

NJ Court Affirms Board of Pharmacy Application of Codey Law Prohibiting Physicians from Referring Patients to Affiliated Pharmacy Notwithstanding in Same Office

Legal Alert

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In an important ruling, the New Jersey Appellate Division of the Superior Court on May 12, 2020 issued an opinion affirming a decision by the New Jersey Board of Pharmacy that a physician-owned specialty pharmacy, which would be owned by the physicians who own a related medical practice and to which the physicians would refer their patients for filling of oncology prescriptions, would violate the New Jersey Codey Anti-Referral law, and would not qualify for the so-called in-house exception to the Codey law. See *In re Application of Summit Medical Group d/b/a SMG Pharmacy* (NJ App. Div. No A-1116-18T1).

The New Jersey Codey law, N.J.S.A. 45:9-22.5, provides in relevant part that a practitioner shall not refer a patient to a healthcare service in which the practitioner or the practitioner's immediate family has a significant beneficial interest. The so-called "in-house" exception provides that these restrictions under the Codey law do not apply to a medical treatment or a procedure that is provided at the practitioner's medical office and for which a bill is issued directly in the name of the practitioner or the practitioner's medical office.

The Court and the Board concluded that on its face, the structure whereby the physician group would be referring its patients to the pharmacy owned by the same physicians would be a prohibited referral under the Codey law. The question turned on whether the so-called "in-house" or "extension of the practice" exception applied. The Board and the Court held that the in-house exception did not apply, even though the pharmacy was going to be located in the same building as the medical practice and would bill under the medical practice's TIN, because the compounding and dispensing of drugs did not constitute a "medical treatment or procedure." The Board and the Court explained that dispensing drugs involves interpreting a prescription and insuring that the drug is properly measured, packaged and labeled, and that pharmacists and pharmacies do not examine patients nor do they evaluate the symptoms of a patient's disease. In other words, the Court said, pharmacists and pharmacies are not involved in the "medical treatment" of a patients, rather they are "the means by which patients receive access to their treatment needs".

This ruling by the Court is important. The application of the Codey law to many situations is somewhat gray. Although on its face it would apply to preclude many arrangements that physicians in New Jersey have in place, or would have in place, with respect to provision of ancillary services and products, it had appeared that in certain cases the intent of the statute would not be violated. However, this case now makes clear that in the case of any ancillary services or products that do not amount to a medical treatment or procedure, the state agencies charged with administering the law (including the New Jersey Boards of Medical Examiners and Pharmacy), and now the courts, are going to take a very strict view and interpretation of the statute. Physician groups that have been taking a contrary position should now

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reevaluate their structures with this guidance now in place.

For any further questions, please contact Alan H. Zuckerman, Esq., Stephen M. Greenberg, Esq., or any member of Flaster Greenberg's Healthcare Law Practice Group.

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