STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Presiding Judge Kathleen Jansen

WILLIAM MILLER,
Plaintiff-Appellee,
v — Supreme Court No. 134393

ALLSTATE INSURANCE COMPANY — Court of Appeal No. 259992
Defendant,
Cross-Defendant-Appellant, — Wayne Circuit No. 03-325030-NF
and

PT WORKS, INC.
Cross-Plaintiff-Appellee.

WILLIAM MILLER,
Plaintiff-Appellee,
v — Supreme Court No. 134406

ALLSTATE INSURANCE COMPANY — Court of Appeal No. 259992
Defendant,
Cross-Defendant-Appellee, — Wayne Circuit No. 03-325030-NF
and

PT WORKS, INC.
Cross-Plaintiff-Appellant.

AMICUS CURIAE BRIEF
OF THE BUSINESS LAW SECTION OF THE STATE BAR OF MICHIGAN

Dated: March 12, 2008

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STATEMENT OF BASIS OF JURISDICTION

Amicus Curiae accepts the Statement of Appellate Jurisdiction set forth at page vii of Cross-Defendant-Appellant Allstate's Brief.

STATEMENT OF QUESTIONS PRESENTED

QUESTION 1 Must PT Works, Inc. be incorporated under the Professional Service Corporation Act (MCL 450.221 *et seq*., "PSCA")?

Allstate's Answer:	Yes
PT Works' Answer:	No
Trial Court's Answer:	No
Court of Appeals' Answer:	Yes
Amicus Curiae's Answer:	No

QUESTION 2 Does Allstate have standing to question the incorporation or corporate acts of PT Works?

Allstate's Answer:	Yes
PT Works' Answer:	No
Trial Court's Answer:	Not directly addressed
Court of Appeals' Answer:	Not directly addressed
Amicus Curiae's Answer:	No

QUESTION 3 If required to incorporate under the PSCA, does the failure of PT Works to so incorporate mean that the physical therapy treatment it proved to Allstate's insured was not lawfully rendered under the no-fault act (MCL 500.3101 *et seq*.)?

Allstate's Answer:	Yes
PT Works' Answer:	No
Trial Court's Answer:	No
Court of Appeals' Answer:	No
Amicus Curiae's Answer:	Issue not addressed by this Amicus Curiae

STANDARD OF REVIEW

Amicus Curiae accepts the standard of review set forth at page 13 of Cross-Defendant-Appellant Allstate's Brief, namely that this Court reviews statutory interpretations *de novo*.

INTEREST OF AMICUS CURIAE

The Business Law Section of the State Bar of Michigan files this brief amicus curiae pursuant to the November 21, 2007 invitation of the Supreme Court of Michigan. This Court in its Order granting leave for this appeal stated:

> The parties shall include among the issues to be briefed whether PT Works must be incorporated under the professional services corporations act (MCL 450.221 *et seq*.) and, if so, whether the failure of PT Works to properly incorporate under the PSCA means that the physical therapy treatment it provided to the defendant's insured was not lawfully rendered under the no-fault act (MCL 500.3101 *et seq*.).

Michigan Supreme Court Order Docket Numbers 134393 and 134406 (November 21, 2007).

Only the first question is within the jurisdiction of the Business Law Section and is addressed in this brief.

REQUIRED STATEMENT AND REPORT OF AMICUS CURIAE REGARDING POSITION TAKEN

The Business Law Section is not the State Bar of Michigan itself, but rather a Section of the State Bar of Michigan whose members choose voluntarily to join based on common professional interest. The positions expressed in this brief are that of the Business Law Section only, and not the position of the State Bar of Michigan. To date, the State Bar of Michigan does not have a position on this matter.

The Business Law Section currently has approximately 3,900 members and the affairs of the Section are administered by an elected Council. The drafting and filing of this brief by the Corporate Laws Committee of the Section were initially approved by the Council after discussions held at a meeting held in conformance with the Section's bylaws on December 1, 2007. The positions taken in this brief were formally adopted by a vote of the Council after discussion at a meeting held in conformance with the Section's bylaws on March 6, 2008. The Council currently consists of fourteen members and the eleven Council members who attended the March 6, 2008 meeting unanimously voted in favor of the positions that are presented in this Amicus Brief.

The subject matter of the positions taken in this Brief is within the jurisdiction of the Business Law Section, and the positions taken in this Brief were adopted in accordance with the Section's bylaws. The requirements of State Bar of Michigan Bylaw Article VIII have been satisfied.

The required report from the Business Section of the State Bar of Michigan is provided on the next page.

SBM STATE BAR OF MICHIGAN | BUSINESS LAW SECTION

Report on Public Policy Position

Name of section:
Business Law Section

Contact person:
Michael S. Khoury

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Amicus Curiae:
Amicus Brief in Miller v. Allstate

Date position was adopted:
March 6, 2008

Process used to take the ideological position:
Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:
14

Number who voted in favor and opposed to the position:
11 Voted for position
0 Voted against position
3 Did not vote

Position:
The Michigan Supreme Court requested that the Business Law Section submit an amicus brief to address the issues raised by the case of Miller v. Allstate. Two issues are raised in the appeal, of which the Section is addressing only one. The position of the Section in the amicus brief is that the incorporation of the entity PT Works, Inc. under the Business Corporation Act (MCL 450.1101 et seq.), was valid.

Explanation of the position, including any recommended amendments:
The Court of Appeals held that the entity was required to be incorporated under the Professional Service Corporation Act (MCL 450.221 et seq.) and that the organization of the entity under the Business Corporation Act rendered the corporation a nullity. The position of the amicus brief is that this holding is incorrect.

STATEMENT OF FACTS

On September 20, 1995, the Michigan Department of Commerce (now constituted as the Department of Labor & Economic Growth, together with predecessor and successor departments, the "DLEG") accepted articles of incorporation incorporating Rehab Works, Inc. as a Michigan Domestic Profit Corporation pursuant to the provisions of 1972 PA 284, as amended (MCL 450.1101 *et seq*., the "Business Corporation Act" or "BCA").[1] On October 1, 1996, the DLEG accepted a Certificate of Amendment to the Articles of Incorporation changing the name of Rehab Works, Inc. to P.T. Works, Inc. (**AA 7a and 8a**, "PT Works"). The "shareholders of PT Works are three individuals who are not licensed physical therapists" *Miller v Allstate*, 275 Mich App 649 at 652-653; 739 NW2d 675 (2007).

On February 27, 2002, Plaintiff-Appellee William Miller ("Miller") was involved in a motor vehicle accident and was later diagnosed with a whiplash condition (**AA 17a and 25a**). Miller was insured by Allstate Insurance Company ("Allstate").

From April 2, 2003 through August 28, 2003, Miller received a regimen of physical therapy from licensed physical therapists employed by PT Works based on prescriptions issued periodically by two medical doctors.[2] PT Works and Miller entered into an agreement whereby PT Works agreed to provide physical therapy services to Miller in exchange for an assignment of Miller's rights to insurance proceeds paid by Allstate relative to such services (**PA 14a and 15a**). Allstate denied payment resulting in the instant action.

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[1] Cross-Defendant-Appellant Allstate's Appendix at pages 3a through 6a; hereinafter, references to such appendix will be indicated by AA followed by the pertinent page number(s). The articles and incorporation and other corporate filings for Michigan corporations may be viewed at the DLEG Database Lookup at http://www.dleg.state.mi.us/bcs_corp/sr_corp.asp (accessed March 10, 2008).

[2] Cross-Plaintiff-Appellant PT Works Appendix at pages 12a, 13a, 16a and 28a; hereinafter, references to such appendix will be indicated by PA followed by the pertinent page number(s).

LAW AND ANALYSIS

I. PT WORKS IS NOT REQUIRED TO BE INCORPORATED UNDER THE PSCA

Allstate's claim that it may avoid payment is founded upon its contention that PT Works was not properly incorporated. The Court of Appeals held that PT Works was improperly incorporated under Michigan corporate laws, but that the amounts owed to PT Works must nonetheless by paid by Allstate in accordance with Michigan no-fault insurance laws. 275 Mich App at 652. Amicus submits that an analysis of the statutes involved, their history, and their prior interpretation and application demonstrates that the Court of Appeals erred in finding that PT Works was not properly incorporated.

A. The PSCA and the Learned Profession Doctrine

The PSCA was developed to enable the so-called "learned professions" to enjoy the tax and organizational benefits of the corporate form. As noted by the Michigan Attorney General:

> Until this legislative enactment, the practice of professions generally recognized as the "learned professions" was not a lawful corporate purpose under Sec. 251(1) of the Business Corporation Act. The "learned professions" have been generally recognized as law, medicine and divinity.

OAG No 6592 at 2 (July 10, 1989) (citations omitted).

The United States Supreme Court also acknowledged that "in the past 'the so-called learned professions were not permitted to organize as corporate entities.' 1A W. Fletcher, Cyclopedia of the Law of Private Corporations § 112.10 (rev ed.1997-2002)." *Clackamas Gastroenterology v Wells*, 538 US 440 at 447; 123 SCt 1673 (2003).

The Michigan Attorney General has also stated that:

> It was an analysis of [the learned profession] doctrine, together with a survey of the doctrine's application in sister states, which led to the conclusion in II OAG, 1955-1956, No 2451, p 124 (March 7, 1956), that neither the practice of medicine nor the furnishing of osteopathic medical services was a lawful corporate purpose permitting the formation of a corporation pursuant to business corporate statutes then in effect.

OAG No 5676 at 2 (April 8, 1980). This Opinion explained the theory behind the doctrine:

> A four-point rationale has been generally advanced as the basis for this doctrine:
>
> 1) Laymen should not be permitted, directly or indirectly by virtue of the corporate form, to practice medicine;
>
> 2) Necessary confidential and professional relationships existing between a physician and his patient could be destroyed by lay shareholders interested only in a profit;
>
> 3) The limited liability of the corporate form is not appropriate where the client must place such a high degree of trust and confidence in the physician; and
>
> 4) It is impossible for a corporation to fulfill the licensing and ethical requirements medical practice demands.

Id. (citations omitted)

The commentary to the Model Business Corporation Act describes the forces behind the adoption of a corporate form available to the learned professions.

> Traditionally, incorporation was not permitted at all for the purpose of practicing the learned professions – e.g., law, medicine, and dentistry – primarily because of the personal skills and confidential relationships between lawyer and client or physician and patient. In the early 1960s, however, a significant movement toward incorporation of professionals surfaced as part of an effort by professionals to obtain employee federal tax benefits. Professionals hoped to form corporations to conduct their practice as employees of the corporation rather than as independent entrepreneurs. Early efforts by professionals to form entities to conduct their practice (despite the lack of state statutory authority to incorporate) met with opposition from the Internal Revenue Service. In 1960 the I.R.S. issued the "Kintner" regulations, which in effect provided that federal tax status would be determined on the basis of the organization's characterization under state law. Treas. Regs. § 301.7701-2 (1960). In response, a number of states passed legislation specifically authorizing professionals to incorporate. Recognition of the corporate tax status of professional corporation was eventually conceded. Rev. Rul. 70-101, 1970-1 C.B. 278. All jurisdictions now have statutes providing for incorporation for the purpose of practicing a profession.

Model Business Corporation Act Section 3.01 Official Comment c (Revised through June 2005).

The Michigan Attorney General also recognized the historic practice of the State of Michigan in restricting only the learned professions to incorporation under the PSCA:

> The Corporation and Securities Bureau advises that it has considered attorneys, physicians, osteopaths, ophthalmologists, and psychiatrists to be professions covered by the learned professions doctrine. These professions have been permitted to incorporate only under the provisions of the Professional Service Corporation Act. It further advises that certified public accountants, because of the provisions of Sec. 705 of 1980 PA 299, MCL 339.705; MSA 18.425(705), dentists, because of the provisions of 1978 PA 368, Sec. 1, MCL 333.16601; MSA 14.15(16601), and psychologists, based upon the informal advice of my office, have been permitted to incorporate only under the provisions of the Professional Service Corporation Act. *All remaining professional services may incorporate under either the Business Corporation Act or the Professional Service Corporation Act.*

OAG 6592 at 2-3 (emphasis supplied).

The Attorney General went on to opine that:

> Based upon the historical prohibition against the incorporation of the "learned professions," the legislative intent in enacting the Professional Service Corporation Act, which addresses and satisfies each of the traditional reasons against such incorporation, and the previously cited requirements of incorporating under the Professional Service Corporation Act, it must be concluded that corporations formed under the Business Corporation Act may not engage in the practice *of the learned professions.*

Id. At 3 (emphasis supplied).

B. The BCA Sections Relevant to This Analysis

The Court of Appeals focused on two sections of the BCA in concluding that PT Works was not properly incorporated, BCA Sections 251 and 123. These sections provide, in pertinent part, as follows:

> Sec. 251.
>
> (1) A corporation may be formed under this act for any lawful purpose, except to engage in a business for which a corporation may be formed under any other statute of this state unless that statute permits formation under this act.

MCL 450.1251(1).

> Sec. 123.
>
> (1) Unless otherwise provided in, or inconsistent with, the act under which a corporation is or has been formed, this act applies to deposit and security

> companies, summer resort associations, brine pipeline companies, telegraph companies, telephone companies, safety and collateral deposit companies, canal, river, and harbor improvement companies, cemetery, burial, and cremation associations, railroad, bridge, and tunnel companies, agricultural and horticultural fair societies, and professional service corporations formed under the professional service corporation act, 1962 PA 192, MCL 450.221 to 450.235. The entities specified in this subsection shall not be incorporated under this act.

MCL 450.1123(1).

C. The Court of Appeals Incorrectly Interpreted the Meaning of "Permits" Under BCA Section 251

In considering BCA Section 251, the Court of Appeals posited the following question:

> In light of this language, our question is whether PT Works was formed to engage in a business for which a corporation may be formed under the PSCA, and, if so, whether the PSCA nonetheless permitted formation under the BCA.

275 Mich App at 653.

Amicus agrees with this analysis of the relevant question. However, the Court of Appeals continued "[w]e conclude that PT Works was improperly incorporated under the BCA." *Id*. Amicus submits that this conclusion is in error.

The Court of Appeals described its task in construing the statutory language in this way:

> Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004). The words contained in a statute provide us with the most reliable evidence of the Legislature's intent. *Id*. at 549. In ascertaining legislative intent, this Court gives effect to every word, phrase, and clause in the statute. Id. We must consider both the plain meaning of the critical words or phrases and their placement and purpose in the statutory scheme. *Id*.

Id. at 652.

However, after citing this authority, the Court of Appeals proceeded to ignore it in its subsequent analysis. It stated:

> The plain language of the statute indicates that the list of professional services identified is not exclusive. And there can be no dispute that physical therapy services for injured or sick individuals is a type of personal service offered to the public. Moreover, engaging in the practice of physical therapy requires a license

> under Michigan law. MCL 333.17820. Accordingly, physical therapy constitutes a professional service for purposes of the PSCA, and thus the business of providing physical therapy services also constitutes "a business for which a corporation may be formed under any other statute of this state." MCL 450.1251(1). *Additionally, the PSCA does not expressly permit formation under the BCA.* MCL 450.1251(1). Moreover, *the BCA provides that professional service corporations formed under the PSCA "shall not be incorporated under this act."* MCL 450.1123(1). Therefore, PT Works was improperly incorporated under the BCA. We also note that, given that PT Works' incorporators and shareholders are not licensed physical therapists, those particular individuals could not incorporate PT Works nor could they be shareholders under the PSCA. MCL 450.222(b); MCL 450.224(1) and (2).

Id. at 654 (emphasis supplied).

The Court of Appeals made no attempt to explore the meaning of the verb "permits" contained in BCA Section 251. Instead, it merely assumed that "permits" means "expressly authorizes." While this is one accepted meaning of this word, it is not the only one. The verb can also mean to allow, to suffer, to grant leave to, to acquiesce in or not to prohibit. For instance, one dictionary includes in its definition of the verb permit: "to allow, suffer, give leave; not to prevent" or "to give leave or opportunity; to allow". *The Oxford English Dictionary, Second Edition* (1989). Another dictionary provides that the verb permit means: "to allow the doing of (something)" or "to grant consent or leave to (someone); authorize" or "[t]o afford opportunity or possibility for". *The American Heritage Dictionary, Fourth Edition* (2000). Further, one thesaurus offers the following regarding the verb permit: "1. To neither forbid nor prevent: allow, have, let, suffer, tolerate. See ALLOW. 2. To give one's consent to: allow, approbate, approve, authorize, consent, endorse, let, sanction." *Roget's II The New Thesaurus, Third Edition* (2003) (emphasis in original). An online legal dictionary takes a similar approach in stating that the verb permit means "to allow by silence, agreement or giving a license." http://dictionary.law.com/ (accessed March 10, 2008).

A federal circuit court had occasion to discern the meaning of "permits or suffers" in a federal statute and stated the following:

> Black's Law Dictionary (5th ed. 1979) defines "permit" as follows: "To suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act." "Suffer" is defined by Black's Law Dictionary as follows: "To allow, to admit, or to permit. It includes knowledge of what is to be done under sufferance. To suffer an act to be done or a condition to exist is to permit or consent to it; to approve of it, and not hinder it."

United States v Launder, 743 F2d 686 at 689 (CA 9, 1984).

The Court of Appeals thus failed to explore the "plain meaning" of this critical word in BCA Section 251. It also failed to consider the word's "placement and purpose in the statutory scheme." In the context of the Michigan statutory regime, "permits" must mean "does not prohibit" as opposed to "expressly permits." And it is clear that the PSCA does not prohibit a professional service corporation from forming under the BCA. PSCA Section 4 states that "[o]ne or more licensed persons *may* organize under this act to become a shareholder or shareholders of a professional corporation for pecuniary profit." MCL 450.224 (emphasis supplied.) This language is permissive, not mandatory.

The error of the Court of Appeals' interpretation of "permit" is clearly shown by examining the Michigan Nonprofit Corporation Act, MCL 450.2101 *et seq*. ("NPCA"), another of our state's entity formation statutes. NPCA Section 251(1) states that "Except if required by law to incorporate under another statute of this state, a corporation may be formed under this act for any lawful purposes not involving pecuniary gain or profit for its officers, directors, shareholders, or members." MCL 450.2251(1). This limits incorporation not by the types of business in which an entity will engage but rather by its motive for pecuniary gain to

stakeholders. The NPCA neither expressly authorizes nor prohibits corporations from forming under the BCA.[3]

The Court of Appeals' formula was simple (though mistaken): if you engage in a business for which you may incorporate under another statute, then you can't incorporate under the BCA, unless the other statute "expressly permits" BCA incorporation. If this were correct, then a corporation that engages in any business for which a corporation may be formed under the NPCA could not be formed under the BCA. Yet there are countless nonprofit corporations engaged in the same "types of businesses" in which for-profit corporations also engage. Familiar examples are nonprofit housing corporations, manufacturing or distribution cooperatives and the like. Since there is virtually no limit on the *types* of business in which nonprofit corporations may engage, the Court of Appeals' interpretation of BCA Section 251 would mean that virtually every Michigan for-profit corporation is improperly formed, because it is engaged in a business for which a nonprofit corporation may also be formed under the NPCA and the NPCA does not expressly permit formation under the BCA.

Amicus has found no Michigan statute that both permits formation of a corporation under its terms and also expressly permits formation under the BCA.[4] Thus, the Court of Appeals' interpretation of BCA Section 251 would cover a set of circumstances that does not exist.

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[3] Note that Section 601 of the NPCA (MCL Sec. 450.2601) allows existing nonprofit corporations to convert to business corporations by amending their articles of incorporation to include only such provisions as might be lawfully contained in original articles of incorporation of a business corporation formed under the BCA. This is not an authorization to form in the first instance, however, and such a corporation once converted would no longer be subject to the NPCA.

[4] There are statutes that permit formation of corporations, and that also make reference to the provisions of the BCA for governing provisions, but do not authorize formation under the BCA. For example, MCL 484.1 et seq. authorizes telephone and telegraph companies to incorporate but provides that the form of the articles of incorporation is that provided under the BCA and that the substantive provisions of the BCA govern such companies (see MCL 484.1). Actual

D. BCA Section 123 Does Not Prohibit Corporations Providing Professional Services from Incorporating Under the BCA

The Court of Appeals noted that BCA Section 123 "provides that professional service corporations formed under the PSCA 'shall not be incorporated under this act.'" 275 Mich App at 564. The Court of Appeals apparently interpreted this language to mean that no corporation providing professional services may be incorporated under the BCA. However, this is *not* what the language says. This section refers only to "corporations *formed* under the professional service corporation act, 1962 PA 192, MCL 450.221 to 450.235". MCL 450.1123(1) (emphasis supplied). It does not refer to all corporations engaged in providing professional services.

This is especially notable because the other corporations described in BCA Section 123 are described by the type of business in which they engage, not the statute under which they are formed. Thus, BCA Section 123 refers to "deposit and security companies, summer resort associations, brine pipeline companies, telegraph companies, telephone companies, safety and collateral deposit companies, canal, river, and harbor improvement companies, cemetery, burial, and cremation associations, railroad, bridge, and tunnel companies, agricultural and horticultural fair societies." MCL 450.1123. So, while BCA Section 123 provides, for instance, that no telephone company may incorporate under the BCA, it provides similar restrictions only on those professional service corporations that are actually incorporated under the PSCA.

Though this language may appear a bit confusing, the development of this section helps explain it. BCA Section 123(1) as originally enacted stated:

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incorporation under the BCA of a telephone company, however, is prohibited by BCA Section 123 (MCL 450.1123), as previously cited. There are also statutes that authorize an entity to incorporate under the BCA, but do not provide for formation of corporations under their terms. MCL 449.316 authorizes partnership associations to "at any time reorganize under any act providing for the incorporation of companies for a purpose or purposes for which such association was organized." However, this act does not authorize the formation of corporations in the first instance. Therefore, neither of these statutes comes within the language of BCA Section 251.

> Unless otherwise provided in, or inconsistent with, the act under which such corporation is or has been formed, this act applies to savings and loan associations, deposit and security companies, summer resort associations, brine pipe line companies, telegraph companies, telephone companies, safety and collateral deposit companies, canal, river and harbor improvement companies, cemetery, burial and cremation association, and agricultural and horticultural fair societies.

1972 PA 284 Section 123(1).

In this original enactment, there was no restriction in Section 123 on the ability of the listed corporations to incorporate under the BCA. There also was no mention of professional service corporations. The last sentence of current Section 123 was added by 1982 PA 407. The legislative analysis for this bill stated that it "would amend the Business Corporation Act to ... clarify that although the act applies to telephone and telegraph companies, deposit and security companies, and other corporations listed in the act, these entities could not be incorporated under the act." SB 358 (S-1) First Analysis, Senate Analysis Section (June 7, 1982). At the time this provision was added, Section 123 still contained no reference to corporations incorporated under the PSCA.

The reference to the PSCA was added in 2001. 2001 PA 57. Its addition was for a purpose unrelated to the question of the proper statute for incorporation. Rather, it was added to overcome a problem arising from a Michigan Attorney General Opinion regarding the updating of statutory references. Understanding this problem requires a brief examination of the structure of the PSCA.

Although the PSCA allows for incorporation, it is a very limited statute. Consisting of only 15 sections, it contains very few provisions for the organization, governance, existence and dissolution of corporations. Rather, it incorporates the BCA by reference for these purposes. PSCA Section 13 states:

> The business corporation act, 1972 PA 284, MCL 450.1101 to 450.2098, is applicable to a corporation organized under this act except to the extent that a provision of this act is in conflict with the provisions of that act. If there is a conflict between a provision of this act and that act, the provision of this act applies with respect to a corporation organized under this act. A professional corporation organized under this act shall not consolidate or merge with another corporation whose shareholders are not licensed persons who may be shareholders under this act.

MCL 450.213.

In an Opinion interpreting this section, the Michigan Attorney General cited *Public Schools of the City of Battle Creek v Kennedy*, 245 Mich 585, 591-592; 223 NWS 359 (1929) for the proposition that "an act, which adopts by reference the whole or a portion of another statute, means the law as existing at the time of the adoption, and does not include subsequent additions or modifications of the statute so adopted, unless it does so by express or strongly implied intent." OAG 6592 at 10. The Attorney General thus opined that "the Professional Service Corporation Act adopted the Business Corporation Act as it existed on July 18, 1980, the effective date of the last amendment to Sec. 13 of the Professional Service Corporation Act making specific reference to the Business Corporation Act." *Id*. Therefore, amendments to the BCA made after that date did not apply to corporations formed under the PSCA. This proved to be a continuing problem, because the PSCA was not amended each time the BCA was amended.

The 2001 amendment to BCA Section 123 was intended to rectify this situation by providing, in the text of the BCA itself, that the BCA is applicable to corporations formed under the PSCA. This would automatically make BCA amendments applicable to such corporations, without the need to amend the PSCA every time the BCA was amended. The BCA Section 123 amendment was included with a number of other BCA amendments in 2001 PA 57. This act was passed and signed into law with 2001 PA 58, which re-adopted PSCA Section 13 so that it would

incorporate all of the BCA changes to date.[5] This belt-and-suspenders approach was an attempt to fix the "updating" problem in the PSCA by amending both the BCA and the PSCA. It was not an attempt to require that all corporations providing professional services incorporate under the PSCA, and indeed the amended language of BCA Section 123 provides no such thing. By its terms it only refers to corporations FORMED under the PSCA.

E. The Court of Appeals' Holding Would Interfere with the Inter-Workings of the State Statutory Scheme

1. Michigan Statutes Evidence a Broad, Permissive Purpose for Business Entity Statutes Coupled with Specific Regulation of Specific Professions

The philosophy behind the BCA was permissive, in accordance with other modern corporate statutes. BCA Section 103 captures this purpose by providing (in its entirety):

> This act shall be liberally construed and applied to promote its underlying purposes and policies which include all of the following:
>
> (a) To simplify, clarify, and modernize the law governing business corporations.
>
> (b) To provide a general corporate form for the conduct or promotion of a lawful business or purpose with variations and modifications from the form as interested parties in any corporation may agree upon, subject only to overriding interests of this state and of third parties.
>
> (c) To give special recognition to the legitimate needs of close corporations.

MCL 450.1103.

[5] 2001 PA 58 included an enacting Section 1 that stated "[t]his amendatory act is remedial and curative and intended to eliminate any confusion with respect to the application of the business corporation act, 1972 PA 284, MCL 450.1101 to 450.2098, to a corporation formed under the professional service corporation act, 1962 PA 192, MCL 450.221 to 450.235, as a result of OAG, 1989-1990, No 6592, p 166 (July 10, 1989). As provided in section 8 of 1846 RS 1, MCL 8.8, the legislature declares that the reference to the business corporation act, 1972 PA 284, MCL 450.1101 to 450.2098, in section 13 of the professional service corporation act, 1962 PA 192, MCL 450.233, includes the latest amendments to the business corporation act, 1972 PA 284, MCL 450.1101 to 450.2098." 2001 PA 58.

This is the context into which BCA Section 251(1) was drafted. Over the years, PSCA Section 4 would be amended to address certain ownership issues relating to corporations incorporated under that statute: the ability to provide one or more professional services; that if the professional service to be rendered by a professional corporation was in the health field, then all shareholders must be licensed to render that same service; that corporations engaged in public accounting required 2/3 of the shareholders to be similarly licensed;[6] and finally our current iteration, which repealed some of the earlier provisions. Consistently through this time, however, the only service providers who were required to incorporate under the PSCA, and therefore were precluded from incorporating under the BCA, were the members of the learned professions.

[6] 1997 PA 10 amended Section 4 of the PSCA to include a provision allowing professional corporations to engage in public accounting if at least two-thirds of the shareholders were licensed as certified public accountants and all other shareholders were licensed in another professional service offered by the corporation. 2000 PA 335 amended Section 4 to delete this provision. PA 335 was part of a package of bills, including PA 10 which amended Section 728 of the Occupational Code (MCL 339.728) to provide that a simple majority (rather than two-thirds) of the ownership interests of a public accounting firm must be held by licensed CPAs. The rationale expressed in the Enrolled Analysis that accompanied this suite of bills explained that the previous requirement that 2/3 of the owners of a public accounting firm be licensed in accounting was too restrictive and that "[m]any people believe that this new focus of diversified services should be reflected in the structure of these CPA firms, and that some of the restrictions regarding the organization of accounting firms were no longer desirable or necessary." The analysis stated that the "bills do not change the scope of practice of the accounting profession but allow accounting firms to provide more flexibility in the structure and organization of their business, and give non-CPAs a greater opportunity to become partners, officers, and shareholders of an accounting firm." http://www.legislature.mi.gov/documents/1999-2000/billanalysis/Senate/htm/1999-SFA-1238-E.htm (accessed March 10, 2008). Through all of this time, accounting was listed within the PSCA's definition of "professional services." If corporations providing professional services were required to incorporate only under the PSCA, amending the PSCA in this fashion would not have achieved the stated goal. PA 335 evidences that the legislature understood that corporations engaged in accounting, since not engaged in one of the "learned professions," were not restricted to incorporating under the PSCA. *See also* 2000 PA 334.

This does not mean that providers of professional services have complete autonomy when deciding upon their ownership structures. Various regulatory statutes apply to holders of professional licenses. Licensing boards often prescribe ownership requirements for their licensees. For instance: one-fourth of the owners of pharmacies must be licensees (MCL 338.481); a simple majority of the voting rights of a certified public accounting firm must be held by licensees (MCL 339.728); owners do not need to be licensees, but notice is required for a change in the business structure for a collection agency (MCL 339.906); active and name owners of a funeral home must be licensees (MCL 339.1804); at least two-thirds of the owners of an architecture firm must be licensees (MCL 339.2010); at least one of the owners of a building firm must be a licensee (MCL 339.2405); and the owners who are the designated principals of a Real Estate business must be licensees (MCL 339.2508), just to name a few examples of the many regulatory regimes applicable to various licensees. If all licensees operating in the corporate form were required to incorporate under the PSCA, then all of these particular regulatory statutes would be overruled by the general PSCA.

2. The Court of Appeals Ruling Would Skew Choice of Entity Options in Michigan Without Any Apparent Rationale

This history is further demonstrated through the approach taken when the legislature adopted the Limited Liability Company Act (1993 PA 23, MCL 450.4101 *et seq*., the "LLCA"). Limited liability companies were developed to give business owners many of the limited liability characteristics of corporations together with the flow-through income tax characteristics of partnerships. The relationship between the corporation and the professional corporation implicit in the structure of the BCA and PSCA is explicit in the limited liability company ("LLC") and the professional limited liability company ("PLLC") provisions of the LLCA. The PLLC provisions are part of the LLCA. *See* Article 9 of the LLCA, MCL 450.4901 to 4910. The

LLCA requires practitioners of the learned professions to form only as PLLCs while allowing other professional service providers to choose between the LLC and the PLLC as their needs, and licensing boards, dictate.

In other respects, the corporation and the limited liability company statutes reflect the same approach to fundamental business duties and formation matters. Consider the following examples: an entity may be formed for any lawful purpose (*compare* MCL 450.1251 (BCA) and MCL 450.4201 (LLCA)); the validity of actions or challenges to action (*compare* MCL 450.1271 (BCA) and MCL 450.4211 (LLCA)); the duties of those entrusted to manage the enterprise (*compare* MCL 450.1541a (BCA) and MCL 450.4404 (LLCA)); the remedies for oppression of an owner (*compare* MCL 450.1489 (BCA) and MCL 450.4515 (LLCA)); the manner of accomplishing merger (*compare* MCL 450.1701 *et seq*. (BCA) and MCL 450.4701 *et seq*. (LLCA)); and the manner and requirements for qualifying foreign entities (*compare* MCL 450.2001 *et seq*. (BCA) and MCL 450.5001 *et seq*. (LLCA)). There is no indication from any source, be it the drafting committees, the legislature, the DLEG, the bench or the bar, that any difference was intended between the application of the corporation and the limited liability company laws as they pertain to providers of professional services.

If PT Works and all other licensed service providers must incorporate under the PSCA, then there will be a significant difference between the business entity schemes that are available under Michigan law to these providers. Entities such as PT Works will be forced to form as limited liability companies rather than corporations,[7] which they are perfectly entitled to do under the language of the LLCA. There is no indication that the legislature intended to skew

[7] As noted in the Court of Appeals' opinion, PT Works is ineligible to form under the PSCA because not all of its shareholders are licensed as physical therapists. *See* 275 Mich App at 658 fn 2.

choice of entity in this manner, nor any rational reason to do so. Rather, the rules applicable to LLCs and corporations providing professional services are mirrors of each other, a scheme that the Court of Appeals ruling upsets.

3. Disrupting the Historical Understanding of these Acts is Not the Best Way to Address the Problems Raised by Allstate

Allstate claims that adopting PT Works position would:

> violate public policy and allow any unlicensed person to form a corporation under the Business Corporation Act, hire physicians, therapists, chiropractors, dentists, and decide what their wages will be, what their working hours will be, the amount of time they will be permitted to take with each patient and otherwise dictate the quality of care and the level of billing.

Allstate's Brief on Appeal at 28.

First, the inclusion of physicians in this group is inappropriate since the current regulatory regime clearly includes medicine in the learned professions. Second, each specific licensing board prescribes various regulatory and ethical rules for each of their licensees. If a licensee is engaging in unethical behavior or associating in business structures with inappropriate parties, then each licensing board can set appropriate provisions tailored to protect the public. The approach advocated by Allstate ignores the specialized knowledge and individualized approach taken by the licensing boards. These various licensing bodies are uniquely qualified to determine how best to protect the public by appropriately balancing licensee business practices and licensee availability.

The availability of businesses in various professions would be severally curtailed if licensees were forced to only have fellow licensees are their co-owners. Funeral directors could no longer provide for family continuity by having unlicensed spouses or children as owners for estate planning purposes; public capital would no longer be available for licensees since broad-based, public ownership would be impossible; CPAs could no longer join with other financial

professionals or consultants in firms that provide valuable services to their clients; the ability of various, non-physician health care providers to provide coordinated services would be extinguished – unless, of course, all of these entities simply adopt the limited liability company as their entity form instead of the corporation.

At least one group of professional licensees does not have the option of switching to the LLCA to avoid the problems of Allstate's position. This group consists of those corporations with public shareholders who provide a licensed service, either directly or through a subsidiary. For instance, should the Court of Appeals' holding stand, then public company funeral homes such as Service Corporation International (NYSE: SCI) and Carriage Services, Inc. (NYSE: CSV) may be unable to continue to conduct their business in Michigan as a domestic or foreign corporation except as a professional corporation (which of course they could not be because of PSCA limitations on ownership). Other public companies in other licensed industries would be similarly precluded from operating in Michigan.

Finally, corporations providing professional services not involving the learned professions, which incorporated under the BCA under the long-standing interpretation of the BCA and PSCA and the practice of the DLEG, also face a highly uncertain future under the Court of Appeals' decision. These corporations may find that their owners have personal liability for past corporate acts, that they are in violation of loan covenants in existing loan agreements and that they are unable to continue to do business, despite their good faith understanding of the state's practice with respect to incorporation.

II. BY THE TERMS OF THE BCA, ALLSTATE DOES NOT HAVE STANDING TO QUESTION THE INCORPORATION OR CORPORATE ACTS OF PT WORKS

A. Only the Attorney General May Challenge the Incorporation of a Corporation Whose Articles of Incorporation Have Been Filed

PT Works was incorporated under the BCA. BCA Section 221 provides in full that:

> The corporate existence shall begin on the effective date of the articles of incorporation as provided in section 131. Filing is *conclusive* evidence that all conditions precedent required to be performed under this act have been fulfilled and that the corporation has been formed under this act, *except in an action or special proceeding by the attorney general*.

MCL 450.1121 (emphasis supplied).

There is no question that the articles of incorporation were filed and accepted in accordance with BCA Section 131.

Michigan Pleading and Practice describes the effect of a statutory conclusive presumption quite succinctly. "A conclusive presumption, as its designation implies, is not subject to rebuttal; it cannot be contradicted but instead remains as an established phase of the case in which it arose." 3A Mich Pleading & Practice § 36.154 (2d ed) and *see also Mosier v American Ry Express Co*, 211 Mich 19; 178 NW 81 (1920) and *Pearo v City of Mackinac Island*, 307 Mich 290; 11 NW2d 893 (1943). The effect of this conclusive presumption is clear from the plain language of the statute.

The Michigan Legislature has clearly entrusted the right to challenge the formation of a corporation to a designated state actor – in this case the attorney general. We recognize, however, that the usual issue of defective incorporation differs from the problem in this case of alleged use of the wrong statute.

This Court has previously considered the issue of who may question the incorporation of a business entity in *Wyandotte Electric Light Co v City of Wyandotte*, 124 Mich 43; 82 NW 821 (1900). In 1889 the Wyandotte Electric Light Company (the "WEL Company") organized under the general manufacturers' act rather than under the more specific act pertaining to electric light companies. The City of Wyandotte granted permission for the WEL Company to erect and maintain poles and wires through the streets of Wyandotte. After the WEL Company had erected hundreds of poles, the City of Wyandotte retracted their earlier permission so that the

City themselves could supply electrical power to the citizens of Wyandotte. The City contended that the WEL Company, by incorporating under the "wrong" act, could not operate as an electric light company. This would mean that the City had no authority to grant the franchise claimed by the WEL Company. Since the City had no authority to grant the franchise, the WEL Company, because it incorporated under the wrong statute, would not have a franchise to provide electrical power in Wyandotte. This argument left the way clear for the City to provide electricity rather than the WEL Company.

In that case, this Court stated that:

> Whether the act under which [the WEL Company] was organized would permit its incorporation, we need not determine. The state for nine years recognized its incorporation as valid. We are of the opinion that the defendants are not in a position to raise the question of lack of power in the complainant, and that that question is one which the state alone can raise.

124 Mich at 46.

B. Allstate May Not Assert Lack of Corporate Capacity With Respect to Acts of PT Works

BCA Section 271 currently states:

> An act of a corporation and a transfer of real or personal property to or by a corporation, otherwise lawful, is not invalid because the corporation was without capacity or power to do the act or make or receive the transfer. However the lack of capacity or power may be asserted:
>
> (a) In an action by a shareholder against the corporation to enjoin the doing of an act or the transfer of real or personal property by or to the corporation.
>
> (b) In an action by or in the right of the corporation to procure a judgment in its favor against an incumbent or former officer or director of the corporation for loss or damage due to his unauthorized act.
>
> (c) In an action or special proceeding by the attorney general to dissolve the corporation or to enjoin it from the transacting of unauthorized business.

MCL 450.1271.

Allstate claims that PT Works has no power to engage in, and bill Allstate for, the physical therapy services received by Miller. Allstate does not dispute that all physical therapy was conducted by properly licensed physical therapists in accordance with medical prescriptions properly issued and properly applied. Allstate's only contention in this regard is that PT Works does not have the proper corporate power to engage in these activities because PT Works incorporated under the wrong statute.

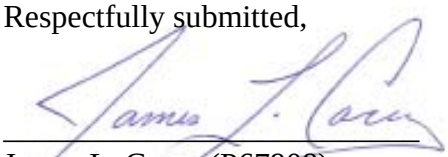
A similar situation was reviewed by the US Supreme Court in *National Bank v Matthews*, 98 US 621; 25 L Ed 188 (1878). In discussing the validity of a real estate transaction where statutory provisions restricted the transfer of title to a bank, the US Supreme Court stated that where "a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose." *Id*. At 628. For a corporation whose regularity of organization is at question, the statute specifically provides dissolution as the proper remedy. The court in *National Bank v Matthews* commented on this point as well, saying that dissolution "has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government." *Id*. at 629. The Michigan statutory scheme not only has the full force of statutory law, but is a codification of the traditional approach in this area. We believe that the clear statutory language of BCA Sections 221 and 271 regarding collateral attacks on incorporation and corporate action prevent Allstate's challenge to the validity of PT Works' incorporation.

CONCLUSION AND REQUEST FOR RELIEF

The ruling of the Court of Appeals incorrectly construed the statutory language of the BCA and the PSCA, and overturned longstanding interpretation and practice. It has caused unnecessary hardship and confusion. In addition, Allstate lacks standing to challenge the validity of PT Works' incorporation under the BCA or its corporate acts. Based upon the foregoing reasons and authorities, Amicus submits that this Court should reverse the ruling of the Court of Appeals on the questions related to the proper incorporation of PT Works under the BCA.

Dated: March 12, 2008

Respectfully submitted,



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