SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
ROSS R. ANZALDI
PRESIDING JUDGE, CIVIL DIVISION

COURT HOUSE
ELIZABETH, NEW JERSEY 07207

March 26, 2008

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LETTER OF OPINION
NOT FOR PUBLICATION WITHOUT APPROVAL

RE: Endo Surgi Center, P.C. v. Libert Mutual Insurance Company
Docket No. UNN-L-0228-06

Dear Counselors:

This matter comes to this Court by way of motion and cross-motion for summary judgment. The Court has received Plaintiff's motion papers, its brief in support thereof, and its brief in opposition to Defendant's motion. This Court has also received Defendant's motion papers, its brief in support thereof, and brief in opposition to Plaintiff's motion. Defendant has also filed a cross-motion for attorney's fees. Both parties submitted reply briefs as well.

Plaintiff is suing Defendant for outstanding claims in the form of facility fees. Defendant is not only refusing payment of outstanding claims but is also affirmatively seeking disgorgement of facility fee payments previously made to Plaintiff. Defendant is also alleging that Plaintiff's billing practices amount to a violation of the Insurance Fraud Prevention Act. Defendant has filed an additional motion seeking damages and

attorney's fees. The parties do not dispute the material facts and agree that the matter is ripe for summary judgment.

This Court renders its decision from its analysis of the law. Pragmatic concerns must be put aside until the legislature chooses to act. Recently, the sponsor of the Codey Act has proposed an amendment which might create an exception for existing surgery centers. As of this opinion, that proposal has not been adopted.

Plaintiff Endo Surgi Center is a professional corporation established as an unlicensed facility for the performance of medical treatments and surgeries. Dr. Yu is a member of Union County Pain Management and bases his private practice out of that organization. Dr. Yu is also a member of Endo Surgi Center. Dr. Yu uses the facility owned by Endo to perform surgery on his patients. The facility fee is then billed under the name Endo Surgi Center. Additionally, non-owner anesthesiologist assist in the procedures performed at Plaintiff's facility. Defendant Liberty Mutual asserts that this structure and practice violates the Codey Law against self-referrals and requires the facility to be licensed. On this basis, Defendant has ceased payment of the facility fees.

Defendant initially has charged that Plaintiff is not entitled to payments for facility fees because Plaintiff's facility has not secured a license. Plaintiff's facility will not be considered a "surgical facility" and will be exempt from licensing if it falls within the definition of a "surgical practice" as defined by N.J.A.C. 8:43A-1.3:

> 1. No more than one room dedicated for use as an operating room which is specifically equipped to perform surgery, designed and constructed to accommodate invasive diagnostic and surgical procedures;
>
> 2. One or more postanesthesia care units or a dedicated recovery area where the patient may be closely monitored and observed until discharged; and
>
> **3. Established by a physician or physician professional association surgical practice solely for his/her/their private medical practice.**

(emphasis added). Thus, if non-owner or non-employee physicians make use of the facility a license is required. Defendant contends that Plaintiff does permit non-owner/non-employee physicians to perform medical procedures in its facility. Specifically, Defendant contends that Dr. Baghal and Dr. Sachan performed surgery at the facility before they became owners. In interpreting a different, yet similar exemption, the Appellate Division stated, "the... exemption does not extend to a situation where a physician invites other physicians outside his professional association to perform surgical procedures in his operating room, regardless of his participation in the procedures." Seashore Ambulatory Surgery Center, Inc. v. N.J. Dept. of Health, 288 N.J. Super. 87, 100 (App. Div. 1997). The rationale is that if non-owner or non-

employee physicians are using the facility, it ceases to be used in the private practice of medicine.

Plaintiff contends that all of the claims that are at issue in this matter were for services performed by a physician owner of the facility, namely Dr. Yu. Additionally, the Department of Health and Senior Services (hereinafter referred to as "DOHSS") advised Plaintiff by letter that their facility did not require a license. Plaintiff asserts that there is no evidence that any non-owner physicians ever used the facility. Defendant asserts that a number of non-owners physicians performed procedures at the facility, triggering the need for a license. Defendant contends that, therefore, the facility was no longer established solely for the private practice of medicine. Plaintiff argues that the non-owner physicians that performed procedures were the employees of Dr. Muthusamy, an owner of Endo. These employee doctors (Baghal, Sachan, Caracello, and Chandra) were performing procedures on Dr. Muthusamy's patients. Thus, they were part of the same professional association and the facility was used for the private practice of medicine, obviating the need for a license. Accordingly, I find that a license was not required.

Also at issue is whether the use of non-owner anesthesiologists requires the facility to obtain a license. Defendant contends that anesthesiologists are non-owner physicians. DOHSS has issued an advisory opinion to this effect, stating "the Department does not view the contracting of anesthesia services to non-owner anesthesiologists as in any way altering the fact that the practice is indeed engaged in the private practice of medicine, which is not subject to licensure by the Department." (Letter from John Calabria dated July 28, 2005). This makes sense given the nature of anesthesiology. Anesthesiologists do not have their own patients and offices, but rather provide support to the surgeon and the surgeon's patients. Thus, this Court finds that the use of non-owner anesthesiologists does not require the licensing of the facility.

Defendant also asserts that Plaintiff has violated the Codey Law against self-referrals. Under the Codey Law, a practitioner is precluded from referring a patient to a facility in which the practitioner has a significant beneficial interest.

> The legislative history makes clear that the Legislature was concerned with eliminating the financial incentive to practitioners to refer patients to entities in which they have any financial interest. The Legislature's concern clearly was centered around the belief that practitioners with financial interests in entities are more likely to base their referrals on financial motives instead of sound medical decision-making. The Codey amendment to N.J.S.A. 45:9-22.5 prohibits practitioners from referring patients to entities in which they have "a significant beneficial interest," defined to mean "any financial interest," unless the practitioner falls under the specified exemptions.

Allstate Ins. Co. v. Greenberg, 376 N.J. Super. 623, 635 (Law Div. 2004). The parties do not dispute that, absent exception, Plaintiff has violated this general proscription. However, as an exception to this rule, N.J.S.A. 45:9-22.5(c) states:

> The restrictions on referral of patients established in this section shall not apply to:
>
> (1) a health care service that is provided at the practitioner's medical office and for which the patient is billed directly by the practitioner.

Therefore, in order to qualify for the exception, Plaintiff must at least provide a health care service (1) at the practitioner's office and (2) for which the patient is billed directly by the practitioner. Along these same lines, the Board of Medical Examiners (hereinafter referred to as "BME") has promulgated N.J.A.C. 13:35-6.17(b)(4)(i):

> 4. The restrictions on referral of patients established in this subsection shall not apply to:
>
> i. A health care service that is provided ***at the practitioner's medical office*** for which the patient is ***billed directly by and in the practitioner's name***

(emphasis added). The purpose of the billing in the practitioner's name requirement is to advise patients of the apparent financial incentive of the practitioner so that the patient, and insurance company, can make an informed decision. See Allstate v. Greenberg, 376 N.J. Super. 623, 635 (Law Div. 2004). The rationale behind the exemption is that if the billing is in the same name as the practitioner it will alert the patient and insurer as to the potential conflict. While there may be other ways to accomplish this goal, the Legislature chose to codify this requirement in the statute.

In the instant case, Dr. Yu bills for his professional services under the practice name of Union County Pain Management. The disputed facility fees are billed under the name Endo Surgi Center. This constitutes a violation of the Codey Law's prohibition of self-referrals, and it does not qualify for the statutory exception under the plain language of the statute. Plaintiff argues that Dr. Yu's name appears on the bill as the doctor performing the service and that this suffices to put the patient/insurer on notice. However, merely having the practitioner's name somewhere on the bill does not equate to compliance with the statute.

Plaintiff cites to a number of BME advisory opinions. As an initial matter, this Court recognizes that an agency's interpretation of legislation is entitled to "some weight." Women's Medical Center v. Finley, 192 N.J. Super. 44, 55 (App. Div. 1983). However, a regulation will be set aside if "it plainly transgresses the statute it purports to effectuate, or if it alters the terms of the statute or frustrates the policy embodied in it." Matter of Adoption of Amendments to N.J.A.C. 6:28-2.10, 305 N.J. Super. 389, 402

(App. Div. 1997). The courts are the final authority on the interpretation of statutes and this Court must engage in its own objective legal analysis. See Ingraham v. Trowbridge Builders, 297 N.J. Super. 72, 79 (App. Div. 1997).

None of the advisory opinions to which Plaintiff refers explicitly state that it is permissible to bill using separate names in light of the statute's command that "the patient is billed directly by the practitioner." These BME opinions do not openly discuss the conflict with the plain language of the statute. Even if such an advisory opinion did exist, it would be in conflict with the plain language of the statute. Billing for medical services under "Union County Pain Management" and then charging a facility fee under "Endo Surgi Center" cannot be interpreted to be consistent with the statutory requirement that "the patient is billed directly by the practitioner."

As the second requirement under the exception, the health care service must be provided "at the practitioner's medical office." In the instant case, Union County Pain Management is located at a different address than Endo Surgi Center. Thus, the services are performed at a different address and under a different name. Again, based on the plain language of the statute the exception cannot be satisfied. Similarly, the BME has issued advisory opinions espousing on the permissibility of such a business structure under the Codey Law. However, the statute does not permit what is ultimately a self-referral to a facility that is owned by a different entity. In order to receive protection under the exception a doctor would have to perform the medical procedure at his own office and bill the patient directly using the same name. The requirements of this exception are logical given the policy rationale behind the statute. If a doctor performs a procedure at his own office and bills under his name no referral has taken place and the proscription against self-referrals is not violated.

This reasoning applies to the matter before this Court. It is clear that the structure and relationship between Union County Pain Management and Endo Surgi Center is not an isolated practice in this State. It is clear that the BME does not find this problematic. However, N.J.S.A. 45:9-22.5(c)(1) is also clear. In order to qualify for the exception the medical service must be performed at the doctor's medical office and the patient must be billed directly in the doctor's name. Here, Plaintiff has done neither. The services were performed at a different location, owned by a different entity, and were billed in a different name. This is at odds with the plain language of N.J.S.A. 45:9-22.5(c)(1), and this result cannot be altered by advisory opinions of an administrative agency.[1] Accordingly, this Court finds that Plaintiff has violated the Codey Law's ban on self-referrals, and Plaintiff is not entitled to payment on the outstanding claims. Summary Judgment is granted in favor of Defendant on this point.

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[1] In response to the decision in Garcia v. Health Net of New Jersey, Inc., Bergen County Chancery Division, C-37-06, the BME issued an Emergency Amendment to N.J.A.C. 13:35-6.17(b). The Emergency Amendment seeks to legitimize under the statute performing surgery at another office and billing in a different name if certain requirements are met. For the reasons stated above, this Regulation is inconsistent with the plain language of N.J.S.A. 45:9-22.5(c)(1). As of the date of oral argument, the Emergency Amendment had not been signed by the Governor.

Defendant also contends that Plaintiff's billing practices have violated the Insurance Fraud Prevention Act. Under N.J.S.A. 17:33A-4(a) a violation occurs when:

> A person or a practitioner violates this act if he:
>
> (1) Presents or causes to be presented any **written or oral statement** as part of, or in support of or opposition to, a claim for payment or other benefit pursuant to an insurance policy or the "Unsatisfied Claim and Judgment Fund Law," P.L.1952, c.174 (C.39:6-61 et seq.), knowing that the statement contains any false or misleading information concerning any fact or thing material to the claim; or
>
> (2) Prepares or makes any **written or oral statement** that is intended to be presented to any insurance company, the Unsatisfied Claim and Judgment Fund or any claimant thereof in connection with, or in support of or opposition to any claim for payment or other benefit pursuant to an insurance policy or the "Unsatisfied Claim and Judgment Fund Law," P.L.1952, c.174 (C.39:6-61 et seq.), knowing that the statement contains any false or misleading information concerning any fact or thing material to the claim; or
>
> (3) Conceals or **knowingly** fails to disclose the occurrence of an event which affects any person's initial or continued right or entitlement to (a) any insurance benefit or payment or (b) the amount of any benefit or payment to which the person is entitled
>
> ...
>
> b. A person or practitioner violates this act if he **knowingly** assists, conspires with, or urges any person or practitioner to violate any of the provisions of this act.
>
> c. A person or practitioner violates this act if, due to the assistance, conspiracy or urging of any person or practitioner, he **knowingly** benefits, directly or indirectly, from the proceeds derived from a violation of this act.

(emphasis added). Plaintiff contends that there is no evidence of any oral or written statements, amounting to fraud, concerning the claims subject to this litigation. There is

similarly no evidence that the individual doctors had actual knowledge of any the alleged billing transgressions.

To establish a claim under the IFPA Defendant must prove knowledge, materiality, and a false or misleading statement by a preponderance of the evidence. Liberty Mutual Life Insurance Co. v. Land, 186 N.J. 163, 174-75 (2006). Violation of the Codey Law does not automatically amount to a violation of the IFPA. Defendant cites to the public policy rationale holding medical providers to constructive knowledge of the law.

Here, however, there is no evidence that Plaintiff attempted to hide its structure to Defendant. Rather, to the contrary, Plaintiff actively sought advisement from the BME. Given the advisory opinions by the BME that seemed to permit Plaintiff's practice, I find that Plaintiff reasonably believed it was in compliance with the law. There is no evidence to demonstrate that Plaintiff knowingly failed to disclose or knowingly benefited from proceeds by billing for facility fees under a different name. On such a record, this Court finds that Defendant cannot maintain a cause of action under the IFPA. Summary judgment is granted in favor of Plaintiff with regards to the IFPA.

Having determined that Plaintiff has violated the Codey Law, Plaintiff is not entitled to payment from Defendant on its outstanding claims. However, is Defendant entitled to the monies already paid to Plaintiff?

I find that The Codey Law provides Defendant with no cause of action against Plaintiff. Enforcement of the Codey Law is placed in the hands of the BME or Attorney General. See N.J.S.A. 45:9-22.8 and N.J.S.A. 45:1-25.

However, Defendant does not claim it is asserting a private course of action. Rather, Defendant asserts it is seeking disgorgement of sums paid to a provider that violated a statute. Defendant relies on Allstate Insurance Co. v. Orthopedic Evaluations, Inc., 300 N.J. Super. 510 (App. Div. 1997). That case involves the Automobile Reparation Reform Act. In commenting on that Act, the court stated, "any healthcare service authorized by the Act, in order to be eligible for recognition, must also comply with any other significant qualifying requirements of law that bear upon rendition of the service." Id. at 516. Because the facility at issue was not in compliance with the regulations, the court found that "the diagnostic services rendered by OEI do not qualify for PIP reimbursement." Id. at 517. This decision does not state that insurers are entitled to recoup payments already made. In fact, the words "disgorgement" and "recoup" do not appear anywhere in the opinion. Nor can this Court cull from that decision an intent to permit same. In the absence of an IFPA violation, Defendant has provided this Court with no basis at law to order disgorgement.

Conclusion:

Plaintiff has violated the Codey Law's ban on self-referrals. As a result, Defendant is entitled to not pay the outstanding claims for facility fees. Accordingly, Plaintiff's motion seeking payment of the unpaid facility fees is **DENIED.** Defendant's cross-motion seeking disgorgement of facility fees already paid is **DENIED.** Defendant's cross-motion seeking attorney's fees and damages is **DENIED.**

Very truly yours,

Ross R. Anzaldi, P.J.Cv.

RRA/