



Vascular Society of New Jersey
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Monthly Report

May 2010

From the Statehouse

Beverly J. Lynch

As is tradition, the New Jersey Legislature is on budget break during the month of April. Every Monday through Thursday, various commissioners and administration officials appear before the Assembly and Senate Budget Committees for presentations of their budgets and questions from the legislative members.

Of most import to the physician community would be the testimony and questioning of the Commissioner of Health and Senior Services, and the Commissioner of Banking & Insurance, especially in light of the fact that these individuals are new, and the new Administration brings their own set of priorities and issues. Obviously, most of the testimony has focused on budget cuts, with all departments charged with cuts in services and programs. For those physicians with time of your hands, and a passion for politics, you can listen to these hearings on <http://www.njleg.state.nj.us/> and click on "archived proceedings."

Organized medicine continues its work on addressing the attacks on out-of-network reimbursement, and the proposed increase on the ASC tax (by removing the cap currently in place). A strong coalition representing 22 physician groups has been formed and tasks assigned.

For more information on these or any legislative issue please don't hesitate to contact me at blynch@blynchassociates.com or (609) 392-7553.

SAVE THE DATE

October 28, 2010 - VSNJ Annual Meeting - Highlawn Pavilion, West Orange, NJ
December 4, 2010 - ACS-NJ 59th Annual Scientific Meeting

Legal Report

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Legislation Extending Delay of Medicare Payment Cut to June 1, 2010 Signed Into Law

On April 15, 2010, President Barack Obama signed legislation into law which delays the application of the 2010 sustainable growth rate ("SGR") conversion factor until June 1, 2010. On April 14, 2010, the Senate had voted to exempt the provision relating to Medicare payments from the Senate rule that mandates that all spending legislation be paid for. Senate Democrats had been trying to pass legislation to delay application of the 2010 SGR conversion factor before the recent two-week recess that ended on April 12, 2010. However, they were blocked by Republican opposition because of objections to passage of a bill that is not paid for. The legislation signed into law on April 15, 2010, also extends, among other things, federal unemployment benefits and the federal COBRA health insurance subsidy. Another bill being considered by Congress would delay application of the 2010 SGR conversion factor until October 1, 2010.

By way of background, application of the 2010 SGR conversion factor results generally in a 21.2 percent reduction in Medicare reimbursement. On December 21, 2009, President Barack Obama signed legislation which provided for the temporary extension of the 2009 SGR conversion factor until February 28, 2010. That extension averted the 21.2 percent cut to physician payments that was scheduled to take effect on January 1, 2010. On February 25, 2010, the Temporary Extension Act extended application of the 2009 SGR conversion factor until April 1, 2010. CMS had instructed Medicare contractors to hold Medicare physician claims for ten business days starting on April 1, 2010, to see what Congress did to extend application of the 2010 SGR conversion factor. If any claims were processed at the lower rate before the new law's recent passage, those claims will automatically be reprocessed now that the bill to avert the 21.2% average payment cut until June 1, 2010, has been signed into law.

Court Orders False Claims Act Action to Trial

In a case involving whether an arrangement for an anesthesia group to provide pain management services at a hospital's free-standing clinic was in violation of the federal Stark Law and federal Anti-Kickback Law (the "Laws"), in United States ex rel. Kosenske v. Carlisle HMA, Inc., on March 31, 2010, upon remand by the United States Court of Appeals for the Third Circuit (the "Third Circuit"), the U.S. District Court for the Middle District of Pennsylvania (the "Court") found that the record contained some evidence suggesting that a hospital located in Carlisle, Pennsylvania (the "Hospital"), compensated an anesthesia group (the "Group") in exchange for facility fees in violation of the Laws, and ordered the case to trial.

By way of background, in 1992, the Hospital contracted with the Group to provide anesthesiology services at the Hospital on an exclusive basis. No pain management services were provided by the Group at that time. However, the agreement contained certain provisions that suggested that pain management services could be provided in the future. Under the agreement, the Group was to provide anesthesiology coverage on a 24 hour/7 day a week basis and the Hospital would provide space, equipment and supplies for the provision of anesthesia services or pain management services at no cost to the Group. The agreement also provided that if the Hospital should open another facility, the Group would be provided with the opportunity to provide anesthesia and pain management services at that facility.

In 1994, the Group began providing pain management services at the Hospital. In 1998, the Hospital built a new stand-alone facility which contained a pain clinic located approximately three miles from the Hospital. From the day that it opened, the Group provided pain management services to the patients at the pain clinic on an exclusive basis. The Hospital provided space, equipment and support personnel at the pain clinic free of charge to the Group. The parties did not amend the 1992 agreement or enter into a new agreement for the provision of these services. The Hospital billed for the facility fees for the services and the Group billed for the professional component of its services, as the parties did under the

1992 agreement.

The suit was brought as a qui tam action by a former member of the Group who alleged that the submission of claims to Medicare for the provision of the pain management services at the pain clinic were fraudulent because the Group's provision of those services were in violation of the Laws. Qui tam cases are lawsuits filed on behalf of the government by private parties for false claims or fraud. If the suit is successful, the party filing suit may recover between 15 - 30% of the government's total recovery and any civil penalties that are assessed.

The Third Circuit had determined that the 1992 agreement for the Group's provision of anesthesiology services at the Hospital did not extend to its provision of pain management services at the pain clinic, which did not even exist in 1992. Consequently, the Third Circuit concluded that the statutory exceptions to neither of the Laws would apply to the arrangement because the exceptions require that such arrangements be set out in writing. The Third Circuit noted that the provision of pain management services is of greater concern, because while hospitals influence the flow of business to physicians for traditional hospital-based practices such as anesthesiology, in pain management, a physician in an outpatient clinic is in a position to generate substantial business for a hospital.

The Third Circuit was also concerned that the Hospital and the Group did not establish that the consideration provided for the Group's provision of pain management services (which consisted of the exclusive right to provide the services and the receipt of space, equipment and support personnel from the Hospital) reflected the fair market value for such services. Indeed, the Third Circuit determined that "a negotiated agreement between interested parties does not 'by definition' reflect fair market value." The Third Circuit further observed that when one party is in a position to refer to the other party, negotiated agreements are often designed to disguise the payment of non-fair-market value compensation and that further evidence is required to demonstrate that the remuneration provided is that of fair market value.

On remand, while the Court found that the compliance officers acted in good faith, the Court also found that it was arguable whether the compliance officers at the Hospital made an attempt to investigate issues pertaining to the Stark Law. Therefore, because the Court was required to view the evidence in the light most favorable to the plaintiff, the Court found there was enough of a dispute to send the matter for a jury to decide. At trial, the plaintiff must be able to prove that under the compensation arrangement, the Hospital: (1) caused claims to be submitted to the government; (2) paid physicians with a purpose to induce referrals; and (3) knew that its actions violated the Laws.

This decision underscores the importance of entering into new agreements when the services provided under an original agreement are either expanded or altered in scope or location to ensure that the arrangements continue to be in compliance with federal and state laws that may apply to the arrangements.

Varbeco Wealth Management

I recently had the opportunity to make a presentation to your board of directors regarding the services that my company could provide the VSNJ members. They have decided to use my company, Varbeco Wealth Management, to help enhance the membership benefits available to you.

Varbeco is an independent financial planning and wealth management company that specializes in working with physicians. As owner and president, I have been helping doctors reach their financial goals since 1990. These goals typically encompass advice and strategies on building your wealth which

includes investment and retirement planning; protecting your wealth from lawsuits, taxes, and a declining investment market; and transferring your wealth to your children and heirs.

Starting this month I will contribute monthly articles to your newsletter that will deal with various planning topics pertinent to a physician's financial wellbeing. I will also make myself available to give advice and answer questions on a one on one basis. So, feel free to call or e-mail me.

I look forward to forward to becoming an independent and unbiased financial resource for the VSNJ and its members.

Announcement: New discounts available to VSNJ members

Your VSNJ membership now entitles you to discounts from several premier Disability and Long Term Care insurance providers. Both Union Central and the Standard are offering discounts on not only their individual disability insurance but also Business Overhead Expense (BOE) and Disability Buy-Out policies.

Participating Long Term Care insurance providers include Guardian, Prudential, and John Hancock.

For more information please contact Varbeco Wealth Management at (877)972-7900 or

dvargo@varbeco.com.

David J. Vargo, CFP®, CMFC

President, Varbeco Wealth Management, LLC

2010 MSNJ Annual Meeting

May 14-16, 2010 - Westin Forrestal Village - Princeton, NJ

MSNJ's Medical Practice Management Section's Annual Meeting is May 14 at the Westin in Princeton. This all day event is a series of educational sessions and an opportunity to visit with over twenty vendors. The theme of this year's event is "Managing Change in Healthcare." The event includes breakfast, lunch, four educational sessions and an opportunity for networking. The program meets the American Academy of Professional Coders' guidelines for 4 continuing education units.

- The program will open with door prizes and end with a panel discussion by experts on the topic "Can You Tell Me What UCR is Now?"
- The key note speaker is the Dean of Rutgers School of Management & Labor Relations who will address the future challenges in healthcare delivery.
- There are two break-out sessions on electronic medical records, a session on ICD-10 planning, a session on managing requests for overpayments, and visionary sessions on value based payments, and how to prosper in a climate of evolving medical economics.

View the full [program brochure](#). [Register on-line now](#).

If you have questions about the program, contact Nicole Martin at (609) 896-1766, ext. 211.

Introducing your newly elected 2010-2011 VSNJ officers....

President Theresa Impeduglia, MD

President-Elect Paul B. Haser, MD

Secretary Steven Curtiss, MD

Treasurer Raymond J. Holmes, MD

Director Michael Ombrellino, MD

Director Todd Vogel, MD

Past-President Joseph P. Costabile, MD