

## **2003 Penny v OrthAlliance Corporate Dentistry Ruled Illegal in Texas**

From Orthalliance 10-k Annual Report

On March 26, 2003, the U.S. District Court for the Northern District of Texas, in ruling on the plaintiffs' motion for summary judgment in a case captioned Penny v. OrthAlliance, Inc., held that, when construed together, the purchase agreements and service agreements between the plaintiffs and OrthAlliance and the employment agreements between the individual plaintiffs and their practices violated Texas statutes prohibiting the unauthorized practice of dentistry and were therefore invalid. In the court's view, the interrelationship among these agreements allowed OrthAlliance to own, maintain or operate an office or place of business in which it employs or engages the plaintiffs to practice dentistry, in violation of Texas law. In reaching its conclusion, the court noted that OrthAlliance leases or owns and maintains the office space and tangible assets used in the plaintiffs' practices and provides comprehensive practice management services, and that the service agreements require that the practices enter into employment agreements with the individual plaintiffs

From Brian Calao Website (One of the Attorneys who tried case)

**Robert C. Penny et al. v. OrthAlliance, Inc., 255 F. Supp. 2d 579 (N.D. Tex. March 27, 2003) (No. CIV.A.3 :01-CV-1 1569-N)**, In a case of first impression, obtained summary judgment on behalf of a group of Texas orthodontists on the grounds that 20 year service agreements between orthodontists and a practice management company violated the prohibition on the corporate practice of dentistry contained in the Texas Dental Practices Act. In the years that followed, this case was widely cited, adopted and followed by numerous other Federal Courts in Washington, Florida, Illinois, Colorado, California, Texas and other states.

From JADA

In 2003 a federal district court in Texas ruled against the MSO Orthalliance, holding that it was a violation of the Texas Dental Practice Act for the MSO to own, maintain or operate a dental office without a dental license issued by the Texas State Board of Dental Examiners. Since Orthalliance therefore was engaged in the illegal practice of dentistry, the Texas court held that the agreements into which it had entered with the plaintiff orthodontists were unenforceable.

From Jordan vs. OrthAlliance New, (5th Cir. 2008)

As written, the BSAs create an interlocking set of obligations that required OCA to exercise considerable control over the Orthodontists' practices. For instance, OCA conducted the financial and marketing activity of the practices, and it maintained the facilities, equipment, and support personnel required to operate the practices. The BSAs also stipulated how much each Orthodontist was required to work, and greatly restricted their ability to perform services outside of the BSAs. In exchange for these services, OCA charged a fee that was tied to the

profits of the practices. The BSAs provided little to no ability for the Orthodontists to oversee any of OCAs decisions related to their practice.

Ultimately, the Orthodontists were essentially only left with control over diagnosing and treating their patients. Accordingly, the subject matter of the agreement runs afoul of section 251.003(a)(4)'s prohibition of unlicensed persons from owning, operating, or maintaining a premises at which those persons also employ or engage another person to practice dentistry.

From the Judicial Review

<http://jv.onebeep.com/Court-Cases/Commercial-Contracts/Texas-Orthodontist-Business-Agreements-Void-for-Illegality/13/5626>

From Monarch & Castle Dentals Parent Firm

Our business support services agreements with affiliated dental groups could be challenged by a state or dentist under laws regulating the practice of dentistry.

The laws of each state in which we operate contain restrictions on the practice of dentistry and control over the provision of dental services. The laws of many states where we operate permit a dentist to conduct a dental practice only as an individual, a member of a partnership or an employee of a PC, limited liability company or limited liability partnership. These laws typically prohibit dentists from splitting fees with non-dentists and prohibit non-dental entities, such as DPM support services organizations, from engaging in the practice of dentistry and from employing dentists (and, in some states, hygienists or dental assistants). The specific restrictions against the corporate practice of dentistry, as well as the interpretation of those restrictions by state regulatory authorities, vary from state to state. However, the restrictions are generally designed to prohibit a non-dental entity from controlling or directing clinical care decision-making, engaging dentists to practice dentistry (or, in certain states, employing hygienists or dental assistants) or sharing professional fees.

For example, the contractual arrangements of an orthodontic practice management support services organization, Orthalliance, have been successfully challenged in Texas and Washington as violating the state laws prohibiting the corporate practice of dentistry. In the Washington case, the court found the fact that Orthalliance was a third party beneficiary of the employment agreements between the dental practice affiliate and the dentists put Orthalliance in the position of a virtual employer of the orthodontists. The contractual relationship between the affiliated dental group and Orthalliance also provided a minimum management fee that was personally guaranteed by the service provider. The totality of the contractual relationships was held to violate Washington's laws against the corporate practice of dentistry and such contracts were voided as illegal and against public policy. The Orthalliance case in Washington is on appeal to the Ninth Circuit and was selected for inclusion in the mediation program in October 2004. In April 2005, OCA, Inc. announced an agreement in principle to settle lawsuits and disputes pending between its subsidiary OrthoAlliance and its affiliated practitioners.

Recently, the United States Court of Appeal for the Fifth Circuit affirmed a decision by the United States Bankruptcy Court for the Eastern District of Louisiana that the Orthalliance management agreements violated Texas law.