



A summary of recent developments provided by the health care law firm **Garfunkel, Wild & Travis, P.C.**

## IRS Reviews Non-Profit NJ Hospitals

The Internal Revenue Service (IRS), as part of its 2006 Work Plan, has sent hospitals a new Compliance Check Questionnaire (form 13790) that, when completed, will provide detailed information about community benefit efforts, charity care and executive compensation. The IRS created this form to replace the original community benefit standard which is no longer meaningful due to substantial changes in the health care industry. The IRS was also concerned that tax-exempt organizations might not be operating exclusively in the public interest (with regard to the promotion of health care and charity care) and for the benefit of their communities.

The new form contains three parts: Part I seeks basic identifying information about the organization, Part II seeks information regarding community benefit activities and governance, and Part III seeks information regarding compensation practices. Part II, the most comprehensive section, is comprised of 72 questions concerning patients, emergency room practices, board of directors, medical staff privileges, medical research, medical education and training, uncompensated care, billing practices and community programs. Part III includes nine ques-

tions regarding organization compensation practices. These questions require disclosure of salary levels for officers, directors, trustees and key employees, as well as compensation policies, compensation approval policies and resources used to establish compensation levels.

The IRS recommends that the completed form be reviewed by an organization's general counsel and risk management department, as well as an organization's business and legal advisors, to prevent unwarranted exposure. ■

## *Undocumented Aliens Now Eligible For UCJF Benefits*

Undocumented aliens can now establish residency within New Jersey to meet the definition of a "qualified person" under the Unsatisfied Claim and Judgment Fund (UCJF) according to a recent ruling by the New Jersey Supreme Court in *Caballero v. Martinez*. This ruling allows undocumented aliens to receive UCJF benefits provided they can satisfy the other requirements under the program. (UCJF was created to provide both personal injury protection benefits and bodily and property damage coverage for persons injured by uninsured motorists or hit-and-run accidents.)

In *Caballero*, an undocumented and uninsured alien had been injured while riding with an uninsured motorist.

When his request for UCJF benefits to cover his hospital expenses and lost wages was denied, he brought suit against the Commissioner of the New Jersey Department of Banking and Insurance and the UCJF Board (Defendants). The trial court granted the Defendants' request for pre-trial judgment, finding that Caballero was not a resident of New Jersey – a requirement to receive UCJF benefits. The Appellate Division affirmed the decision.

The New Jersey Supreme Court, however, found that an undocumented alien can qualify as a resident under the statute provided he/she can establish an "intent to remain" in the State at the time of the accident. Even when an undocumented alien leaves the State following an accident, he or she may still be able to prove an "intent to remain." In allowing undocumented aliens to qualify as residents, the Court determined that no

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## CMS Proposes DRG Changes

Recently the Centers for Medicare and Medicaid Services (CMS) proposed a hospital Inpatient Prospective Payment System (IPPS) for the 2007 fiscal year. Conceptualized in the Deficit Reduction Act of 2005, IPPS is a payment system related to the operating costs of inpatient stays under Medicare Part A. The proposal revises the hospital payment system by placing Medicare

cases into Diagnosis Related Groups (DRGs) to determine the amount of reimbursement a hospital will receive.

The proposed CMS rule proposes the most significant changes to DRGs since the inpatient system's inception in 1983. The rule substantially changes payment for certain services and potentially redistributes billions of dollars among hospitals. ■

## Medicaid Now Requires Proof of Citizenship

Effective July 1, 2006, the U.S. Department of Health and Human Services implemented a new rule that requires persons applying for or renewing Medicaid coverage to provide proof of citizenship or nationality.

There is some concern that applicants and current Medicaid recipients

attempting to renew their applications may be denied desperately needed Medicaid benefits despite being U.S. citizens. Many participants, particularly the elderly, may be unable to provide documentation of citizenship. Thus, certain individuals may lose their benefits until they produce the necessary proof. ■

## CMS Recovers Fee-For-Service Charges

Approximately 360,000 Medicare claims have been erroneously paid by the Centers for Medicare and Medicaid Services (CMS) and CMS has announced that it will attempt to recover these payments within the next six months. The overpayments occurred when CMS made payments to providers for both fee-for-service and monthly capitation payments. At the time, many beneficiaries had been retroactively

enrolled in the Medicare Advantage Plan and CMS did not have specific enrollment and non-enrollment information.

CMS began collecting Medicare overpayments effective June 26, 2006. Once a provider receives the adjustment code (reason code 24 - payment for charges adjusted), the provider must then contact the Medicare Advantage plan to arrange for repayment. ■

## Campaign Seeks to Repeal Sustainable Growth Rate

To curb declining Medicare reimbursement, an ongoing Sustainable Growth Rate (SGR) campaign to stabilize the Medicare fee formula has taken form. However, the American Medical Association and various state medical societies have been unable to accomplish the stabilization. Therefore, Medicare fees will continue to decline.

If not re-calculated, the current formula will cut Medicare reimbursement by 5% on January 1, 2007.

The campaign seeks to repeal the SGR and provide annual fee schedule updates based on the Medicare Economic Index that measures the increased cost of medical services. Bill proposals are likely to begin late this summer. ■

## Bill Removes Pre-authorization Requirement

Assembly Bill A-1631, sponsored by Assemblyman Herb Conoway, was recently released from the Assembly of Financial Institutions & Insurance Committee. This Bill amends the Health Care Quality Act by removing pre-authorization requirements for specified services despite existing requirements by some health insurance carriers.

The bill, which takes effect 90 days after its enactment, provides that the medical directors of managed care plans must ensure that insurance carriers no longer require pre-authorization for the following services:

- Physical and occupational therapy
- Prescription drugs and biologics
- Radiological examinations
- Durable medical equipment

## DHHS Amends Blood Donor Requirements

In an effort to increase New Jersey's blood donor supply, the New Jersey Department of Health and Senior Services (DHHS) recently adopted amendments to N.J.A.C. 8:8-8.2, entitled Donor's Emergency Care.

The amendments provide greater flexibility to blood bank directors by allowing them to determine, on a case-by-case basis, whether a registered nurse must be present at blood collection locations. Previously, a registered nurse was required to be present at all blood collection drives. The DHHS will assess 2006 and 2007 data to determine the impact on donor safety and volume of blood collection. ■

### Ambulatory Care Facilities

The State Assembly and Senate are reviewing two proposed bills (A-2595 and S-1046) that, if passed, would affect ambulatory care facilities primarily involved in cancer-related diagnostic and treatment services including radiation, chemotherapy, diagnostic radiology and medical/surgical evaluation. The proposed bills provide that such facilities may not deny services to patients based on any patient's inability to pay or the source of payment.

While the overall intent of the bills is the same, two issues must be addressed before the bills are signed into law – the effective date and the size of the facility affected. The Assembly version of the bill requires that the facility be at least 30,000 square feet, while the Senate version requires only 20,000 square feet.

Both bills would subject any qualifying ambulatory care facility to a \$10,000 per violation civil penalty for failure to provide such services. Both bills also call for annual reporting to the Commissioner of the Department of Health and Senior Services regarding the number of patients treated that were unable to pay, whether in part or in whole.

### Physicians' Professional Liability

In *Johnson v. Brady*, the New Jersey Supreme Court held that a physician's personal assets may be used in the event a physician's professional liability carrier is bankrupt or if there is a judgment against the physician in excess of \$300,000. The Medical Society of New

Jersey is currently working with the legislature to pass the New Jersey Property-Liability Insurance Guaranty Association Bill. If enacted, it will raise the guaranty amount from \$300,000 to \$500,000 and would not expose physicians to personal liability for amounts that exceed the guaranty.

### PIP Ambulance Fee

The Medical Transport Association's petition for an update to the ambulance and medical transport personal injury protection fee schedule in N.J.A.C. 11:3-2.6 has been delayed for further review by the Department of Banking and Insurance.

### Proposed New Fraud Acts

Two bills recently approved by the New Jersey Senate Health, Human Services and Senior Citizens Committee (SHHC) and the Senate Budget and Appropriations Committee (SBAC) would increase penalties for Medicaid fraud.

Bill S-1829, approved on June 8 by the SHHC and known as the New Jersey False Health Claims Act, allows for civil penalties of \$5,500 to \$11,000 for any violation, plus triple damages. The Act also contains a provision that allows for "Qui tam" actions. Qui tam actions allow a private individual to sue for recovery of false claims money, a portion of which the private individual can keep. Qui tam actions are permitted under the federal False Claims Act.

A related bill (S-1852) – approved by the SBAC on June 12 and known as the Medicaid Program Integrity and Protection Act – creates the Office of the

Medicaid Inspector General as part of the state executive branch. The office would have several duties, including investigation, detection and prevention of fraud and abuse in the Medicaid system, as well as recovery of improperly used Medicaid funds. It will have authority to carry out audits and quality reviews of Medicaid providers, thereby creating a new level of scrutiny in the Medicaid system at the state level.

### New Commercial Real Estate Tax

Businesses in New Jersey are sure to be impacted by a recently passed law that imposes a fee for recording the deed of any commercial property sold within New Jersey for over \$1 million. The fee is equal to 1% of the sales price and is paid by the buyer of the property.

This type of transfer fee has been in place for residential properties for several years, but the new law now applies to commercial properties as well. Purchases of new medical offices and similar health care-related properties will fall under this new law if they are income-producing real property that is not vacant land, residential property, farm property, industrial property or apartments.

According to Joan Verplanck, President of the New Jersey Chamber of Commerce, "This will clearly have a widespread effect on businesses throughout the state. You're really hard-pressed to find a commercial property here under \$1 million." ■

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## ***Patient Safety Alert:*** **Use of Sand Bags With MRIs**

In conjunction with the New Jersey Patient Safety Act, the New Jersey Department of Health and Senior Services (DHHS) recently declared a Patient Safety Alert upon receipt of a report detailing an MRI accident involving what was thought to be a sand bag filled with sand. Specifically, an emergency MRI for a patient following cardiac catheterization resulted in a near miss. The patient had received pressure, via a towel-wrapped sand bag, to the groin. However, when the MRI began, the bag moved towards the patient's head and became stuck to the rim of the machine. Luckily, staff members were able to remove the patient before serious injury occurred. It was determined that the sand bag was filled with metal shot rather than sand.

As a result, DHHS recommends that all sand bags be checked and that vendors understand that sand bags must contain sand only. It also recommends that if a facility uses metal shot bags and there is any chance that a patient will be leaving to have an MRI, all metal shot bags should be replaced with sand bags.

The New Jersey Patient Safety Act was signed into law in 2004 by the DHHS to improve patient safety and encourage

the reporting of adverse patient events (such as anesthesia events, criminal activity, falls and attempted suicides). Reports must be made in writing within five business days of the incident on the reporting form that can be found at [www.nj.gov/health/hcgo/ps/report.shtml](http://www.nj.gov/health/hcgo/ps/report.shtml). The form requires information regarding when and how the event was discovered. ■

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## ***Undocumented Aliens***

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undue burden would be placed on the assets of UCJF. It is not likely that undocumented aliens will relocate to New Jersey simply to collect UCJF funds in the event of an automobile accident.

On review of the trial evidence, the Court found that Caballero had presented evidence of his "intent to remain" in the state for at least five years. This was supported by the fact that he had remained in New Jersey since the accident, which occurred in 2001. The Court therefore reversed the lower court decisions and remanded the case for further proceedings. ■

## **Electronic Health Care Transactions Simplified**

The National Provider Identifier (NPI), a new identifier for use in electronic health care transactions that was announced in 2005 by the Center for Medicare & Medicaid Services (CMS), becomes effective May 2007 for covered entities and May 2008 for small health plans.

NPI is a single provider that allows healthcare entities to use one self-identifier when conducting electronic health transactions. It simplifies electronic health transactions by allowing healthcare providers to transfer information to any health plan in the United States. Healthcare providers were allowed to begin the application process as of May 25, 2005. For more information, go to [www.cms.hhs.gov/apps/pni/01\\_overview.asp](http://www.cms.hhs.gov/apps/pni/01_overview.asp). ■

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## **Physicians' Cultural Competency Required by March 2008**

The New Jersey Board of Medical Examiners (BME) has drafted legislation which requires all physicians to meet the cultural competency requirements for re-licensing by March 2008. This regulatory guidance was necessary to implement the Cultural Competency Law passed in 2005 which required that all physicians take courses on cultural competency in order to become licensed or to renew licensure. However, it did not specify the amount or type of training required.

The Medical Society of New Jersey is working with the BME to ensure that its rules do not create unnecessary financial costs and time requirements for physicians seeking re-licensure. They will also ensure that the cultural competency requirements meaningfully relate to a physician's ability to provide high-quality care. ■

### **About Garfunkel, Wild & Travis, P.C.**

*Garfunkel, Wild & Travis, P.C. (GWT) is among the most active health care specialty law firms in the country, with offices in New Jersey and New York. It serves numerous New Jersey hospitals, licensed health facilities, medical practices, physicians and other health care practitioners, and health care related companies.*

*The firm specializes in addressing the complex legal, regulatory, business and financial needs of its clients: it helps clients negotiate favorable reimbursement rates from insurers and government; gain regulatory approval for facilities expansion or new services; merge, acquire or network with other organizations; and purchase or lease new technology and equipment. GWT also assists numerous health care providers and others to comply with complicated, costly, and often onerous state and federal regulations.*

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