

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION
BOARD OF MEDICINE

Final Order No. AHCA-95-00646 Date 4-27-95

FILED

Agency for Health Care Administration
AGENCY CLERK

R.S. Power, Agency Clerk

By: Brandon Limore
Deputy Agency Clerk

IN RE: THE PETITION FOR DECLARATORY
STATEMENT OF STEPHEN G. SACKEL, M.D.

FINAL ORDER

This cause came before the Board of Medicine (hereinafter Board) pursuant to Section 120.565, Florida Statutes, and Chapter 28-4, Florida Administrative Code, on April 9, 1995, for the purpose of considering the Petition for Declaratory Statement filed on behalf of Stephen G. Sackel, M.D. (hereinafter Petitioner). No person or entity has sought to intervene as a party. Having considered the petition, the arguments of counsel, the applicable law, and being otherwise fully advised in the premises, the Board makes the following findings and conclusions.

FINDINGS OF FACT

1. Petitioner Stephen G. Sackel, M.D. is licensed to practice medicine in the State of Florida pursuant to Chapter 458, Florida Statutes.

2. The facts asserted by Petitioner are as follows: In 1988, Petitioner along with 7 other physicians, organized a Florida limited partnership known as Ameriscan, Ltd. (hereinafter Ameriscan). Petitioner and the other 7 physicians each purchased an equal amount of the stock in the corporate general partner of Ameriscan, Ameriscan Associates, Inc. (hereinafter General Partner). As of the date of this Petition, the General Partner

owns approximately 40% of the partnership interests of Ameriscan. Petitioner, as a shareholder in the General Partner, is an investor in Ameriscan. Ameriscan was established to operate a diagnostic imaging center through which diagnostic imaging services would be provided to the public whose physicians recommend such testing. Diagnostic imaging services are "designated health services" as that term is defined in Subsection 455.236(3)(d), Florida Statutes. In order to acquire the equipment needed to operate the diagnostic imaging center, Ameriscan took out a loan from a bank. As a condition precedent to loaning the money to Ameriscan, the bank required each of the shareholders of the General Partner, including Petitioner, to personally guaranty the loan. Ameriscan has been approached by several persons or entities who are interested in purchasing all of the outstanding partnership interests in Ameriscan. However, none of the prospective purchasers have been able or willing to pay off the entire amount of the loan in conjunction with the purchase of Ameriscan. The bank does not object to the General Partner selling its interest in Ameriscan, but it is unwilling to release the shareholders of the General Partner, including Petitioner, from their personal guaranties on the loan. As a physician, Petitioner is in a position to refer patients to the diagnostic imaging center operated by Ameriscan. Petitioner intends to divest himself of all investment interests in Ameriscan and he has refrained from referring any patients to the diagnostic imaging center operated by Ameriscan since September 30, 1994. Petitioner will continue to refrain from such referrals

until he has acceptably divested himself of all investment interest in Ameriscan.

3. Petitioner requests that the Board of Medicine review the above stated facts and state whether Petitioner's personal guaranty of the bank loan to Ameriscan is an investment interest pursuant to Section 455.236(3)(k), Florida Statutes, or makes Petitioner an "investor" as that term is defined in Subsection 455.236(3)(1), Florida Statutes, and therefore results in Petitioner's being prohibited from referring patients to the diagnostic imaging center operated by Ameriscan pursuant to Subsection 455.235(4)(a), Florida Statutes.

4. This Petition was noticed by the Board of Medicine in Vol. 21, No. 13, dated March 31, 1995, of the Florida Administrative Weekly (p. 1990).

CONCLUSIONS OF LAW

1. The Board of Medicine has jurisdiction over this matter pursuant to Section 120.565, Florida Statutes, Section 455.236(4)(b)4., Florida Statutes, and Rule Chapter 28-4, Florida Administrative Code.

2. The Petition for Declaratory Statement is in substantial compliance with the provisions of Section 120.565, Florida Statutes and Rule Chapter 28-4, Florida Administrative Code.

3. Subsection 455.236(3)(k), Florida Statutes, defines the term investment interest as an equity or debt security issued by an entity including without limitation equity interests or debt interests. The Board of Medicine concludes that Petitioner's

personal guaranty of the loan that Ameriscan needed in order to enter into the business of providing designated health services is the type of equity interest that creates a significant incentive to refer patients to Ameriscan. It is clear from the facts presented that if Ameriscan fails financially, Petitioner is liable for funds in the amount of the loan to Ameriscan. Therefore, the Board hereby determines that Petitioner's personal guaranty of Ameriscan's bank loan is an investment interest as defined in Subsection 455.236(3)(k), Florida Statutes.

4. Subsection 455.236(3)(l), Florida Statutes, defines the term investor as a person or entity owning a legal or beneficial ownership or investment interest directly or indirectly. Clearly, Petitioner is currently an investor and will remain so until such time as he divests himself of his shares in the General Partner that owns interest in Ameriscan. Furthermore, once Petitioner has so divested, the existence of his personal guaranty would still constitute an indirect investment interest as discussed above.

5. Subsection 455.236(4)(a), Florida Statutes, prohibits referrals by a health care provider for the provision of designated health services to an entity in which the health care provider is an investor or has an investment interest. As a shareholder of the General Partnership, Petitioner is an investor in Ameriscan and therefore prohibited from referring patients to Ameriscan for the provision of designated health services. As a guarantor of Ameriscan's bank loan, Petitioner has an investment

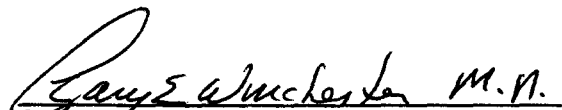
interest in Ameriscan and therefore is prohibited from referring patients to Ameriscan for the provision of designated health services.

WHEREFORE, the Board of Medicine hereby determines that as applied to the specific facts set forth in the Petition for Declaratory Statement, Petitioner's personal guaranty of the bank's loan to Ameriscan creates an investment interest pursuant to Subsection 455.236(3)(k), Florida Statutes, and makes Petitioner an investor as defined in Subsection 455.236(3)(l), Florida Statutes, and Petitioner is therefore prohibited from referring patients to Ameriscan for the provision of designated health services, including diagnostic imaging services because of the prohibition set forth in Subsection 455.236(4)(a), Florida Statutes.

This Final Order takes effect upon filing with the Clerk of the Agency for Health Care Administration.

DONE AND ORDERED this 25 day of April, 1995.

BOARD OF MEDICINE


GARY E. WINCHESTER, M.D.
CHAIRMAN

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS MAY BE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE CLERK OF THE AGENCY FOR HEALTH CARE ADMINISTRATION AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES REQUIRED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THIS FINAL ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to Stephen G. Sackel, M.D. c/o Robert P. Macina, Attorney at Law, 515 East Las Olas Boulevard, 15th Floor, Fort Lauderdale, Florida 33301, this _____ day of _____, 1995.

interests are purchased. The Bank holding the Note does not object to the General Partner selling its partnership interest, but it is unwilling to release the shareholders of the General Partner, including the Petitioner, from their personal guaranties on the Note.

6. Issue. The Petitioner seeks a Declaratory Statement regarding whether the Act will prohibit the Petitioner from referring patients to the diagnostic imaging center operated by the Partnership if: (i) a purchaser purchases all of the outstanding partnership interests of the Partnership, including the Petitioner's shares in the General Partner; but (ii) the Petitioner continues to personally guaranty the Note outstanding from the Partnership to the Bank.

7. Analysis. Petitioner is an investor (as defined in Section 455.236(3)(1), Florida Statutes) in an entity which provides designated health services (as defined in Section 455.236(3)(d), Florida Statutes). Section 455.236(4)(a) provides:

a health care provider may not refer a patient for the provision of designated health services to an entity in which the health care provider is an investor or has an investment interest.

The Act defines "investor" as a person or entity owning a legal or beneficial ownership or investment interest, directly or indirectly, including, without limitation, through an immediate family member, trust or another entity related to the investor within the meaning of 42 CFR Section 413.17, in an entity. The Act defines "investment interest" to mean an equity or debt security

issued by an entity, including, without limitation, shares of stock in a corporation, units or other interests in a partnership, bonds, debentures, notes, or other equity interests or debt instruments.

If a purchaser purchases all of the outstanding partnership interests of the Partnership, but the Petitioner continues to personally guaranty the Note, the Petitioner does not believe he will have an equity or debt security issued by the Partnership. Specifically, the Petitioner will not hold any units in the Partnership, nor will he hold any bonds, debentures, notes or other equity interests or debt instruments issued by the Partnership. Therefore, it does not appear that the Petitioner would have an investment interest (as defined by the Act) in the Partnership. In addition, the Petitioner would not own a legal or beneficial ownership, directly or indirectly, through an immediate family member, a trust or any other entity related to the Petitioner. Therefore, the Petitioner would not appear to be an investor as defined by the Act.

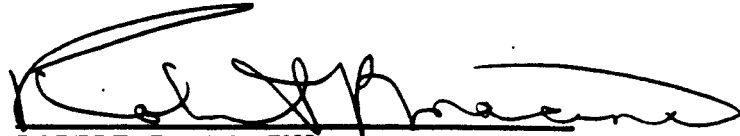
Since the Petitioner is subject to the jurisdiction of the Board of Medicine, and since violations of Section 455.236 may subject Petitioner to disciplinary action by the Board of Medicine, Petitioner respectfully requests the Board to provide guidance in this matter.

Respectfully submitted,


STEPHEN G. SACKEL, M.D.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via Federal Express this 11th day of January, 1995, to Executive Director, Board of Medicine, Northwood Centre, 1940 N. Monroe Street, Tallahassee, Florida 32399-0770.



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