

# The Bulletin

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# New Jersey Legislature Debates Legislation Permitting Physician Referrals To Ambulatory Surgical Centers And Surgical Practices In Which They Own An Interest

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Governor (and Senator) Richard Codey and Senator John Adler introduced S-787 earlier this year, to provide that it is not a violation of the Codey Act if a physician makes a referral to an ambulatory surgical center ("ASC") or a surgical practice in which he has an ownership interest subject to certain conditions. The bill was released by the Senate Health Committee on February 14, 2008 following testimony from both proponents and opponents of the amendment to the New Jersey anti-self-referral law, commonly known as the "Codey Act."

The legislation was introduced following a November 20, 2007 Superior Court ruling in the case of Joseph Garcia, MD, et al. v. Health Net of New Jersey, Inc. v. Wayne Surgical Center, LLC ("Center"), which held that the referrals of a patient to an ASC in which the referring physician owns an interest violates the Codey Act. Although the Court's decision only applies to physicians in that county, the State's insurance companies have indicated that they might argue that the decision should apply throughout the State. In addition, the insurance companies argued that the ASCs might be committing insurance fraud by submitting insurance claims for facility fees associated with procedures performed on patients referred by physician-owners.

Thus, the ruling has potentially devastating consequences for every ASC in New Jersey. Any physician who refers a patient to an ASC in which he owns an interest risks being charged by an insurance carrier for violating the Codey Act and the New Jersey Insurance Fraud Prevention Act ("IFPA"), which carries a variety of penalties, including triple damages.

Although the Court held that neither the physicians nor the Center had committed insurance fraud because they had no reason to know that their conduct constituted a Codey violation, insurance carriers, relying on this decision, may well refuse to pay claims of other ASCs for all self-referred procedures. This possibility could deliver a potentially crippling economic blow to physicians – and it was another reason for the sponsors' push to get legislation enacted.

The physicians and the Center refuted the insurance companies' arguments by relying on:

(a) a 1997 advisory opinion (the "1997 BME Ruling") of the New Jersey Board of Medical Examiners ("BME") which held that an ASC was really an "extension of the physician's medical office" and, therefore, the arrangement did not violate the Codey Act; and

(b) the prevalence of these

arrangements throughout New Jersey and the fact that the BME never enforced the self-referral prohibition.

However, these arguments were not persuasive to the Court. The judge stated that he was constrained to follow the law and that it is up to the Legislature to change it. Therefore, as soon as the decision was published, both the Legislature and the BME acted to ensure that all physician-owners of ASCs in New Jersey are permitted to refer their patients to their ASCs.

The BME proposed that an amendment to its self-referral regulation be adopted on an emergency basis. However, the Attorney General sent a letter dated February 11, 2008 to the BME stating that she did not find evidence that an emergency exists because insurance companies are continuing to pay for services provided by the referring physician in his ASC. After this determination, attention shifted to the pending legislation.

The Senate Health Committee met on January 28, 2008 to debate the ASC bill. The bill as amended would exempt from the Codey Act any ASC licensed by the Department of Health and Senior Services or any surgical practice established on the effective date of the bill, if the practitioner who provided the referral also performed the surgery, and the practitioner's remuneration as an owner or investor in the ACS is directly proportional to his ownership interest and not to the volume of patients the practitioner refers to the ASC.

Several individuals testified in favor of the legislation, including Eileen Kean, the legislative counsel for MSNJ, an administrator for four endoscopy suites and a physician from North Jersey who performs endoscopies.

However, numerous representatives from the insurance industry were there in

force to testify in opposition to the bill. They requested an amendment providing that the legislation should not be applied retroactively, thereby permitting them to take action against physicians who made referrals prior to the bill's enactment. They testified that there are millions of dollars in claims outstanding and that they should not have to make those payments since the physicians were violating the Codey law. They also testified that the BME is sanctioning physicians for violating the Codey Act.

The bill was released from Committee without recommendation – this was a reflection of the questions some Senators had about the bill as amended. The Senate Health Committee directed that staff should meet with the insurance industries' representatives, physicians, and ASC representatives to address the issues.

A meeting of the "stakeholders" interested in the legislation was held to discuss the insurance industries' request that the amendments to the Codey Act not be applied retroactively. I attended that meeting, at which the representatives from the insurance industry stated that there are nine suits against eleven ASCs pending and that approximately seven million in denied claims are outstanding. They do not want to be obligated to pay those claims if the practitioners did comply with the terms of the proposed bill.

On March 18, 2008, the legislation was substituted on the floor of the Senate for another version of the bill containing substantive changes. The substitute states that a practitioner's medical office includes, but is not limited to, a surgical practice and specifies that bills for medical services must be issued directly in the name of the practitioner or the practitioner's medical or surgical practice. The substitute also imposes additional requirements regarding disclosure to patients, which must be made at, or before the time the referral is made.

Furthermore, the legislation specifies that certain conditions must be met in order for a surgical practice to be considered a practitioner's medical office. One of the requirements is the practitioner's remuneration as an owner or an investor in the practice must be directly proportional to his ownership interest and not to the volume of patients the practitioner refers to the practice. Another provision states that all clinically related decisions at a facility owned in part by non-practitioners shall be made by practitioners and shall be in the best interest of the patient.

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# DOCTORS' DAY

*Every year this day comes and every year most doctors are forgotten.*

*Doctors' Day is not a made up Hallmark card.*

*It has its own history:*

*The first Doctors' Day observance was March 30, 1933, in Winder, Georgia.*

*The idea came from Eudora Brown Almond, wife of Dr. Cha Almond, and the date was the anniversary of the first use of general anesthetic in surgery.*

*(On March 30, 1842, Dr. Crawford Long of Barrow County, Ga., used ether to remove a tumor from a patient's neck - four years before it's famous demonstrated use in the Mass. General Hospital Ether Dome in Boston on October 16, 1846.)*

*The Barrow County Medical Society Auxiliary proclaimed the day "Doctors' Day," which was celebrated by mailing cards to physicians and their wives, and by placing flowers on the graves of deceased doctors, including Dr. Long.*

*The United States House of Representatives adopted a resolution commemorating Doctors' Day on March 30, 1958.*

*In 1990, legislation was introduced into the United States House of Representatives and United States Senate to establish a National Doctors' Day.*

*Following overwhelming approval by the House and Senate, then-President George H. W. Bush signed a resolution designating March 30 as National Doctors' Day.*

*The first National Doctors' Day was celebrated in 1991.*

## NJ Legislature Debates

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Any referrals made prior to the effective date of the substitute, to a surgical practice or a licensed ASC, is in compliance with the law if the practitioner personally performed the procedure or surgery. In addition, the surgical practice or ASC has six months from the effective date to comply with the remuneration requirements.

Another significant change provides that the Commissioner of Health and Senior Services shall establish a two-year moratorium on the issuance of initial licenses to ASCs beginning September 1, 2008. The moratorium does not apply to

an ASC that has already filed its plans, specifications and required documents. The license of an ASC may be transferred and a facility may be expanded.

Finally, the substitute creates a 15-person Practitioner Self Referral Review Task Force in the Division of Consumer Affairs to review the impact of the legislation throughout New Jersey. The task force is mandated to consider developments that have occurred since the enactment of the law in 1989, how and where procedures are performed and whether further requirements concerning practitioner referrals to services in which they have a financial interest are necessary to ensure compliance with the law. The members of the task force shall include

consumers, physicians, representatives of general hospitals, representatives of ASCs, and representatives of insurance carriers.

The Senate Substitute for S-787 must now be voted on by the entire Senate after which it will be referred to the Assembly Health Committee for its consideration and then passage in the Assembly. The Legislature adjourns for the summer recess on June 30, 2008 and it is likely that the legislation will be on the Governor's desk by then.

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