

# THE COUNSELOR

SIROTE & PERMUTT'S STATEWIDE LEGAL NEWSLETTER

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## NOW YOU SEE IT NOW YOU DON'T

*Diminishing Applicability of the Physician Office Exemption*

Kelli F. Robinson



Before initiating a healthcare project, offering a new healthcare service, or purchasing major medical equipment, physicians should analyze whether a certificate of need (CON) is required under Alabama law or whether the project is exempt from CON review under the statutory physician office exemption. Due to recent rulings by the Alabama CON Review Board narrowing the scope of the physician office exemption, the extent, scope, and cost of any healthcare proposal by a physician or physician group practice must be carefully considered before proceeding.

### CON REQUIREMENT

A CON is a written determination by the CON Review Board that there is a demonstrated need for a proposed project; that the project will not increase the cost of quality healthcare in Alabama unnecessarily; and that the project will be appropriate to the area and the population it proposes to serve. In general, a "new institutional health service" requires a CON. Under Alabama CON law, rules and regulations, a "new institutional health service" is defined to include, among other things, the construction of a new healthcare facility and/or capital expenditures made by or on behalf of a healthcare facility that exceed certain statutory expenditure thresholds.

Currently, any expenditures by or on behalf of a healthcare facility in excess of \$2,356,977 for major medical equipment; \$942,791 for new annual operating costs; or \$4,713,954 for

any other capital expenditure require a CON. The offering of lithotripter, magnetic resonance imaging (MRI), and positron emission tomography (PET) services, or the purchase of such equipment, however, is statutorily exempt from CON review, regardless of the cost.

### LETTER OF NON-REVIEWABILITY

If physicians believe their healthcare proposal is statutorily exempt from CON review, a letter of non-reviewability from the Executive Director of the State Health Planning and Development Agency (SHPDA) may be requested. A letter of non-reviewability is for informational purposes only and is valid only as long as the law and facts upon which it was based do not change. A letter of non-reviewability confirms the position of SHPDA regarding the proposal and is honored by SHPDA and other Alabama administrative agencies such as the Alabama Department of Public Health if licensure, registration, and/or certification is required.

### PHYSICIAN OFFICE EXEMPTION

For many years, physicians have requested and obtained letters of non-reviewability for proposed healthcare projects based on the physician office exemption, an exemption which arises from the statutory definition of a healthcare facility. Section 22-21-260(6) of the Alabama Code provides, in pertinent part, that the term "healthcare facility shall not include the offices of private physicians or dentists, whether

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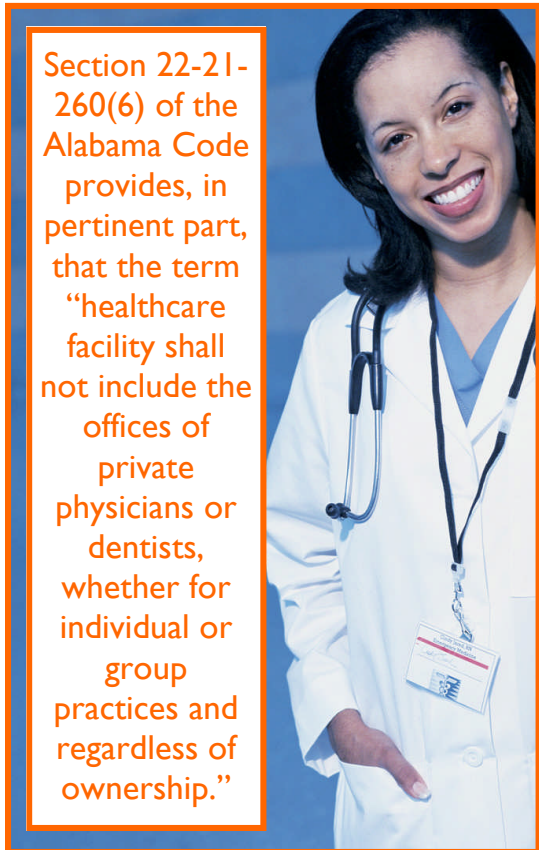
for individual or group practices and regardless of ownership.” Historically, a healthcare proposal involving the office of a private physician, dentist or group of physicians or dentists, did not require a CON.

#### **FOUR-PART TEST**

In DR-100, a 2001 proceeding involving Heart-Lung Associates of America, P.C., the CON Review Board created a four-part test for determining what constitutes the “offices of private physicians” for purposes of applying the physician office exemption. According to the CON Review Board, a project would qualify for the physician office exemption if: (1) the proposed services are to be provided, and related equipment used, exclusively by the physicians identified as owners or employees of the physicians’ practice for the care of their patients; (2) the proposed services are to be provided, and related equipment used, at the primary office of the physicians; (3) all patient billings related to such services are through, or expressly on behalf of, the physicians’ practice, and not on behalf of a third party; and (4) the equipment shall not be used for inpatient care, nor by, through, or on behalf of a healthcare facility. Subsequent CON Review Board rulings also have made clear that the CON Review Board will review the “totality of evidence” and that no single factor will govern the determination in the absence of other considerations. Until recently, this four-part test was used by SHPDA without challenge to issue scores of non-reviewability determinations based upon the physician office exemption.

#### **CARDIOVASCULAR GROUP’S PROPOSAL FOUND REVIEWABLE**

Last year, the CON Review Board twice considered a cardiovascular group’s proposal to construct a \$9.5 million physician office building that would include a physician office CT scan room and physician office heart catheterization laboratory, among other equipment. In January 2007, a hospital opposing the project sought a declaratory ruling from the CON Review Board that the cardiovascular group’s proposal was a “healthcare facility” under Alabama CON law, rules and regulations and, therefore, required a CON.



Initially, the cardiovascular group proposed to include additional leased tenant space in its building for “allied medical practices,” other than the primary cardiovascular group that would occupy the site. The CON Review Board concluded that the design and structure of the building, as well as the proposed structure of the group practice, reflected the cardiovascular group’s intent to share and use its facility and equipment for the treatment of patients other than just those of the treating physicians whose primary offices were to be located at the facility. The CON Review Board determined that the project involved the provision of a “new institutional health service,” did not qualify for the physician office exemption and did, therefore, require a CON.

Subsequently, the cardiovascular group restructured its project so that only the members of its group would use the building; the building would constitute the primary office location for each member of the group; and there would be no unaffiliated physicians utilizing the proposed building and equipment. It then petitioned the CON Review Board for another declaratory ruling that the cardiovascular group’s restructured healthcare proposal met the physician office exemption and was, therefore, not reviewable. Despite the restructuring of the project, the CON Review Board remained unconvinced that the cardiovascular group’s “large, multifaceted facility” was merely a physician’s office. Furthermore, the CON Review Board took issue with the fact that the physicians were not, at that time, practicing medicine as one

group but instead were still operating under multiple Tax ID numbers despite statements to the contrary. Again, the CON Review Board concluded, based on the totality of evidence, that the restructured proposal was reviewable.

The cardiovascular group subsequently filed a Petition for Judicial Review of the CON Review Board’s decision in the Circuit Court of Montgomery County. Although the judge had remanded the case to the CON Review Board to allow the cardiovascular group to present additional evidence to the CON Review Board concerning its current structure, operations and management of the project, the CON Review board, at its August 20, 2008, meeting, did not take additional evidence, but instead voted to approve a settlement in the case that was mediated by the parties, including SHPDA.

As part of the mediated settlement, the cardiovascular group apparently intends to file a Non-Reviewability Determination Request with SHPDA setting forth the revised proposal, which will apparently include the leasing of certain space in the building to the opposing hospital. By granting this Non-Reviewability Determination Request, it is anticipated that SHPDA will clarify the physician office exemption. However, until the Non-Reviewability Determination Request is filed, and a Letter of Non-Reviewability is issued, the full impact that this settlement will have on SHPDA's historic interpretation of the physician office exemption is unknown. Sirote & Permutt will address these developments in the next issue of "The Counselor."

## WHAT ABOUT YOUR PROJECT?

Given the diminishing applicability of the physician office exemption by the current CON Review Board, if a physician or a group of physicians is considering initiating a healthcare project, offering a new healthcare service, or purchasing major medical equipment, the best course is to seek the advice of experienced healthcare counsel on the applicability of Alabama CON law, rules and regulations. If possible, the design of the project should be structured to ensure full compliance with the physician office exemption as currently interpreted by the Alabama CON Review Board.



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## Update: Identity Theft Prevention Program

Your business may be required to implement an identity theft prevention program by November 1, 2008. In November 2007, the federal banking agencies, the National Credit Union Administration and the Federal Trade Commission issued joint regulations and guidelines regarding the *detection, prevention and mitigation of identity theft*.

Under the final Rule, those financial institutions and creditors that offer or maintain "covered accounts" must develop and implement a written identity theft prevention program. A "covered account" is (1) an account primarily for personal, family, or household purposes that involves or is designed to permit multiple payments or transactions, or (2) any other account for which there is a reasonably foreseeable risk to customers from identity theft. In other words, almost every retail sale for a consumer purpose with deferred payback, as well as consumer loan, will comprise a "covered account."

What may surprise some is that auto dealers, stock brokers, and utility and telephone companies offer "covered accounts."

Part of the regulation addresses only users of consumer reports who discover or are informed of address discrepancies. Another part addresses only debit and credit card issuers. However, the detection, prevention and mitigation component does apply to all consumer creditors, and covered businesses should be working toward meeting the November 1<sup>st</sup> deadline.

The final rule provides that the identity theft program to be adopted by a creditor must be tailored to the creditor's size, complexity and operations.

The Regulations also enumerate certain steps that creditors must take to administer their programs, including obtaining approval of the initial written program by their board of directors or a committee of the board, ensuring oversight of the development, implementation, and administration of the program, training staff, and overseeing service provider arrangements. Clearly, the agencies intended for identity theft prevention to be a fundamental business principle for creditors.

The rule's appendix provides detailed guidance on development of identity theft programs. Each creditor must consider the guidelines and include in its program those guidelines that are appropriate. Illustrative examples of Red Flags (i.e., indicators that identity theft may exist) are listed in a supplement to the guidelines.

If the new rule applies to your business, you must have an identity theft prevention program in place by November 1, 2008.



**MAURICE L. SHEVIN'S** legal practice includes real estate, consumer finance, credit insurance, banking and general business. Mr. Shevin serves as General Counsel to national and state trade associations. In addition, Shevin is a fellow of the American College of Consumer Financial Services Lawyers and has authored many articles and lectures on the topics of consumer and real estate finance law.