

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

DISCHINGER ORTHODONTICS, PC,
a domestic professional corporation;
and Tanya L. March, individually
and as a parent and natural guardian of
BMS#1, a minor, and BMS#2, a minor,
individually and on behalf of
all others similarly situated,
Plaintiffs-Appellants,

v.

REGENCE BLUECROSS
BLUESHIELD OF OREGON,
an Oregon non-profit public benefit corporation,
Defendant-Respondent.

Multnomah County Circuit Court
14CV07130; A158123

Stephen K. Bushong, Judge.

Argued and submitted May 17, 2016.

David S. Senoff, Pennsylvania, argued the cause for appellants. With him on the opening brief were Darian A. Stanford, Nicholas J. Slinde, Phil J. Nelson, and Slinde Nelson Stanford; William R. Caroselli, Lauren C. Fantini, and Caroselli, Beachler, McTiernan & Conboy, Pennsylvania; and Jay Edelson, Rafey S. Balabanian, Ari J. Scharg, J. Aaron Lawson, and Edelson PC, Illinois. With him on the reply brief were Darian A. Stanford, Nicholas J. Slinde, Phil J. Nelson, and Slinde Nelson Stanford; Anapol Weiss, Pennsylvania; and Jay Edelson, Rafey S. Balabanian, Ari J. Scharg, J. Aaron Lawson, and Edelson PC, Illinois.

Joel A. Mullin argued the cause for respondent. With him on the brief were Rachel C. Lee and Stoel Rives LLP.

Before Armstrong, Presiding Judge, and Egan, Judge, and Shorr, Judge.

EGAN, J.

Affirmed.

EGAN, J.

Plaintiffs brought these putative class action claims against defendant Regence BlueCross and BlueShield of Oregon, claiming that defendant breached insurance contracts with its policyholders by retaining excessive earnings and distributing them as compensation to executives, in violation of defendant's contracts, articles of incorporation, and state law. Plaintiffs also sought a declaration that defendant violated its articles of incorporation, contracts with policyholders, and state law, and an order requiring defendant to recover the improperly distributed earnings. On defendant's motion to dismiss under ORCP 21 A(6) ("the party asserting the claim is not the real party in interest"), the trial court concluded that plaintiffs' claims are barred. We agree with the trial court that plaintiffs lack standing to bring their claims, and we therefore affirm.

We take our summary of the facts from the allegations of plaintiffs' complaint, which we assume to be true for purposes of reviewing the trial court's ruling. *Simonsen v. Ford Motor Co.*, 196 Or App 460, 462, 102 P3d 710 (2004), *rev den*, 338 Or 681 (2005). Defendant is an independent licensee of the national BlueCross and BlueShield Association and provides health insurance coverage to approximately 500,000 Oregonians. Defendant is incorporated as a non-profit public benefit corporation that was formed pursuant to ORS 65.044 to 65.067. *See* ORS 65.001(35).

Defendant's articles of incorporation state:

"This corporation is a public benefit corporation. The purposes of this Corporation shall be:

"Without profit to itself to furnish, provide, contract for or pay for health care services, including but not limited to medicine, medical and surgical treatment, nursing, hospital service, ambulance service, dental service, and any other necessary services, whether or not contingent upon injury, sickness or accident."

The complaint alleges that defendant's website states, "Being a nonprofit means we put people first. *** We maintain our status as a not-for-profit organization to remain focused on providing value to our members."

The representative plaintiffs for the putative class are alleged to own health insurance policies issued by defendant. Plaintiffs' complaint alleges that, as a nonprofit public benefit corporation, defendant's activities are required to benefit the community as a whole and are not to be focused on the accumulation of profits. "In particular," plaintiffs allege, "generated profits are to be used for the benefit of policyholders."

Plaintiffs' complaint alleges a claim for declaratory judgment and two claims for breach of contract. The general allegations applicable to all claims assert that defendant's articles of incorporation state that defendant is a "public benefit corporation," and that its purposes

"shall be:

"Without profit to itself to furnish, provide, contract for or pay for health care services[.]"

Plaintiffs contend that, in violation of and contrary to its obligation under its articles of incorporation and state law, defendant has established a corporate structure with a primary profit motive and has amassed millions of dollars in excess profits that have not been used for the benefit of policyholders but, rather, have been retained or paid to executives as bonuses.¹ Plaintiffs allege that in accumulating excess profits and failing to use those profits for the benefit of policyholders, defendant has violated its obligations under its articles of incorporation and state law, necessitating judicial relief for the benefit of all policyholders.

Specific to their claim for declaratory relief, plaintiffs allege that defendant's conduct constitutes an abuse of defendant's corporate franchise and a violation of the articles of incorporation. In their first breach of contract claim, plaintiffs do not allege a violation of specific contractual provisions; and the policies themselves are not attached to the complaint. Rather, plaintiffs allege that defendant's articles

¹ For example, plaintiffs alleged that retained profits of three months of claims payments is generally considered sufficient to cover unexpected financial contingency but that defendant has retained excess profits of nearly four months of claims payments. Plaintiffs allege that over the past three years, defendant's top executives have earned nearly \$3,500,000 in bonuses from their positions at defendant.

of incorporation and statutory obligations are incorporated into its contracts with its policyholders, not explicitly, but as a matter of law, as part of the duty of good faith and fair dealing, and that defendant breached those obligations by “planning, generating, accumulating and retaining excess profits *** and failing to use such profits for the benefit of policy holders”; “acting as a for-profit company with a primary profit motive”; and improperly distributing excess profits as bonuses. Plaintiffs’ second breach of contract claim includes the same allegations of misconduct, but also alleges plaintiffs’ status as third-party beneficiaries of defendant’s articles of incorporation with the State of Oregon.

Plaintiffs seek certification of the class; an order declaring that defendant has breached its obligations under its contracts with policyholders, its articles of incorporation, and Oregon law; and an order requiring defendant to recover improperly distributed excess profits, along with an award of appropriate injunctive relief and reasonable attorney fees.

Defendant filed a motion to dismiss under ORCP 21 A(6) and (8), asserting, among other arguments, that plaintiffs lack standing to pursue their claims under the express terms of ORS 65.084, which provides:

“(1) Except as provided in subsection (2) of this section, the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

“(2) A corporation’s power to act may be challenged:

“(a) In a proceeding by a member or members, a director or the Attorney General against the corporation to enjoin the act;

“(b) In a proceeding by the corporation, directly, derivatively or through a receiver, a trustee or other legal representative, including the Attorney General in the case of a public benefit corporation, against an incumbent or former director, officer, employee or agent of the corporation; or

“(c) In a proceeding under ORS 65.664.”

Under the statute, the validity of a nonprofit corporation’s action may not be challenged based on the corporation’s power or lack of power to act, except as described in ORS

65.084(2). It is not disputed that this is not a proceeding described in ORS 65.084(2). Defendant contends that plaintiffs are precluded under ORS 65.084(1) from bringing their action, because the allegations challenge defendant's power to act in making decisions regarding profitability, the use of surplus profit, and the compensation to be paid to defendant's executives.

Plaintiffs contend that a review of the legislative history reflects that ORS 65.084 is primarily intended to limit the use, by a corporation, of the defense of *ultra vires* in avoidance of a contract, transaction, or obligation. In that context, the statute prevents a corporation from asserting that it lacked the power to act. But, as plaintiffs acknowledge, the statute's text also limits claims brought *against* a corporation—" [T]he validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act." As we construe the statutory text, it applies to claims asserting that a corporation has acted outside of its power.²

Plaintiffs further respond that ORS 65.084 is nonetheless inapplicable, because their claims are not made on the ground that defendant lacked the *power* to act, but rather that, in so acting—contrary to its status as a non-profit public benefit corporation through its retention and distribution of profits—defendant breached its contracts, articles of incorporation, and state law. On this record,

² We note that the Official Comment to the provision of the Revised Model Business Corporation Act, on which ORS 65.084 is based, states that the provision "applies equally to the use of the [*ultra vires*] doctrine as a sword or as a shield." 1 Revised Model Business Corporation Act Annotated § 3.04 at 3-62 (4th ed 2013).

Section 3.04(a) of the Revised Act provides:

"Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the nonprofit corporation lacks or lacked power to act."

The Official Comment states, at 3-62:

"The phrase in Section 3.04(a) that the 'validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act' applies equally to the use of the doctrine as a sword or as a shield: a third person may no more avoid an undesired contract with a corporation on the ground the corporation was without authority to make the contract than a corporation may defend a suit on a contract on the ground that the contract is *ultra vires*."

and based on the allegations of the complaint, plaintiffs' attempted distinction escapes us. As plaintiffs have correctly contended, "[Defendant's] Articles of Incorporation define its authority to do business." A corporation's charter defines its power to act. *Loveland & Co. v. Doernbecher Co.*, 149 Or 58, 70, 39 P2d 668 (1934). If, as plaintiffs contend, defendant had the power to act as it did, then it did not violate its articles. Plaintiffs' complaint alleges, in essence, that the retention of profits and the payment of generous bonuses to defendant's executives are contrary to defendant's status as a non-profit corporation for the public benefit as stated in its articles, and that those profits should be shared with defendant's policyholders in the form of premium reductions. As noted, the policies are not in the record, and plaintiffs alleged only a violation of the general duties set forth in the articles of incorporation and a breach of the duty of good faith and fair dealing. We, like the trial court, conclude that plaintiffs' contention that defendant's actions are not within the corporation's purposes as defined in its articles is a claim that defendant lacked the power to act.³ The court did not err in concluding that ORS 65.084 is applicable and prevents plaintiffs from bringing these claims.⁴

Plaintiffs assert that, even if the contract claims are barred, their declaratory judgment claim nonetheless survives, because it does not challenge a corporate action, but simply seeks a declaration of rights. But, contrary to plaintiffs' contention, the allegations of the declaratory judgment claim do indeed challenge defendant's actions and demonstrate that the claim is premised on the same alleged misconduct that we have held is not subject to

³ Defendant's articles of incorporation expressly authorized it to engage in "[a]ny other lawful purpose for which a corporation may be formed under the Oregon Nonprofit Corporation Law."

⁴ Additionally, plaintiffs are not among the categories of persons permitted, in a derivative action, to challenge the business decisions of defendant's board of directors. See ORS 65.174(1); *Wilcox v. Stiles*, 127 Or App 671, 680, 873 P2d 1102, *rev den*, 320 Or 360 (1994) (when a plaintiff alleges harm to a corporation and its shareholders generally but does not allege any harm that is distinct to the plaintiff, the action "must be brought as a derivative action").

We note that defendant's premium rates are set by the Department of Business and Consumer Services pursuant to ORS 743.018 and are subject to challenge under that statute.

challenge.⁵ In the complaint, plaintiffs allege that defendant abused its corporate franchise and violated its articles of incorporation. And in their briefs, plaintiffs argue that they seek a declaration that “[defendant] has hoarded profits and paid its executives exorbitant salaries at the expense of its policyholders and in contravention of [defendant’s] articles of incorporation.” We conclude that plaintiffs seek a declaration as to defendant’s actions.

Plaintiffs nonetheless contend that the standing requirements for seeking a declaration under ORS 28.020⁶ are liberal and require a declaration in a case such as this, which involves a justiciable controversy, as articulated by the Supreme Court. See *Doyle v. City of Medford*, 356 Or 336,

⁵ The declaratory judgment claim alleged, part:

“47

“Plaintiffs and all of [defendant’s] policyholders are affected by [defendant’s] abuse of its corporate franchise and violation of its Articles of Incorporation.

“48

“Plaintiffs, therefore, may seek declaratory relief that [defendant’s] conduct is an abuse of its corporate franchise and a violation of its Articles of Incorporation.

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“Plaintiffs and all of [defendant’s] policyholders, therefore, also may seek a declaratory judgment that [defendant] has breached its contracts by engaging in the following acts or omissions:

“(a) Planning, generating, accumulating and retaining excess profits as of December 31, 2013, for the years 2008-2013 and failing to use such funds for the benefit of policyholders;

“(b) Acting as a for-profit company with a primary profit motive for the years 2008-2013, resulting in excess profits as a non-profit public benefit corporation; and

“(c) Improperly distributing said excess profits as bonuses paid to certain members of [defendant’s] management.”

⁶ ORS 28.020 provides:

“Any person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.”

372, 337 P3d 797 (2014) (a justiciable controversy exists if there is (1) an actual and substantial controversy; (2) because parties having adverse legal interests; and (3) the controversy involves present facts as opposed to a dispute based on future hypothetical events).

In the trial court, defendant did not assert that plaintiffs would lack standing under the Declaratory Judgments Act, but argued that, as the more specific provision, ORS 65.084 governs who may bring the type of challenges asserted in this case. The trial court agreed with defendant, noting that the text of ORS 65.084(1) prohibits *any* challenge (other than those listed in ORS 65.084(2)) to the validity of a corporate action on the ground that the corporation lacked the power to act. In light of plaintiffs' acknowledgment that all of plaintiffs' claims are based on alleged violations of the articles of incorporation, the court characterized plaintiffs' claim as a challenge to defendant's actions on the ground that defendant lacked the power to act. Because ORS 65.084 is narrow and more specific than ORS 28.020, the court ruled that the former statute's standing limitations prevail over the more general standing provisions of the Declaratory Judgment Act, and that plaintiffs did not have standing to seek that declaration. *See* ORS 174.020(2) ("When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent."); *see also State ex rel Juv. Dept. v. M. T.*, 321 Or 419, 426, 899 P2d 1192 (1995) ("When a general statute and a specific statute both purport to control an area of law, this court considers the specific statute to take precedence over an inconsistent general statute related to the same subject.").

On appeal, plaintiffs continue to assert that the Declaratory Judgment Act takes precedence over the limitations in ORS 65.084. As defendant points out, however, if that were so, then ORS 65.084 would be meaningless, because a party could avoid the limitations of the statutory provision simply by styling the complaint as one for declaratory relief. We agree with the trial court that ORS 65.084 controls and conclude that the trial court did not err in

granting defendant's motion to dismiss under ORCP 21 A(6) based on a lack of standing.⁷

Affirmed.

⁷ In view of our disposition, we do not address defendant's alternative arguments for affirmance that plaintiffs' claims are barred by the business judgment rule and the filed rate doctrine.