



As a service to our healthcare clients, the following information is provided as a brief summary of proposed legal changes. The summary is provided for informational purposes only and the reader is urged to review the entire text of the changes. Further, this summary represents only selected changes and selected effects. As such, please be aware that there are other legal changes that may affect the reader and the legal changes described herein may have additional important effects that are not described in this summary.

On November 24, 2008, a modified version of Senate Bill No. S-787 (“S-787”) proposed by Senator Codey was presented to the New Jersey Senate¹. This version of S-787² would do several things:

New Codey Law Outpatient Surgical Facility Exception - Overruling *Garcia v. Health Net Decision*. S-787 would amend the New Jersey Health Care Practitioner Self-Referral Law (commonly referred to as the “Codey Law”) to add an exception allowing physicians to refer patients to an ambulatory surgical facility (“ASF”) or unlicensed, physician-owned single operating room surgical facility (“surgical practice”) in which they have an ownership interest, provided that:

- a. the physician who provides the referral performs the procedure;
- b. the physician’s remuneration as an investor is not related to the volume of patients the physician refers to the facility;
- c. disclosure is made to patients concerning the physician’s interest in the facility, and that services or fees associated with the referral may be considered to be “out-of-network” by the patient’s third party payer, in a form to be prescribed by the New Jersey Board of Medical Examiners; and
- d. all clinically-related decisions at a facility owned in part by non-practitioners are made by practitioners and are in the best interests of the patient.

¹ S-787, sponsored by Senators Codey, Adler and Van Drew, was originally introduced in the Senate on January 24, 2008. In its original version, S-787 merely created a new exception under the Codey Law for referrals to licensed ambulatory surgical facilities (“ASFs”) and unlicensed surgical practices when the referring physician performs the procedure. A later substitute version of S-787 introduced in the Senate in March 2008, as well as a similar bill introduced in the Assembly in June 2008, maintained this exception with some modifications and also would have created a two-year moratorium on the issuance of new ambulatory surgical facility licenses by the New Jersey Department of Health and Senior Services (the “NJDHSS”), other than facilities that had submitted plans for review by the New Jersey Department of Community Affairs (the “DCA”) prior to a specified deadline.

² The current version of S-787 can be accessed on the New Jersey Legislature’s web site at http://www.njleg.state.nj.us/2008/Bills/S1000/787_U2.PDF.

S-787 would effectively overrule the November 2007 New Jersey Superior Court decision in *Garcia v. Health Net*, and subsequent similar decisions, holding that physicians violate the Codey Law when they perform procedures in facilities in which they have an ownership interest. Referrals to ASFs and surgical practices made prior to the enactment of S-787 would be deemed to comply with the Codey Law as long as the physician who provided the referral performed the procedure. Referrals to ASFs and surgical practices made in the year following enactment would also be deemed to comply with the Codey Law as long as the physician who provided the referral performed the procedure, and the disclosure to patients described above is made.

Importantly, S-787 would not prohibit ownership of ASFs by investors other than physicians and hospitals.

New ASFs and Surgical Practices Prohibited if Plans not Submitted within Six Months. S-787 would stop the establishment of new ASFs that do not have a hospital or medical school as an owner, and new surgical practices, other than those that are already in existence or those that have submitted plans for approval by the appropriate agency (the New Jersey Department of Community Affairs for ASFs, and for a surgical practice, the municipality where it will be located) within six months of enactment.

New Registration Requirement for Surgical Practices, and Accreditation Requirement for All Surgical Facilities. S-787 would expand the regulation of surgical practices by creating a new registration requirement that will subject surgical practices to regulations to be written by the NJDHSS, and by requiring all ASFs and surgical practices to be accredited by Medicare or a Medicare-approved accreditation organization. Existing surgical practices would have one year from the effective date of S-787 to register with the NJDHSS and obtain accreditation. Likewise, existing ASFs would have one year from the effective date of S-787 to obtain accreditation.

It appears that, despite the registration requirement, surgical practices will not be subject to the NJDHSS assessment on gross revenue that applies to licensed ASFs and other licensed ambulatory care facilities.

Elimination of Codey Law Exception for Physician Interests in Lithotripsy and Radiation Therapy Centers Effective After One Year - Existing Interests as of Effective Date Permitted. Effective on the first anniversary of enactment, S-787 would eliminate the existing exception under the Codey Law that allows physicians to refer to lithotripsy and radiation therapy facilities in which they have an ownership interest, except if the interest was held prior to the first anniversary of enactment.

Wording Change to Existing Codey Law Exception for Services Provided in the Referring Practitioner's Office. S-787 modifies the wording of the existing exception under the Codey Law that allows referrals for any services that are provided at the referring practitioner's medical office and for which the patient is billed directly by the referring practitioner. While it is difficult to predict how this change will be interpreted, it could affect physician groups that provide ancillary services in a centralized location that is not also used as a medical office by

each physician in the group who orders those ancillary services, when no other Codey Law exception (such as the exception for ASFs and surgical facilities and for existing lithotripsy and radiation therapy facilities) applies.

In order to become law, S-787 must be adopted by both the New Jersey Senate and the New Jersey Assembly and approved by the Governor, which could occur by the end of the year. Prior to adoption, S-787 may be subject to further modification.

The information provided in this summary is for discussion purposes only and shall not be considered legal advice or legal opinion on any specific facts or circumstances. The contents of this summary and any related information and/or materials are intended solely for general information purposes only. You are urged to consult your own attorney concerning your own situation and any specific legal questions that you may have. You may also contact Michael F. Schaff, Esq., Brian Kalver, Esq. or Alyson M. Leone, Esq. of the law firm of Wilentz, Goldman & Spitzer, P.A. at (732) 636-8000 or via e-mail at mschaff@wilentz.com, bkalver@wilentz.com or aleone@wilentz.com.