



New Jersey Health Law

Bulletin

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

Pending Legal Changes to Affect Physician Referrals to Ambulatory Surgical Centers

A bill has been introduced by the Senate that would amend the law prohibiting referrals for health care services to an entity for which the referring physician has an ownership interest, known as the Codey Law. The Bill would permit physicians to refer patients to an Ambulatory Surgical Center (ASC) in which they have an ownership interest if the physician performs the procedure himself or herself and is not paid based on volume or value of referrals. The Bill is intended to provide relief from the recent holding in *Garcia v. Health Net of New Jersey*.

In *Garcia*, the physicians relied on a New Jersey Board of Medical Examiner (BME) opinion issued for an unrelated facility which defined "medical office," for the purpose of an ASC, as an "extension of the physician's medical office," and therefore not a violation of the Codey Law. The Court interpreted the Codey Law as prohibiting physicians from referring cases to an ASC where they have an ownership interest, regardless of what previous BME opinions had stated.

As adopted by the Senate on March 17, 2008, the Bill provides that it is not

improper for physicians to make referrals to an ASC in which they have an ownership interest, provided certain conditions are met. The Bill also establishes a two-year moratorium on the issuing of initial licenses to ambulatory surgical facilities beginning on September 1, 2008. The moratorium does not apply to an ASC that has filed, prior to September 1, 2008, its plans, specifications, and required documents with the Health Care Plan Review Unit

(the Unit) of the Department of Community Affairs, provided the facility also meets the requirements for an ASC and subsequently obtains Department of Health and Senior Services licensure.

The moratorium does not restrict the transfer of ownership of an ASC, nor restrict expansion plans that have been filed with the Unit prior to September 1, 2008. The moratorium also does not apply to single-suite unlicensed surgery facilities. ■

Nonprofit Sector Panel Issues Principles for Good Governance

The Panel on the Nonprofit Sector, which is comprised of various leaders of American nonprofit entities, issued an informational guide outlining recommendations for board members and managers of charitable organizations. The publication, entitled "Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations," focuses on four main areas of nonprofit management. First, it explores legal compliance and public disclosure issues,

including the implementation of conflict of interest and whistleblower policies. Second, the guide makes recommendations regarding effective corporate governance. Third, the Panel discusses strategies for strong financial oversight. Finally, the guide recommends principles for responsible fundraising.

The Panel issued the guide in an effort to promote ethics and accountability in the nonprofit sector. While the Panel issued 33 principles of sound practice, only six are required by law. However, according to the Panel, the remaining principles are strongly recommended. ■

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CMS Final Rule Impacts Diagnostic Testing Arrangements

The Centers for Medicare and Medicaid Services (CMS) issued a final rule regarding Medicare's 2008 Physician Fee Schedule. The date the rule will go into effect has been postponed until 2009. The rule finalizes the anti-markup provisions of the federal Stark regulations. Most notably, the new Physician Fee Schedule applies Stark's anti-markup limitations to the technical and professional components of diagnostic tests.

The Stark regulations provide that in-office ancillary services are not subject to the anti-markup limitations. However, the final rule incorporates specific limitations that apply to the technical and professional components of diagnostic tests if they are either purchased from an outside supplier or performed outside of the billing physician's primary office space.

Whereas the text of the in-office ancillary services exception refers to services provided in the same "building," the final rule limits the exception to services provided in the billing physician's "office." For physician groups, that office is defined as the space where the group provides "substantially the full range of" services. Therefore, physicians may not markup diagnostic services provided in the same building

if they are not provided in the space where "substantially the full range of patient care services" are provided.

The rule was to go into effect on January 1, 2008. CMS received informal comments subsequent to the publication of the final rule concerning the definition of the phrase, "office of the billing physician or other supplier." Commentators remarked that such a limited definition would disrupt patient access and would reduce the amount of diagnostic tests that could be provided to patients.

The CMS is not delaying implementation of the anti-markup rule with

respect to the technical component of any purchased diagnostic test. This is of little consequence, however, since there is a long-standing rule on the books regarding the technical component of purchased tests. The CMS also noted that because anatomic pathology diagnostic testing arrangements "precipitated" the new rule, the rule will take effect for all testing furnished in a group practice's "centralized building" (as defined in the Stark Law), only if that space does not meet the Stark definition of "the same building." ■

Governor Corzine Signs Violence Prevention Legislation

New Jersey Governor Jon S. Corzine signed the "Violence Prevention in Health Care Facilities Act," which will require the establishment of violence prevention programs in health care facilities. The law, which protects workers from violence, affects general and specialty hospitals, nursing homes, state and county psychiatric hospitals and state developmental centers (Covered Entities).

A Covered Entity must now institute and conduct annual violence prevention

training which includes a review of procedures, restraining techniques and reporting requirements. Incidents must be documented and maintained for at least five years following the reported act and the Covered Entity must establish a post-incident response system that provides, at a minimum, an in-house crisis response team for employee victims and their co-workers. Such responses may include support groups, family crisis intervention and professional referrals. ■

Safe Patient Handling Act Signed into Law

In response to legislative findings that New Jersey nurses, nurse aides, orderlies and attendants combined have the highest number of nonfatal occupational injuries and illnesses, New Jersey Governor Jon S. Corzine signed into law the Safe Patient Handling Act. The new law requires New Jersey hospitals, nursing homes, developmental centers and

psychiatric hospitals to institute and implement safe patient handling programs to help protect patients and staff from injury. Covered health care facilities must establish a safe patient handling program within 36 months of the effective date of this Act.

By January 1, 2009, each facility must have established a safe patient handling

committee that will be responsible for the development, implementation, evaluation and possible revision of the safe patient handling program. The facility must also conduct annual evaluations of the safety procedures and patient-handling equipment. Copies of the protocol must be posted in a location easily visible to staff, patients and visitors. ■

HCAB Approves Patient Safety Rules

The Health Care Administration Board (HCAB) recently approved the adoption of new rules to implement the Patient Safety Act. The HCAB also approved amendments and repeals to rules regarding provider licensing standards that are now replaced by the patient safety rules.

The rules address reportable events extending beyond patient care to situations such as interruptions of electrical service to problems with water. The rules also consolidate the reportable events that are addressed in the various licensing rules. Inconsistencies in standards still exist between acute care hospital and long term care facilities; however, the Department of Health and Senior Services (DHSS) claims it will address the concern through a guidance document initially, and then a rulemaking proposal. Rehabilitation hospitals and general, special and psychiatric hospitals are expected to be in compliance. Other health care providers have between six months to a year to be in compliance.

Legislature Passes False Claims Act

The New Jersey Legislature recently passed the False Claims Act (the Act), modeled after the federal False Claims Act, which recoups billions of dollars a year through whistleblower actions known as qui tam actions. Under the Act, an individual can be liable if they are found to have knowingly or recklessly submitted to an employee, officer or

agent of the state or to any contractor or any recipient of state funds, a false or fraudulent claim for payment or approval. The Defendant can be liable for treble damages and up to \$10,000 per violation, plus legal fees. The Act permits individuals to bring actions individually and allows the Attorney General of the State of New Jersey the option to intervene.

The Act restricts present or former employees or agents of the State or any political subdivision from bringing forth actions discovered in any civil, criminal or administrative investigation or audit which was within the scope of the employee's or agent's duties or job description. There is also a statute of limitations of six years after the date on which the violation is committed, or three years after the date in which facts material to the violation should have been reasonably known, with a 10-year absolute cut-off.

HIV Testing Required

On December 26, 2007, acting New Jersey Governor Richard J. Codey signed a law mandating HIV screenings of all pregnant women and all newborns for whom the mother's HIV status is positive or unknown. Every birthing facility will be required to test newborns for HIV unless the parents provide a written statement objecting to the test on religious grounds.

Hospitals Must Report Infection Rates

Governor Jon S. Corzine signed a law that requires New Jersey hospitals to report their infection rates to the New Jersey Department of Health and Senior

Services (DHSS). The law forces every hospital to track hospital-acquired infections and report its findings to DHSS. In addition, hospitals must report all control measures that have been implemented to reduce infection rates.

Non-Profits Exempt from Pay-to-Play

The state Election Law Enforcement Commission (ELEC) affirmed that non-profit entities are not subject to the Pay-to-Play legislation enforced against business entities.

The disclosure rules that went into effect in January 2006 prohibit a State agency in the Executive Branch from engaging in a contract exceeding or anticipated to exceed \$17,500 with a business entity. Any entity that enters into a state contract cannot contribute during the contract's term to the State's committee of the political party of the Governor in office when the contract is awarded. While the Act defines a "business entity" as "any natural or legal person, business corporation, professional services corporation, limited liability company partnership, limited partnership business trust, association or any other legal commercial entity," non-profit entities are exempt from the list. ■

MIIX Liquidation

Continued from page 4

ruling could be used to reach the personal assets of physicians in medical malpractice situations. In response, the New Jersey Legislature has proposed a variety of bills in an attempt to mitigate and prevent the harsh realities of this ruling. Currently, none of the proposed bills have the force of law, therefore, if litigation is allowed to proceed, physicians could find themselves personally liable for damages in medical malpractice suits. ■

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Temporary Restraint on Litigation for MIIX Liquidation

The state of New Jersey recently filed an order to show cause on a petition for liquidation of medical malpractice liability insurer MIIX Insurance Company and for temporary restraints on litigation. The liquidation of MIIX comes at the heels of the decision by the New Jersey Supreme Court in *Johnson v. Braddy*, which allows the personal assets of an insured to be at risk when the insurer becomes insolvent and the insured has a judgment in excess of \$300,000 entered against him or her. An insurance company's insolvency triggers the New Jersey Property-Liability

Insurance Guaranty Act (the Act). As a result, the New Jersey Property-Liability Insurance Guaranty Association (PLIGA) is responsible for any amount of damages up to \$300,000. Once that threshold is

met, the insured may be held personally liable for any remainder.

While *Johnson v. Braddy* involved an automobile accident, it is possible that

Continued on page 3

Final Commission Report Released on Rationalizing Health Care Resources

The New Jersey Commission on Rationalizing Health Care Resources (the Commission) released its final report on the financial status of New Jersey hospi-

tals and offered some insight on how to assist those hospitals in financial distress. The Commission, created in October 2006, found that while hospital services in New Jersey are utilized at "a higher level than much of the nation, the State currently faces an oversupply of hospital beds." This surplus is projected to increase between now and 2015.

The oversupply of beds, underpayment by public insurers, the relationship between physicians and hospitals, and the poor compensation rates for medical vs. surgical care will lead a great number of hospitals in New Jersey toward financial distress in the next few years. The Commission suggests that the "situation is unlikely to improve absent closure of some non-essential facilities" along with external and internal changes to hospitals. ■

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, New York and Connecticut. 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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