

## Shakeup in New Jersey Related to Physician-Owned ASCs

On February 5, 2009, legislators in the State of New Jersey passed Assembly Bill A1933 (identical to Senate Bill 787, passed in December 2008), which created certain safe harbors for physicians referring patients to ASCs in which they had a financial or ownership interest, as well as creating a requirement for all ambulatory surgery centers (ASCs) to register with the State and the Centers for Medicare & Medicaid Services (CMS).

The New Jersey Bill is the first update to the 1991 "Codey Law" which banned physician self-referrals to ASCs in the state of New Jersey. It is likely that the recent bill is in response to reaction from a 2007 New Jersey Supreme Court case, "*Health Net of New Jersey, Inc. v. Wayne Surgical Center, LLC*,"<sup>1</sup> which held that any interpretation of the 1991 Codey Law allowing for physician self-referrals to ASCs was illegal. While the judge's ruling applied only to the litigants involved, many ASC physician-owners feared future prosecution for self-referrals.<sup>2</sup> Because many ASCs provide services to patients referred by the ASC's physician owners, if the amendment to the Codey Law was not passed, approximately 250 ASCs had the potential to face prosecution for fraud and abuse related actions.<sup>3</sup> The Bill allows physicians to refer to ASCs in which the physicians have a financial interest if the referring physician meets certain safe harbors. First, the physician must provide the patient with a written notice, stating the physician's financial interest in the ASC and informing the patient that he or she has the right to seek treatment elsewhere. The notification must also inform the patient of the fees associated with the referral if the referral is "out-of-network" for the patient. Additionally, the safe harbors allow such referrals if the physician who provided the referral will personally perform the procedure. Further, the physician must be able to demonstrate that his or her remuneration received from the subject ASC is directly correlated to his or her proportional ownership of the facility, and is not based on the volume of referrals. All clinical decisions for services provided at the ASC must be made by clinical staff who deem that the services to be provided are in the best interest of the patient.<sup>4</sup>

In addition to the amendment to the Codey Law, the legislation, sponsored by Senators Richard Codey and John Adler, requires that all facilities that include a "single room" surgical practice register with the state

Department of Health and Senior Services within one year of enactment of the Bill. In order for ASCs to keep their registration current within the state of New Jersey, they will have to report "the number of patients served by payment source, including the number of Medicaid-eligible and medically indigent persons served; the number of new patients accepted; and, the number of physicians, physician assistants, and advance practice nurses providing professional services at the surgical practice."<sup>5</sup> As a condition of state registration, the facility must also obtain ASC certification from CMS or from another accrediting body recognized by CMS. Currently licensed ASCs that do not have CMS certification will have one year from the effective date of the legislation to obtain certification.<sup>6</sup>

Also contained in the Bill are provisions restricting future growth of ASCs in the State, i.e., ASCs that are currently in development have 180 days from the date of enactment to file registration with the State, and ASCs that are not currently in development will only be allowed to register with the state if: (1) there is a transfer of ownership; (2) the facility needs to be relocated; (3) the facility is owned jointly by a general hospital and another party; or, (4) the facility is owned by a medical school or hospital.<sup>7</sup> Accordingly, a new physician-owned ASC will only be licensed if the ASC is part of a joint-venture with hospital or a medical school.

The New Jersey Hospital Association supports the legislation, stating that the restriction will reduce the rapid growth of physician-owned ASCs and allow more competition between hospitals and ASCs.<sup>8</sup> The limitation is one of many examples in which hospitals and the government are seeking to restrict the growth of physician-owned ASCs and specialty hospitals. While this legislation was passed in New Jersey, it is potentially only the first of many future state bills passed to restrict the growth of physician-owned specialty hospitals and ASCs.<sup>9</sup>

While the Bill has been approved by the New Jersey legislature, it is awaiting a signature from New Jersey Governor, Jon Corzine. Once the bill has the Governor's signature, it will be effective immediately,<sup>10</sup> with a twelve-month grace period for practices to obtain DHSS registration and accreditation from CMS or another accrediting body.<sup>11</sup>

<sup>1</sup> On November 20, 2007, a New Jersey court handed down a

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decision in the matter of “Health Net of New Jersey, Inc. v. Wayne Surgical Center, LLC,” holding that physicians who refer their patients to an ASC in which they have an ownership interest violates the Codey Act’s prohibitions against self-referral.<sup>1</sup> In its ruling, the Court distinguished the current case (in which the ASC was physician owned) from the situation which includes a hospital owner. In a decision that has critical implications for the ASC community, the Court not only held that an ASC is *not* an extension of a physician’s office, but also *“rejected a widely relied upon advisory opinion of the New Jersey Board of Medical Examiners from 1997, which indicated that a surgeon’s referrals of his or her own patients to a surgery center of which he or she is an owner is not an impermissible referral.”*

<sup>2</sup> “New Jersey’s New Codey Law – New Limits on Physician Ownership and Referrals,” By Elizabeth G. Litten, Fox Rothschild, LLP, February 2009, [http://www.foxrothschild.com/uploadedFiles/stayingWell\\_feb09\\_NJNewCodeyLaw2.pdf](http://www.foxrothschild.com/uploadedFiles/stayingWell_feb09_NJNewCodeyLaw2.pdf)

<sup>3</sup> “New Jersey Legislature Clears Safe Harbors for Referrals to Ambulatory Surgical Centers,” By Lorraine McCarthy, Bureau of National Affairs Health Law Reporter, 18 HLR 184, February 12, 2009

<sup>4</sup> “Senate Substitute for Senate, No. 787,” State of New Jersey Senate, November 24, 2008, p.7.

<sup>5</sup> “Senate Substitute for Senate, No. 787,” State of New Jersey Senate, November 24, 2008, pp.3-4.

<sup>6</sup> “Senate Substitute for Senate, No. 787,” State of New Jersey Senate, November 24, 2008, p.4.

<sup>7</sup> “Senate Substitute for Senate, No. 787,” State of New Jersey Senate, November 24, 2008, p.5.

<sup>8</sup> “New Jersey Legislature Clears Safe Harbors for Referrals to Ambulatory Surgical Centers,” By Lorraine McCarthy, Bureau of National Affairs Health Law Reporter, 18 HLR 184, February 12, 2009

<sup>9</sup> “A comparative study of quality outcomes in freestanding ambulatory surgery centers and hospital-based outpatient departments: 1997-2004,” Askar S. Chukmaitov, Nir Menachemi, L. Steven Brown, Charles Saunders, and Robert G. Brooks, Health Services Research, October 2008, [http://findarticles.com/p/articles/mi\\_m4149/is\\_5\\_43/ai\\_n30985695](http://findarticles.com/p/articles/mi_m4149/is_5_43/ai_n30985695) (Accessed 03/02/09)

<sup>10</sup> “Amendment to Codey Law Moves Quickly Through New Jersey Legislature,” By Michael Schaff, Becker’s ASC Review, February 19, 2009, <http://www.beckersasc.com/news-analysis-asc/antikickback-legal-regulatory/amendment-to-codey-law-moves-quickly-through-new-jersey-legislature.html> (Accessed 2/23/09)

<sup>11</sup> “Senate Substitute for Senate, No. 787,” State of New Jersey Senate, November 24, 2008, p.12.



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