By Stephen Gibson
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> **Real Estate:** *Even if limitations bars foreclosure, the lender is equitably subrogated to any previous lien the debtor discharged with the loan proceeds.*

In *PNC Mortgage v. Howard*, the borrower refinanced a loan by giving the lender a property lien, then used the borrowed money to discharge earlier liens. The borrowers defaulted on the refinanced note, but limitations expired before the lender foreclosed its lien. In *Federal Home Loan Mortgage Corp. v. Zepeda*, 601 S.W.3d 763, 766 (Tex. 2020), decided last year, the court ruled a refinancing lender's failure to timely foreclose its own lien did not prevent the lender from assuming rights to the discharged lien under the doctrine of equitable subrogation. In this case, the refinancing lender had been named as a defendant in a previous lienholder's unsuccessful effort to foreclose its lien *after* it assigned the underlying note. The court of appeals ruled the refinancing lender was not equitably subrogated to the previous lender's lien because it had been negligent in failing timely to foreclose its own lien after learning about the previous lender's attempted foreclosure of the earlier lien.

By per *curiam* opinion, the Texas Supreme Court rejected negligence or delay as an equitable defense to refinancer's assertion by equitable subrogation of the previous lender's lien. The court explained that "equitable [ ]subrogation rights become fixed [when] the proceeds from a later loan … discharge an earlier lien." "A lender's negligence in preserving its rights under its own lien thus does not deprive the lender of its [equitable] rights." If constitutional defects in the lienholder's own lien did not preclude equitable subrogation, then failure to act in a timely manner would not do so. Neglect or lack of diligence may, however, adversely affect the *priority* of the lienholder's lien.

Workers Compensation – *Medical Fee Disputes: The burden of proof is on the party seeking relief at the particular stage of administrative review, not the party who initiated the medical fee dispute resolution process.*

Interpretation of Administrative Rules: *Like statutes, administrative rules must be interpreted as a whole, not in isolation, in the context of the larger subject of the regulatory rules.*

Under the worker's compensation act, an insurer must make "appropriate payment" for medically necessary and appropriate treatment compensable injuries. Disputes over the payment "appropriate" according to governing rules and statutes may be resolved through medical fee dispute resolution by the Worker's Compensation Division of the Texas Department of Insurance at the behest of either insurer or provider. If this does not resolve the dispute, further review is available through benefit review conference and contested case hearing thereafter. A dissatisfied party who exhausts all of these administrative remedies may then seek judicial review.

In *Patient's Medical Center v. Facility Insurance Corp.* the provider dissatisfied with the insurer's agreement to pay only 3% of the provider's charges initiated a medical fee dispute resolution. The contest continued through the contested case hearing stage, which favored the provider. The administrative law judge's decision turned on who bore the burden of proof. The ALJ reasoned the insurer "failed to carry its burden of proving [the provider] was not entitled" to additional reimbursement. The insurer appealed to the district court.

When the case reached the Supreme Court of Texas, the issue was whether the party who initiated the administrative proceedings bore the burden of proof through all later phases of administrative review or whether the burden of proof was on the party who initiated each particular phase. The rules governing burden of proof before the ALJ say first consideration is given to the applicable statute, then agency's policies. The statute was silent, so the court looked to the agency rule that the burden of proof was on the "party seeking relief." But did this mean the party who initially sought relief – the provider in this instance – or the person who sought relief in the particular proceeding – i.e., the loser as the previous stage of administrative review which was the insurer in this case?

In a unanimous opinion by Justice Lehrmann, the person "seeking relief" was the party who initiated that *particular phase* of the administrative review. The court applied to administrative rules the same maxims for interpreting statutes. The interpretation must be consistent with the context of the rule considered as part of the whole body of law.

The administrative rules characterized separately for each phase of administrative review the party who "appeal[ed]" or sought "review." Review could end at the conclusion of any phase unless one of the parties invoked the next review phase. Consequently, the opinion concluded that the context of the administrative proceeding's rules indicated that the party seeking relief was the party who sought relief at *that phase*, not the party who commenced the administrative review process to begin with. Administrative review of medical reimbursements is not a "static process" with respect to who is seeking relief at any particular stage.

The Texas Medical Association and the Worker's Compensation Division filed *amicus curiae* briefs supporting the provider. The TMA argued that placing the burden on the review initiator penalized providers through higher fees and costs from having the burden of proof throughout. The Division argued that the rule urged by the insurers undermined the entire review system. The medical association bested the insurance industry in this particular case.

Regulation of Professions: *Courts must presume an agency rule is valid and only consider whether the rule is within the authority delegated to the agency by the Legislature and not the wisdom of the rule as a matter of policy implementation. A rule is not invalid merely because it does not explicitly prohibit acts beyond the scope of the profession.*

Texas Board of Chiropractic Examiners et al. v. Texas Medical Association was the culmination of a ten-year turf war over the line between chiropractic and medical practices. The Chiropractic Board adopted a rule that permitted chiropractors to conduct eye examinations to diagnose an inner ear sensory nervous system disorder. The Texas

Medical Association (TMA) objected that this and related rules authorized the unlicensed practice of medicine, not chiropractic therapy.

Writing for a 7:2 majority, Chief Justice Hecht held the Chiropractic Board's rule authorizing this examination was within statutorily authorized chiropractic practice and did not encroach on the practice of medicine allowed only by a licensed physician. The Medical Practice Act defines medical practice as "the diagnosis, treatment, or offer to treat a mental or physical disease or disorder or a physical deformity or injury by any system or method." It does not prohibit, however, "licensed chiropractor[s] engaged strictly in the practice of chiropractic." Tex. Occ. Code §151.052 (3). Chiropractic practice includes "(1) objective or subjective means to analyze, examine, or evaluate the biomechanical condition of the spine and musculoskeletal system of the human body [or] (2) uses adjustment, manipulation, or other procedures in order to improve subluxation[, the alignment of vertebrae,] or the biomechanics of the musculoskeletal system." Tex. Occ. Code §§ 201.002 (b)(1)-(2).

The Chiropractic Board defined "musculoskeletal system" and "subluxation complex" by adopting Rule 78.1. That rule defines musculoskeletal system as "[t]he system of muscles and tendons and ligaments and bones and joints and associated tissues and nerves that move the body and maintain its form." 22 Tex. Admin Code § Rule 78.1(a)(5). The TMA complained this definition broadly included the nervous system and brain, and asked the definition be limited to the spine. Rule 78 also defines a subluxation complex as a "neuromusculoskeletal condition that involves an aberrant relationship between two adjacent articular structures that may have functional or pathological sequelae, causing an alteration in the biomechanical and/or neuro-physiological reflections of these particular structures, their proximal structures, and/or other body systems that may be directly or indirectly affected by them." *Id*. § 78.1(a)(9).

Rule 78 initially did not include "diagnosis" as part of chiropractic practice, but it was amended to allow chiropractors who pass a specific examination to perform an eye-movement test to detect nystagmus – an involuntary, side-to-side eye movement that may be a symptom of a brain, inner ear, or eye problem. This subset of specially qualified chiropractors used the test to help rule out a neurological condition a balance problem that only a physician could treat.

The Texas Medical Association has "associational standing" to sue on behalf of its members who are aggrieved by the action of the Texas Chiropractic Board.

Enter the TMA. It sued, alleging Rule 78 "diminishes the privilege of practicing medicine and the value of physicians' medical licenses by authorizing the unlicensed practice of medicine." The majority first addresses whether the TMA had "constitutional" standing necessary for subject-matter jurisdiction. The Administrative Procedure Act authorizes declaratory relief if a "rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege." Tex. Gov't Code §2001.038 (a). After reiterating the distinction between constitutional standing necessary for subject-matter jurisdiction and satisfaction of a statute that authorizes relief, the majority ruled the TMA enjoyed the necessary standing. It reasoned "[o]btaining and maintaining the privilege of practicing medicine imposes economic costs on physicians [so that] allowing nonphysicians to practice medicine … would impair—or at least threaten to impair—that privilege."

Regarding whether the TMA, a voluntary advocacy organization, had a sufficient interest threatened by Rule 78.1, the opinion simply pointed to *Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970), which held organizations had constitutional standing when the government action allegedly resulted in increased competition that "might entail some future loss of profits." No party contested the TMA's "associational standing" to sue for its members.

Courts should only decide whether the agency rule is contrary to the authorizing statute, not the wisdom of the rule or the desirability of its effect.

To assure that "courts … stay in their lane" and appropriately defer to legislative intent, the opinion devotes greater-than-usual attention to the standard of review. It explains that the question when reviewing Rule 78 is not whether it authorizes a provider to practice medicine. Instead, the question for the court to decide is whether the rule's presumptive validity has been rebutted by showing it either "contravenes specific ... language" of the enabling statute or "runs counter to [that statute's] general objectives." *Texas State Board of Examiners of Marriage and Family Therapists v. Texas Medical Association*, 511 S.W.3d 28, 33 (Tex. 2017), decided nearly four years ago involved a similar issue: whether a rule authorizing a particular practice exceeded the agency's regulatory authority. There, the court emphasized that resolution of this issue is a "purely legal" question of statutory interpretation to which well-settled rules apply. Those include the use of commonly understood meanings for undefined terms, deciding the meaning of a rule by considering it in the context of related rules to ascertain the validly authorized activity, and beginning with a presumption the agency rule was valid. The end result in *Marriage and Family Therapists Board* was that a particular practice was not necessarily unauthorized merely because it overlapped with the practice of medicine.

The majority refuses to invalidate Rule 78.1 because the judiciary must treat the agency action as presumptively valid and should not assume the Rule permitted or required unauthorized practices not explicitly prohibited by the rule itself.

The majority chided the court of appeals' for departing from the appropriate standard of review by considering the evidence and deciding the issue as one of fact rather than law. The majority then turns to whether Rule 78.1 impermissibly authorized the unlicensed practice of medicine by allowing non-physicians to make diagnoses concerning more than the musculoskeletal system. The majority found no such transgression. They explained, "The rule merely acknowledges … that chiropractors cannot ignore the … associated nerves that help shape the musculoskeletal system and allow it to move." Accordingly, Rule 78.1 did not exceed the bounds of chiropractic practice authorized under the Occupations Code. The majority reasoned Rule 78.1 had to be considered in the larger context of related rules, all of which were designed to assure that chiropractic practice was limited to statutorily authorized activities.

The majority was unpersuaded by the TMA's argument that the Rule's reference to "nerves" sanctioned more. It explained that Rule 78.1 "merely recognizes … that musculoskeletal dysfunctions cannot be diagnosed or treated without considering associated nerves." Nothing in that Rule, the majority insisted, authorized chiropractors to venture into the "far broader field" of medical neurology. The majority, however, deferred to the Chiropractic Board to identify

the appropriate dividing line between chiropractic and medical practice in light of the presumption of the validity of the Chiropractic Board's rule.

The majority rejected the reasoning of Justice Bland's dissent, in which Justice Boyd joined, that authorization of only specially trained chiropractors to perform the eye exam in question necessarily exceeded the limits of chiropractic practice to the "the biomechanical condition of the spine and musculoskeletal system" because the test could also be used for the treatment of conditions that go beyond the scope of chiropractic treatment. In particular, the dissent argued the exam could be used to make a differential diagnosis by eliminating neurological conditions as a cause of the patient's condition. The majority reasoned "differential diagnosis is … the process every healthcare provider goes through when assessing a patient's symptoms to determine whether it is appropriate to treat the patient or refer the patient elsewhere." As an unavoidable part of chiropractic evaluation, the majority refused to condemn any such practice an impermissible transgression on medical practice. Rule 78.1 did not, therefore, exceed the scope of authority delegated to the Chiropractic Board. The broader question of whether the examination *should* be used by chiropractors was deemed one the Legislature delegated to the Board, not the courts.