IN THE SUPREME COURT OF MISSISSIPPI

DIALYSIS SOLUTIONS, LLC — APPELLANTS

VS. — CAUSE NO: 2011-TS-01041

MISSISSIPPI STATE DEPARTMENT OF HEALTH;
MARY CURRIER, IN HER OFFICIAL CAPACITY AS
THE EXECUTIVE DIRECTOR OF THE DEPARTMENT
AND STATE HEALTH OFFICER — APPELLEES

APPEAL FROM THE DECISION OF
THE MISSISSIPPI STATE DEPARTMENT OF HEALTH

BRIEF OF APPELLEE THE MISSISSIPPI STATE DEPARTMENT OF HEALTH

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that that the Justices of the Mississippi Supreme Court and/or the Judges of the Mississippi Court of Appeals may evaluate the possible disqualification or recusal.

1. Dialysis Solutions, LLC (Appellant);

2. Clark & Clark, PLLC, Robert G. Clark, III, Esq. (Counsel for Appellants, Dialysis Solutions, LLC);

3. Mississippi State Department of Health (Appellee);

4. Jim Hood, Esq. Mississippi Attorney General, and Bea Tolsdorf, Esq. Special Assistant Attorney General (Counsel for Appellee Mississippi State Department of Health);

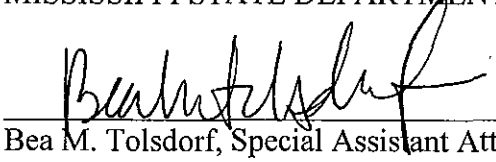
5. RCG-Montgomery County, LLC (Appellee)

6. Baker, Donelson, Bearman, Caldwell & Berkowitz. P.C, counsel for RCG-Montgomery County, LLC

7. Mary Currier, MD, MPH (State Health Officer for Mississippi);

8. Cassandra Walter, Esq.

Respectfully Submitted,
MISSISSIPPI STATE DEPARTMENT OF HEALTH

BY: 

Bea M. Tolsdorf, Special Assistant Attorney General

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Statement of the Issues

1. Whether or not Section 1 of 2011 Mississippi Laws chapter 540 is constitutionally viable?
2. Whether or not Section 1 of 2011 Mississippi Laws chapter 540 benefits the public interest?

Statement of the Case

This is an appeal of a Final Order of the State Health Officer (hereinafter "SHO") with regard to Certificate of Need (hereinafter "CON") number ESRD-NIS 1206-044. The Appellee has requested to construct a six-stage end stage renal disease (hereinafter "ESRD") facility in Winona, Montgomery County, Mississippi. The Staff for the Mississippi State Department of Health ("hereinafter the "Department"), an Independent Hearing Officer and the SHO found that this project did not substantially comply with the requirements of the CON Manual, the State Health Plan, and the CON Laws.

A. Summary of the Proceedings

On December 29, 2006, Dialysis Solutions, a for-profit limited liability company, filed a certificate of need application with the Department for the purposes of establishing a six-station ESRD facility in Winona, Montgomery County, Mississippi. After initial review, the Department determined that additional information was needed and on February 21, 2007, the Department requested that Dialysis Solutions produce this additional information. On July 16, 2007, the Department received the additional information requested from Dialysis Solutions. On October 1, 2007, the application filed by Dialysis Solutions was deemed complete. On November 15, 2007, the Staff Analysis for the project proposed by Dialysis Solutions was published by the Department recommending the project not be approved. On December 4, 2007, Renal Care Group (hereinafter "RCG") requested a hearing during the course of review regarding the application filed by Dialysis Solutions. The requested hearing was held on October 26, 2010. The parties were afforded the opportunity to submit *Proposed Findings of Fact and Conclusions of Law* to the hearing officer upon conclusion of the hearing. Counsel for

Dialysis Solutions submitted said findings on February 21, 2011.[1] The Hearing Officer submitted her recommendation of disapproval on June 15, 2011 and, after reviewing the record and all pertinent documentation, the SHO concurred with the Department Staff and the Hearing Officer. On June 30, 2011, the SHO disapproved the application filed by Dialysis Solutions, LLC. It is from this decision that Dialysis Solutions makes the present appeal.

B. **Statement of the Facts** [2]

For years, the CON appellate process has been a topic of much debate. It was long bemoaned that the process simply took too long, and therefore delayed the implementation of needed health care services unnecessarily. However, the appellate track for CON was set by statute[3] and therefore those appealing from the Final Order of the Department regarding a CON could not waiver from this process. During the 2011 Legislative session, House Bill 826 (hereinafter "HB") was introduced. This HB was entitled, in relevant portion,

> AN ACT TO AMEND SECTION 41-7-201, MISSISSIPPI CODE OF 1972, **TO PROVIDE THAT APPEALS OF ORDERS OF THE STATE DEPARTMENT OF HEALTH PERTAINING TO CERTIFICATES OF NEED FOR HEALTH CARE FACILITIES SHALL BE MADE DIRECTLY TO THE MISSISSIPPI COURT;. . .** Mississippi. H.826 2011 Reg. Sess. (April 26, 2011) *(Emphasis Added)*

HB 826 was referred to the Public Health and Human Services Legislative Committee on January 14, 2011. On February 10, 2011 this measure passed the House and on February 11, it was transferred to the Senate; and on February 14, 2011, it was referred to the Public Health and

[1] Upon information and belief, Counsel for RCG submitted findings to the Hearing Officer; however, it does not appear that these findings were filed with the Department.

[2] Traditionally, in CON appeal briefs, the Statement of the Facts section details the facts pertaining to the approval or denial of a CON; however, this brief is not meant to address the correctness of the decision of the Department (briefing of that nature will be presented to this Court at a future date.) The purpose of this brief is to discuss the importance and validity of Section 1 of 2011 Mississippi Laws chapter 540, and as such, the Statement of the Facts will relate to the passage of House Bill 826.

[3] Mississippi Code Annotated §41-7-201 (1972, as amended).

Welfare section. The Senate passed an amended version of the HB on February 25, 2011. The bill was referred to conference and on March 29, 2011, the Legislature adopted a joint conference report. The conference report was approved and thereafter signed by the Governor on April 26, 2011.

This law became effective on July 1, 2011 as Section 1 of 2011 Mississippi Laws chapter 540.

Summary of Argument

On March 29, 2011, the Mississippi House and Senate adopted the joint conference report for HB 826, as amended. On April 26, 2011, Governor Haley Barbour signed the proposed legislation into law. This law became effective on July 1, 2011 as a general law of the State of Mississippi, titled as Section 1 of 2011 Mississippi Laws chapter 540. In effect, Section 1 of 2011 Mississippi Laws chapter 540, which amends Section 41-7-201 of the Mississippi Code Annotated, provides for the direct appeal of a Final Order of the Department with regard to a CON to the Mississippi Supreme Court. Prior to the passage of this measure, all appeals of such Final Orders were made first to the proper Chancery Court and thereafter, an appeal may be made to the Supreme Court.

During the legislative debate of HB 826, the Department offered its full support of the proposal, and the governing authority for the Department, the Mississippi State Board of Health, officially endorsed the legislation. The reasoning for such was simple—due to the previous appellate structure for CON, projects which proposed to provide necessary and needed health services were too often tied up in appellate red tape—seeming lost in litigation for years. A lengthy appellate process for CON often resulted in lengthy delays with regard to the provision of needed health services. Such an unnecessary delay negatively impacts effective health planning and thwarts two of the major tenants of Mississippi's health planning and health regulatory purposes: improving the health of Mississippians, and increasing the "accessibility, acceptability, continuity, ad quality of health services." *2011 Mississippi State Health Plan,* Chapter 1, Page 2. Section 1 of 2011 Mississippi Laws chapter 540 attempts to cure these infirmities by allowing parties to bypass the Chancery Court during the CON appellate process.

The efficient and timely provision of needed health services in Mississippi is critical to the health, well-being and safety of the residents of this state. The appellate process outlined in Section 1 of 2011 Mississippi Law chapter 540, could not only help to provide needed health services in a timelier manner; it would establish a more cost effective process by which affected parties are still afforded "their day in court" as well an opportunity to appeal any adverse decision to the final arbiter in the state—the Mississippi Supreme Court. Therefore, not only does the appellate process established by HB826 provide for more effective health planning—it provides an affected person feeling aggrieved by a CON Final Order with adequate appeal measures.

It is for these reasons that Section 1 of 2011 Mississippi Law chapter 540 should be found appropriate, necessary and in the best interest of the public. As such, this Honorable Court has proper appellate jurisdiction over the present matter presented.

Argument

I. The timely implementation of needed health services and/or facilities is of great importance to the citizens of Mississippi; and the previous Certificate of Need appeal process did not facilitate a timely resolution to CON disputes, therefore causing an unreasonably long delay in the implementation of needed health services and/or facilities

"The Certificate of Need program seeks to assure access to essential health services for all citizens of the state. The program is designed to balance the growth of health facilities and services with the need for those services." *Certificate of Need Manual,* Mission and Purpose Statement, Page V, (May 2010). Such a critical aspect of health-planning for the Department is determining whether or not a need for a health service or facility exists within a defined area. The methodology for determining if such a need exists varies depending on the type of health service or facility that is being evaluated. For example, the need methodology for offering Magnetic Resonance Imaging (MRI) service is different than the need methodology for the establishment of a new hospital.

Throughout the year, the health planners for the Department work diligently with each need methodology to determine what the health care needs for services and facilities are across the State. These health service needs are then reflected in the State Health Plan. Therefore, each year, the public is put on notice of what health services and facilities are needed and which are not. If a health care service or facility is needed, a party may apply to provide such health service or construct such facility; however, if there is no need for a particular health service or facility, than the Department may not approve any project proposing such a project. What this means then, is that at the *time an application for CON is filed,* a defined need for a health service has already been established by the Department.

Imagine that the Department, by conducting all necessary and appropriate need methodology studies, determines that a specific community in Mississippi is underserved with regard to a specific health service and/or facility; as such, it is determined that there is a defined need for this service and/or facility. Appropriately, this need is reflected in the State Health Plan. Accordingly, the Department receives applications for a CON to implement this service and/or facility. After a diligent review process, the Division of Policy and Planning within the Department recommends that one entity be awarded a CON. An affected party, feeling aggrieved by this recommendation—perhaps their application was denied or the applicant would compete with the affected party's service and/or facility—may ask for an administrative hearing on this decision. This administrative hearing allows the aggrieved party the opportunity to challenge the recommendation of Policy and Planning. During the administrative hearing process, which functions for all intensive purposes as a trial, the parties may call witnesses, including experts, produce evidence and exhibits and make objections.

Upon the conclusion of the administrative hearing (which can last days or weeks), each party is afforded the opportunity to submit briefs on the pertinent issues and then the Hearing Officer makes her ruling and provides a recommendation to the State Health Officer. After such a recommendation is made, the State Health Officer reviews the matter and makes the ultimate decision on whether or not the project should be approved or disapproved. This decision is the Final Order of the State Department of Health on the matter. Under the previous law, if an affected party felt aggrieved by this Final Order, an appeal may be taken to the Chancery Court of proper jurisdiction. **It is important to note that at this point in our hypothetical, the need for this service and/or facility **has already been established**—this means that each day the project is delayed by appellate measures, this defined **need goes unmet**.

If the matter is appealed to Chancery Court, the Chancellor must make his or her ruling on the matter within 120 days of the Final Order. "The chancery court shall give preference to any such appeal from a final order by the State Department of Health in a certificate of need proceeding, and shall render a final order regarding such appeal no later than one hundred twenty (120) days from the date of the final order by the State Department of Health." *Miss. Code Ann.* §41-7-201(2)(c) (1972, as amended). The Chancellor reviews the decision of the State Health Officer to simply determine if said decision was arbitrary or capricious—no new evidence is presented and the facts are not reweighed. This standard of review is set forth in statute, and states, in pertinent part,

> The order shall not be vacated or set aside, either in whole or in part, except for errors of law, unless the courts finds that the order of the State Department of health is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the State Department of Health, or violates any vested constitutional right of any party involved in the appeal. (*Miss. Code Ann.* §41-7-201(2)(f)(1972, as amended).

Once the Chancellor rules on the matter, that Order may then be appealed to the Supreme Court of Mississippi. At the Supreme Court, the case follows the same track as all other matters before the Supreme Court. The Supreme Court may choose to hear the matter or it may hand it down to the Court of Appeals. If the matter is handed down, then obviously an aggrieved party may petition for *Certiorari* and may also ask for rehearing. As can be inferred from the hypothetical, the appellate process can at times, be exceedingly lengthy. On occasion, matters

concerning CON(s) have taken as long as nearly five (5) years to make its way through the appellate process.[4]

This lengthy appeal process translates into members of the public waiting a long time for needed health services. It must be noted that once the judicial process is complete, the facility or service must actually constructed and/or implemented, which can in and of itself take years. The question must be asked—must it take this long to resolve a CON dispute? The Department believes it should not; and that is why the process outlined in Section 1 of 2011 Mississippi Law chapter 540 is most appropriate.

II. A direct appeal of CON matters to the Supreme Court will help eliminate any unnecessary delay in the provision of health services and/or facilities.

If this Honorable Court allows Section 1 of 2011 Mississippi Laws chapter 540 to stand, needed health care services could be provided in a timelier manner. This would truly be a benefit to all Mississippians, as it would increase access to necessary and needed health services and help to provide continuity of care. Citizens are much more likely to obtain the health services they need to maintain their health and well-being if those services are more readily available and easily accessible. If the amount of time between CON approval and actual implementation of the project, when an appeal is involved, could be appropriately shortened, the health care needs of Mississippians could be met more quickly. Section 1 of 2011 Mississippi Laws chapter 540 does exactly that—it streamlines the CON appeal process in a manner that is appropriate and logical—it removes the Chancery Court level review and allows Final Orders of the Department to be appealed directly to the Supreme Court.

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[4] HTC Healthcare II, Inc. vs. Mississippi State Department of Health and George County Hospital; Cause No. 2007-SA-01086. In that matter, a CON Final Order was awarded on February 24, 2005. The matter was then appealed to Chancery Court and then to the Supreme Court. The Court of Appeals heard the matter. Thereafter, a Petition for Certiorari was filed, but denied. The Mandate in the matter was issued on November 19, 2009—four (4) years and nine (9) months after the award of the CON.

a. **The role of the Supreme Court will remain unchanged if direct appeal is allowed.**

Section 1 of Mississippi Laws chapter 540 allows for an appeal of a CON Final Order to bypass the Chancery Court and move directly to the Supreme Court. Such a process makes tremendous sense when public interest reasons are evaluated. Rarely, if ever, are CON matters resolved upon Order of the Chancery Court. Generally speaking, a CON dispute is either resolved at the Department level or by the Supreme Court. Therefore, bypassing the Chancery Court on the CON appellate track would cause a timelier final resolution of the dispute. The appellate process could be shortened *at the very least,* by four (4) months. This could mean that a defined health care need could be met *at least* four (4) months sooner.

Further, under the previous law, the Chancery Court and the Supreme Court were limited to the same standard of review—an arbitrary or capricious standard. *See Miss. Code Ann.* §41-7-201(2)(f)(1972, as amended). Under the previous law, and under Section 1 of 2011 Mississippi Law chapter 540, the standard of review for the Supreme Court remains the same. The Supreme Court must determine if the Department was arbitrary or capricious in making its Final Order. Under the previous law, the Supreme Court did not weigh the decision of the Chancery Court—it either upheld or reversed said decision—but that was based upon the actions of the Department. Therefore, if the Chancery Court level of review is removed—nothing will change concerning the role of the Supreme Court in the appellate process for CON. The Supreme Court will still review the decision of the Department to determine if it was arbitrary or capricious—just as it has for the life of the CON program. Therefore, this Court should maintain jurisdiction over the present action in accordance with Section 1 of 2011 Mississippi Laws chapter 540.

Although the Department does feel that the appellate process for CON should be modified to allow for the timely implementation of needed health services, the Department *does*

not wish to infringe upon an aggrieved party's right to appeal an adverse decision. However, the process outlined by Section 1 of 2011 Mississippi Laws chapter 540 affords an individual or entity the right to appeal *directly* to the final arbiter. Not only will such an appeal process allow for a quicker resolution to a dispute, it will prove to be more cost effective for all parties involved. Neither the state, nor the parties to the dispute, will be required to spend time and money debating an issue at the Chancery Court level. As stated above, rarely—if ever—are CON matters finally resolved at the Chancery Court level. Once appealed, these matters, are almost exclusively resolved by the Supreme Court or the Court of Appeals. Therefore, bypassing the Chancery Court in the CON appellate process would prove to save all interested parties time and money. Additionally, the removal of CON appeals from the jurisdiction of the Chancery Court will help to ease the already crowded dockets for Chancellors.

The Office of the Mississippi Attorney General has submitted a *Brief* concerning the constitutionality of Section 1 of Mississippi Law chapter 540. This *Brief* presented to this Court by the Office of the Attorney General succinctly demonstrates the reasons by which Section 1 of Mississippi Law chapter 540 is constitutional, and therefore in keeping with the traditional judicial and appellate rights of this state. The Department has joined into the Brief submitted by the Attorney General's Office and adopts in full all legal and equitable arguments contained therein, so a repetition of those arguments here would be here mere surplus; however, the Department does contend that Section 1 of Mississippi Law chapter 540 is constitutional and should therefore be upheld as a general law of this state.

b. **A CON administrative hearing functions in the same capacity as a trial, and is therefore of great importance to the CON process.**

As outlined above, the citizens of the State of Mississippi would greatly benefit by the timelier provision of needed health care services. In order to timelier meet health care needs, the

appellate process *must* be streamlined. The only logical revision to this process is to bypass the Chancery Court and allow aggrieved parties the right to directly appeal to the Supreme Court. As outlined above, the Supreme Court is the final arbiter in the State, and the appellate process outlined by Section 1of 2011 Mississippi Laws chapter 540 would not change that for CON purposes. As stated above, regardless of whether or not the Chancery Court is part of the appeal process for CON, the standard of review for the Supreme Court remains unchanged. The Supreme Court must review the record created at the administrative hearing level and then determine, based upon that record, if the decision of the Department arbitrary or capricious. It becomes clear then, how important the administrative hearing is to the CON process.

When an administrative hearing is requested by an affected party, an independent hearing officer is appointed and the parties fully prepare for the "hearing" just as if it were a trial. Prior to the hearing, parties gather discovery, file motions and argue those motions. During the hearing witnesses are called, exhibits and evidence are introduced, objections to such are allowable, and an official record is made of the entire hearing. These hearings can often be lengthy, with many witnesses called and much evidence introduced—the necessary preparatory time can be great.

As stated above, the Department believes that the appellate process for CON should be shortened to allow for the more timely provision of needed health services; however, because the administrative hearing is the only avenue during the CON process with which parties are afforded the opportunity to present a case, it would seem fundamentally unfair to unreasonably restrict the amount of time parties are provided for conducting the administrative hearings.[5] If

[5] There is a time frame by which a CON Administrative Hearing may occur. According to the CON Manual, ". . . a public hearing will be held by the Department within sixty (60) days after the date the hearing request was

parties to a CON dispute were *mandated* to comply with a rigid time within which an administrative hearing must be heard, it could greatly affect the ability to make a full and complete record; and it is this full and complete record that helps the Department make an informed decision with regard to a contested issue. Therefore, it seems that the administrative processes presently in place at the Department should remain unchanged, as the current processes are apparently successful in affording parties a fair first-level "hearing."

This Court must strike a balance between what is necessary, what is not and what is in the best interest of the public. It is necessary to afford parties a fair hearing, the opportunity to present a case and make a record. It is also necessary to afford parties the right to appeal a decision which aggrieves them—the process outlined by Section 1 of 2011 Mississippi Laws chapter 540 does exactly that. It maintains the necessary—the administrative process of the Department and the appellate review by the Supreme Court; but it eliminates the extraneous—review by the Chancery Court in CON matters.

For the foregoing reasons, the Supreme Court should uphold Section 1 of 2011 Mississippi Laws chapter 540 and find that it has proper jurisdiction over the matter presently before this Court.

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received by the Department, unless a waiver of time has been agreed upon by all parties." *Certificate of Need Manual,* Chapter 4, Page 39 (May 2010).

CONCLUSION

It is imperative to the health and well being of all residents of the State of Mississippi, that the judicial process support and encourage the provision of the best and most current health care services. Unfortunately, this goal is thwarted when the implementation of needed health services in the state is so delayed due to a lengthy appellate process for CON matters. Section 1 of 2011 Mississippi Laws chapter 540 effectively shortens this process and thereby causes needed health care services to more readily available to serve the needs of Mississippians. It is for these reasons, and others as outlined by the Attorney General in this matter, that the Department would ask this Honorable Court to uphold Section 1 of 2011 Mississippi Law chapter 540 as constitutional and valid general law of this State.

Respectfully Submitted,
MISSISSIPPI STATE DEPARTMENT OF HEALTH

BY: _____
Bea Tolsdorf, Special Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that she has on this day caused to be sent via United State Mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

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The undersigned counsel does hereby certify that she has on this day caused to be delivered, via hand mail, a true and correct copy of the above and foregoing document to the following:

Mary Currier, MD, MPH
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Post Office Box 1700
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So certified, this the 28th day of September, 2011.

Bea Tolsdorf
Special Assistant Attorney General