

Proposed Amendment to New Jersey's "Codey Act" Would Allow Self-Referral to Physician-Owned ASCs

After the November 20, 2007 decision in *Health Net of New Jersey, Inc. v. Wayne Surgical Center, LLC*, physicians in New Jersey who referred their patients to an ambulatory surgery center (ASC) in which they had an ownership interest were suddenly at risk of being in violation of New Jersey's anti-self-referral law (the "Codey Act").¹ The *Health Net* decision sparked controversy regarding this practice, which had been common practice and had not previously been adjudged as a violation of the Codey Law, which was enacted in 1992. Most unexpectedly, the *Health Net* decision rejected a widely relied upon 1997 New Jersey Board of Medical Examiners (BME) advisory opinion, which held that an "ASC was really an 'extension of the physician's medical office' and therefore the arrangement did not violate Codey."²

After the ruling in *Health Net*, the BME immediately adopted emergency rules which declare that doctors who refer patients to physician-owned ASCs are not in danger of violating the law as long as they meet certain conditions. Now, legislators in New Jersey, led by Senate President Richard Codey (the namesake of the original law), have proposed an amendment to the Codey Law which would allow self-referral to physician-owned ASCs.

In addition to protecting doctors who refer patients to ASCs in which they have financial interest, the

amendment would put a two-year moratorium on the construction of new surgery centers, as well as establish a Practitioner Self Referral Review Task Force that will review practitioner referral patterns as they relate to the law. If the bill, which passed through the Senate on March 17, becomes enacted, the Codey Law will not apply to ASCs that perform surgeries requiring anesthesia if the ASC satisfies three precise conditions: (1) the surgery is performed at an ASC licensed by the New Jersey Department of Health and Senior Services; (2) the referring physician also performs the surgery; and, (3) the physician's remuneration as an owner of the ASC is directly proportional to his ownership interest and not the volume of patients referred.³ The facilities would have six months after the passage of the amendment to comply with this last condition regarding remuneration. These conditions apply regardless of whether the ASC is owned solely by practitioners or in conjunction with non-practitioners.

¹ New Jersey Code Act, N.J.S.A. 45-922.5, 1992.

² "New Jersey Court Rules that Physician Referrals to Ambulatory Surgical Center In Which They Own an Interest Violates Codey Act," Flaster Greenberg Health Care Alert Newsletter, December 2007, <http://www.flastergreenberg.com/home/publications/legal-alerts.aspx?d=272> (Accessed April 18, 2008) (quoting 1997 BME advisory opinion).

³ Amendment to Section 2 of P.K. 1989, c. 19 (C.45:9-22.5), subsection c.(1)(a)-(c), http://www.njleg.state.nj.us/2008/Bills/S1000/787_U1.HTM (Accessed April 18, 2008).



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Robert James Cimasi, MHA, ASA, FRICS, MCBA, AVA, CM&AA, serves as President of **HEALTH CAPITAL CONSULTANTS (HCC)**, a nationally recognized healthcare financial and economic consulting firm headquartered in St. Louis, MO, serving clients in 49 states since 1993. Mr. Cimasi has over thirty years of experience in serving clients, with a professional focus on the financial and economic aspects of healthcare service sector entities including: valuation consulting and capital formation services; healthcare industry transactions including joint ventures, mergers, acquisitions, and divestitures; litigation support & expert testimony; and, certificate-of-need and other regulatory and policy planning consulting.

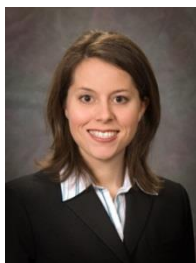
Mr. Cimasi holds a Masters in Health Administration from the University of Maryland, as well as several professional designations: Accredited Senior Appraiser (ASA – American Society of Appraisers); Fellow Royal Intuition of Chartered Surveyors (FRICS – Royal Institute of Chartered Surveyors); Master Certified Business Appraiser (MCBA – Institute of Business Appraisers); Accredited Valuation Analyst (AVA – National Association of Certified Valuators and Analysts); and, Certified Merger & Acquisition Advisor (CM&AA – Alliance of Merger & Acquisition Advisors). He has served as an expert witness on cases in numerous courts, and has provided testimony before federal and state legislative committees. He is a nationally known speaker on healthcare industry topics, the author of several books, the latest of which include: *“The U.S. Healthcare Certificate of Need Sourcebook”* [2005 - Beard Books], *“An Exciting Insight into the Healthcare Industry and Medical Practice Valuation”* [2002 – AICPA], and *“A Guide to Consulting Services for Emerging Healthcare Organizations”* [1999 John Wiley and Sons].

Mr. Cimasi is the author of numerous additional chapters in anthologies; books, and legal treatises; published articles in peer reviewed and industry trade journals; research papers and case studies; and, is often quoted by healthcare industry press. In 2006, Mr. Cimasi was honored with the prestigious *“Shannon Pratt Award in Business Valuation”* conferred by the Institute of Business Appraisers. Mr. Cimasi serves on the Editorial Board of the Business Appraisals Practice of the Institute of Business Appraisers, of which he is a member of the College of Fellows.



Todd A. Zigrang, MBA, MHA, ASA, FACHE, is the Senior Vice President of **HEALTH CAPITAL CONSULTANTS (HCC)**, where he focuses on the areas valuation and financial analysis for hospitals and other healthcare enterprises. Mr. Zigrang has significant physician integration and financial analysis experience, and has participated in the development of a physician-owned multi-specialty MSO and networks involving a wide range of specialties; physician-owned hospitals, as well as several limited liability companies for the purpose of acquiring acute care and specialty hospitals, ASCs and other ancillary facilities; participated in the evaluation and negotiation of managed care contracts, performed and assisted in the valuation of various healthcare entities and related litigation support engagements; created pro-forma financials; written business plans; conducted a range of industry research; completed due diligence practice analysis; overseen the selection process for vendors, contractors, and architects; and, worked on the arrangement of financing.

Mr. Zigrang holds a Master of Science in Health Administration and a Masters in Business Administration from the University of Missouri at Columbia, and is a Fellow of the American College of Healthcare Executives. He has co-authored *“Research and Financial Benchmarking in the Healthcare Industry”* (STP Financial Management) and *“Healthcare Industry Research and its Application in Financial Consulting”* (Aspen Publishers). He has additionally taught before the Institute of Business Appraisers and CPA Leadership Institute, and has presented healthcare industry valuation related research papers before the Healthcare Financial Management Association; the National CPA Health Care Adviser's Association; Association for Corporate Growth; Infocast Executive Education Series; the St. Louis Business Valuation Roundtable; and, Physician Hospitals of America.



Anne P. Sharamitaro, Esq., is the Vice President of **HEALTH CAPITAL CONSULTANTS (HCC)**, where she focuses on the areas of Certificate of Need (CON); regulatory compliance, managed care, and antitrust consulting. Ms. Sharamitaro is a member of the Missouri Bar and holds a J.D. and Health Law Certificate from Saint Louis University School of Law, where she served as an editor for the Journal of Health Law, published by the American Health Lawyers Association. She has presented healthcare industry related research papers before Physician Hospitals of America and the National Association of Certified Valuation Analysts and co-authored chapters in *“Healthcare Organizations: Financial Management Strategies,”* published in 2008.