



New Jersey Health Law

Bulletin

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

Appellate Division Affirms Decision in Controversial ASC Case

The New Jersey Appellate Division recently affirmed the Superior Court holdings regarding the Wayne Surgical Center in *Garcia v. Healthnet*. In *Garcia*, the physician plaintiffs owned an ambulatory surgical center (the "ASC"). The physician owners brought their own patients to the ASC and personally performed medically necessary procedures on such patients. Many of the physician owners contracted with Healthnet as in-network providers. The ASC was not part of the insurer's network, so patients were responsible for payment of "co-insurance," or a percentage of the ASC's charge for the procedure.

Healthnet opted not to renew many of the physician owners' provider agreements, and the physicians brought suit against Healthnet, claiming that Healthnet chose not to renew their contracts because they referred their patients to an out-of-network facility in which they had an ownership interest. The physicians argued that patients had the right to utilize their out of network benefits, and that the referrals did not contravene applicable law. Therefore, the physicians argued, their contracts with Healthnet should be reinstated.

Healthnet filed counterclaims against the physician owners and the ASC, asserting that claims submitted to Healthnet for services performed at the ASC violated the Insurance Fraud Prevention Act ("IFPA"). Healthnet argued that the physicians' referrals to the ASC

violated the New Jersey prohibition against self-referrals (the "Codey Act"), and that by submitting claims to Healthnet arising from such referrals, the physicians acted fraudulently. Similarly, Healthnet argued that by failing to collect co-insurance from patients, the ASC misrepresented its charges, rendering its claims for reimbursement fraudulent.

In November 2007, the Superior Court ruled that, although the physicians' referrals to the ASC did violate the Codey Law, the physicians did not knowingly submit claims that were false and misleading. First, the physicians had reason to believe that they acted in accordance with the Codey Law when they referred patients to the ASC. The court ruled that there was a lack of clear guidance from regulatory

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Hospital Safety Information Available to Public

Governor Corzine recently signed legislation requiring the New Jersey Department of Health and Senior Services ("DHSS") to publicly report preventable patient safety errors committed by New Jersey hospitals.

The DHSS must include in its annual Hospital Performance Report ("Report") designated, hospital-specific patient safety indicators ("PSIs"). Reportable PSIs include preventable medical errors and hospital-acquired conditions. The DHSS is required to compile PSI information each year from data obtained in hospital bills. This information will be included in the Report and made available to the public.

In addition, the law prohibits hospitals and physicians from charging patients or insurers for similar medical errors or hospital-acquired conditions.

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Need for Clarity in Physician Explanations of Medical Procedures

Physicians must ensure that the consequences of a medical procedure are clearly conveyed to patients. A New Jersey court has recently voided a contract that governed a plastic surgery procedure. The court ruled that there had not been a meeting of the minds among the physician and patient as to the consequences of the procedure.

In *White v. Miller*, the physician explained the risks and consequences associated with a plastic surgery procedure. Following the explanation, the patient agreed to undergo the procedure and the physician contracted with the patient to perform the surgery at issue. The contract required that the patient pay a nonrefundable fee in order to schedule the procedure. Despite the contract's provision against cancellation, the patient cancelled the procedure two days before the scheduled date after

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Nursing Home Amendments Create Private Right of Action for Residents

The Third Circuit has determined that the Federal Nursing Home Reform Amendments (the "FNHRA") grant nursing home residents individually enforceable rights. In *Grammer v. John J. Kane Regional Centers*, the court ruled that a plaintiff can bring a private right of action against a nursing home when he or she receives care that is below the standard enunciated by the FNHRN.

The FNHRA was passed to provide for the oversight and inspection of nursing homes that participate in the Medicare and Medicaid programs. In order for nursing homes to participate in federal reimbursement programs, they must satisfy certain standards and ensure that residents receive a particular level of care and service. For example, the FNHRA requires that nursing homes maintain a grievance policy for patients, provide patients with free choice of attending physicians at the facility, and ensure that patients are free from abuse and neglect. These provisions were at issue in *Grammer*.

The court ruled that such provisions not only set forth the duties of nursing homes, but also created a private right of action under 42 U.S.C. § 1983 for those patients who do not receive the requisite quality of care.

42 U.S.C. § 1983 is a civil rights statute that serves as a mechanism for imposing liability against anyone who deprives another person of rights or privileges protected by law. The rights or privileges must be established by federal law. However, plaintiffs may not bring actions simply based upon violations of a federal law. Rather, the applicable federal statute must confer an individual right upon the plaintiff. In *Grammer*, the court determined that Congress intended to confer individual rights upon residents of nursing homes that qualify for Medicare and Medicaid. Congress intended the provisions of FNHRA to benefit those plaintiffs who receive inadequate nursing home care. The Court remanded the case for further proceedings consistent with its decision.

Controversial ASC Case

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agencies as to the application of Codey Law to ambulatory surgical centers. Therefore, the physicians could not be expected to know that referrals to the surgical center were improper. Thus, the physicians were not in violation of IFPA for submitting claims to the insurer for medical procedures completed at the ASC.

The court also held that the ASC did not submit fraudulent claims as a result of failing to collect co-insurance payments. The ASC did not have a policy of always waiving co-insurance, and at the time the procedure was performed, the ASC did not know whether it would collect the co-insurance payments from patients. Further, upon admission, each patient signed a form acknowledging that they were fully responsible for all charges related to procedures performed at the ASC. The court found that the ASC did not know-

ingly submit false claims because the ASC did not waive the patient's legal obligation to pay co-insurance, even though it was not always actually collected.

Despite the court's ruling that the physicians did not violate IFPA, the court found that Healthnet was not obligated to renew its contracts with the physicians. The court stated that Healthnet did not "terminate" the contracts because the physicians acted as advocates for their patients. Rather, Healthnet simply chose not to renew the contracts, as it was entitled to do under the agreements. Each contract permitted either party to refuse renewal, provided that appropriate notice was given. There was no contractual basis to mandate reinstatement. The court found that Healthnet acted in accordance with the terms of the contract when it chose not to renew the agreements with the physicians.

Hospital Safety Information

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A hospital cannot seek reimbursement for any service it provides in response to designated conditions acquired by a patient while in the care of the hospital. Physicians who acknowledge responsibility for committing a preventable error or causing a hospital acquired condition may not seek reimbursement themselves.

The New Jersey Legislature adhered to the guidance set forth by the Center for Medicare and Medicaid Services when writing the law at issue. Those conditions for which a New Jersey hospital or physician cannot charge mirror those listed in the hospital-acquired condition payment policy of the Medicare program.

Need for Clarity in Explanations

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learning about a risk of which he was unaware. The patient sought reimbursement for the nonrefundable fees paid upon signature of the contract.

The court ruled that the physician's explanation of the risks of the plastic surgery procedure was unclear and inadequate. The patient took reasonable care to understand the consequences of the procedure as explained by the physician. Yet, the patient remained confused as to the precautions he would have to take following the procedure. The court found that the patient's confusion at the time he signed the contract constituted a mistake of fact. The court stated that such a mistake of fact serves as a basis to rescind a contract. Due to the mistake of fact regarding the risks of the procedure, the enforcement of the contract between the patient and physician would be unconscionable. Therefore, the court ruled that the physician must reimburse the patient for the fee paid pursuant to the contract. The contract was rendered void.

LEGISLATIVE & REGULATORY UPDATE

Hospital Trustee Training

General hospitals in the state of New Jersey must ensure that all members of the hospital's governing body complete a trustee training program. The Department of Health and Senior Services ("DHSS") has set forth the requirements for such a training program. The trustee training program must be conducted by an approved training provider within six months of the member's appointment. In addition, the program must consist of at least seven hours of instruction and must address the following subjects: 1) the ethical and fiduciary responsibilities of the member, 2) the role of the governing body in improving health care quality, 3) hospital financial management, 4) hospital organization and governance, and 5) legal and regulatory compliance issues.

New Requirements for Emergency Care to Sexual Assault Victims

The Department of Health and Senior Services ("DHSS") has adopted new regulations that govern the provision of emergency care to sexual assault victims by all emergency health care facilities. General hospitals and satellite emergency departments must provide sexual assault victims with verbal and written information about emergency contraception and sexually transmitted diseases. In particular, covered health care facilities must provide to each sexual assault victim the brochure entitled, "For People Who Have Been Sexually Assaulted ... What you Need to Know about STDs and Emergency Contraception." This brochure was written by the DHSS, in collaboration with the New Jersey Coa-

lition Against Sexual Assault. Covered health care facilities must also provide emergency contraception upon request from the sexual assault victim.

Finally, the adopted regulations require that each covered health care facility establish written policies and procedures to ensure that all personnel comply with the provisions stated above. All personnel who provide care or information to a sexual assault victim must complete mandatory training about emergency contraception and sexually transmitted diseases. In addition, personnel must document in writing the provision of care and information in accordance with these regulations.

New Reporting Requirements for Health Care Professionals

Health care professionals must report any child who is born in New Jersey with a birth defect to the Department of Health and Senior Services, Special Child Health and Early Intervention Services Program ("Department"). Recently adopted amendments set forth the birth defects that qualify for inclusion in the reporting requirement. A wide range of defects are listed in the amendments, ranging from the most severe, spina bifida, to the cosmetic, cauliflower ear. In addition, health care professionals must separately report to the Department any New Jersey resident who is under 21 years of age and has been diagnosed with autism based on DSM criteria. The DSM is published by the American Psychiatric Association and provides the diagnostic criteria for all mental disorders.

Health Care Professionals May Be Required to Provide Voluntary Medical Services

A bill has recently been introduced in New Jersey that will require all physicians, dentists, and nurses to complete no less than 30 hours of volunteer medical services every two years as a condition of biennial license renewal. These health professionals must provide medical care without charge to low-income patients who are not covered by any public or private third party payer. The State Boards of Medical Examiners, Dentistry, and Nursing will each require licensees to complete 30 hours of such volunteer service in order to retain a professional license.

Protection for the Mentally Ill

Additional safeguards are likely to be passed by the New Jersey legislature to protect mentally ill adults from abuse or neglect by their caretakers. A bill has been passed by the State Assembly that requires health care professionals, law enforcement officers, firefighters, and paramedics with reasonable cause to believe that a vulnerable adult residing in a private residence or non-institutional setting is the subject of abuse or neglect to report such information to adult protective services. In addition, any other person with reasonable cause to believe that a vulnerable adult is a victim of abuse may report the information to protective services. Pursuant to the bill, individuals who report abuse are immune from civil or criminal liability, and protected from retaliatory actions by their employer. •

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Firm News:

Garfunkel, Wild & Travis, P.C. Re-named to Garfunkel Wild, P.C.

Garfunkel, Wild & Travis, P.C., a leading health care law firm that will celebrate its 30th anniversary in 2010, has changed its name to Garfunkel Wild, P.C. The firm will also further expand its Long Island offices to meet the needs of its growing client base and to position itself for the future.

"As our firm enters a new decade, we are well positioned to serve our clients' needs and meet their objec-

tives, not just because of our depth of talent, but also because of our depth of experience and commitment to client service," said Founding Partner and Chairman Robert Andrew Wild. "Garfunkel Wild continually seeks to invest in its future success." •

Steven Gorelick Joins GW as Litigation Partner

Garfunkel Wild, P.C. (GW) is pleased to announce the addition of partner Steven D. Gorelick to its Litigation and Arbitration Practice Group and

as a supervising litigation partner in its Hackensack, New Jersey office. GW founding partner and chairman Robert Andrew Wild notes: "We are pleased to have a litigator of Steve's caliber join us. With his broad expertise and considerable experience, he will be a terrific resource for our clients. We expect that Steve will contribute significantly to the continued growth of our litigation and arbitration practice."

Mr. Gorelick brings with him 18 years of litigation and trial experience in New Jersey and New York, representing corporations, institutions and other businesses in various industries in complex litigation, class actions, investigations and audits, including in the areas of health care, employment, securities, real estate and general commercial litigation.

Mr. Gorelick was a litigation partner at Stern & Kilcullen, LLC in Roseland, NJ for the past three years, and prior to that, at Sills Cummis & Gross in Newark, NJ. He began his career in the litigation department of Schulte Roth & Zabel in Manhattan. Mr. Gorelick is a graduate of Brown University, where he obtained a B.A. in political science and an M.A. in public policy analysis, and Georgetown University Law Center, where he obtained his law degree. •

About Garfunkel Wild, P.C.

Garfunkel Wild, P.C. (GW) 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. GW also assists numerous health care providers and others to comply with complicated, costly, and often onerous state and federal regulations.

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