

## New Jersey Appellate Court Holds Private Entities Lack Standing to Enforce the Codey Law

On November 17, 2009, the Appellate Division of the Superior Court of New Jersey held in *Garcia v. Health Net of New Jersey, Inc.* (*Garcia*) that private persons or entities, such as insurance companies, have no standing to enforce New Jersey's Codey Law against physicians.<sup>1</sup> The appellate court's ruling represents a victory for physicians who feared private litigation under the Codey Law for patient referrals to ambulatory surgical centers (ASCs) in which they own a financial interest after the trial court initially held in 2007 that such referrals violate the Codey Law.<sup>2</sup>

The appellate court ruling affirms the trial court's 2007 decision, which stated that the physicians involved violated the plain language of the Codey Law by referring patients from their private practices to an ASC in which they had an ownership interest but granted summary judgment to the physicians with respect to the Codey Law claims on the basis that the Codey Law does not create a private cause of action.<sup>3</sup> However, some legal experts have expressed concern that the appellate court's affirmation of the underlying Codey Law might subject physician owners of ASCs to regulatory action.

New Jersey's Codey Law was enacted in 1989 to prohibit physicians from referring patients to "health care services" in which the physician has a "significant beneficial interest," a practice known as self-referral.<sup>4</sup> The statute defines "significant beneficial interest" as "any financial interest" except financial interests in leases and publicly traded securities.<sup>5</sup>

In reaching its decision, the appellate court noted that 2009 legislative amendments to the Codey Law now permit physician referrals to ASCs if they qualify for the statute's safe harbor.<sup>6</sup> These amendments to the Codey Law were signed by New Jersey Governor Jon S. Corzine on March 21, 2009, in reaction to the trial court's 2007 ruling in *Garcia*, and create a safe harbor under which physicians can legally refer patients to an ASC in which they own a financial interest.<sup>7</sup> In order to qualify for the safe harbor, the following requirements must be met: (1) the referring physician must personally perform the procedure; (2) the physician's financial interest must not be related to the volume of patients referred; (3) all decisions must be made in the best interest of the patient; (4) the patient must be given written notice of the physician's financial interest in the

ASC; and, (5) the patient must be informed in writing before the procedure whether or not any reimbursed payments will be at an out-of-network level.<sup>8</sup> In addition, physicians may only refer patients to registered and accredited surgical practices.<sup>9</sup>

The appellate court's November 17<sup>th</sup> decision protects physicians from the threat of private litigation under the Codey Law, and together with the latest 2009 amendments to the Codey Law, creates a limited set of circumstances under which physicians can legally refer their patients to ASCs in which they have an ownership interest.

<sup>1</sup> *Garcia v. Health Net of New Jersey, Inc.*, No. A-2430-07T3, 2009 N.J. Super. Unpub. LEXIS 2858 (N.J. Super. Ct. App. Div. Nov. 17, 2009).

<sup>2</sup> "Sweeping Changes to New Jersey's 'Codey Law'" By Audrey A. Hale and Kristy Hlavenka, DrinkerBiddle, April 23, 2009, <http://www.drinkerbiddle.com/files/Publication/755ab5ee-eb3f-475f-b881-11d517e3fa3c/Presentation/PublicationAttachment/ea17db8d-2626-4ffd-8f13-1772ae8a4e61/CodeyLaw.pdf> (Accessed December 14, 2009); *Garcia v. Health Net of New Jersey, Inc.*, No. C-37-06, 2007 N.J. Super. Unpub. LEXIS 2995 (N.J. Super. Ct. Ch. Div. Nov. 20, 2007).

<sup>3</sup> *Garcia v. Health Net of New Jersey, Inc.*, No. C-37-06, 2007 N.J. Super. Unpub. LEXIS 2995 (N.J. Super. Ct. Ch. Div. Nov. 20, 2007).

<sup>4</sup> "Sweeping Changes to New Jersey's 'Codey Law'" By Audrey A. Hale and Kristy Hlavenka, DrinkerBiddle, April 23, 2009, <http://www.drinkerbiddle.com/files/Publication/755ab5ee-eb3f-475f-b881-11d517e3fa3c/Presentation/PublicationAttachment/ea17db8d-2626-4ffd-8f13-1772ae8a4e61/CodeyLaw.pdf> (Accessed December 14, 2009); N.J.S.A. 45:9-22.4 to -22.5 (2009).

<sup>5</sup> N.J.S.A. 45:9-22.4 (2009).

<sup>6</sup> *Garcia v. Health Net of New Jersey, Inc.*, No. A-2430-07T3, 2009 N.J. Super. Unpub. LEXIS 2858 (N.J. Super. Ct. App. Div. Nov. 17, 2009).

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<sup>8</sup> "Sweeping Changes to New Jersey's 'Codey Law'" By Audrey A. Hale and Kristy Hlavenka, DrinkerBiddle, April 23, 2009, <http://www.drinkerbiddle.com/files/Publication/755ab5ee-eb3f-475f-b881-11d517e3fa3c/Presentation/PublicationAttachment/ea17db8d-2626-4ffd-8f13-1772ae8a4e61/CodeyLaw.pdf> (Accessed December 14, 2009).

<sup>9</sup> "Sweeping Changes to New Jersey's 'Codey Law'" By Audrey A. Hale and Kristy Hlavenka, DrinkerBiddle, April 23, 2009, <http://www.drinkerbiddle.com/files/Publication/755ab5ee-eb3f-475f-b881-11d517e3fa3c/Presentation/PublicationAttachment/ea17db8d-2626-4ffd-8f13-1772ae8a4e61/CodeyLaw.pdf> (Accessed December 14, 2009).



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