On March 2, 2007, a unanimous Virginia Supreme Court in Parikh v. Family Care Center, Inc. held that a medical practice that was not organized as a professional corporation could not enforce a covenant not to compete in its employment agreement with a physician employee.

Under the facts relevant to the appeal, the licensed physician was employed by Family Care Center, Inc. ("FCC"). On the date of employment, FCC was a professional corporation. After the death of the physician owner of FCC, his widow became the owner, converting the professional corporation to a non-professional corporation by operation of law.

The employment agreement stated that FCC “is presently engaged in the practice of medicine” and that the employed physician would “assist [FCC] in the practice of medicine.” The non-compete agreement provided for liquidated damages if the physician “engaged in a competing practice” of medicine.

In its analysis, the Court first recited settled case law that restrictive covenants are disfavored, are construed against the employer and are enforceable only if narrowly written to protect the employer’s legitimate business interests. The Court then summarized the dispositive issue in the case as “whether [FCC] has a legitimate business interest in enforcing the covenant not to compete under the terms of the employment agreement.” In determining whether FCC had a legitimate interest in enforcing the restrictive covenant, the Court confined its analysis to the narrow question of whether a non-professional corporation “may lawfully engage in the practice of medicine in Virginia,” as stated in FCC’s employment agreement with the physician.

The Court concluded “that a non-professional corporation cannot engage in the practice of medicine in Virginia.” The Court held that, by statute, only “licensed” persons can “engage in the practice of medicine.” Since a non-professional corporation is not licensed and thus may not lawfully “engage in the practice of medicine”, the Court concluded that FCC had “no legitimate business interest in enforcing the covenant not to compete ...”

In reaching its decision, the Court considered and distinguished relevant provisions of the Virginia Professional Corporation Act (the “Act”), which permit professional medical services to be “rendered” through a non-professional corporation. The court expressly did not address (i) the scope of medical services that FCC, as a non-professional corporation, could “render;” (ii) the difference between the “rendering” of professional medical services by a corporation and “engaging” in the “practice” of medicine; or (iii) whether a non-professional corporation “rendering” professional services may enforce a covenant not to compete with its employees.

... continued
In addition, the Court did not fully address several issues that could have far-reaching implications for the health care industry.

- It expressly leaves open the issues of whether a non-professional entity can lawfully employ a licensed physician to practice medicine or whether there are limitations on the scope of such services. Several Virginia Attorney General Opinions have held such employment generally is permissible so long as the employer does not interfere with the independent professional judgment of the licensed practitioner.

- The decision raises unanswered questions about whether any entity, even a professional corporation, can enforce a restrictive covenant with a licensed professional since only individuals, not entities, may be “licensed to practice medicine.”

The Court did not indicate whether its holding would have been different had the employment agreement recited that the entity was engaged in the business of “rendering professional services through its employed licensed physicians” rather than stating that the entity “engaged in the practice of medicine.”

A Motion for Rehearing was filed on March 12, 2007. If granted by the Court, a rehearing is likely to occur later this year in the Court’s June or September session. If the decision stands as written, the implications and uncertainties facing the Virginia health care industry could be substantial, and a legislative resolution may be needed. Williams Mullen will keep you apprised of the issues as they unfold.

For more information on this topic, please contact issue editors, Patrick C. Devine, Jr., Stephen C. McCoy and Lynn F. Jacob, or any member of the Williams Mullen Health Care Team.

1 Unless otherwise prohibited by law or regulation, the professional services described in subsection A of 13.1-543 [including the services of practitioners of the healing arts] may be rendered in this Commonwealth by a [non-professional stock or non-stock] corporation.” Va. Code §13.1-542.1 (2007).