.27 RCW; (12) debt adjusting act, chapter 18.28 RCW; (13) dental hygienist act, chapter 18.29 RCW; (14) dentistry, chapter 18.32 RCW; (15) dispensing opticians, chapter 18.34 RCW; (16) naturopathic physicians, chapter 18.36A RCW; (17) embalmers and funeral directors, chapter 18.39 RCW; (18) engineers and land surveyors, chapter 18.43 RCW; (19) escrow agents registration act, chapter 18.44 RCW; (20) \*maternity homes, chapter 18.46 RCW; (21) midwifery, chapter 18.50 RCW; (22) nursing homes, chapter 18.51 RCW; (23) optometry, chapter 18.53 RCW; (24) osteopathic physicians and surgeons, chapter 18.57 RCW; (25) pharmacists, chapter 18.64 RCW; (26) physical therapy, chapter 18.74 RCW; (27) registered nurses, advanced registered nurse practitioners, and practical nurses, chapter 18.79 RCW; (28) psychologists, chapter 18.83 RCW; (29) real estate brokers and salesmen, chapter 18.85 RCW; (30) veterinarians, chapter 18.92 RCW.

[1994 sp.s. c 9 § 717; 1987 c 447 § 16; 1982 c 35 § 170; 1969 c 122 § 14.]

**Notes:**

\*Reviser's note: The definition of "maternity home" was changed to "birthing center" by 2000 c 93 § 30.

**Severability -- Headings and captions not law -- Effective date -- 1994 sp.s. c 9:** See RCW 18.79.900 through 18.79.902.

**Severability -- 1987 c 447:** See RCW 18.36A.901.

**Intent -- Severability -- Effective dates -- Application -- 1982 c 35:** See notes following RCW 43.07.160.

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**18.100.145****Doctor of osteopathic medicine and surgery — Discrimination prohibited.**

A professional service corporation that provides health care services to the general public may not discriminate against a qualified doctor of osteopathic medicine and surgery licensed under chapter 18.57 RCW, who has applied to practice with the professional service corporation, solely because that practitioner was board certified or eligible under an approved osteopathic certifying board instead of board certified or eligible respectively under an approved medical certifying board.

[1995 c 64 § 2.]

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**18.100.150****Indemnification of agents of any corporation authorized.**

See RCW 23B.17.030.

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**18.100.160****Foreign professional corporation.**

A foreign professional corporation may render professional services in this state so long as it complies with chapter 23B.15 RCW and each individual rendering professional services in this state is duly licensed or otherwise legally authorized to render such professional services within this state.

[1998 c 293 § 7.]

**A-4**

## Chapter 19.86 RCW

# Unfair business practices — consumer protection

### Chapter Listing

#### RCW Sections

- 19.86.010 Definitions.
- 19.86.020 Unfair competition, practices, declared unlawful.
- 19.86.023 Violation of RCW 15.86.030 constitutes violation of RCW 19.86.020.
- 19.86.030 Contracts, combinations, conspiracies in restraint of trade declared unlawful.
- 19.86.040 Monopolies and attempted monopolies declared unlawful.
- 19.86.050 Transactions and agreements not to use or deal in commodities or services of competitor declared unlawful when lessens competition.
- 19.86.060 Acquisition of corporate stock by another corporation to lessen competition declared unlawful -- Exceptions -- Judicial order to divest.
- 19.86.070 Labor not an article of commerce -- Chapter not to affect mutual, nonprofit organizations.
- 19.86.080 Attorney general may restrain prohibited acts -- Costs -- Restoration of property.
- 19.86.085 Establishment of investigation unit -- Receipt and use of criminal history information.
- 19.86.090 Civil action for damages -- Treble damages authorized -- Action by governmental entities.
- 19.86.095 Request for injunctive relief -- Appellate proceeding -- Service on the attorney general.
- 19.86.100 Assurance of discontinuance of prohibited act -- Approval of court -- Not considered admission.
- 19.86.110 Demand to produce documentary materials for inspection, answer written interrogatories, or give oral testimony -- Contents -- Service -- Unauthorized disclosure -- Return -- Modification, vacation -- Use -- Penalty.
- 19.86.115 Materials from a federal agency or other state's attorney general.
- 19.86.120 Limitation of actions -- Tolling.
- 19.86.130 Final judgment to restrain is prima facie evidence in civil action -- Exceptions.
- 19.86.140 Civil penalties.
- 19.86.145 Penalties -- Animals used in biomedical research.
- 19.86.150 Dissolution, forfeiture of corporate franchise for violations.
- 19.86.160 Personal service of process outside state.
- 19.86.170 Exempted actions or transactions -- Stipulated penalties and remedies are exclusive.
- 19.86.900 Severability -- 1961 c 216.
- 19.86.910 Short title.
- 19.86.920 Purpose -- Interpretation -- Liberal construction -- Saving -- 1985 c 401; 1983 c 288; 1983 c 3; 1961 c 216.

#### Notes:

Adult family homes: Chapter 70.128 RCW.

Advertisement of children for adoption: RCW 26.33.400.

Agriculture -- Declarations of "Washington state grown": RCW 15.04.410.

Auctioneers: Chapter 18.11 RCW.

Automotive repair: Chapter 46.71 RCW.

Bail bond agents -- Records -- Finances -- Disposition of security -- Application of consumer protection act: RCW 18.185.210.

Chapter 19.86 RCW: Unfair business practices — consumer protection

Usurious contracts: RCW 19.52.036.

Viatical settlements act: Chapter 48.102 RCW.

Water companies exempt from utilities and transportation commission regulation: RCW 80.04.010.

Weatherization of leased or rented residences: RCW 70.164.060.

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**19.86.010**  
**Definitions.**

As used in this chapter:

- (1) "Person" shall include, where applicable, natural persons, corporations, trusts, unincorporated associations and partnerships.
- (2) "Trade" and "commerce" shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.
- (3) "Assets" shall include any property, tangible or intangible, real, personal, or mixed, and wherever situate, and any other thing of value.

[1961 c 216 § 1.]

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**19.86.020**  
**Unfair competition, practices, declared unlawful.**

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

[1961 c 216 § 2.]

**Notes:**

Hearing instrument dispensing, advertising, etc. -- Application: RCW 18.35.180.

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**19.86.023**  
**Violation of RCW 15.86.030 constitutes violation of RCW 19.86.020.**

Any violation of RCW 15.86.030 shall also constitute a violation under RCW 19.86.020.

[1985 c 247 § 7.]

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**19.86.030**  
**Contracts, combinations, conspiracies in restraint of trade declared unlawful.**