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When Are Doctors' Referrals Too Self-Serving?

Ruling could settle a clash between insurers, outpatient centers

By Thomas Gaudio

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TRENTON

New Jersey's 200 ambulatory surgery centers are eagerly awaiting a state licensing board ruling that could prove vital to their health. At issue is a rule governing doctors who refer patients from their private practices to centers in which the physicians have an ownership interest.

The New Jersey Board of Medical Examiners (BME) is responding to calls for a decision on the matter from parties that include the New Jersey Association of Ambulatory Surgery Centers and the Medical Society of New Jersey on one side, and insurers Health Net of New Jersey Inc. and Allstate Insurance Co. on the other.

The trade groups sought BME action after Superior Court Judge Robert Contillo denied their request to reconsider a November decision in a case brought by Health Net against six doctors who own Wayne Surgical Center LLC. Outpatient services at the center include plastic, urologic and other surgeries.

Contillo held that the "defendant-doctors' referrals of their private patients to the ambulatory surgical center, in which each of them had a significant beneficial interest, runs afoul of the Codey Act ban on such self-referrals."

John Fanburg, head of the health law practice group in the Roseland office of WolfBlock Brach Eichler, says the trade groups could sue the BME "for making the wrong decision" if the board decides that such referrals are a conflict of interest. Meanwhile, "I think insurers are waiting to figure out what's going on," says Fanburg, whose firm represents the trade groups.

In a statement this month, the BME said it will try to resolve the issue quickly. If ambulatory surgery centers were "to close or cut back on the services provided," the board said, "it is not clear that alternative providers—hospitals or offices—could immediately absorb additional cases, providing timely services." Therefore, "any effort on the part of insurers to deny claims submitted by the physician-owners will likely have a significant impact on the availability of services, representing a potential imminent peril to the public health," the board said.

But rushing a decision would be a "big mistake," says Fanburg. Since an ambulatory surgery center can be set up in any one of several ways, an assessment of the legality and ethics of the different business models should be carefully considered, he says.

The BME statement noted that Contillo's ruling said the Wayne Surgical Center "was at a different location from the other medical offices maintained by the doctors, the doctors did not control the personnel, and different bills were generated for the professional services rendered for the facility fees."

Health Net of New Jersey, a unit of Health Net Inc. based in Woodland Hills, Calif., claimed that the Wayne center committed insurance fraud by submitting claims based on self-referrals that violated the Codey Act. The insurer sought a refund of the payments it made to the center based on those claims, plus damages under the New Jersey Insurance Fraud Prevention Act.

While Contillo found that the doctors violated the Codey Act of 1989, he ruled that they didn't commit fraud because they didn't know that they were breaking the law.

Health Net Inc. spokeswoman Amy Sheyer says the insurer "is pleased that Judge Contillo recognized that the physicians were in violation of New Jersey's Codey Act and the Board of Medical Examiners' regulations relating to self-referrals. However, we are disappointed that he did not appropriately apply the New Jersey Insurance Fraud Act, which we believe mandates damages for claims based on self-referrals."

Fanburg says BME, which licenses ambulatory surgery centers in the state, has been fine with the system for "nearly 20 years. The board should issue a regulation that maintains the status quo," he says.

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